Inside This Issue

Table of Contents ....................................................... 5
New Mexico Supreme Court, Committee Vacancy .... 6
Board of Bar Commissioners Meeting ................. 7
Chief Judge Jonathan B. Sutin Swearing In ............. 10
Hearsay/In Memoriam .............................................. 11
Rules/Orders .............................................................. 18
From the New Mexico Supreme Court ............... 23
From the New Mexico Court of Appeals ............... 30

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MARCH 16, 2007
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SPEAKERS
♦ Honorable Gene E. Franchini, former Chief Justice, New Mexico Supreme Court
♦ Honorable James T. Martin, Third Judicial District Court Judge, Family Court
♦ Honorable Mike Murphy, Third Judicial District Court Judge, Family Court
♦ Mary W. Rosner, Esq., Board Recognized Specialist in Family Law
♦ Carolyn J. Waters, Esq., Board Recognized Specialist in Family Law
♦ DeAnna L. Steinman, CLA, CSA

TOPICS
• Civil and Criminal Contempt Motions to Show Cause
• Calculating Gross Monthly Income for Child Support/Alimony with a Self-employed Party
  • Apportionment Law in New Mexico
  • Professionalism
• QDRO Creation from a Paralegal Perspective
• Law Office Management and the Productive Use of Paralegals
  • Administration Behind the Scenes
• Status of Proposed Alimony Guidelines and Update on Recent Family Law Opinions

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Cover Artist: Working in oils and acrylics, Sally McDevitt captures the New Mexico landscape in a realistic style. Her window-sized paintings bring the outdoors in, and wispy clouds in bold blue skies virtually drift across the canvas. Paintings may be viewed on her Web site, www.sallysartgallery.com. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.

Table of Contents

Notices .........................................................................................................................................................6–9
Chief Judge Jonthan B. Sutin Swearing In ...............................................................................................10
Hearsay/In Memoriam ................................................................................................................................11–12
Legal Education Calendar .............................................................................................................................13–14
Writs of Certiorari ......................................................................................................................................15–16
List of Court of Appeals’ Opinions .............................................................................................................17
Rules/Orders ..................................................................................................................................................18–22

No. 06-8300-30: In the Matter of the Adoption of New Rule 10-233 and
New Form 10-420 NMRA of the Children’s Court Rules .................................................................18
No. 06-8300-32: In the Matter of the Amendments of Rules 17-316 NMRA
of the Rules Governing Discipline ...........................................................................................................19
No. 07-8300-01: In the Matter of the Amendments of Rules 1-050 and 1-088.1
NMRA of the Rules of Civil Procedure for District Courts .............................................................20
No. 07-8300-02: In the Matter of the Amendment of Rule 5-501 NMRA
of the Rules of Criminal Procedure for the District Courts .............................................................21
Opinions .........................................................................................................................................................23–52

From the New Mexico Supreme Court
2007-NMSC-002, No. 29,202: Montgomery v. Lomos Altos, Inc. .............................................23

From the New Mexico Court of Appeals
2007-NMCA-012, No. 25,878: State v. Duarte ....................................................................................36
2007-NMCA-014, No. 24,536: State v. Ruiz .........................................................................................47

Advertising ..................................................................................................................................................53

Professionalism Tip
With respect to my clients:
I will work to achieve lawful objectives in all other matters as expeditiously and economically as possible.

Meetings
February
12 Taxation Section Board of Directors, noon, via teleconference
14 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
15 Alternative Methods of Dispute Resolution Committee, noon, 2nd Judicial District Court
15 Natural Resources, Energy and Environmental Law Section Board of Directors, noon, State Bar Center

State Bar Workshops
February
14 Common Legal Issues Affecting Senior Citizens, 10:30 a.m., San Jose Senior Center, Carlsbad
15 Common Legal Issues Affecting Senior Citizens, 10:30 a.m., Hobbs Senior Center, Hobbs
22 Common Legal Issues Affecting Senior Citizens, 10:15 a.m., Los Lunas Senior Center, Los Lunas

Bar Bulletin - February 12, 2007 - Volume 46, No. 7 5
**NOTICES**

**COURT NEWS**

**N.M. Supreme Court Law Library**

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Closed Saturdays and Sundays.

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

**Notice of Vacancy on the Rules of Criminal Procedure for District Courts Committee**

One attorney vacancy exists on the Rules of Criminal Procedure for District Courts Committee due to the resignation of one member. Attorneys interested in volunteering time on this commission may send a letter of interest and/or resume to:

Kathleen Jo Gibson, Chief Clerk
PO Box 848
Santa Fe, NM 87504-0848

Deadline for letters/resumes is March 5.

**First Judicial District Court**

**Criminal Bench and Bar Brown-Bag Meeting**

The 1st Judicial District Court Criminal Bench and Bar will have a brown-bag meeting at noon, Feb. 13, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim, (505) 827-5047.

**Destruction of Exhibits**

Pursuant to the Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the Court in civil cases for the years 1975 to 1984, including 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 April 27. Attorneys who have cases with exhibits may verify exhibit information with the Archives and Special Services Division, (505) 841-6717, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Feb. 23.

**Family Law Brown-Bag Meeting**

The 1st Judicial District Court will host its family law brown-bag meeting at noon, Feb. 13, in the Grand Jury Room, second floor, Steve Herrera Judicial Complex, Santa Fe. The 1st Judicial District Court ADR Director Celia Ludi will discuss the ADR Pilot Project. For more information or to suggest agenda items, contact Elege Simons Harwood, (505) 988-5600, or esimonsharwood@simonsfirm.com. Provide one dollar, name and State Bar number and receive 1.0 CLE credit.

**Second Judicial District Court**

**Destruction of Criminal Tapes**

Pursuant to the Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy tapes filed with the Court in criminal cases for years 1983 to 1986, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and who wish to have duplicates made may verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Feb. 16.

**Destruction of Criminal Tapes**

Pursuant to the Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy tapes filed with the Court in criminal cases for years 1975 to 1984, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and who wish to have duplicates made may verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Feb. 23.

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

**Proposed Amendment to Local Civil Rules**

A proposed amendment to the Local Civil Rules of the U.S. District Court for the District of New Mexico is being considered. The proposed amendment is to D.N.M.LR-Civ. 83.1, Courtroom and Courthouse Decorum. A “red lined” version (with proposed additions underlined and proposed deletions stricken out) and a clean version are posted on the Court’s Web site, www.nmcourt.fed.us.

Members of the State Bar may submit comments no later than March 5 by e-mail to lrciv@nmcourt.fed.us; or by mail to U.S. District Court, Clerk’s Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: LRCiv.

**Reappointment of The Honorable Karen Ballard Molzen, U. S. Magistrate Judge**

The Article III Judges of the U.S. District Court, District of New Mexico, announce the reappointment of The Honorable Karen Ballard Molzen as U.S. magistrate judge, effective April 26, for an eight-year term.

**Reduction of Calendar Year 2007 Annual Federal Bar Dues**

For the past two years, Federal Bar dues for the District of New Mexico have been waived. With the concurrence of the Article III judges, collection of the calendar year 2007 attorney dues has been ordered at a reduced rate of $15 instead of $25. This rate is effective for calendar year 2007 dues only. Dues should be submitted to the Clerk of Court, U.S. District Court, 333 Lomas Blvd NW, Suite 270, Albuquerque, NM 87102. For anyone who has submitted dues for calendar year 2007 in the amount of...
$25, reimbursement of the difference will be forthcoming.

**STATE BAR NEWS**

**Attorney Support Group**

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

**Bankruptcy Law Section**

**Annual Meeting and CLE**

The Bankruptcy Law Section will hold its annual membership meeting at 1:15 p.m., March 9, in conjunction with the 22nd Annual Bankruptcy Year in Review at the State Bar Center. Specifics on the CLE program are forthcoming. Contact Chair James Jacobsen, jcjacobsen@ago.state.nm.us or (505) 222-9085, to place an item on the agenda. The board of directors would like input from members regarding areas of focus for 2007. Of particular interest is reaching members in outlying areas.

**Board of Bar Commissioners**

**Meeting Agenda**

**11:30 a.m., Feb. 16, Bar Center, Albuquerque**

1. Swearing in of new commissioners.
2. Approval of Dec. 15, 2006, meeting minutes.
3. Finance Committee report.
7. Public Law Section bylaw amendment.
8. Pro Haec Vice Committee report and grant recommendations.
9. Membership Services Committee recommendation.
10. Committee on Women and the Legal Profession request for new State Bar award.
11. President’s report.
12. Executive Director’s report.
13. Division reports.
15. Section, committee and division annual reports.

**Casemaker Online Legal Research**

**Free Training Available**

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:

- **State Bar Center, Albuquerque:** Feb. 16 and March 26, 3 to 4 p.m. R.S.V.P. to (505) 797-6000.
- **Farmington:** Feb. 20, 12:30 to 1:30 p.m., San Juan Country Club, Farmington. Lunch is $12 and will be served from noon to 12:30 p.m. R.S.V.P. to Doug Echols, (505) 334-4301.
- **Grants:** Feb. 26, noon to 1 p.m., Coyote del Malpais Golf Course, 2001 George Hanosh Blvd., Grants.

Seating is limited. The training is approved for 1.0 CLE general credit.

Anyone who has problems with access should contact the Casemaker helpline at (505) 797-6039 or e-mail vcordova@nmbar.org.

**Elder Law Section**

**Annual Meeting, CLE and Reception**

The Elder Law Section will hold its annual meeting at 11:30 a.m., April 13, at the State Bar Center prior to the 4th Annual Elder Law Seminar. Details on the CLE program will be forthcoming. Send agenda items to Chair Amanda Hartmann, ahhlaw@comcast.net or call (505) 401-7832. Lunch will be provided and reservations are required. E-mail membership@nmbar.org or call (505) 797-6033.

**Paralegal Division**

**Monthly Brown-Bag CLE for Attorneys and Paralegals**

The Paralegal Division invites members of the legal community to bring a lunch and attend *Water Law in New Mexico*, presented by William Teel, Attorney at Law PC. The program will be held from noon to 1 p.m., Feb. 14, at the State Bar Center and offers 1.0 general 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 PC, (505) 884-0777.

**Prosecutors Section**

**Annual Meeting**

The Prosecutors Section will hold its annual meeting during the AODA Conference March 20–23. Details on the exact time, date and location are forthcoming. Agenda items should be sent to Chair Stephen Kovach, skovach@da.state.nm.us or (505) 622-4121.

**Nominations Sought for Annual Awards**

The Prosecutors Section is soliciting nominations for awards that the section will present to five prosecutors at the Association of District Attorneys’ Spring Conference to be held March 20–23. The five award categories are as follows:

- **Prosecutor of the Year:** The nominee must have five or more years of full-time prosecution experience. The nomination should address the individual’s outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution and the image of prosecutors.

- **Law Enforcement Prosecutor:** This nomination should address the support and assistance the nominee has provided to law enforcement agencies and his or her commitment of time in assisting law enforcement.

- **Community Service Prosecutor:** This nomination should address the service the nominee has provided to the community and the results of those efforts; e.g., volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.

- **Legal Impact Prosecutor:** Along with the nominee’s outstanding character, this nomination should address the significant impact that resulted from the nominee’s efforts in criminal prosecution(s) and the significant and positive impact or effect on the law.

- **Rookie Prosecutor of the Year:** The nominee must have been prosecuting for no more than two years. The nomination should address the nominee’s dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted for receipt no later than Feb. 23 by mail to Michael P. Sánchez Deputy District Attorney, c/o 5th Judicial D.A. Office, 400 North Virginia Ave., Suite G-2, Roswell, NM 88201-6222; by e-mail to msanchez@da.state.nm.us; or by fax, (505) 624-0802. The nominees will be presented to a committee for selection.
Public Law Section Nominations Sought for Public Lawyer Award

The Public Law Section is currently accepting nominations for the ninth annual Public Lawyer of the Year Award, which will be presented on Law Day, May 1. Prior recipients include Florenceth Brown, Frank D. Katz, Douglas Meiklejohn, Martha A. Daly, Charles N. Estes, Mary M. McNerney, Gerald Bruce Richardson, Peter T. White, Robert M. White, Paul L. Biderman and Frank D. Weissbarth.

The work or service recognized by the award must have occurred in New Mexico. A candidate must be admitted to practice in New Mexico but does not have to be a member of the Public Law Section to be eligible. The following are factors that will be considered in making this award. An applicant need not meet all of these criteria:

1. significant length of service in government, which does not have to be continuous or for one specific employer, or for work as an attorney;
2. excellence as an attorney/advisor and/or advocate;
3. training or education of the public or State Bar concerning public issues;
4. mentorship of junior attorneys in the public sector;
5. role model for other public lawyers;
6. involvement in one particularly difficult or important case or negotiation that significantly advanced a governmental policy or purpose;
7. service to social welfare organizations, charitable institutions or nonprofit entities connected with the practice or enhancement of an area of public law;
8. advocacy of, or work on, issues or legislation of importance in the public sector, such as open meetings and public records, public procurement and administrative procedures;
9. a lawyer who is not likely to be recognized for his or her outstanding work as a public lawyer; and
10. a lawyer whose personal character and dedication to public law and public service further the integrity and repute of the legal profession.

Send nominations by 5 p.m., March 1, to Doug Meiklejohn, dmeiklejohn@nmlc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe 87505-4074. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Solo and Small Firm Practitioners Section Directory Update

The Solo and Small Firm Practitioners Section is updating its membership directory so that members can make referrals and seek advice from each other. The Solo and Small Firm Practitioners Questionnaire should be filled out and sent to the State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199 by March 1. The questionnaire may be found at http://www.nmbar.org/Content/NavigationMenu/Divisions_Sections_Committees/Sections/Solo_and_Small_Firm_Practitioners/solomallnewsletterOcot06.pdf. Few forms have been received, so all members are urged to complete this process.

Luncheon Presentation

Jason Marks, Public Regulation Commissioner, District 1 (Albuquerque area), will speak before the Solo and Small Firm Practitioners Section on Update on the PRC, Renewable Energy and Climate Change. The PRC regulates the utilities, telecommunications, motor carriers and insurance industries to ensure fair and reasonable rates and reasonable and adequate services to the public as provided by law. Marks, who holds a law degree from the UNM School of Law, also has extensive experience in health care financing.

The meeting will be held at noon, March 20, at the State Bar Center, and lunch will be served to those who R.S.V.P. by March 19 to Tony Horvat, thorvat@nmbar.org, or (505) 797-6033. Each attendee should bring a $5 check made payable to the State Bar Solo and Small Firm Practitioners Section to help defray the cost of the lunch. The board of directors will meet at 11:30 a.m.

Summer Law Clerk Program

Seeking Participating Firms and Agencies

The State Bar of New Mexico is partnering with major New Mexico law firms and governmental law departments to provide excellent employment opportunities for diverse and deserving law students at the UNM School of Law. The Summer Law Clerk Program provides law students who have capable research and writing skills with the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions.

The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that have nothing to do with performance or the potential for success as an attorney. The rigorous application and interview process combines a unique learning experience for law students with a unique insight into the qualifications and potential of our applicants.

Working with law firms and agencies who are committed to the ideal of diversified applicant pools, the Summer Law Clerk Program has been bringing down artificial barriers to employment, producing quality law clerks and diversifying attorney applicants for nearly a generation.

Law firms or agencies interested in participating in the 2007 Summer Law Clerk Program should contact Art Jaramillo, Arturo.Jaramillo@state.nm.us, by 5 p.m., Feb. 28. Interviews will be held at UNM on March 3.

Young Lawyers Division 2007 Summer Fellowships

The Young Lawyers Division is currently accepting applications for its 2007 Summer Fellowships. Two fellowships will be awarded by the YLD to two law students who are interested in working in the public interest or government sector during the summer of 2007. The fellowship awards are intended to provide the opportunity for law students to work in positions that might not otherwise be possible because the positions are unpaid. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer.

In order to be eligible, applicants must be a current law student in good standing with their school. Applications for the fellowship must include: (1) a letter of interest that details the student’s interest in public interest law or the government sector; (2) a résumé; and (3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer of 2007. Submit applications to: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, N.M. Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, New Mexico 87501.

Applications must be postmarked by March 31. Direct questions to J. Brent Moore, (505) 476-3783.
Have you an idea for a Bar Bulletin article? We encourage submissions for consideration. The primary purpose of articles is to educate or inform the reader on issues of substantive law and practical concern to lawyers. Analysis, opinion and criticism of the current state of the law are also encouraged and should be clearly identified by sufficient legal authority on all sides of an issue to enable the reader to assess the validity of the opinion. Criticism should be directed to issues only. Articles should be no longer than 1,500 words, including endnotes, and will be reviewed by the board of editors.

For more information on submission guidelines, contact the editor of the Bar Bulletin, Dorma Seago, (505) 797-6030, or dseago@nmbar.org.

We're Looking for a Few Good Writers.

Have you an idea for a Bar Bulletin article? We encourage submissions for consideration.

The primary purpose of articles is to educate or inform the reader on issues of substantive law and practical concern to lawyers. Analysis, opinion and criticism of the current state of the law are also encouraged and should be clearly identified by sufficient legal authority on all sides of an issue to enable the reader to assess the validity of the opinion. Criticism should be directed to issues only.

Articles should be no longer than 1,500 words, including endnotes, and will be reviewed by the board of editors.

For more information on submission guidelines, contact the editor of the Bar Bulletin, Dorma Seago, (505) 797-6030, or dseago@nmbar.org.
New Chief Judge of the New Mexico Court of Appeals

Message to the State Bar

Dear Members of the State Bar:

I am, of course, honored to have been elected as Chief Judge of the New Mexico Court of Appeals. I follow a line of very effective chief judges, including outgoing Chief Judge Michael Bustamante. I am equally honored to have the opportunity to take on the responsibility that chief judges have of assuring that the Court continues to live up to its reputation of a hard-working court, committed to thorough and sound analysis in each case it considers. I anticipate that the job will be made a good bit easier because I will have at my right and left hands Chief Clerk Gina Maestas and Prehearing Director Bridget Gavahan, both very experienced and exceptionally capable attorneys and administrators.

I hope during the next two years to have the opportunity to reach members of the State Bar and citizens throughout New Mexico explaining that the Court of Appeals is working as it should and answering questions about the Court and our review process. In addition, the Court will attempt to engage in the popular activity of holding oral arguments in the schools in various communities, with the cooperation of local bar associations, schools and district judges.

Spearheaded by outgoing Chief Judge Bustamante, we hope to obtain legislative funding for construction of a new Court of Appeals annex in Albuquerque. The annex is needed because our present accommodations in Albuquerque and Santa Fe are inadequate to house the thirty persons that comprise the ten judges’ chambers, sixteen staff attorneys, two-person mediation group, ten employees in our Clerk’s Office, as well as our records and files. The annex will also have a courtroom. The annex will remain next to the UNM School of Law, which allows us to continue our unique relationship with the law school.

Members of the State Bar should always feel free to approach me, or any member of the Court or the chief clerk, to express any concern or dissatisfaction you may have with respect to the Court. As our active internal committee work and introspective process shows, we continually examine our efficiency and ways of lessening the delay and expense involved in the litigation process in our Court. As many of you know, members of the Court are collegial and enjoy conversing with members of the State Bar. Please do not hesitate to engage us in conversation.

Sincerely,

Jonathan B. Sutin, Chief Judge
New Mexico Court of Appeals

New Court of Appeals Chief Judge Jonathan B. Sutin (right) was sworn in by outgoing Chief Judge Michael D. Bustamante on Jan. 23.

Jonathan B. Sutin, Chief Judge
New Mexico Court of Appeals

Chief Judge Sutin grew up in New Mexico. He served in the Marine Corps Reserve and obtained his law degree from the UNM School of Law. Before his appointment to the Court of Appeals in 1999, he was a trial attorney in the U.S. Department of Justice, Civil Rights Division, was involved in school desegregation and voter discrimination litigation, and was in private practice for 35 years. He was president of the organization that obtained passage of the N.M. Human Rights Act and has twice received the Outstanding Contribution Award of the State Bar of New Mexico. Varied legal and community activities over the years include serving as pro bono general counsel to Futures for Children, a non-profit organization involved in community development and sponsorship of Native American children. Chief Judge Sutin has been married 43 years, has three children (all of whom are graduates of the UNM School of Law) and five grandchildren. He is an active handball player and runner. In his more youthful days, he completed 10 marathons and was an active back-packer in the Grand Canyon, having also climbed South American glaciers.
Aaron Ezekiel, a 2006 graduate of the UNM School of Law, has joined the law firm of Popejoy & MacKenzie. Ezekiel will focus his practice on litigation of trust and estate matters. He clerked for the deputy university counsel for research and intellectual property at UNM and for administrative law judges at the Social Security Administration. He was also an editor of the *Natural Resources Journal*.

Sutin Thayer & Browne announces that Henry A. Kelly and Twila B. Larkin have been elected shareholders. Kelly received his law degree in 1968 and his undergraduate degree in 1966 from the University of Texas. He practices primarily in the areas of corporate law, partnership law, mergers and acquisitions, commercial real estate law, insurance law and business and individual taxation. Larkin received her law degree from the UNM School of Law in 1996 and her undergraduate degree from Texas Tech University in 1984. She is a fellow with the American Academy of Matrimonial Lawyers and certified as a family law specialist by the New Mexico Board of Legal Specialization. She practices exclusively in family law/domestic relations.

Denise S. Hall has joined Riley & Shane PA as an associate attorney. Hall will practice primarily in insurance defense, medical malpractice and construction law. She earned her law degree at UNM.

Barbara C. Lucero was elected president of the Navajo National Bar Association. Lucero, a Navajo, San Carlos Apache and Taos Pueblo American Indian from Window Rock, Arizona, is a Navajo-licensed advocate practicing in the areas of commercial, resource and energy litigation and employment and labor law. She currently works for Modrall Sperling in Albuquerque.

The Albuquerque Bar Association’s 2007 officers are William K. Stratvert, of counsel at Miller Stratvert PA, president; Peter H. Pierotti, City of Albuquerque Legal Department, vice president; Lisa Joynes Carrillo, Dixon, Scholl, & Bailey PA, treasurer; Jason Bousliman, Modrall Sperling Roehl Harris & Sisk PA, secretary; and Sean Olivas, Keleher & McLeod PA, past president.

Eleven lawyers from Sutin Thayer & Browne have been included in the 2007 edition of *The Best Lawyers in America*.

- **Paul G. Bardacke**, Alternate Dispute Resolution and Commercial Litigation
- **Anne P. Browne**, Real Estate Law
- **Saul Cohen**, Intellectual Property Law
- **Gail A. Gottlieb**, Bankruptcy and Creditor-Debtor Rights Law
- **Michael J. Golden**, Family Law
- **Jay D. Hertz**, Banking Law
- **Robert G. Heyman**, Banking Law, Corporate Law, Public Finance Law and Securities Law
- **Henry A. Kelly**, Corporate Law, Leveraged Buyouts and Private Equity Law and Real Estate Law
- **Jay D. Rosenblum**, Corporate Law and Mergers/ Acquisitions Law
- **Michael G. Sutin**, Real Estate Law and Trusts and Estates

Appellate practitioner Bill Lazar, who published *The Electronic Digest of New Mexico Cases* for two years before taking a sabbatical last year, has announced that the digest will resume publication in April on a quarterly basis. The first issue will cover all New Mexico appellate cases published in the *Bar Bulletin* during the first three months of 2007. Each issue during the publication year will be cumulative of the year’s cases. The digest is organized alphabetically by topic with an expandable point-and-click topical index and is electronically searchable by key word. As before, the digest will be a free service to the bench and bar. It will be distributed by e-mail to attorney listservs and to individual subscribers in .pdf format. It will also be posted on the Web by the UNM Law School Library with links from the Web sites of the State Bar and the New Mexico Judicial Education Center. The new digest is a collaboration. Lazar covers all civil cases. Criminal cases are covered in alternate quarters by Zach Ives of Freedman, Boyd, Daniels, Hollander, Goldberg, & Ives, and by Trace Rabern, who was with the Appellate Division of the New Mexico Public Defender Department for eight years before recently taking the plunge into private practice. To receive the *Electronic Digest of New Mexico Cases* or have it sent to a listserv (it is presently to be sent to the NMTLA and NMCDLA listservs), contact Lazar at lazar@nets.com.
**IN MEMORIAM**

**Norman D. Bloom** passed away Jan. 7 after a brief illness. Bloom retired in 2004 after nearly 40 years of active practice in Alamogordo. He treasured the collegiality and professionalism of those with whom he practiced law. He was the first district attorney appointed when Otero and Lincoln counties became the 12th Judicial District in 1971. Bloom set the standard for integrity and fairness in the administration of justice and was widely respected in the law enforcement community. Most of his professional practice was with the late George Fettinger, representing business and government entities and individuals throughout New Mexico. Bloom helped organize the original Crimestoppers Program in Alamogordo. He was the driving force behind the planning, fundraising and construction of the La Placita Children's Home, which is now a facility of CYFD. Bloom was honored by Sertoma with the Service to Mankind Award at the local, district and regional levels in 1978. A long-time member of Kiwanis, Bloom was a veteran of the Korean War and a life member of the VFW and American Legion. He was born in Albuquerque in 1928 to Norman D. Bloom, Sr., and Rose Conway Bloom, who predeceased him. After completing his college education, Bloom first worked as a potash miner in Carlsbad, where he became a leader in union activities. For a short time, he published a weekly newspaper. He graduated from the UNM School of Law in 1966. He is survived by his wife Betty and by daughters Ellen Stephens and husband Floyd of Albuquerque; Nancy R. Wilson of Albuquerque; Verna Clevinger and husband Cecil of Bossier City, La.; Dorothy J. Kudla and husband Paul of Shalimar, Fla.; Norma Jo Barnett and husband Earle of Alamogordo; Brenda Johnson and husband George of Germany; Anthony of Garland, Texas; Debbie K. Huble and husband Edward of Alright, N.M., where he attended Highlands University, majoring in English and history with a speech minor. There he met and married Laura Thorne, and the two continued their travels together, first as teachers in El Rito, N.M., then in Anchorage. After helping to organize a teachers union and lobbying the Alaska legislature for a teacher pay increase, he decided to become a lawyer. Solomon received law degrees at George Washington University and UNM School of Law and was admitted to the State Bar in 1958. He worked for the N.M. State Highway Department for two years before entering private practice. He specialized in real estate, estate planning, land grants and school law, representing most school districts in northern N.M. at one time or another. Over the years, Solomon was involved in the N.M. Civil Liberties Union, the Association of Commerce and Industry, the N.M. Trial Lawyers Assoc., Northern N.M. Rural Legal Services, Santa Fe Legal Aid Society, N.M. Medical-Legal Panel, B’nai B’rith, Temples Beth Shalom and Beit Tikva, Lions, and the New Deal Preservation Association. Solomon loved the fine arts and travel, which he shared with his family and friends. He is survived by daughters Carol Howe and Sue Romero; son-in-law, Russ Howe; grandchildren Kenneth and Rebecca Howe; and countless friends and family across the country.

**Paul R. Ezatoff, Jr.** an attorney who recently relocated to New Mexico, died Dec. 17, 2006, while hiking around the summit of the Haleakala volcanic crater in Maui, HI. Ezatoff was 51 years old. He is survived by his parents, Paul and RoseMarie Ezatoff; his sister, Gail Crisp (husband, Dan); his uncle, Robert Beecher; his cousin, Brigitte Welsby (and husband, David); his companion, Judith Brillman, M.D.; aunts, uncles, and cousins in Detroit and Pittsburgh; and a host of loving friends. Ezatoff is remembered as “a good man with an adventurous soul.”

**Daniel Coit Lill,** 62, passed away Jan. 4. He was the third of five sons born to Eleanor Coit Lill and George Lill II. As a young man, Lill participated in the family business, Lill Coal & Oil, and spent his summers on the family’s working farm on Green Lake, Wis. He came to Albuquerque to attend UNM, left for a short time to work for Richard Nixon’s presidential campaign, and returned to the university, joining the Sigma Phi Epsilon fraternity and earning a bachelor’s degree in business administration before becoming a graduate of UNM’s law school in 1969. He served a one-year term as a law clerk under Judge Oman at the New Mexico Court of Appeals before opening his own practice in Albuquerque, where he specialized in trial law and insurance fraud. He loved the law and worked at his profession until his death. Lill is survived by his wife of 40 years, Carolyn Phillips Lill, a fellow UNM student whom he met when they were both participating in a wedding party at the Immanuel Presbyterian Church on Valentine’s Day in 1963. They had three children: daughter Lorissa and husband, Dr. Bernhard Schilling of Syracuse, NY; and sons Charles Coit and wife, Keena, Robert Duff Lill; and grandson Cole Coit Lill, all of Albuquerque. He is also survived by three brothers John Lill of Wis., Steven Lill of Costa Rica, and William Lill of Fla.; and long-time friend John McDonough of Kenilworth, IL. He was preceded in death by his eldest brother, George Lill III, formerly of Bolivia.

**Charles S. Solomon** passed away Jan. 28. In his own words, he had a good life. He did what he wanted to, when he wanted to and he spent almost 54 years with the love of his life, Laura Solomon. Born in the Bronx to Morris and Dora (Zobler) Solomon, he overcame polio and worked to support himself selling newspapers and magazines and ushering at Loew’s Paradise Theater. He first ventured west to attend forestry school at Utah Agricultural College (now Utah State University) in 1937. He returned to the East Coast in 1938 and was trained as an airplane mechanic at a National Youth Administration camp in Quoddy Village, Maine. During WW II, he put this knowledge to work for American Airlines, first in New York and then in California. After WW II, he followed friends to Las Vegas, N.M., where he attended Highlands University, majoring in English and history with a speech minor. There he met and married Laura Thorne, and the two continued their travels together, first as teachers in El Rito, N.M., then in Anchorage. After helping to organize a teachers union and lobbying the Alaska legislature for a teacher pay increase, he decided to become a lawyer. Solomon received law degrees at George Washington University and UNM School of Law and was admitted to the State Bar in 1958. He worked for the N.M. State Highway Department for two years before entering private practice. He specialized in real estate, estate planning, land grants and school law, representing most school districts in northern N.M. at one time or another. Over the years, Solomon was involved in the N.M. Civil Liberties Union, the Association of Commerce and Industry, the N.M. Trial Lawyers Assoc., Northern N.M. Rural Legal Services, Santa Fe Legal Aid Society, N.M. Medical-Legal Panel, B’nai B’rith, Temples Beth Shalom and Beit Tikva, Lions, and the New Deal Preservation Association. Solomon loved the fine arts and travel, which he shared with his family and friends. He is survived by daughters Carol Howe and Sue Romero; son-in-law, Russ Howe; grandchildren Kenneth and Rebecca Howe; and countless friends and family across the country.
## Legal Education

### February

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G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.

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**Bar Bulletin** - February 12, 2007 - Volume 46, No. 7
### Legal Education

**22** Choice of Entity for Nonprofits  
Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbar.org

**23** Scientific Evidence–Practical Solutions to Real World Problems  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**27** Ethical Issues in ADR  
State Bar Center  
Center for Legal Education of NMSBF  
1.0 E  
(505) 797-6020  
www.nmbar.org

**22** Internet—Things Lawyers Should Know About It  
Teleconference  
TRT  
2.0 G  
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www.trtcle.com

**26** Picking the Right Cases—When to Say No  
Teleconference  
TRT  
2.0 G  
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www.trtcle.com

**28** Ethical Quandaries—Problem-Solving Workshop  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

### March

**2** Drafting Effective Wills and Trusts  
Albuquerque  
National Business Institute  
5.0 G, 1.0 E  
(717) 835-8525  
www.nbi-sems.com

**7** Hoop it Up: CLE in Vegas 2007  
MGM Grand, Las Vegas, Nevada  
Center for Legal Education of NMSBF  
4.0 G, 1.0 E, 1.0 P  
(505) 797-6020  
www.nmbar.org

**13** Internet—Things Lawyers Should Know About It  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**2** Permian Basin Oil and Gas Law Update  
Midland, TX  
Live Oak CLE  
5.0 G, 1.0 E  
(800) 205-7931

**8** Getting Ready for Your Client’s Deposition  
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TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**14** Arbitration—Theory and Practice  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**6–7** The Law of Religious Organizations, Parts 1 & 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.0 G  
(505) 797-6020  
www.nmbar.org

**9** Experts—Discovery and Work-Product Issues  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**14** At-Will Doctrine—Employment Law’s Misunderstood Rule  
Albuquerque  
Paralegal Division  
1.0 G  
(505) 222-9356

**7** Employment Laws Made Simple  
Albuquerque  
National Business Institute  
6.6 G  
(800) 930-6182  
www.nbi-sems.com

**12** Electronic Discovery—Updates and Problem Solving  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

**15** Picking the Right Cases—When to Say No  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
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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 February 12, 2007

Petitions for Writ of Certiorari Filed and Pending:

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Effective February 12, 2007
Writs of Certiorari

NO. 30,142 Albq. Redi Mix v. Scottsdale Ins. Co. (COA 26,872) 1/30/07
NO. 30,169 Cook v. Anding (COA 27,139) 1/30/07
NO. 30,193 State v. Hand (COA 25,931) 2/1/07

Certiorari Granted and Submitted to the Court:
(Submission = date oforal argument or briefs-only submission)

<table>
<thead>
<tr>
<th>NO.</th>
<th>Case Name</th>
<th>Court of Appeals No.</th>
<th>Submission Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>29,058</td>
<td>Sanchez v. Pellicer</td>
<td>COA 25,082</td>
<td>9/29/05</td>
</tr>
<tr>
<td>29,016</td>
<td>State v. Jade G.</td>
<td>COA 23,810</td>
<td>10/11/05</td>
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<td>10/11/05</td>
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<td>29,134</td>
<td>State v. Kathleen D.C.</td>
<td>COA 24,540</td>
<td>11/14/05</td>
</tr>
<tr>
<td>29,160</td>
<td>Benavidez v. City of Gallup</td>
<td>COA 25,373</td>
<td>12/13/05</td>
</tr>
<tr>
<td>29,158</td>
<td>State v. Otto</td>
<td>COA 23,280</td>
<td>2/13/06</td>
</tr>
<tr>
<td>29,350</td>
<td>Doe v. Santa Clara Pueblo</td>
<td>COA 25,125</td>
<td>3/27/06</td>
</tr>
<tr>
<td>29,351</td>
<td>Lopez v. San Felipe Pueblo</td>
<td>COA 25,884</td>
<td>3/27/06</td>
</tr>
<tr>
<td>29,218</td>
<td>Montoya v. Ulibarri</td>
<td>12-501</td>
<td>4/10/06</td>
</tr>
<tr>
<td>29,476</td>
<td>Salazar v. Torres</td>
<td>COA 23,841</td>
<td>4/11/06</td>
</tr>
<tr>
<td>29,286</td>
<td>State v. Gutierrez</td>
<td>COA 25,279</td>
<td>5/22/06</td>
</tr>
<tr>
<td>29,712</td>
<td>Smith v. City of Santa Fe</td>
<td>COA 24,801</td>
<td>6/12/06</td>
</tr>
<tr>
<td>29,336</td>
<td>State v. Kerby</td>
<td>COA 24,350</td>
<td>6/13/06</td>
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<td>29,533</td>
<td>State v. Kerby</td>
<td>COA 25,891</td>
<td>6/13/06</td>
</tr>
<tr>
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<td>Maes v. Audubon Indemnity Ins. Group</td>
<td>COA 25,598</td>
<td>8/15/06</td>
</tr>
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<td>29,562</td>
<td>State v. Scott</td>
<td>COA 24,735</td>
<td>9/11/06</td>
</tr>
<tr>
<td>29,699</td>
<td>Wood v. Educational Retirement Board</td>
<td>COA 24,819</td>
<td>9/11/06</td>
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<tr>
<td>29,513</td>
<td>State v. Grogan</td>
<td>COA 25,699</td>
<td>9/12/06</td>
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<td>29,690</td>
<td>State v. Romero</td>
<td>COA 24,389</td>
<td>9/12/06</td>
</tr>
<tr>
<td>29,344</td>
<td>State v. Hughey (on rehearing)</td>
<td>COA 24,732</td>
<td>11/14/06</td>
</tr>
<tr>
<td>29,557</td>
<td>State v. Pacheco</td>
<td>COA 24,154</td>
<td>11/15/06</td>
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<tr>
<td>29,768</td>
<td>Luna v. Lewis Casing Crews</td>
<td>COA 26,338</td>
<td>11/15/06</td>
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<td>29,725</td>
<td>McMinn v. MBF Operating Acquisition Corp.</td>
<td>COA 25,006</td>
<td>11/27/06</td>
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<td>29,257</td>
<td>State v. Kirby</td>
<td>COA 24,845</td>
<td>12/12/06</td>
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<tr>
<td>29,717</td>
<td>Rael v. Blair</td>
<td>12-501</td>
<td>12/12/06</td>
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<td>29,857</td>
<td>State v. Lucero</td>
<td>COA 24,891</td>
<td>12/12/06</td>
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<tr>
<td>29,752</td>
<td>Campos v. Bravo</td>
<td>12-501</td>
<td>12/12/06</td>
</tr>
<tr>
<td>29,846</td>
<td>State v. Lopez</td>
<td>COA 25,516/25,517</td>
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<td>29,803</td>
<td>State v. Lopez</td>
<td>COA 24,566</td>
<td>1/22/07</td>
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<td>29,938</td>
<td>Cruz v. FTS Construction</td>
<td>COA 25,708</td>
<td>1/23/07</td>
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<tr>
<td>29,790</td>
<td>Board of Veterinary Medicine v. Rieger</td>
<td>COA 25,610</td>
<td>1/23/07</td>
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Petition for Writ of Certiorari Denied:

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<th>Case Name</th>
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<tr>
<td>30,157</td>
<td>State v. Arrequin</td>
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<td>1/18/07</td>
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<tr>
<td>30,156</td>
<td>State v. Marsh</td>
<td>COA 25,014</td>
<td>1/18/07</td>
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<tr>
<td>30,155</td>
<td>State v. Andres-Serapio</td>
<td>COA 26,775</td>
<td>1/18/07</td>
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<tr>
<td>30,153</td>
<td>State v. Alexander</td>
<td>COA 26,916</td>
<td>1/18/07</td>
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<td>30,150</td>
<td>State v. Hasley</td>
<td>COA 26,760</td>
<td>1/18/07</td>
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<td>30,160</td>
<td>State v. Ruiz</td>
<td>COA 24,536</td>
<td>1/18/07</td>
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<td>30,113</td>
<td>Rodeo, Inc. v. Columbia Casualty Co.</td>
<td>COA 25,648/25,652</td>
<td>1/19/07</td>
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<td>30,136</td>
<td>Jensen v. Janecka</td>
<td>12-501</td>
<td>1/19/07</td>
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<td>30,195</td>
<td>Killingsworth v. Williams</td>
<td>12-501</td>
<td>1/19/07</td>
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<td>30,090</td>
<td>Stevens v. Lytle</td>
<td>12-501</td>
<td>1/23/07</td>
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<td>Brown v. Ulibarri</td>
<td>12-501</td>
<td>1/23/07</td>
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<td>State v. Dixon</td>
<td>COA 25,196</td>
<td>1/23/07</td>
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<td>State v. Reyes</td>
<td>COA 26,858</td>
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<td>State v. Sherrick</td>
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<td>1/24/07</td>
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<td>State v. Casanova</td>
<td>COA 25,178</td>
<td>1/24/07</td>
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<td>30,179</td>
<td>State v. Reyes</td>
<td>COA 25,353</td>
<td>1/24/07</td>
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<td>State v. Baca</td>
<td>COA 25,952</td>
<td>1/25/07</td>
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<td>30,182</td>
<td>State v. Miranda</td>
<td>COA 26,907</td>
<td>1/26/07</td>
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<td>30,183</td>
<td>State v. Salgado</td>
<td>COA 26,418</td>
<td>1/26/07</td>
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<td>State v. Garcia</td>
<td>COA 26,719</td>
<td>1/26/07</td>
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<td>State v. Rivas</td>
<td>COA 26,199</td>
<td>1/26/07</td>
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Writ of Certiorari Quashed:

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<tr>
<td>29,517</td>
<td>State v. Bonjour</td>
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<td>State v. Campos</td>
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<td>State v. Pittman</td>
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### PUBLISHED OPINIONS

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<td>WCA 03-56120, A GRIMES v WAL MART (reverse)</td>
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<td>2nd Jud Dist Bernalillo CV-03-253, ESTATE E HAAR v W UDWELLING (affirm)</td>
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### UNPUBLISHED OPINIONS

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<td>2nd Jud Dist Bernalillo JQ-05-9, CYFD v TANIA A (affirm)</td>
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<td>27005</td>
<td>1/29/2007</td>
<td>5th Jud Dist Lea CV-05-460, M GOINS v K OWINGS (affirm)</td>
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<td>1/29/2007</td>
<td>8th Jud Dist Colfax CV-04-59, B BERGER v S RUFFIN (affirm)</td>
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<td>26743</td>
<td>1/30/2007</td>
<td>5th Jud Dist Chaves DM-05-529, R JENKINS v E MONTES (affirm)</td>
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<td>1/30/2007</td>
<td>5th Jud Dist Chaves DM-99-86, L HERRERA v M ARANDA (affirm)</td>
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<td>1/31/2007</td>
<td>7th Jud Dist Soccoro CV-05-113, J TORRES v L TOLLIVER (affirm)</td>
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<td>2/1/2007</td>
<td>5th Jud Dist Eddy CV-05-320, H GONZALES v LOVING VILLAGE (reverse)</td>
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<td>27212</td>
<td>2/1/2007</td>
<td>2nd Jud Dist Bernalillo JQ-05-22, CYFD v ERVIN T (affirm)</td>
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Slip Opinions for Published Opinions may be read on the Court’s Web site:
IN THE MATTER OF THE ADOPTION OF NEW RULE 10-233 AND NEW FORM 10-420 NMRA OF THE CHILDREN’S COURT RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Children’s Court Rules Committee to adopt new Rule 10-233 and new Form 10-420 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that new Rule 10-233 and new Form 10-420 NMRA hereby are APPROVED and ADOPTED;

IT IS FURTHER ORDERED that the adoption of new Rule 10-233 and new Form 10-420 NMRA of the Children’s Court Rules shall be effective for cases filed on or after January 15, 2007;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the adoption of the new rule and form by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 29th day of November, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

10-233. Automatic sealing of records.

A. No adjudication of delinquency. When a petition for delinquency has been filed that does not result in an adjudication of delinquency, the children’s court attorney shall present the court with an order sealing the files and records in the case, in a form prescribed by the Supreme Court, which the court shall enter upon conclusion of the case.

B. Release from legal custody and supervision. When a person has been released from the court-ordered supervision of the Children, Youth, and Families Department (CYFD or department), and the department has not received any new allegations of delinquency regarding that person for two (2) years since the release, the department shall notify the court that two (2) years have elapsed since the release and shall present the court with an order sealing the files and records in the case, in a form prescribed by the Supreme Court, which the court shall enter.

C. Copies of order. The clerk of the court shall deliver or mail copies of any sealing order to:
(1) the children’s court attorney;
(2) CYFD and any other authority granting the release;
(3) the law enforcement officer, department and central depository having custody of the law enforcement files and records;
(4) any other agency having custody of records or files subject to the sealing order;
(5) counsel of record at the time of disposition; and
(6) the person who is the subject of the sealing order, at that person’s last known mailing address.

COMMITTEE COMMENTARY

This rule is based on the 2003 statutory amendments to Section 32A-2-26 NMSA 1978, Subsections G and H. These subsections provide for automatic sealing of court records for a person who is not the subject of a delinquency petition; for a person who is determined by the court not to be a delinquent offender; or for a person who has been released from legal custody and supervision and for whom no new allegations of delinquency have been received in the past two years. This rule is intended to specify the mechanism for automatic sealing, as the statute does not state how it is to be accomplished, and to provide guidance to the Children, Youth and Families Department (department) and the courts in its implementation. The rule is not intended to govern or comment on sealing by motion under subsection A of Section 32A-2-26 NMSA 1978.

Note that the rule does not address the first part of Subsection G of Section 32A-2-26 NMSA 1978, which provides that a person who is not the subject of a delinquency petition shall have his or her files automatically sealed. The fact that a delinquency petition was not filed means that the matter was handled informally by probation services. The committee believes this is a matter best left to the department, which administers probation services. The committee strongly encourages the department to develop a mechanism for sealing under these circumstances, as these children’s records otherwise will remain unsealed while children for whom a petition has been filed are protected by the rule.

With regard to Paragraph A of the rule, there are a variety of circumstances under which a petition for delinquency is filed but does not result in an adjudication of delinquency. Such circumstances may include, but are not limited to, dismissal by the state, a satisfaction of time waiver, completion of the terms of a consent decree, an acquittal or other form of dismissal, or a ruling on appeal that concludes the case without an adjudication of delinquency. Not all courts enter formal orders of dismissal or make formal determinations that the child is not delinquent; the rule is broadly stated to accommodate different practices around the state. This approach is consistent with Rule 10-103.2(B) NMRA, which provides, with limited exceptions, that a dismissal “operates as an adjudication upon the merits”.

With regard to Paragraph B of the rule, the committee recommended the use of the phrase “court-ordered supervision of the department” instead of the statutory phrase “custody and supervision of the department” to make it clear that a child given probation alone is as entitled to sealing as a child placed in the department’s custody. Comments received during the public comment period suggested that this required clarification.

It is the committee’s intent that the term “files and records” include all forms of such documents, including but not limited to electronic and paper versions. Finally, the committee encourages all recipients of any sealing order under this rule to ensure that the order is given to the proper person responsible for sealing within the recipient’s agency. The rule attempts to delineate...
the responsible persons to the degree possible, but ultimately implementation of this rule and its underlying statute rests with the recipient individuals and agencies.

Because this rule does not change current law, which has been in effect since July 1, 2003, this rule applies to all cases either pending or filed on or after the effective date of the statute and to those cases that were closed but not yet eligible for sealing before that date. Those persons who were eligible to move for sealing of their records before the amended statute became effective are not covered by this rule, but they may still file a motion to have their records sealed.

10-420. Sealing order.
[Rule 10-223]

STATE OF NEW MEXICO
COUNTY OF
JUDICIAL DISTRICT COURT
IN THE CHILDREN’S COURT

No. ______________ (number of original case)

IN THE MATTER OF:
__________________________, a child
Date of Birth: ______________
Social Security Number (last four digits only): _______

SEALING ORDER

(check one)
[ ] The children’s court attorney has notified this court that the petition in this case, which is concluded, did not result in an adjudication of delinquency.
[ ] The Children, Youth and Families Department (CYFD or department) has notified this court that (insert name of child) has been released from the court-ordered supervision of the department; that two (2) years have elapsed since the release; and that the department has not received any new allegations of delinquency regarding (insert name of child) during that time period.

The Court has further been provided with the following names and addresses of the persons or agencies to whom the sealing order shall be delivered or mailed:

1. Children’s Court Attorney
Name __________________ Address __________________

2. CYFD and any other authority granting the release
Name __________________ Address __________________

3. Law enforcement officer, department and central depository having custody of the law enforcement files and records
Name __________________ Address __________________

4. Any other agency having custody of records or files subject to this order
Name __________________ Address __________________

5. Counsel of record at the time of disposition
Name __________________ Address __________________

6. Person who is the subject of this order at that person’s last known address
Name __________________ Address __________________

IT IS THEREFORE ORDERED THAT the files and records in this case shall be sealed and that the clerk of this court shall deliver or mail copies of this sealing order to the persons and agencies listed herein.

IT IS FURTHER ORDERED THAT, upon entry of this sealing order, the proceedings in the case shall be treated as if they never occurred and all index references shall be deleted.

IT IS FURTHER ORDERED THAT all persons and agencies to whom this sealing order is directed shall reply to any inquiry that no record exists with respect to the person who is the subject of this sealing order.

__________________________
Children’s Court Judge

CERTIFICATE OF SERVICE
I certify that I delivered or mailed a copy of this order to the above-named persons and agencies at the above-listed addresses.

__________________________
Clerk

__________________________
Date

NO. 06-8300-32

IN THE MATTER OF THE AMENDMENTS OF RULES 17-316 NMRA OF THE RULES GOVERNING DISCIPLINE

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Disciplinary Board to approve amendments to Rules 17-316 NMRA of the Rules Governing Discipline, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 17-316 NMRA of the Rules Governing Discipline hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 17-316 NMRA of the Rules Governing Discipline shall be effective January 15, 2007;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 29th day of November, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
17-316. Review by the Supreme Court.

A. Decisions subject to review. There are three methods for seeking review by the Supreme Court of a recommendation or decision of the Disciplinary Board entered pursuant to Rule 17-315 NMRA:

(1) if the decision recommends public censure by the Court, suspension, disbarment, reinstatement after suspension or disbarment or denial of reinstatement after suspension or disbarment, a respondent-attorney or disciplinary counsel may petition the Supreme Court for a hearing, which the Court, in its discretion, may grant.

(2) if the decision of the board is to assess costs, to impose a formal public reprimand by the board or to impose or terminate probation, within fifteen (15) days of service of the decision, the respondent-attorney or disciplinary counsel may petition the Supreme Court for a hearing, which the Court, in its discretion, may grant. The petition must allege one of the following:

(a) the decision of the Disciplinary Board is in conflict with a decision of the Supreme Court;

(b) a significant question of law is involved;

(c) there is no substantial evidence in the record to support a material finding of fact upon which the decision of the Disciplinary Board is based; or

(d) the petition involves an issue of substantial public interest that should be determined by the Supreme Court; or

(3) if the decision of the board is to dismiss the charges, within fifteen (15) days of service of the decision, the respondent-attorney or disciplinary counsel may petition the Supreme Court for a hearing, which the Court, in its discretion, may grant. The petition must allege one or more of the following:

(a) the decision of the Disciplinary Board is in conflict with a decision of the Supreme Court;

(b) a significant question of law is involved;

(c) there is no substantial evidence in the record to support a material finding of fact upon which the decision of the Disciplinary Board is based; or

(d) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. Procedure. If a hearing is held in accordance with this rule, the clerk of the Supreme Court shall notify the respondent-attorney and disciplinary counsel of the time and place of the hearing. Proper notice shall be presumed by mailing to the address on file in the Supreme Court office. Briefs shall be submitted only if requested by the Supreme Court. In this event, the clerk of the court will advise the parties of dates when their respective briefs must be submitted and the issues which are to be addressed. The form of any such briefs shall be that which is prescribed by the Rules of Appellate Procedure.

C. Failure to request a hearing. If, within fifteen (15) days from the date that the recommendations of the Disciplinary Board are served, a respondent-attorney or disciplinary counsel has not requested or petitioned for a hearing with the Supreme Court in accordance with this rule, and:

(1) the recommendation is for public censure by the Supreme Court, suspension or disbarment, the Supreme Court may issue a mandate accepting the recommendations of the Disciplinary Board or it may take such other action as it deems appropriate;

(2) the decision is to impose a formal reprimand by the Disciplinary Board or probation, the Disciplinary Board may publish the public reprimand or place the attorney on probation in accordance with its decision.

D. Supreme Court decision. The Court, in its discretion and under such conditions as it may specify, may:

(1) reject any or all of the findings, conclusions or recommendations of the Disciplinary Board;

(2) accept any or all of the findings and conclusions of the board;

(3) impose the discipline recommended by the board or any other greater or lesser discipline that it deems appropriate under the circumstances including disbarment; or

(4) impose probation or other conditions as a type of discipline by itself or may defer the effect of the discipline imposed.

NO. 07-8300-01
IN THE MATTER OF THE AMENDMENTS OF RULES 1-050 AND 1-088.1 NMRA OF THE RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Civil Procedure for the District Courts Committee to adopt amendments to Rules 1-050 and 1-088.1 NMRA, and the Court having considered said request and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 1-050 and 1-088.1 NMRA of the Rules of Civil Procedure for District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 1-050 and 1-088.1 NMRA of the Rules of Civil Procedure for District Courts shall be effective for cases filed on or after March 15, 2007;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rules 1-050 and 1-088.1 NMRA by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 29th day of January, 2007.

Chief Justice Edward L. Chávez
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Richard C. Bosson

1-050. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

A. Judgment as a matter of law.

(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(a) resolve the issue against the party; and

(b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
(2) A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

B. **Renewing the motion after trial; alternative motion for a new trial.** If the court does not grant a motion for judgment as a matter of law made under Paragraph A of this rule, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten (10) days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than ten (10) days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 1-059 NMRA. In ruling on a renewed motion, the court may:

1. If a verdict was returned:
   a. allow the judgment to stand;
   b. order a new trial; or
   c. direct entry of judgment as a matter of law; or

2. If no verdict was returned:
   a. order a new trial; or
   b. direct entry of judgment as a matter of law.

C. **Granting renewed motion for judgment as a matter of law; conditional rulings; new trial motion.**

1. If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereof does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

2. Any motion for a new trial under Rule 1-059 by a party against whom judgment as a matter of law is rendered shall be filed no later than ten (10) days after entry of the judgment.

D. **Denial of motion for judgment as a matter of law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

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1-088.1. **Peremptory challenge to a district judge; recusal; procedure for exercising.**

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has requested that judge to perform any act other than an order for free process or a determination of indigency.

B. **Procedure for excusing a district judge.** A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing with the clerk of the district court a peremptory election. The peremptory election to excuse must be:

1. signed by a party plaintiff or that party’s attorney and filed within ten (10) days after the latter of:
   a. the filing of the complaint and assignment of a judge; or
   b. mailing by the clerk of notice of reassignment of the case to a judge; or

2. signed by any other party, or that party’s attorney, and filed within ten (10) days after the filing of the first pleading or motion pursuant to Rule 1-012 by that party or of mailing by the clerk of notice of assignment or reassignment of the case to a judge.

C. **Notice of reassignment; service of excusal.** After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall give notice of the reassignment to all parties. Any party electing to excuse a judge shall serve notice of such election on all parties.

D. **Recusal.** After the filing of a timely and correct exercise of a peremptory challenge, that district judge shall proceed no further. No district judge shall sit in any action in which the judge’s impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

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NO. 07-8300-02

**IN THE MATTER OF THE AMENDMENT OF RULE 5-501 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS**

**ORDER**

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to amend Rule 5-501 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 5-501 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED:

IT IS FURTHER ORDERED that the amendments of Rule 5-501 NMRA of the Rules of Criminal Procedure for District Courts shall be effective on and after March 15, 2007; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rule 5-501 NMRA by publishing the same in the and NMRA.

DONE at Santa Fe, New Mexico, this 29th day of January, 2007.

Chief Justice Edward L. Chávez
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Richard C. Bosson

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5-501. **Disclosure by the state.**

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

1. any statement made by the defendant, or codefendant,
or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;

(2) the defendant’s prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

B. Examination by defendant. The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. Depositions. The state may move the court to perpetuate the testimony of any such witness by taking the witness’ deposition pursuant to Rule 5-503 NMRA.

D. Certificate of compliance. The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified.

The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

E. Disclosures for enhanced sentences. If the state intends to use a prior criminal conviction to enhance a sentence, the state shall provide or make available to the defendant certified copies or other proof of any prior conviction to be offered during the sentencing hearing.

F. Information not subject to disclosure. The prosecutor shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer; or

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

G. Statement defined. As used in this rule, and Rules 5-502 and 5-503, “statement” means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) any written, stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral [statement] declaration and which is recorded contemporaneously with the making of the oral declaration.

H. Failure to comply. If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.
OPINION

PATRICIO B. SERNA, JUSTICE

{1} Applicants applied for permits from the State Engineer to change the point of diversion and the place and purpose of use of surface water rights in Valencia County (move-from location) to groundwater rights in Sandoval County (move-to location). Both the move-from location and move-to location are within the Rio Grande Underground Water Basin. Applicants, developers, sought the transfer to provide water to the Overlook Subdivision, a 106-lot residential development. Protestants, existing surface water users at the move-to location, objected to the applications based on three statutory grounds: the transfer would (1) impair existing water rights at the move-to location, (2) be contrary to conservation of water within the state, and (3) be detrimental to the public welfare of the state. See NMSA 1978, §§ 72-5-23, 72-12-7(A) (1985). A State Engineer hearing examiner determined the Protestants’ objections were without merit and approved the applications. Protestants appealed to the district court and, in a de novo proceeding, both Protestants and Applicants filed cross-motions for summary judgment. The district court adopted the hearing examiner’s findings, granted Applicants’ cross-motion for summary judgment, and denied Protestants’ motion. Protestants appealed to the Court of Appeals, which affirmed in a split decision.

{2} Protestants appeal five issues to this Court: (1) Applicants’ transfer applications should be considered new groundwater appropriations; (2) surface depletions at the move-to location caused by the applications should be considered per se impairment of existing rights; (3) the State Engineer should have considered all existing rights and not have impermissibly determined the validity of non-party declarants’ water rights; (4) the district court should not have granted Applicants’ cross-motion for summary judgment on the issue of impairment because material facts were in dispute; and (5) the Court of Appeals erred in holding that Protestants failed to preserve the issues of water conservation and detriment to the public welfare of the state. Applicants and the State Engineer urge us to affirm the Court of Appeals decision.
{3} We hold that (1) the Court of Appeals correctly determined that the applications were not for new appropriations of groundwater and (2) the surface depletions resulting from the granting of the applications are not per se impairment. However, we agree with Protestants that (3) the State Engineer should have either considered all existing water rights at the move-to-location or extinguished those rights; (4) the district court erred by granting Applicants’ cross-motion for summary judgment because there was a material fact dispute as to the extent of depletion at the move-to-location; and (5) the district court erred in granting Applicants’ cross-motion for summary judgment because the motion failed to provide Protestants notice that the issues of water conservation and detriment to the public welfare of the state were subject to summary judgment. This Opinion addresses (3) consideration of existing water rights and (4) the extent of depletion at the move-to-location because both apply to the impairment analysis. Therefore, we remand to the district court for a de novo proceeding to determine the measure of existing rights and the extent of depletion at the move-to-location, whether this depletion constitutes impairment of existing rights, and whether the applications are contrary to water conservation or detrimental to the public welfare of the state.

I. FACTUAL BACKGROUND

{4} Applicants Lomos Altos, Inc. and Garden Path Associates sought to provide water to a maximum of 106 residences that compose the Overlook Subdivision in Sandoval County near Placitas, New Mexico. As a result, Applicants filed three permit applications between June 30, 1997, and August 25, 1999, to change the diversion point and the place and purpose of use from surface to groundwater within the Rio Grande Underground Water Basin. The permits sought to transfer a total 15.05 acre feet per year (afy) in surface water rights from locations on the Rio Grande in Valencia County to groundwater pumping rights in Sandoval County, near Placitas.

{5} Applicants published a notice of the applications pursuant to NMSA 1978, Section 72-5-5 (1941, prior to 2001 amendment). See also NMSA 1978, § 72-12-3(D)(1985, prior to 2001 amendment) (containing the publication requirement for groundwater transfers). Sections 72-5-23 and 72-12-7(A) govern surface water and groundwater transfers, respectively, and allow water rights to be transferred from one location to another, without losing priority, if such transfer (1) is made without detriment or impairment to existing water rights, (2) is not contrary to conservation of water within the state, and (3) is not detrimental to the public welfare of the state. The transfer must satisfy all three requirements before the State Engineer can approve it. See §§ 72-5-23, 72-12-7(A).

{6} Protestants Robert Wessely, Elizabeth Gardner, Lynn Montgomery, and Catherine Harris hold water rights at the move-to-location. Protestants’ water rights are taken from sources including Rosa de Castillo Spring, San Francisco Springs, Harris Spring, Tunnel Spring, and Placitas Springs. Protestants claimed that if Applicants’ transfer applications were approved, then Protestants’ respective water rights would be impaired by the resulting depletion at the water sources. Protestants also objected to the applications on the other two statutory grounds.

{7} The State Engineer hearing examiner held a hearing to discuss the three applications and to determine if they satisfied the three statutory requirements. The hearing examiner determined that the transfer applications met all three statutory criteria but focused his report and recommendation on whether the applications would impair existing rights at the move-to location. The impairment analysis concentrated on the proposed applications’ effects on Rosa de Castillo Spring, San Francisco Springs, Harris Spring, Tunnel Spring, and Placitas Springs, the springs’ estimated annual yields, and all existing water right declarations at each spring.

{8} At the hearing, Applicants, Protestants, and the State Engineer submitted simulations of the proposed applications’ effects on existing wells and springs at the move-to location. Applicants’ expert predicted drawdowns of less than 0.17 feet in neighboring wells of other ownership after 40 years of pumping and that the 15.05 afy retirement of surface water rights at the move-from location would offset the proposed groundwater pumping impacts on the Rio Grande. In other words, the applications would only slightly deplete the level in existing wells and springs and have no effect on the Rio Grande as whole.

1 A diversion point is the place where the appropriator installs a device for removing water from the ground, such as wells, pumps, and canals. Charles T. DuMars & Michele Minnis, New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation, 31 Ariz. L. Rev. 817, 821 (1989).

2 A water right is defined not only by its priority date, but also by how the water is used, e.g., agricultural, municipal, or industrial use. DuMars & Minnis, supra note 1, at 820.

3 New Mexico water law is based on prior appropriation, i.e., “[p]riority in time shall give the better right.” NMSA 1978, § 72-1-2 (1907).

4 The Rosa de Castillo Spring was also identified as Rose de Castille Spring, Rosa de Castilla Spring, and Rosa de Costillo Spring in various reports and motions filed below.

5 Wessely and Gardner own a surface water right used on 5.5 acres of land taken from the San Francisco Springs. Harris owns an underground water right taken from a well approximately 32 feet deep and 4 feet square that is on her property. Montgomery owns a water right to irrigate 8 acres of land taken from the Rosa de Castillo Spring.

6 Offset and retirement are interrelated concepts. The Middle Rio Grande Administrative Area Guidelines require groundwater applicants to obtain valid surface water rights in an amount sufficient to offset the application’s effect on the Rio Grande’s surface flows. Office of the N.M. State Eng’r, Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications 2, 5 (2000), http://www.ose.state.nm.us/doing-business/mrgbasin/crit9-13.pdf. These surface water rights are then retired, i.e., no longer used toward surface water uses. See City of Albuquerque v. Reynolds, 71 N.M. 428, 440, 379 P.2d 73, 81 (1962) (“[T]he requirement that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer.”).

7 Different units of measurement are used in this opinion. Generally, the proposed pumping impacts were measured in afy, and water rights were measured by their use on individual acres of land.
Protestants’ expert’s model, in contrast, showed more significant effects on the springs. The State Engineer Water Rights Division’s (WRD) model yielded results similar to Applicants’ model. The hearing examiner determined Protestants’ model was less reliable than both Applicants’ and WRD’s models. The hearing examiner then listed the State Engineer’s estimated annual yields of the springs at the move-to location. Rosa de Castillo Spring’s annual yield is estimated at 161 afy, the San Francisco Springs annually yield approximately 129.6 afy, and Harris Spring yields an estimated 0.8 afy annually.

9 Finally, the hearing examiner reviewed existing water right declarations at each of the springs at the move-to location. The hearing examiner observed that the depletion effects on Tunnel Springs and Placitas Springs would be de minimis and that there were no water rights associated with Harris Spring. Therefore, for purposes of this appeal, we look at all the water right declarations for Rosa de Castillo Spring and San Francisco Springs.

10 Rosa de Castillo Spring is the source of three water right declarations: Protestants Montgomery’s Declaration 03890 claims a right to irrigate 8 acres of land; Declaration 01644 describes an irrigation right used on a total of 83.92 acres of land; and Declaration 03420 claims a water right applied to 17 acres of land. A WRD resource master’s memorandum relied on aerial photographs from 1935, 1954, 1962, 1967, and 1975 to conclude that most of these irrigation rights had been discontinued. The hearing examiner’s report and recommendation listed only Declaration 03890’s claim for irrigation of 8 acres, and concluded that the Rosa de Castillo Spring’s yield of 161 afy far exceeded the amount required by the declaration and that no existing water rights would be impaired by the transfer applications’ pumping impacts.

11 San Francisco Springs is the source of two water right declarations: Protestants Wessely and Gardner’s Declaration 04358, which claims water put to beneficial use on 5.5 acres of land; and Declaration 02276, which claims a water right to beneficially use water on a minimum of 29 acres. While the total amount of water from San Francisco Springs to be put to beneficial use was on at least 34.5 acres, the hearing examiner relied on four aerial photographs taken between 1935 and 1971 to conclude that only 15 acres of land were irrigated and that Applicants’ proposed use would not impair the existing irrigation rights used on 15 acres from San Francisco Springs. In sum, the hearing examiner found no impairment of existing rights at either Rosa de Castillo Spring or San Francisco Springs because the annual estimated yields are sufficient to satisfy all existing water rights at each spring, even after the transfer applications are granted and the attendant depletion occurs.

12 The State Engineer adopted the hearing examiner’s recommendations in an August 28, 2001, Order. Protestants appealed the State Engineer’s decision pursuant to NMSA 1978, Section 72-7-1(A) (1971), and raised issues including the same three statutory questions addressed by the hearing examiner. The district court reviews these appeals de novo. Section 72-7-1(E).

Protestants named Applicants and the State Engineer as Defendants. Protestants moved for summary judgment on impairment of existing water rights based on the novel contention that in the fully-appropriated Rio Grande stream system, any new surface depletion is per se impairment. Protestants based their motion on undisputed facts. Applicants filed a cross-motion for summary judgment, which fully incorporated Protestants’ statement of facts, but included five additional facts alleging that depletions caused by the proposed wells would be de minimis. Applicants also averred in a footnote that Protestants did not challenge the State Engineer’s determination that the transfers were not contrary to the state’s water conservation or that they would not be detrimental to the state’s public welfare, but the motion did not include a statement of reasons why the transfer applications met these two statutory criteria. Protestants’ response contested Applicants’ claim that the depletions would be de minimis because the depletion amount was in dispute. However, Protestants failed to respond to Applicants’ footnote that claimed Protestants did not challenge the State Engineer’s conclusions that the transfer applications were not contrary to the state’s water conservation or the public welfare. After conducting a hearing on these motions, the district court denied Protestants’ summary judgment motion, granted Applicants’ summary judgment cross-motion, and approved the transfer applications in accordance with the State Engineer’s order dated August 28, 2001.

13 Protestants appealed the district court’s decision to the Court of Appeals. The Court of Appeals affirmed the district court’s reasoning and result. See Montgomery v. State Engineer, 2005-NMCA-071, 137 N.M. 659, 114 P.3d 339. Protestants filed a petition for writ of certiorari with this Court, and we granted the petition on June 2, 2005.

II. THE STATUTORY AND ADMINISTRATIVE FRAMEWORK FOR WATER RIGHT TRANSFERS IN THE MIDDLE RIO GRANDE ADMINISTRATIVE AREA

14 We begin by reviewing the law surrounding surface water and groundwater transfers, City of Albuquerque v. State Engineer, 71 N.M. at 437, 379 P.2d at 79, and the Office of the New Mexico State Engineer, Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications (2000), http://www.ose.state.nm.us/doing-business/mrnga/administrativearea.pdf [hereinafter MRGAA Guidelines]. Surface water and groundwater transfers are governed by Sections 72-5-23 and 72-12-7(A), respectively. These sections allow water right transfers from land in one area to another, without losing priority of the right when established, if such transfers (1) can be made without detriment or impairment to

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9 Any water right holder may make and file a declaration of beneficial use with the State Engineer. NMSA 1978, §§ 72-12-5 (1931) (groundwater right), 72-1-3 (1961) (surface water right vested pre-1907). These declarations are prima facie evidence of their contents, including the claimed water right. Sections 72-12-5, 72-1-3.

10 Declaration 01644 is under the name Rumaldo T. Montoya. Montoya did not object to the transfer applications or participate in these proceedings. A WRD impairment analysis memorandum states Declaration 01644 contained three items, including a right to irrigate 3.5 acres and an irrigation right used on 80.42 acres.

11 Declaration 03420 was filed under the name of several individuals who did not protest Applicants’ transfer applications or participate in these proceedings.

12 Declaration 02276 is under the name of Richard Illing. Illing did not object to the transfer applications or participate in these proceedings, but the hearing examiner considered this declaration in the examiner’s impairment analysis.
existing water rights, (2) are not contrary to conservation of water within the state, and (3) are not detrimental to the public welfare of the state. Sections 72-5-23, 72-12-7(A). The State Engineer has authority to approve an application for a water right transfer only when all three criteria are met. Sections 72-5-23, 72-12-7(A). Since there is a hydrologic connection between the Rio Grande and the underlying aquifer, described in City of Albuquerque, 71 N.M. at 437, 379 P.2d at 79, this Court recognized the State Engineer’s authority to read surface and groundwater statutes in harmony when requiring an offset of a surface water right before allowing a new groundwater appropriation in the Rio Grande Underground Water Basin. City of Albuquerque specifically acknowledged that the State Engineer has the power to develop regulations and impose conditions on groundwater applications, such as the surface water right retirements, in order to prevent impairment of existing rights. Id. at 439, 379 P.2d at 80-81.

Applicants’ transfer application must not result in net depletions to the Rio Grande’s surface water and must not impair existing water rights. Impairment of existing rights is evaluated in terms of the Rio Grande and the move-to location.

III. STANDARD OF REVIEW {16} An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Id. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. Martinez v. Metzgar, 97 N.M. at 173, 174, 637 P.2d at 1228, 1229 (1981). “All reasonable inferences are construed in favor of the non-moving party.” Portales Nat’l Bank v. Ribble, 2003-NMCA-093, ¶ 3, 134 N.M. 238, 75 P.3d 838; see also Gormley v. Coca-Cola Enters., 2005-NMSC-003, ¶ 8, 137 N.M. 192, 109 P.3d 280.

IV. APPLICANTS SOUGHT TO TRANSFER EXISTING SURFACE WATER RIGHTS, NOT TO MAKE NEW GROUNDWATER APPOINTMENTS {17} Applicants contend that this case is simply the transfer of 15 afy of surface water rights to groundwater rights and is governed by Sections 72-5-23 and 72-12-7. Protestants argue that the applications are for new groundwater uses and, therefore, are new groundwater appropriations.

{18} Protestants, Applicants, and the State Engineer agree that the MRGAA Guidelines apply in this case. The MRGAA Guidelines state that the Rio Grande’s surface waters have been considered fully appropriated since the Rio Grande Compact was signed. Id. at 1. The MRGAA Guidelines embody the WRD’s current practices, including how the State Engineer evaluates pending applications for groundwater permits. Id. “A permit to divert ground water shall be conditioned to limit the actual groundwater diversion to the valid consumptive use surface water rights held and designated for offset purposes . . . .” Id. at 4. The MRGAA Guidelines also explain that “the public welfare is best served by limiting actual groundwater diversions . . . to the amount of valid surface water rights transferred or otherwise held by the permittee.” Id. at 3 (emphasis added). Therefore, the State Engineer treats new groundwater appropriations as surface water right transfers which change the surface water right’s purpose of use and diversion point.

{19} Protestants depend on City of Albuquerque, 71 N.M. at 439, 379 P.2d at 80 (analyzing the State Engineer’s authority to promulgate rules requiring surface water right retirements “as a condition to new appropriations of underground water from the Rio Grande”), and the MRGAA Guidelines at 1 (“These guidelines embody the [WRD’s] current practice for evaluating pending and future applications for permits for groundwater use in the MRGAA . . . .”) (emphasis added), for the proposition that Applicants’ water rights transfer applications are for new appropriations of water in the Rio Grande Underground Basin. Regardless of how Protestants wish to characterize Applicants’ applications, the MRGAA Guidelines clearly state the applicable State Engineer’s procedure: the applicant must obtain, designate, and retire a valid surface water right to offset the new groundwater diversion, id. at 5, and there should be no impairment to existing water right holders, id. at 6. The application must also meet the other two Section 72-5-23 requirements. MRGAA Guidelines at 6, 8.

{20} Protestants agree that the retirement of surface water rights at the move-from location will offset the groundwater pumping depletion impacts to the Rio Grande stream system as a whole, but argue that the surface right offset must come from the move-to location rather than anywhere in the MRGAA. Nothing in the MRGAA Guidelines or Sections 72-12-7 and 72-5-23 require offset to come from the move-to location. In this case, it is uncontested that both the move-from and move-to locations are hydrologically connected within the MRGAA. As long as the net depletion from the groundwater pumping is offset by retirement of surface rights for the system as a whole, there is no new appropriation of basin water. As a result, the State Engineer, district court, and Court of Appeals were correct in finding that the applications are requests for transfers to change the diver-

sion point and place and purpose of use from surface to groundwater and are not new appropriations.

V. DEPLETIONS AT THE MOVE-TO LOCATION DO NOT CONSTITUTE PER SE IMPAIRMENT OF EXISTING WATER RIGHTS

{21} It is uncontested that the Rio Grande’s surface waters are fully appropriated. From this fact, Protestants urge this Court to find that, since it is uncontested that some depletion of surface waters will occur as a result of the Applicants’ transfer applications, per se impairment of Protestants’ surface water rights will occur. In other words, any depletion at the move-to location should be considered impairment. Applicants correctly state, however, that this Court has refused to make any bright-line rule regarding what constitutes impairment. “[T]he question of impairment of existing rights is one which must generally be decided upon the facts in each case, and . . . a definition of ‘impairment of existing rights’ is not only difficult, but an ‘attempt to define the same would lead to severe complications.’” *Mathers v. Texaco, Inc.*, 77 N.M. 239, 245, 421 P.2d 771, 776 (1966).

{22} In *Mathers*, the protestants complained that granting a groundwater appropriation application in the Lea County Underground Water Basin would result in impairment of their existing water rights because the new appropriation would lower the water tables in the protestants’ wells and increase their pumping costs. *Id.* at 242-43, 421 P.2d at 774. While we recognized that the Lea County Underground Water Basin is a non-rechargeable basin, *id.* at 242, 421 P.2d at 774, this Court refused to find impairment as a matter of law where a lower water level would result in increased pumping costs for the protestants, *id.* at 246, 421 P.2d at 776. We held the protestants’ impairment theory would make any groundwater appropriation approval subsequent to the initial permit unlawful. *Id.* at 244-45, 421 P.2d at 775; see also *Application of Brown*, 65 N.M. 74, 78-79, 332 P.2d 475, 478 (1958) (upholding a non-impairment finding although there would be a decline in the protestant’s water table); *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) (“New withdrawals which cause a minimal acceleration in the rate of saltwater intrusion or a minimal increase in salinity do not constitute impairment as a matter of law. . . . The determination of whether there is impairment must be made on a case-by-case basis.”). This Court has found impairment in other circumstances. See *City of Albuquerque*, 71 N.M. at 434-35, 379 P.2d at 77-78 (finding that if the city acquired and retired surface water rights to offset proposed groundwater appropriations there would be no impairment of existing surface rights). Likewise, we are not announcing that de minimis depletions cannot result in impairment. In *Heine v. Reynolds*, 69 N.M. 398, 401-02, 367 P.2d 708, 710-11 (1962), we upheld the State Engineer’s impairment determination when the facts showed granting an application would result in an increase, albeit small, in salt content in an underground basin. To the contrary, these findings were based on the individual facts of the cases and did not announce a bright-line impairment rule. *Id.* at 402, 367 P.2d at 711 (“We are of the view that the question of impairment of existing rights is a matter which must generally depend upon each application, and to attempt to define the same would lead to severe complications.”).

{23} Protestants’ claim in this case is very similar to the *Mathers* protestants’ argument: impairment exists as a matter of law if there is any resulting surface depletion at the move-to location. Protestants attempt to distinguish this case by noting that the State Engineer does not allow new Rio Grande surface water appropriations. While this is true, we have already found that Applicants seek to transfer surface water rights to groundwater rights. The State Engineer permits such surface water right to groundwater right transfers in the Middle Rio Grande Basin according to the MRGAA Guidelines. Protestants’ attempt to distinguish this case is, therefore, unpersuasive.

{24} We reaffirm our holdings in *Mathers* and *Stokes* that the individual facts of each case may require different resolutions of impairment questions. This Court deems to the facts relating to impairment which will be presented to the trial court and refuses to adopt Protestants’ argument that surface depletions in the fully-appropriated Rio Grande result in per se impairment. Therefore, we affirm the district court and Court of Appeals. See *Montgomery*, 2005-NMCA-071, ¶ 33.

{25} Protestants’ motion for summary judgment relied exclusively on the argument that any depletion in a fully-appropriated water system is per se impairment. Having found no merit in that argument, we affirm the Court of Appeals’ conclusion that the district court did not err in denying Protestants’ motion for summary judgment. *Id.* ¶ 41.

VI. THE DISTRICT COURT IMPROPERLY GRANTED APPLICANTS’ SUMMARY JUDGMENT CROSS-MOTION ON THE ISSUE OF IMPAIRMENT BECAUSE THERE ARE MATERIAL FACTS IN DISPUTE

{26} Protestants argue that Applicants’ cross-motion for summary judgment was premised on the fact that the depletions at the move-to location were de minimis and that the existing water rights associated with Rosa de Castillo Spring and San Francisco Springs would be much less than the estimated yields at both sites, i.e., there was enough water to satisfy all existing water rights and any attendant depletions resulting from the transfer applications. Applicants counter that the State Engineer could validly find that no impairment would occur because the effect on certain springs would be de minimis. Applicants explain that this is not a new legal impairment standard, only a proper basis upon which to make an impairment determination because the impact on the existing water rights was immeasurable. In the Rosa de Castillo Spring and San Francisco Springs where the predicted depletion effect was measurable, Applicants claim the effect on existing water rights was still minimal and, therefore, the State Engineer’s non-impairment determination was valid.

{27} In granting the transfer applications, the hearing examiner described the depletion impacts on Tunnel Spring and Placitas Springs as de minimis but made no similar finding as to the other springs. Instead, the hearing examiner found that the estimated annual yield of Rosa de Castillo Spring and San Francisco Springs would satisfy the current water uses at these springs, even after the transfer applications’ attendant depletions would occur. Before the district court, Applicants relied on five facts for their cross-motion for summary judgment, which can be summed up in three statements: (1) the depletions to surrounding springs would be de minimis; (2) most of the water declarations filed at the move-to location springs had been discontinued and, therefore, overstated current irrigation water uses; and (3) the estimated annual yields of the Rosa de Castillo Spring and the San Francisco Springs were greater than the water rights associated with each spring. Protestants, the non-moving party, specifically contested these points in their response, arguing that the expected depletions at Rosa de Castillo Spring and San Francisco Springs were measurable and
in dispute. Protestants also contested whether the water declarations filed at the move-to-location had actually been discontinued. The district court’s order denying Protestant’s summary judgment motion and granting Applicants’ cross-motion for summary judgment incorporated the hearing examiner’s findings but did not include an independent de minimis finding.

A. The State Engineer Must Consider All Declared Water Rights at the Move-To Area in the Impairment Analysis or Extinguish Non-Party Declarants’ Water Rights

{28} The State Engineer has a statutory obligation to determine if existing water rights will be impaired when a transfer application is filed. See §§ 72-5-23, 72-12-7. In considering the issue of existing water rights at the Rosa de Castillo Spring, the State Engineer hearing examiner only included Protestant Montgomery’s Declaration 03890, which claims a water right for irrigation of 8 acres. The hearing examiner did not mention Declaration 01644 or Declaration 03420, which claim rights to irrigate a total of 100.92 acres. A WRD water resource master utilized five aerial photographs taken between 1935 and 1975 to determine that most irrigation rights from Rosa de Castillo Spring were discontinued. For the San Francisco Springs, the hearing examiner listed Protestants Wessely and Gardner’s Declaration 04358 and Declaration 02276, which claim water rights for irrigation on a total of at least 34.5 acres. The hearing examiner relied on aerial photographs taken between 1935 and 1971 to conclude that at the time of the hearing, irrigation water uses were limited to approximately 15 acres of land from San Francisco Springs. These conclusions led to the hearing examiner’s finding that the estimated yields of the springs far exceeded the current water usage and the proposed pumping impacts at each spring. We hold that under the facts of this case, the hearing examiner had no authority to ignore the above-mentioned water rights declarations at these springs.

{29} We agree with Applicants and the State Engineer that beneficial use is the measure, basis, and limit of a water right, N.M. Const. art. XVI, § 3; Section 72-1-2; and that these pre-1907 declarations are only prima facie evidence of the claimed water right, Section 72-1-3. The Court of Appeals has recognized the State Engineer’s authority to rebut presumptions created by pre-1907 declarations. See State ex rel. Martinez v. Lewis, 118 N.M. 446, 449, 882 P.2d 37, 40 ( Ct. App. 1994) (“A ‘prima facie’ showing merely establishes the fact if not rebutted.”); see also Eldorado Utils., Inc. v. State ex rel. D’Antonio, 2005-NMCA-041, ¶ 20, 137 N.M. 268, 110 P.3d 76 (upholding the State Engineer’s refusal to accept amended declarations when the State Engineer’s records contained information rebutting the declarations’ claims), cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111. In this case the State Engineer argues it is rebutting the contents of the non-party water right declarations but avers that this is not an attempt to adjudicate declared or undeclared rights. This Court disagrees because the State Engineer’s failure to formally extinguish these rights leaves open the possibility that the non-party declarants may attempt to use these rights in the future. The hearing examiner saw evidence of use after several years of nonuse in this case. The WRD water resource master acknowledged that a 1975 aerial photograph of Rosa de Castillo Spring showed irrigation on 3 acres of land after a 1967 aerial photograph showed no irrigation for over 17 years. By not formally extinguishing these non-party declarants’ water rights, the State Engineer risks overappropriation of surface water at the move-to location.

{30} Eldorado Utilities and Lewis state that the State Engineer has the authority to rebut the contents of pre-1907 declarations. Those cases are distinguishable. In both Eldorado Utilities and Lewis, the declarants wishing to enforce the contents of the declarations were parties to the proceeding and, therefore, in a position to respond to the State Engineer’s rebuttal evidence. Eldorado Utilities., 2005-NMCA-041, ¶ 2; Lewis, 118 N.M. at 449, 882 P.2d at 40. In this case, the individuals who filed Declaration 01644, Declaration 03420, and Declaration 02276 are not parties to the proceeding. Consequently, these cases do not support the State Engineer’s action in this case.

{31} For the impairment analysis, the State Engineer must either include the total amount of water rights contained in these non-party declarations or formally extinguish them. The State Engineer can extinguish these rights through various means, including a forfeiture proceeding or an abandonment action. NMSA 1978, Section 72-5-28(A) (1998, prior to 2002 amendment), states the applicable forfeiture procedure. See also NMSA 1978, § 72-12-8 (1998, prior to 2002 amendment) (applicable to groundwater rights). After four years of nonuse, the State Engineer provides a party with notice of impending water right forfeiture. Section 72-5-28(A). If nonuse persists for another year, the vested water right reverts to the public. Id. Our water law statutes recognize that a surface water right will not be forfeited when the reason for nonuse is beyond the water right owner’s control. Id.; see also Chavez v. Gutierrez, 54 N.M. 76, 82, 213 P.2d 597, 600-01 (1950).

{32} This Court recognized common law abandonment and distinguished it from forfeiture in State ex rel. Reynolds v. South Springs Co., 80 N.M. 144, 146-47, 452 P.2d 478, 480-81 (1969). Unlike forfeiture, abandonment requires an intent to abandon. Id. A presumption of an intent to abandon is created by “evidence of the failure of the party charged to use the right, or the water, or to keep the works necessary for the utilization of the water in repair””for an unreasonable period. Id. at 146, 452 P.2d at 480 (quoting 2 Clesson S. Kinney, A Treatise on the Law of Irrigation and Water Rights, § 1116, at 2012 (2d ed. 1912)). Abandonment is also distinct from forfeiture because abandonment does not require a one-year waiting period after the State Engineer provides the nonuser notice. See Section 72-5-28(A). Either of these proceedings should assure that all existing water rights at the move-to location will be considered in the impairment analysis. We conclude that summary judgment on the issue of impairment was inappropriate because the State Engineer failed to consider the aggregate water rights of non-party declarants or, in the alternative, to formally extinguish these water rights.

B. The Magnitude of the Depletions is also a Material Fact in Dispute for Purposes of the Impairment Analysis

{33} Protestants also disputed the fact that the effects on some of the springs would be de minimis. In an exhibit attached to their response, Protestants projected a depletion of 3.572 afy on the Harris Spring, 3.352 afy on the Rosa de Castillo Spring, and 1.508 afy on the San Francisco Springs after 40 years. These numbers were significantly higher than the WRD’s projected depletions of 0.152 afy on the Harris Spring, 0.299 afy on the Rosa de Castillo Spring, and 0.199 afy on the San Francisco Springs. Because Protestants disputed the impairment uses at the Rosa de Castillo Spring and San Francisco Springs, as well as the transfer applications’ depletion impacts at these springs, the hearing examiner’s impairment determination, relied upon by the district
court, could be flawed.

{34} Applicants did not meet their burden to show that they were entitled to judgment as a matter of law. As a result, this issue is remanded to the district court to properly determine the extent of existing water rights, the magnitude of the applications’ depletions, and whether existing water rights will be impaired at each of the move-to location springs.

VII. APPLICANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUES OF CONSERVATION OF WATER AND PUBLIC WELFARE OF THE STATE

{35} Protestants aver that they preserved the issues of water conservation and public welfare for the state, contrary to the Court of Appeals holding. See Montgomery, 2005-NMCA-071. ¶ 39-40. Protestants argue that they had no notice that Applicants sought summary judgment on these issues in Applicants’ cross-motion for summary judgment. Without such notice, Protestants claim that they were not given an opportunity to preserve these issues at this level. Applicants counter that their cross-motion asserted that the State Engineer had properly analyzed and considered all three statutory criteria: impairment, water conservation, and public welfare. They contend that Protestants failed to address these last two issues in their response to the cross-motion for summary judgment or at the June 24, 2003, motions hearing, thereby waiving appellate review.

{36} Rule 1-056 NMRA states New Mexico’s summary judgment procedure: “The moving party shall submit to the court a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon.” The opposing party then has fifteen days to file a response. Id. The notice requirement and opportunity to respond “are designed to protect the rights of the party opposing the motion. When the opposing party has reasonable notice of the issues underlying a summary judgment, together with the opportunity to be heard, and makes no specific allegation of prejudice at that time, summary judgment is an appropriate procedure.” Aldridge v. Mims, 118 N.M. 661, 664, 884 P.2d 817, 820 (Ct. App. 1994). Where the facts are insufficiently developed to make a legal determination, however, summary judgment is not appropriate. Brown v. Taylor, 120 N.M. 302, 307, 901 P.2d 720, 725 (1995).

{37} In this case, Protestants’ motion for summary judgment specifically stated it only sought summary judgment on the issue of impairment. Applicants’ response and cross-motion for summary judgment included facts and legal authority relating only to the issue of impairment. The cross-motion concluded, “[t]he approved applications will not cause impairment as a matter of law. The State Engineer properly assessed the application’s impacts of the applications [sic] on existing rights as required by New Mexico law.” Applicants’ cross-motion referenced the other two statutory criteria in two sentences, including a footnote that stated, “[P]rotestants] do not challenge the State Engineer’s determination that the applications are not detrimental to the public welfare or contrary to the conservation of water.” Applicants’ cross-motion failed to include any facts or explain how they were entitled to summary judgment on the issues of public welfare and conservation of water.

{38} We hold that Applicants did not provide Protestants with sufficient notice that the issues of public welfare or conservation of water were at issue in the summary judgment cross-motion and remand to the district court to determine whether the applications meet these two statutory requirements.

VIII. CONCLUSION

{39} We hold that Applicants’ applications were properly considered transfers to change point of diversion and place and purpose of use from surface to groundwater, not new groundwater appropriations. We also hold that the State Engineer properly found that in a fully-appropriated stream system, new depletions should not automatically constitute impairment as a matter of law. However, the district court erred in granting Applicants’ cross-motion for summary judgment because material facts are still in dispute. Therefore, we remand to the district court for a de novo proceeding to consider all existing water rights at the move-to location, or extinguish those rights, the extent of depletion at the move-to location, and determine whether this depletion constitutes impairment of existing rights. The district court must also determine whether the applications are contrary to water conservation or detrimental to the public welfare of the state.

{40} IT IS SO ORDERED.

PATRICIO M. SÉRNA,
Justice

WE CONCUR:
RICHAID C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-011

CAPCO ACQUISUB, INC., Plaintiff-Appellee, versus GREKA ENERGY CORPORATION, Defendant-Appellant, and
MICHAEL HARTON, LINDA HARTON, JOE ANN DUNCAN (a/k/a JOE ANN MISSEY and f/k/a JOE ANN ANDERSON), ROBERT WRALDO DUNCAN, JR., IVALEE THOMPSON, BETTY BAUM COOPER, DEBORAH THOMPSON (f/k/a DEBRA ANN CAMPBELL), TOM RAY GAINER (As His Sole And Separate Property), and LELA RENEE THOMAS (As Her Sole And Separate Property), Plaintiffs-Appellees, versus GREKA AM, INC., SABA ENERGY OF TEXAS, INC., STRATA VARIOUS L.C., TATUM ENERGY, L.C., CAPCO ACQUISUB, INC., DR. IFTIKHAR AHMAD, DARSHAM S. MUNDY, DR. HAMID UR RAHMAN, MUHAMMAD SAEED, KALEEM AHMAD SAYED, SEHER ENTERPRISES, INC., and SUMMER ENTERPRISES, INC., Defendants-Appellants. No. 25,816 (filed: December 4, 2006)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY GARY L. CLINGMAN, District Judge

MARK TERRENCE SANCHEZ GARY DON REAGAN REAGAN & SANCHEZ, P.A. Hobbs, New Mexico for Appellee Capco Acquisub, Inc.

THOMAS C. BIRD DAVID W. PETERSON GARY J. VAN LUCHENE NIKOLAI N. FRANT KELEHER & MCLEOD, P.A. Albuquerque, New Mexico for Appellants Greka AM, Inc. and Saba Energy of Texas, Inc.

JEFFREY M. JOHNSTON MICHAEL A. SHORT, OF COUNSEL SHORT & JOHNSTON, P.C. Midland, Texas for Appellees

O P I N I O N

MICHAEL D. BUSTAMANTE, CHIEF JUDGE

1} This case requires us to determine whether the district court erred in denying Appellants' motion for extension of time in which to file a notice of appeal under Rule 12-201(E)(2) NMRA. We conclude that the district court did not abuse its discretion in denying the motion. Accordingly, we affirm.

BACKGROUND

2} This appeal originates from a judgment entered in a case concerning claims related to oil and gas properties in Lea County, New Mexico. The judgment involved two separate lawsuits that were consolidated for trial: *Capco Acquisub, Inc. v. Greka Energy Corporation*, No. CV-2001-249 (Lea County, N.M., filed July 6, 2001) and *Harton v. Greka AM, Inc.*, No. CV-2001-417 (Lea County, N.M., filed Oct. 29, 2001). Defendants Greka AM, Inc. and Saba Energy of Texas, Inc. (collectively, the Subsidiaries or Appellants), are subsidiaries of Defendant Greka Energy Corporation (GEC) and bring the present appeal.

3} Throughout the course of the litigation below, GEC and the Subsidiaries experienced substantial difficulty in complying with the judicial process. For example, the district court sanctioned GEC and the Subsidiaries for failing to comply with discovery rules and for failing to appear at a discovery hearing. Furthermore, after the district court allowed their counsel to withdraw from the case, GEC and the Subsidiaries failed to retain new counsel and failed to appear for the final trial on the merits.

4} The district court entered judgment against GEC and the Subsidiaries on January 18, 2005. GEC, having finally retained new counsel, filed a motion to vacate the judgment on February 16, 2005. The Subsidiaries neither joined in GEC’s motion, nor did they participate in the hearing on the motion. The district court denied GEC’s motion on February 18, 2005, and GEC filed a timely notice of appeal the same day. Once again, GEC filed the notice of appeal solely on its own behalf. The Subsidiaries assert that they believed they were to be included in GEC’s notice of appeal and that they did not become aware of their omission from the notice until “early March” of 2005. The Subsidiaries’ difficulties continued as they failed to file their own timely notice of appeal. In an attempt to preserve their chances of appellate review, the Subsidiaries filed a motion on April 19, 2005, for an extension of time to file a notice of appeal. The district court held a hearing on that motion on April 22, 2005.

5} As grounds for their motion, the Subsidiaries asserted that their omission from GEC’s post-trial motion and notice of appeal was a result of a miscommunication with their attorneys. More specifically, the Subsidiaries claimed that Susan Whalen, general counsel for GEC and the Subsidiaries, understood that the law firm of Modrall, Sperling, Roehl, Harris & Sisk, P.A. (the Modrall firm) would file the motion and notice of appeal on behalf of all three entities. Ms. Whalen submitted an affidavit in which she stated that she had several conversations with the Modrall firm that were “centered around those steps to be taken to protect the interests of [GEC and the Subsidiaries] with regard to the Amended Judgment and the perfection of an appeal . . . on behalf of [GEC and the Subsidiaries].” Ms. Whalen further noted in her affidavit that she did not receive a copy of GEC’s notice of appeal until “after the date it was filed[,]” and that the Subsidiaries did not become aware of their omission from the notice of appeal until “early March.” Thus,
the Subsidiaries argued, their failure to file a timely notice of appeal was due to excusable neglect.

{6} Appellees opposed the motion, arguing that the district court no longer had jurisdiction to hear the motion and, alternatively, that the Subsidiaries’ conduct in failing to file a timely notice of appeal did not amount to excusable neglect. In their reply to the Subsidiaries’ motion to extend, some of the Appellees pointed out that Ms. Whalen was present at a hearing on February 18, 2005, at which trial counsel for GEC acknowledged that GEC had thirty days from the disposition of its postjudgment motions in which to file its notice of appeal. Thus, these Appellees argued, nothing prevented the Subsidiaries from filing a timely notice of appeal.

{7} The district court denied the Subsidiaries’ motion from the bench, stating that, while he was unsure about the jurisdictional question and was planning to research it, he would deny the motion in any event because of “the history of this case,” referring to the Subsidiaries’ “complete indifference” to the judicial process throughout the litigation. The district court entered its written order denying the motion to extend on April 25, 2005. The written order did not indicate whether the denial was based on the district court’s lack of jurisdiction to extend the time for filing a notice of appeal, or whether the denial was based on the court’s finding that the Subsidiaries’ conduct did not amount to excusable neglect.

**DISCUSSION**

{8} The Subsidiaries bring the present appeal challenging several of the district court’s rulings, including: (1) the denial of the Subsidiaries’ motion for an extension of time to file a notice of appeal; (2) the award of punitive damages against the Subsidiaries; (3) the imposition of discovery sanctions against the Subsidiaries; and (4) the district court’s jurisdiction to hear the Capco Plaintiffs’ claims against the Subsidiaries. Because we conclude that the district court did not err in denying the Subsidiaries’ motion to extend time to file a notice of appeal, we address that issue exclusively and do not reach the remaining issues raised by the Subsidiaries.

**The Subsidiaries’ Motion to Extend Time to File Notice of Appeal**

{9} The Subsidiaries argue that the trial court abused its discretion in denying their motion for an extension of time to file their notice of appeal based on three rationales: (1) under the present circumstances, procedural formalities should not outweigh the Subsidiaries’ right to an appeal under art. VI, § 2 of the New Mexico Constitution; (2) the disposition of GEC’s post-trial motion pursuant to NMSA 1978, Section 39-1-1 (1917), tolled the district court’s jurisdiction to grant the extension to the Subsidiaries under Rule 12-201(E); and (3) the Subsidiaries were entitled to an extension of time in which to file their notice of appeal based on their excusable neglect. Conversely, Appellees urge us to affirm, arguing that: (1) the district court did not have jurisdiction to extend the time period for the Subsidiaries to file a notice of appeal under Rule 12-201(E); and (2) even if the district court did have jurisdiction, the Subsidiaries’ actions in failing to file a timely notice of appeal did not constitute excusable neglect. We begin by addressing the question of whether the district court had jurisdiction to extend the time period for the Subsidiaries to file a notice of appeal because, if the district court did not have jurisdiction, the question regarding excusable neglect is moot.

In resolving the question of the district court’s jurisdiction, we simultaneously consider the Subsidiaries’ first point regarding their constitutional right to an appeal as it relates to our construction of the New Mexico Rules of Appellate Procedure.

**1. The District Court Had Jurisdiction to Extend the Time Period in Which Appellants Could File a Notice of Appeal**

{10} Whether a trial court has jurisdiction to extend the time period in which a party may file a notice of appeal is a question of law that we review de novo. *Chavez v. U-Haul Co.*, 1997-NMSC-051, ¶ 13, 124 N.M. 165, 947 P.2d 122. Rule 12-201 of the New Mexico Rules of Appellate Procedure governs extensions of time to file a notice of appeal. See Rule 12-201(E). Generally, an appellant must file a notice of appeal “within thirty (30) days after the judgment or order appealed from is filed in the district court clerk’s office.” Rule 12-201(A)(2). However, the filing of certain post-trial motions shifts the commencement of the thirty-day time limit in which an appellant may file a notice of appeal to “the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion . . . . whichever occurs first.” Rule 12-201(D). Post-trial motions filed pursuant to Section 39-1-1 are among those enumerated in Rule 12-201(D) that toll the deadline for filing a timely notice of appeal. Rule 12-201(D).

{11} Furthermore, before the time for filing the notice of appeal has expired, the district court may extend the time for filing a notice of appeal “upon a showing of good cause . . . . for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.” Rule 12-201(E)(1). Once the time has expired for filing a notice of appeal, the district court may still grant an extension for up to thirty days from the original expiration date “upon a showing of excusable neglect or circumstances beyond the control of the appellant[].” Rule 12-201(E)(2). However, “[n]o motion for extension of time to file the notice of appeal may be granted after sixty (60) days from the time the appealable order is entered. If the motion is not granted within the sixty (60) days, the motion is automatically denied.” Rule 12-201(E)(4). Moreover, if a litigant has filed one of the post-trial motions enumerated in Rule 12-201(D), the sixty-day time period begins to run from either the entry of an order disposing of the motion or the date of any automatic denial of the motion, whichever occurs first. Rule 12-201(E)(4). Therefore, “where post-trial motions are filed, the district court retains, for a sixty-day period from the disposition of a post-trial motion, the authority to grant an extension up to a maximum of thirty days.” *Chavez*, 1997-NMSC-051, ¶ 12.

{12} Appellants argue that we should construe the above rules in light of the constitutional mandate in New Mexico that “an aggrieved party shall have an absolute right to one appeal.” N.M. Const. art. VI, § 2. Our Supreme Court has noted that the courts “must ensure that the procedural rules expedite rather than hinder this right.” *Trujillo v. Serrano*, 117 N.M. 273, 276, 871 P.2d 369, 372 (1994) (citing *Govich v. N. Am. Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991)). The Court further stated that modern rules promote expedition and uniformity and attempt to balance constitutional rights with the need for the efficient administration of justice. As we have previously stated, “[i]t is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits, where it can be done without impeding or confusing administration or perpetrating injustice.” *Id.* (citation omitted). Therefore, “[p]rocedural formalities should not outweigh basic rights where the facts present a marginal case which does not lend itself
to a bright-line interpretation.” Id.

{13} In light of the above policy favoring review on the merits, the Court held that “an untimely filing of a notice of appeal is not circumscribed by [a] bright . . . jurisdictional line.” Id. at 277, 871 P.2d at 373 (citation omitted). Thus, “while lack of subject matter jurisdiction precludes the possibility of hearing a case, it has occasionally been possible for an appellant to file a late notice of appeal and still invoke the court’s jurisdiction.” Id. (citation omitted). The Court described the timely filing requirement for a notice of appeal as a “mandatory precondition [to the exercise of jurisdiction] rather than an absolute jurisdictional requirement,” which means that an appellate court has the discretion to entertain an untimely filed appeal under unusual circumstances. Id. at 278, 871 P.2d at 374.

{14} In order to resolve the question of whether the district court had jurisdiction to grant an extension in the present case, we must first determine the relevant deadlines with respect to the Subsidiaries. Ordinarily, the thirty-day time limit for filing a notice of appeal under Rule 12-201(A)(2), and the sixty-day time limit beyond which the district court cannot grant an extension under Rule 12-201(E)(4), would have commenced once the district court entered its judgment on January 18, 2005. However, GEC timely filed a post-trial motion to vacate the judgment on February 16, 2005. GEC moved to vacate the judgment pursuant to Rule 1-060(B) NMRA and Section 39-1-1. The motion pursuant to Section 39-1-1 tolled both the thirty-day time limit in which GEC could file a notice of appeal under Rule 12-201(D), as well as the sixty-day time limit in which the district court could extend GEC’s time to file a notice of appeal under Rule 12-201(E)(4). See Rule 12-201(D) (enumerating Section 39-1-1, but not Rule 1-060(B), as authority for tolling time to file notice of appeal); Rule 12-201(E)(4) (enumerating Section 39-1-1, but not Rule 1-060(B), as authority for tolling time in which the district court may extend time to file notice of appeal). What remains less clear, however, is whether GEC’s post-trial motion—in which the Subsidiaries did not join—told the thirty- and sixty-day time limits for the Subsidiaries as well.

{15} Looking at the plain language of Rules 12-201(D) and 12-201(E)(4), it is not readily apparent whether the tolling provisions apply only to the party filing one of the enumerated post-trial motions, or whether the tolling provisions apply to all parties. Rule 12-201(D) reads, in relevant part:

**D. Post-trial motions extending the time for appeal.**

If a party timely files a motion pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA, or Rule 1-059 NMRA or a motion pursuant to Rule 5-614 NMRA based on grounds other than newly discovered evidence, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first.

Similarly, Rule 12-201(E)(4) reads:

**E. Other extensions of time for appeal.**

. . . .

(4) No motion for extension of time to file the notice of appeal may be granted after sixty (60) days from the time the appealable order is entered. If the motion is not granted within the sixty (60) days, the motion is automatically denied. If a post-trial motion is timely filed pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA or Rule 1-059 NMRA or a motion pursuant to Rule 5-614 NMRA based on grounds other than newly discovered evidence, this sixty (60) day period begins to run from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first.

Appellees urge us to hold that the tolling effect of Rules 12-201(D) and 12-201(E)(4) only applies to the party filing the post-trial motion because the rules do not specifically state otherwise. Cf. Fed. R. App. P. 4(a)(4)(A) (the federal counterpart to our Rule 12-201(D)) (specifically stating that, if a party timely files one of the enumerated post-trial motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion” Fed. R. App. P. 4(a)(4)(A) (emphasis added)). We note, however, that neither of our rules expressly or impliedly limits its tolling provision to the party filing the applicable post-trial motion. We hold instead that policy considerations weigh in favor of applying the tolling provisions of Rule 12-201(D) and Rule 12-201(E)(4) to all parties in the litigation.

{16} First, an important policy, as we have previously noted, is to construe the Rules of Appellate Procedure liberally so that appeals may be determined on their merits. See Trujillo, 117 N.M. at 276, 871 P.2d at 372. Second, we find it significant that the tolling provisions of Rule 12-201(D) and Rule 12-201(E)(4) apply exclusively to post-trial motions filed under five sources of authority: (1) Section 39-1-1 (allowing the district court to retain jurisdiction for thirty days following entry of judgment “to pass upon and dispose of any motion . . . directed against such judgment”); (2) Rule 1-050(B) NMRA (renewed motion for judgment as a matter of law); (3) Rule 1-052(D) NMRA (motion to amend findings and conclusions); (4) Rule 1-059 NMRA (motion for new trial in a civil case); and (5) Rule 5-614 NMRA (motion for new trial in a criminal case). See Rules 12-201(D) and 12-201(E)(4). Conversely, New Mexico courts have held that certain other post-trial motions cannot serve to extend the time for filing a notice of appeal. See, e.g., Martinez v. Friede, 2004-NMSC-006, ¶ 17, 135 N.M. 171, 86 P.3d 596 (noting that a district court’s power to reopen judgment and grant a new trial under Rule 1-060(B) has “no effect on the parties’ ability to calculate the time in which they must file their notice of appeal . . . because a motion under Rule 1-060(B) ‘does not affect the finality of a judgment or suspend its operation’” (citation omitted)). The committee commentary to Rule 12-201 does not address why the tolling provisions of Rule 12-201(D) and Rule 12-201(E)(4) only apply to motions filed under the five sources of authority mentioned above. Neither has our research revealed any cases that clearly address the issue. However, in light of the fact that Rules 12-201(D) and 12-201(E)(4) enumerate an exclusive list of post-trial motions that toll the time for filing a notice of appeal, it does not require too great an imaginative leap to presume that the motions have something in common that justifies this tolling effect. Therefore, to understand whether the tolling provisions of Rules 12-201(D) and 12-201(E)(4) should apply to moving and non-moving parties alike, we look broadly at the policies underlying our system of appellate proce-
We begin with the general principle, known as the final judgment rule, that our appellate jurisdiction is limited to review of “any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights[,]” NMSA 1978, § 39-3-2 (1966); 12 N.M. App. 412, 413, 863 P.2d at 448 (internal quotation marks and citation omitted). The final judgment rule “serves a multitude of purposes, including the prevention of piecemeal appeals and the promotion of judicial economy.” Moore v. Henney, 1999-NMSC-043, ¶ 7, 128 N.M. 328, 992 P.2d 879. These policies regarding finality are the key to understanding the impact of post-trial motions on the time for filing a notice of appeal. The critical question is: to what extent does a post-trial motion disturb the finality of the underlying judgment so that the time for filing a notice of appeal should be tolled?

With that question in mind, we note that motions filed under any of the five sources of authority enumerated in Rules 12-201(D) and 12-201(E)(4) have the potential to affect the finality of the underlying judgment. For example, a motion to vacate the judgment filed pursuant to Section 39-1-1, as was filed in the present case, would, if granted, literally undo the judgment. Furthermore, Section 39-1-1 provides that a district court retains jurisdiction over final judgments for a limited time “to enable the court to pass upon and dispose of any motion . . . directed against such judgment,” which suggests that such a motion seeks to alter the finality of the judgment. Section 39-1-1 (emphasis added); see Trujillo v. Hilton of Santa Fe, 115 N.M. 398, 402, 851 P.2d 1065, 1069 (Ct. App.) (holding that a workers’ compensation claimant’s post-trial motion for attorney’s fees was not a motion directed against the judgment under Section 39-1-1 and thus did not extend time for filing notice of appeal under Rule 12-201(D), rev’d on other grounds, 115 N.M. 397, 851 P.2d 1064 (1993).

A renewed motion for judgment as a matter of law under Rule 1-050(B) also clearly threatens the underlying judgment. See Valley Bank of Commerce v. Hillburn, 2005-NMCA-004, ¶ 20, 136 N.M. 741, 105 P.3d 294 (holding that the time for filing a notice of appeal does not begin to run until the district court enters an order ruling on a post-trial motion for judgment as a matter of law). Likewise, a motion to amend findings and conclusions under Rule 1-052(D) could destroy the finality of the underlying judgment if the proposed amendments would alter the judgment in a material way. Finally, our Supreme Court has held that a timely motion for new trial under Rule 1-059 “suspends the finality of the judgment and tolls the running of the time for taking an appeal.” Rhein v. ADT Auto., Inc., 1996-NMSC-067, ¶ 12, 122 N.M. 646, 930 P.2d 783 (quoting 6A Jeremy C. Moore et al., Moore’s Federal Practice ¶ 59.15[1] (2d ed. 1985)). It follows that motions for new trial filed under Rule 5-614 in criminal cases would similarly threaten the finality of the underlying judgment. Thus, the potential impact of a post-trial motion on the finality of the underlying judgment justifies tolling the time for filing a notice of appeal. However, our inquiry does not end there. We now return to the question of whether the tolling effect applies to all parties in the litigation.

In addition to ensuring the finality of the judgment on appeal, applying the tolling provisions of Rules 12-201(D) and 12-201(E)(4) to all parties would help to prevent “the confusion and waste of time that might flow from putting the same issues before two courts at the same time.” Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992) (internal quotation marks and citation omitted). Such is the purpose of the general rule divesting the district court of jurisdiction upon the filing of a notice of appeal. Id. The exception to this rule, however, is that “a pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal.” Id. at 241, 824 P.2d at 1043. As mentioned above, the post-trial motions enumerated in Rules 12-201(D) and 12-201(E)(4) have the potential to impact the finality of the underlying judgment, which would certainly affect the judgment on appeal. Therefore, applying the tolling provisions of Rules 12-201(D) and 12-201(E)(4) to all parties would ensure that appellate courts and district courts will not simultaneously take action affecting the merits of a final judgment.

In the absence of specific authority to the contrary and in light of the above-mentioned policies, we conclude that one party’s filing of a post-trial motion under any of the five authorities enumerated in Rules 12-201(D) and 12-201(E)(4) tolls the time in which all parties may file a notice of appeal, as well as the time in which the district court may grant an extension to any party to file a notice of appeal. Thus, the relevant time period commences upon the disposition of the motion by the court or by operation of law. Therefore, in the present case, GEC’s motion to vacate the January 18, 2005, judgment pursuant to Section 39-1-1 suspended the finality of the judgment and tolled both the time in which the Subsidiaries could file a timely notice of appeal under Rule 12-201(D) as well as the time in which the district court could entertain the Subsidiaries’ motion for an extension of time to file a notice of appeal under Rule 12-201(E)(4). The district court denied GEC’s motion to vacate on February 24, 2005. There is no dispute that, even with the benefit of the tolled period resulting from GEC’s motion to vacate, the Subsidiaries missed the deadline to file a notice of appeal on Monday, March 28, 2005.

Nevertheless, the district court retained jurisdiction to consider the Subsidiaries’ request for an extension until April 25, 2005, sixty days following the date on which the district court denied GEC’s motion, February 24, 2005. The Subsidiaries filed their motion for an extension on April 19, 2005, six days before the expiration of the sixty-day period. Thus, the district court had jurisdiction to entertain the Subsidiaries’ request for an extension.

We note that our holding today mirrors the federal policy of tolling the time for appeal for all parties upon the filing of certain post-trial motions. See Fed. R. App. P. 4(a)(4)(A). One commentator, addressing the tolling provisions of Rule 4(a)(4)(A), points out that the obvious purpose of suspending the appeal period during the pendency of any of the enumerated post-trial motions is to give the district court an opportunity to correct errors before appeal. For this reason, suspension of the appeal period does not depend on who makes the post-judgment motion. The time for appeal “for all parties” is suspended pending disposition of such a motion.

approach promotes judicial efficiency and meaningful appellate review; if the district court can correct errors in the judgment before any of the parties perfects an appeal, then there is a lessened likelihood that the case will make its way to the appellate courts in “piecemeal” fashion. See State v. Peppers, 110 N.M. 393, 397, 796 P.2d 614, 618 (Ct. App. 1990) (stating that action by the district court pursuant to a post-trial motion under Section 39-1-1 can render an appeal unnecessary, thus promoting efficiency).

{24} Having resolved the question of the district court’s jurisdiction to grant the Subsidiaries an extension of time to file a notice of appeal, we now turn to the question of whether the district court abused its discretion in denying the requested relief.

2. The District Court Did Not Abuse Its Discretion in Denying Appellants’ Motion for an Extension of Time to File a Notice of Appeal

{25} We review a district court’s denial of a motion for an extension of time to file a notice of appeal under an abuse of discretion standard. Guess v. Gulf Ins. Co., 94 N.M. 139, 141, 607 P.2d 1157, 1159 (1980). Rule 12-201(E) sets forth the circumstances in which a district court may grant an extension of time to file a notice of appeal and, in relevant part:

(1) Before the time for filing a notice of appeal has expired, upon a showing of good cause, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.

(2) After the time has expired for filing a notice of appeal, upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing a notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of time otherwise provided by this rule, but it shall be made upon motion and notice to all parties.

Id. Therefore, depending on when the appellant files the motion for an extension, the district court must apply a different degree of scrutiny. If the appellant files the motion prior to the expiration of the thirty-day time limit for filing a notice of appeal, the district court may grant the extension on a showing of good cause. Rule 12-201(E)(1).

In contrast, once the thirty-day deadline has passed, the appellant must demonstrate excusable neglect or circumstances beyond the appellant’s control. Rule 12-201(E)(2); see Knibb, Federal Court of Appeals Manual § 12.3 (“Excusable neglect obviously means something more than good cause. Otherwise the standards . . . for granting extensions before and after the appeal expiration would be the same.”); see also DeFillippo v. Neil, 2002-NMCA-085, ¶ 27, 132 N.M. 529, 51 P.3d 1183 (stating that, under Rules 1-055(C) NMRA and 1-060(B), “the ‘good cause’ standard . . . is broader and more liberal than the . . . ‘excusable neglect’ standard”).

{26} In the present case, the thirty-day deadline to file a notice of appeal passed before the Subsidiaries filed their motion for an extension. Therefore, the district court could only grant the motion upon a showing of excusable neglect or circumstances beyond the Subsidiaries’ control. Rule 12-201(E)(2). The Subsidiaries allege that their failure to file a timely notice of appeal was due to excusable neglect. However, they do not claim that the failure was due to circumstances beyond their control. We therefore only address whether the Subsidiaries’ inaction was due to excusable neglect and, if so, whether the district court abused its discretion in denying the Subsidiaries’ motion.

{27} Whether an appellant’s conduct amounts to excusable neglect will depend on the facts and circumstances of each case. See Sunwest Bank v. Rodriguez, 108 N.M. 211, 214, 770 P.2d 533, 536 (1989) (holding that, in ruling on motions to set aside judgment pursuant to Rule 1-060(B)(1), courts should analyze claims of excusable neglect based on the circumstances of each case); Knibb, Federal Court of Appeals Manual § 12.3, at 231 (stating that federal case law “illustrate[s] how much the concept of excusable neglect depends on the facts”). Although there are few New Mexico cases elaborating on the concept of excusable neglect, our Supreme court has prescribed a firm approach to claims of excusable neglect in the present context. Compare Guess, 94 N.M. at 142-43, 607 P.2d at 1160-61 (holding that former Rule 3(f), the predecessor to current Rule 12-201(E)(2), “should be strictly construed so as to prevent the progressive erosion of the rule to the point that attorneys will assume that they have sixty days within which to file notices of appeal”) with Rodriguez, 108 N.M. at 213, 770 P.2d at 533 (noting that, in deciding motions to set aside default judgment under Rule 1-060(B)(1), trial courts should apply a liberal standard in determining the existence of excusable neglect). The Guess Court held that “[w]here failure to receive notice alone, work overload of attorneys, palpable error of counsel and other causes that do not rise to the level of ‘unique’ circumstances that cannot be anticipated or controlled by a party’s counsel are not sufficient.” 94 N.M. at 143, 607 P.2d at 1161. Likewise, in this Court we held that “[w]e will not extend the exception to late filing to circumstances . . . where options available to the appellant to ensure timely filing of the notice [of appeal] were not taken.” Wilson v. Mass. Mut. Life Ins. Co., 2004-NMCA-051, ¶ 12, 135 N.M. 506, 90 P.3d 525. With this approach in mind, we now turn to the Subsidiaries’ claim of excusable neglect.

{28} The Subsidiaries claim that their failure to file a timely notice of appeal was due to a “miscommunication” with trial counsel and that this miscommunication amounts to excusable neglect. However, claims of excusable neglect that attempt to disaggregate an appellant’s conduct from that of its agent will generally fail. See, e.g., Wilson, 2004-NMCA-051, ¶¶ 11-12 (holding that appellant’s reliance on a delivery service that failed to deliver appellant’s notice of appeal on time did not constitute excusable neglect). The Subsidiaries claim that their failure to file a timely notice of appeal was due to a “miscommunication” with trial counsel and that this miscommunication amounts to excusable neglect. However, claims of excusable neglect that attempt to disaggregate an appellant’s conduct from that of its agent will generally fail. See, e.g., Wilson, 2004-NMCA-051, ¶¶ 11-12 (holding that appellant’s reliance on a delivery service that failed to deliver appellant’s notice of appeal on time did not constitute excusable neglect).
defendant cannot assert a justifiable belief that his interests were being protected, if he fails to inquire concerning possible problems of which he should have been aware under the circumstances.” Id. ¶ 23 (internal quotation marks and citations omitted).

{29} In the present case, the Subsidiaries failed to monitor the progress of their appeal. The Subsidiaries claim that their failure to file a timely notice of appeal was due to a “miscommunication” with trial counsel, yet they offer no details explaining how the miscommunication took place, much less whether the miscommunication was “excusable.” To the contrary, the overwhelming weight of the record points to the opposite conclusion.

{30} The record shows that the Subsidiaries had plenty of time and several opportunities to correct any miscommunication they had with their trial counsel. First, the Subsidiaries claim that their general counsel, who was also general counsel for GEC, communicated to trial counsel for all three entities that all three entities desired to challenge the January 18, 2005, judgment, both through post-trial motions and through the appellate process. Yet the Subsidiaries did not join in GEC’s post-trial motion to vacate the judgment, which was filed on February 16, 2005. If this were the result of a miscommunication with trial counsel, the Subsidiaries’ general counsel certainly became aware of the mistake when she attended the hearing on the motion and noticed that trial counsel was not representing the Subsidiaries in the hearing. However, the Subsidiaries never offered any details as to why this error went uncorrected.

{31} Second, even though GEC filed a notice of appeal on February 18, 2005, the Subsidiaries never filed their own notice of appeal. The Subsidiaries’ general counsel admitted in her affidavit that she received a copy of GEC’s notice of appeal, but not until “after the date it was filed.” Thus, so the story goes, the general counsel did not become aware of the Subsidiaries’ omission from the notice of appeal until “early March.” Assuming that “early March” means sometime within the first half of March, nothing prevented the Subsidiaries from filing their notice of appeal by March 28, 2005—the extended deadline that resulted from GEC’s filing of its post-trial motion—or from requesting an extension of time under Rule 12-201(E). Instead, the Subsidiaries failed to file their motion for an extension, which was at least a month following their discovery of GEC’s notice of appeal in “early March.”

{32} The Subsidiaries attribute this delay to the time required to retain a new firm to handle their motion for an extension and to bring that firm up to speed on the facts and circumstances of the underlying case. This argument is unpersuasive. While it is true that a substitution of counsel may incur some delay, the Subsidiaries could have directed their outgoing counsel to file the motion for an extension under the good cause standard of Rule 12-201(E)(1) before the deadline to file a notice of appeal expired on March 28, 2005. Furthermore, we are not willing to hold, as a matter of law, that a substitution of counsel will excuse a party from filing for an extension of time for a period of over a month. Given their early notice regarding their omission from GEC’s post-trial motions, the Subsidiaries failed to act diligently to ensure that their trial attorneys were properly representing their interests.

{33} In light of the foregoing discussion, the district court did not abuse its discretion in denying the Subsidiaries’ motion for an extension of time to file a notice of appeal. The Subsidiaries had well over a month, from the filing of GEC’s post-trial motion on February 16, 2005, to the March 28, 2005, deadline for all parties to file a notice of appeal, to discover that their trial attorneys were not acting on their behalf as instructed. It is difficult to understand how the Subsidiaries’ general counsel, who was also the general counsel for GEC, as the manager of legal affairs for all three entities, could have failed to discover and correct any miscommunication early on. Furthermore, the Subsidiaries failed to provide the district court with any details regarding the alleged “miscommunication” with trial counsel, and they are unable to point this court to anything in the record suggesting that their neglect in failing to file a timely notice of appeal was excusable. Finally, in denying the motion from the bench, the district court noted the Subsidiaries’ “complete indifference” to the judicial process throughout the litigation.

{34} These facts do not present a compelling case to support a finding of excusable neglect. To the contrary, the Subsidiaries conduct represents precisely the kind of delay and waste of judicial resources against which our Rules of Appellate Procedure are designed to protect. Holding otherwise would greatly undermine our Supreme Court’s directive that Rule 12-201(E)(2) be “strictly construed so as to prevent the progressive erosion of the rule.” Guess, 94 N.M. at 142-43, 607 P.2d at 1160-61.

{35} In sum, although the district court had jurisdiction to hear the Subsidiaries’ motion for an extension of time to file a notice of appeal, the district court did not abuse its discretion in denying the motion. We therefore dismiss the remainder of Subsidiaries’ appeal as untimely and remand to the district court for proceedings consistent with this opinion.

{36} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
LYNN PICKARD, Judge
RODERICK T. KENNEDY, Judge
OPINION

JONATHAN B. SUTIN, Judge

{1} Defendant James F. Duarte was arrested at a sobriety roadblock. Among other convictions, he was convicted of driving while intoxicated (DWI) under NMSA 1978, § 66-8-102(C)(1), (G) (2004) (amended 2005). He asserts district court error (1) in not suppressing evidence because the police officer lost a videotape of field sobriety tests, thus depriving Defendant of evidence and prejudicing his right to a fair trial; (2) in not excluding evidence because of the State’s late disclosure of witnesses and documents, prejudicing his ability to adequately prepare for trial; (3) in admitting results of a breath alcohol test because Defendant was not advised of his right to independent testing as required under NMSA 1978, § 66-8-109(B) (1993); and (4) in admitting evidence that was obtained after the police officer improperly exercised discretion in questioning Defendant outside of the narrow confines of instructions the officer was to follow at the roadblock, resulting in an unlawful seizure in violation of the Fourth Amendment to the United States Constitution. We affirm.

BACKGROUND

{2} Officer Cory Crayton arrested Defendant at what is commonly called a DWI roadblock after the following circumstances occurred. Defendant first denied, but then later admitted drinking; the officer saw an open bottle of beer between Defendant’s feet; Defendant looked for but could not find any registration or insurance documents; Defendant spilled the beer as he stepped out of the vehicle; Defendant admitted that he had drunk about three inches from the open bottle of beer and that he and a friend had drunk a six-pack; the officer learned that the vehicle registration had expired, and that the vehicle was not insured; Defendant smelled of alcohol and had bloodshot, watery eyes; and Defendant did not perform well on field sobriety tests. After Defendant was arrested, he was given two breathalyzer tests, which produced results of 0.13 breath alcohol content.

DISCUSSION

A. Lost Videotape

{3} The denial of a motion to sanction by dismissal or suppression of evidence is reviewed for abuse of discretion. State v. Riggs, 114 N.M. 358, 361, 838 P.2d 975, 978 (1992). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” State v. Caudillo, 2003-NMCA-042, ¶ 12, 133 N.M. 468, 64 P.3d 495 (internal quotation marks and citation omitted).

{4} Because Officer Crayton’s audio equipment did not work during the field sobriety tests that were first administered, a second set of field sobriety tests was given to Defendant, this time using video equipment. However, the video of the second set of field sobriety tests was lost. At trial, the officer testified on direct examination as to the results of the first set of field sobriety tests. He did not testify on direct examination as to the results of the second set of tests. On cross-examination, he testified that he did not know how Defendant did on the second round of tests and that he based his arrest of Defendant on the first round of tests and not on the second.

{5} The day before trial, Defendant filed a motion in which he claimed prejudice because the State had not produced and was unable to produce the videotape but had a duty to do so. Acknowledging the district court’s discretion in granting a remedy for losing evidence, Defendant suggested that the court should dismiss or exclude all evidence that might have been impeached if the tape had not been lost, relying on State v. Chouinard, 96 N.M. 658, 661-62, 634 P.2d 680, 683-84 (1981), which enunciates a test to determine if a deprivation of evidence violates a defendant’s due process right.

{6} Defendant’s motion was heard on the morning of trial. The State admitted that it had a duty to preserve the tape and that the tape was material. The State argued that the loss of the tape was unintentional and that Defendant was not prejudiced. Defense counsel examined Officer Crayton on the customary use of, and purpose for using, the video equipment. Both defense counsel and the court questioned the officer in regard to customary practice of preserving videotapes and on the loss of the tape in question. Defense counsel stated that he was not making an issue out of the tape being intentionally lost or kept from him.

{7} The district court determined that the loss of the videotape was not intentional. While noting that a video can fairly significantly impeach an officer, the court stated that it was not going to dismiss the case, and indicated to defense counsel that he “[u]ndoubtedly . . . [was] going to make some hay with the jury over this videotape being lost[,]” and that the court would allow defense counsel to “question thoroughly about why and how it could have been lost,” because “that’s clearly impeachment.” Defense counsel followed up by acknowledging that dismissal was an extreme remedy but arguing that “certainly [the] sobriety test could be suppressed based upon the fact, by [the prosecutor’s] admission, it’s a material piece of evidence.” After being critical about the State’s “loose” handling of the evidence,
the court again indicated that defense counsel could question the officer at length about how and why he lost the videotape, stating “those things are not lost on the jury.”

On appeal, Defendant contends that because the State conceded that it had a duty to preserve the evidence and that the evidence was material, the only issue before the district court was whether Defendant was prejudiced. Defendant argues “extreme prejudice” because the officer “could not remember much of what happened,” and Defendant argues that he was “severely prejudiced” because he was not able to effectively cross-examine the officer regarding the administration and scoring of the field sobriety tests, particularly given the fact that the officer was unable to state what the standards for administering the tests were and what instructions he gave to Defendant.

The State argues lack of prejudice because the officer did not testify regarding the tests that were videotaped, Defendant was allowed to extensively cross-examine the officer about the lost tape and to argue the significance of that to the jury, and, notwithstanding the officer’s weak recollection of standards and instructions, the officer was able to describe the first field sobriety testing.

Chouinard sets out a three-part test to determine whether deprivation of evidence is reversible error for denial of a fair trial and thus a denial of due process: “1) The State either breached some duty or intentionally deprived the defendant of evidence; 2) The improperly suppressed evidence must have been material; and 3) The suppression of this evidence prejudiced the defendant.”

Chouinard, 96 N.M. at 665, 634 P.2d at 685 (indicating that there must be a “realistic basis, beyond extrapolated speculation, for supposing that availability of the lost evidence would have underwritten the prosecution’s case”).

In discussing the manner in which a court is to analyze the issue and the relief for a defendant when the test is met, Chouinard stated:

Where the loss is known prior to trial, there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import. The choice between these alternatives must be made by the trial court, depending on its assessment of materiality and prejudice. The fundamental interest at stake is assurance that justice is done, both to the defendant and to the public.

Determination of materiality and prejudice must be made on a case-by-case basis. The importance of the lost evidence may be affected by the weight of other evidence presented, by the opportunity to cross-examine, by the defendant’s use of the loss in presenting the defense, and other considerations.

The trial court is in the best position to evaluate these factors.

The district court evaluated the issue before trial. We have the benefit of evaluating the issue after the evidence was in. We hold that the court’s handling of the issue of the lost videotape was not an abuse of discretion.

B. Late Disclosure of Witnesses and Documents

Defendant complains that the State added two additional witnesses to its list of witnesses five days before trial, produced documentation regarding certification of the breathalyzer tests three days before trial, and produced calibration of the testing equipment one day before trial. Defendant asserts that “[t]he late disclosure did not allow adequate time for preparation of a defense.”

We review a district court’s ruling on late discovery for abuse of discretion. See State v. McDaniel, 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701. “In order to find an abuse of discretion, we must conclude that the decision below was against logic and not justified by reason.” Id.

Failure to disclose a witness’ identity prior to trial in itself is not grounds for reversal. Defendant has the burden of showing that he was prejudiced by the untimely disclosure.” State v. Vallejo, 2000-NMCA-075, ¶ 32, 129 N.M. 424, 9 P.3d 668 (internal quotation marks and citation omitted).

In considering whether late disclosure of evidence requires reversal, a reviewing court will consider the following factors: (1) whether the State breached some duty or intentionally deprived the defendant of evidence; (2) whether the improperly non-disclosed evidence was material; (3) whether the non-disclosure of the evidence prejudiced the defendant; and (4) whether the trial court cured the failure to timely disclose the evidence.

McDaniel, 2004-NMCA-022, ¶ 8 (internal quotation marks and citation omitted). See generally Rule 5-501 NMRA (stating the initial duty of the State to disclose evidence in a criminal trial); Rule 5-505 NMRA (setting out the duty of parties to disclose any additional evidence or witnesses and setting out various remedies for the violation of this rule). The test for materiality, the second factor, is whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”
McDaniel, 2004-NMCA-022, ¶ 11 (internal quotation marks and citation omitted). As for determining whether the defendant has been prejudiced, the third factor, we look at whether the defense’s case “would have been improved by an earlier disclosure or how [the defense] would have prepared differently for trial.” Id. ¶ 14.

{16} The issue of late discovery was argued on the first day of trial, before trial began. Defendant asserted that three pieces of evidence were disclosed late: (1) the names of two additional witnesses were disclosed five working days before trial; (2) documentation regarding the certification of the breath test machine and the officer administering the test were disclosed three working days before trial; and (3) calibration logs for the breath test machine were disclosed the day before trial.

{17} Regarding the late disclosure of the witnesses, in its initial disclosure after arraignment, the State listed the arresting officer, the officer who administered the breath test, and “[a]ny and all witnesses named in police reports.” Later, five working days before trial, the State submitted an amended witness list named two additional officers, who were supervising the roadblock. The State indicated that the names of these officers were listed in the police reports initially disclosed in July. Defendant did not dispute this point. Defendant also pointed out that, while the name of another witness was disclosed in the initial witness list, the State did not identify that witness as being the one who performed the calibration on the breath test machine until the day before trial when the calibration logs were supplied to Defendant. After reflecting on the chronic problem of late discovery in criminal cases in the Third Judicial District and chastising the prosecution’s history of late discovery, the court explained that Defendant could have discovered the specific role of the witnesses disclosed in July and pointed out to defense counsel that “[y]ou can talk to those witnesses and you can do the things necessary to prepare.” On appeal, the State points out that the two later-identified additional supervising officers were never called to testify.

{18} Applying the test for determining whether to reverse a conviction based on the late disclosures to the case at hand, we believe it is clear that the State had a duty to disclose these witnesses. Rule 5-501(A)(5). We need not reach the issue whether the State complied with its duty by the disclosures in its initial witness list. Cf. McDaniel, 2004-NMCA-022, ¶¶ 9-10 (determining that the State met its duty to disclose the identity of a witness when it disclosed the witness as soon as she was located). Even if we were to conclude here that the State had not fulfilled its duty, Defendant has not demonstrated that the information was material by indicating that there is a reasonable probability that the outcome of the trial would have been different had the disclosure been made earlier. See id. ¶ 11 (stating that, in the context of the late disclosure of information, for evidence to be material there must be a reasonable probability that the outcome of the proceedings would have been different had the information been disclosed earlier).

Nor has Defendant convincingly demonstrated that he was prejudiced by the late disclosure, or that the district court failed to cure any prejudice resulting from the late disclosure. Defendant had the opportunity to interview the witnesses and two of the witnesses did not testify at trial. See Vallesjoas, 2000-NMCA-075, ¶ 34.

{19} As to the late disclosure of the documents showing certification and the calibration logs relating to the breath test machine, the State conceded that it had a duty to disclose this evidence and apologized for the late disclosure. Even assuming that the State breached its duty to disclose this evidence, again, Defendant has not demonstrated materiality or prejudice. While Defendant argued to the district court that the machine was a different machine from what he was used to seeing, and therefore he could not just look at the calibration logs and determine if the machine was correctly calibrated without research, Defendant does not indicate on appeal that the outcome of the trial would have been different had he received this information earlier. See McDaniel, 2004-NMCA-022, ¶ 11. Defendant does not assert on appeal that he, at any time, discovered that the calibration records showed that the machine was improperly calibrated, or that the machine certification was erroneous or invalid. Further, neither below nor on appeal does Defendant argue that earlier disclosure of the certification information in this case would have produced a different result at trial or that his defense would have been improved or he would have defended differently had there been an earlier disclosure. Defendant has not demonstrated that the evidence was material, nor has he demonstrated prejudice. See id. ¶¶ 11-15. Accordingly, we will not reverse Defendant’s conviction on the grounds of the late disclosure of the certification information and the calibration logs

C. Advice of Right to Independent Alcohol Content Test

{20} Section 66-8-109(B) in the Implied Consent Act requires that a person be advised of the right to an independent chemical test for blood or breath alcohol content in addition to any test performed at the direction of a law enforcement officer. Defendant contends that he was not advised of this right, and that the State, therefore, did not comply with Section 66-8-109(B) and the breath test results should have been excluded. Cf. State v. Jones, 1998-NMCA-076, ¶ 19, 125 N.M. 556, 964 P.2d 117 (indicating that the officer must give advice substantially in compliance with Section 66-8-109(B), but that “[s]trict compliance with the statute is not required because words other than those used in the statute can convey the information required”).

{21} The testimony on this issue was as follows:

[Prosecutor:] Okay. Then what happened after the officer placed Defendant under arrest?
[Officer:] Then I read him the implied consent with the [news] video camera staring at us. He denied consent because of the video camera.

[Prosecutor:] Okay. You talked about implied consent. Is there a full name for that?
[Officer:] The New Mexico Implied Consent Act.

[Prosecutor:] Okay. Can you tell the ladies and gentlemen of the jury just briefly what is the New Mexico Implied Consent Act?
[Officer:] It asks a person to voluntarily submit to chemical testing, whether it be breath, blood, or both. You can refuse it. But you will lose your license up to a year, and you can accept. If you accept, then that is going to show what your breath or blood alcohol is.

[Prosecutor:] What is the procedure for when you are reading the New Mexico implied consent, what actually takes place?
[Officer:] What do you mean?

[Prosecutor:] Like for you to say, I am going to read the New Mexico Implied Consent Act, do you read it off a card?
[Officer:] Oh, yes, sir. I have a card that I keep in my ticket book.
Defendant bases this claim on New Mexico case law that requires for the implementation of DWI roadblocks minimal motorist intrusion through law enforcement supervisory procedural planning that limits unbridled discretion of officers in the field. See City of Las Cruces v. Betancourt, 105 N.M. 655, 658, 735 P.2d 1161, 1164 (Ct. App. 1987). It is the assurance of supervisory limitation on discretion which constitutionally permits stopping motorists at roadblocks without a showing of individualized suspicion of criminal activity. See State v. Bates, 120 N.M. 457, 460, 902 P.2d 1060, 1063 (Ct. App. 1995).

25 We first set out the pertinent circumstances of the roadblock in this case, together with the precise issue that Defendant raises. We then analyze United States Supreme Court and New Mexico case law relating to roadblocks. Finally, we narrow in on the claimed constitutional violation, namely, whether the officer’s deviation from procedure during preliminary questioning upon first contact between the officer and Defendant violated Defendant’s Fourth Amendment rights, requiring application of the exclusionary rule as to all evidence of drinking and intoxication discovered after the question was asked.

1. Circumstances and Issue

26 In a briefing by his supervisors before the DWI roadblock was set up, Officer Crayton was given a script of what to say as he approached a stopped motorist. Pursuant to the script, Officer Crayton was to say “good evening, sir, or ma’am,” and then say: “I am an officer with the New Mexico State Police. This is a DWI sobriety checkpoint. May I see your driver’s license, vehicle registration, proof of insurance?” Nothing on the script mentioned asking someone if they had had something to drink.

27 As Officer Crayton approached Defendant’s vehicle, the officer said, “I am Officer Crayton, State Police. This is a DWI roadblock. Have you been drinking tonight?” After Defendant responded “no,” the officer said, “Okay, let me see your driver’s license, registration, and insurance.” Defendant gave the officer his ID card, and began to look for his registration and insurance information, at which time the officer shined his flashlight inside the vehicle and saw an open bottle of Busch beer between Defendant’s feet. After Defendant stated that he could not find his registration and insurance, the officer told Defendant that he had seen the beer bottle and asked Defendant to pull over to the side of the road. The officer asked Defendant to exit the vehicle and upon exiting the vehicle, Defendant spilled the beer. The subsequent investigation indicated that the vehicle registration had expired and the vehicle was not insured. Defendant admitted he had been drinking, and the officer testified that he smelled alcohol on Defendant’s breath “the whole time,” and that Defendant had bloodshot, watery eyes. Also, the officer conducted field sobriety and blood alcohol tests. On appeal, Defendant’s sole focus is on the officer’s question, “Have you been drinking tonight?” And Defendant’s sole complaint in regard to the question is that the question was not on the script of questions provided by his supervisors. The officer acknowledged that he made the choice to ask something outside what he was instructed to say.

28 During the first day of trial, Defendant’s counsel told the court that Defendant was “not going to challenge the constitutionality of the roadblock,” but that Defendant had “an issue with the actual administration to [Defendant], based on the standards that were set forth by the supervisors.” Counsel later clarified this by stating that Defendant’s “objection to the stop is not that the roadblock was unconstitutional in and of itself, but, in fact, that the officer didn’t follow [the] guidelines but used his discretion when he encountered [Defendant].” Acknowledging that Officer Crayton “asked an extra question that was different from the script that was given [to him] at the briefing,” the district court nevertheless determined that the deviation was “not a defect that would give rise to a dismissal or a suppression” and, treating Defendant’s objection as a motion to dismiss or to suppress, the court denied the motion.

29 Defendant asserts that decisions regarding roadblocks “must be made by supervisory personnel and the discretion of the field officers at the roadblock must be limited regarding the manner in which the vehicles are stopped.” In support of this assertion, Defendant relies on Bates, in which this Court emphasized the importance “[i]n determining the reasonableness of a roadblock, . . . [of] the role of supervisory personnel and the restrictions on discretion of field officers.” 120 N.M. at 463, 902 P.2d at 1066. Defendant points out that Officer Crayton’s question, “Have you been drinking tonight?” was not within his supervisor’s instructions to “approach and greet everyone in the same manner.” The officer’s question about drinking, according to Defendant, “change[d] the nature of the seizure significantly,” and resulted in an illegal seizure in...
violation of the Fourth Amendment to the United States Constitution.

{30} Thus, Defendant raises only the alleged Fourth Amendment infirmity of the officer’s exercise of discretion by asking a question not in his supervisor’s script of questions for motorists. Based on the very limited scope of this attack, we note at the outset what this case is not about. Defendant does not assert that the deviation from script violated the New Mexico Constitution. We therefore do not go there. See State v. Jason L., 2000-NMSC-018, ¶ 9, 129 N.M. 119, 2 P.3d 856 (reviewing a claim of unlawful seizure only under the Fourth Amendment where the defendant did not argue that the New Mexico Constitution afforded him greater protection); see also State v. Madalena, 121 N.M. 63, 69, 908 P.2d 756, 762 (Ct. App. 1995) (stating that “[t]he eight [Betancourt] factors impose additional and stricter guidelines than the balancing test used by the United States Supreme Court in [Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990)]” and holding that “a sobriety checkpoint conducted in substantial compliance with the eight Betancourt factors is constitutional under the New Mexico Constitution”). Further, this case is not about the constitutionality of any other aspect of the roadblock. Therefore, we need not scrutinize the constitutionality of the roadblock under the full gamut of the tests and guidelines laid out in Betancourt for determining whether a roadblock is reasonable under the Fourth Amendment. See Betancourt, 105 N.M. at 658-60, 735 P.2d at 1164-66 (setting out (1) a test requiring a balancing of (a) governmental interest and public concern served by a roadblock and the extent to which the roadblock advances those interests and concerns, against (b) the severity of the interference with individual liberty, security, and privacy; and (2) eight guidelines to be considered in determining the reasonableness of a roadblock). Finally, this case is not about the officer’s request for license, registration, and insurance. See State v. Goss, 111 N.M. 530, 532, 807 P.2d 228, 230 (Ct. App. 1991) (citing New Mexico cases upholding the constitutionality of “[r]outine police roadblocks established for the purpose of checking drivers’ licenses, vehicle registrations, and the existence of vehicle liability insurance”).

2. Standard of Review

{31} The issue of whether deviation from the script constitutes a Fourth Amendment violation is one of law which we review de novo. See State v. Williamson, 2000-NMCA-068, ¶ 6, 129 N.M. 387, 9 P.3d 70 (stating, in a traffic stop case involving a claimed impermissible expansion of the scope of inquiry requiring a court to balance the character of and justification for the intrusion, that “we examine, as a matter of law, the totality of the circumstances to determine whether the officer[] . . . impermissibly expanded his scope of inquiry,” calling for de novo review). The issue of whether the constitutional violation, if it exists, requires application of the exclusionary rule, involves the application of law to undisputed facts, and our review is de novo. See State v. Lowe, 2004-NMCA-054, ¶¶ 8-10, 18, 135 N.M. 520, 90 P.3d 539.

3. Case Law Related to Investigative Activity Associated with Roadblocks

{32} DWI roadblocks are “seizures” within the meaning of the Fourth Amendment. Betancourt, 105 N.M. at 657, 735 P.2d at 1163. The determination of “whether a particular roadblock violates the fourth amendment is basically one of reasonableness.” Id. Reasonableness depends upon a “balance [of] the gravity of the governmental interest or public concern served by the roadblock” against “the severity of the interference with individual liberty, security, and privacy resulting from the roadblock.” Id. at 658, 735 P.2d at 1164. A major concern lies in the “possibility of improper, unbridled discretion of the officers who meet and deal with the motoring public.” Id. In one of the eight guidelines we adopted in Betancourt, we stated that “[i]t is also wise to instruct officers . . . on uniform procedures to be utilized when stopping motorists. As nearly as possible, each motorist should be dealt with in precisely the same manner.” Id. at 659, 735 P.2d at 1165.

{33} In Bates, the defendant attacked the constitutionality of a DWI roadblock on the grounds of lack of an empirical basis for the time and location of the roadblock and the lack of adequate advance notice of the roadblock. Bates, 120 N.M. at 462-63, 902 P.2d at 1065-66. Bates quoted State v. Bolton, 111 N.M. 28, 32, 801 P.2d 98, 102 (Ct. App. 1990), which involved a roadblock set up to detect violations of licensing, registration, and insurance liability laws, in noting that “[t]he reasonableness of a roadblock provides a constitutionally adequate substitute for the reasonable suspicion that would otherwise be required to justify the detention of vehicles and the questioning of their occupants.” Bates, 120 N.M. at 460, 902 P.2d at 1063 (internal quotation marks and citation omitted). In Bates, among other procedures, field officers were under instructions to ask the same questions of each driver that was stopped and to keep their initial contact with the driver to one minute. Id. at 463, 902 P.2d at 1066. Although it does not appear that any particular questioning was at issue in Bates, we determined that, “on balance, the roadblock [was] set up so as to ensure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.” Id. (internal quotation marks and citation omitted). Significantly, in our analysis of reasonableness, we stated that “[i]n determining the reasonableness of a roadblock, all the [Betancourt] factors must be considered, and none is dispositive but the role of supervisory personnel and the restrictions on discretion of field officer.” Id. at 463, 902 P.2d at 1066; see State v. Villas, 2002-NMCA-104, ¶ 7, 123 N.M. 741, 55 P.3d 437 (indicating that in Bates this Court recognized “as dispositive” the Betancourt holding “that the police must implement uniform procedures at roadblocks as a means to restrict the discretion of field officers”).

{34} Our most recent case, Villas, 2002-NMCA-104, ¶¶ 1-4, involved a constitutional attack on a field officer’s wrongful post-stop conduct in allowing an intoxicated driver to go free because he was the brother of a fellow officer, a different treatment than that applied to other intoxicated drivers. In Villas, the uniform procedure for officers included asking a set of scripted questions, and if an officer suspected that a driver had been drinking, the driver was directed to a secondary area and given sobriety tests. Id. ¶ 2. We determined that the particular conduct of the officer at issue was a post-stop procedural infirmity that would not affect the validity of the roadblock as to all drivers, and would “not invalidate other arrests made at the same roadblock.” Id. ¶ 13. Still, we confirmed that the failure of the police to establish uniform procedures for a DWI roadblock will invalidate that roadblock. Id. ¶ 7.

{35} In none of the foregoing New Mexico cases was the issue of the constitutional propriety of specific field officer questioning of the driver or departures from a pre-approved script addressed. However, we see nothing in New Mexico decisions that in any way rules out appropriate limited questioning during the initial officer-motorist contact at a DWI roadblock. To the contrary, the courts appear to have assumed that properly set up roadblocks would include some uniform questioning of all motorists at the outset, and that individualized suspicion need not be shown to justify such questioning. As we have indicated earlier in this opinion,
it is noteworthy that Defendant questions whether the content or scope of the inquiry about drinking. He questions only the act of deviating from the script provided him by his supervisors, asserting that this deviation was constitutionally infirm simply because it was a deviation from the script.

\{36\} Ultimately, of course, the question in a Fourth Amendment roadblock case is that of the reasonableness of the roadblock. See Villas, 2002-NMCA-104, ¶ 11; Madalenalana, 121 N.M. at 66, 908 P.2d at 759; Bates, 120 N.M. at 460, 462, 902 P.2d at 1063, 1065; Betancourt, 105 N.M. at 657, 660, 735 P.2d at 1163, 1166. As we now explain, we cannot agree that the particular deviation from the prepared script in this case made the roadblock unreasonable as to Defendant.

4. The Intrusion and Deviation Analyzed

\{37\} In this case, the initial contact consisted of the officer identifying himself and the roadblock, and then asking Defendant if he had been drinking that night. There can be no question that the foregoing contact occurred with minimal duration and intensity. Defendant does not contend otherwise. The issue confronting us reduces to whether the mere deviation from the script alone, as occurred in this case, was a sufficient invasion into personal privacy and security to render Defendant’s roadblock detention unreasonable.

\{38\} What makes this a viable issue is the unique substitution of a properly implemented roadblock for the requirement of individualized suspicion. The elimination of the requirement for individualized suspicion creates the serious concern about lack of uniformity and need for limitation of discretion. At the very crux of the script deviation concern is the fear of unrestricted discretion in questioning, and the invidious, intrusive invasion of privacy that can occur from such discretion. The substitution was based in no small part on implanting the essential ingredient of standard and neutral criteria, established in advance by supervisory law enforcement officials, to assure minimal field officer discretion. Without this essential ingredient, a roadblock cannot survive constitutional scrutiny. See Brown v. Texas, 443 U.S. 47, 51 (1979) (stating that “the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers”).

\{39\} Yet, notwithstanding the unwavering requirement of the establishment of a plan by supervisors containing standard and neutral criteria, neither the United States Supreme Court nor this Court has required, much less even suggested, that questioning upon initial contact with a motorist be absolutely and finally limited to a supervisor’s script, from which an officer can deviate only upon pain of a brand of unconstitutionality. While officers in the field should not deviate from uniform law enforcement roadblock procedure and take a substantial risk of branding of unconstitutionality if they deviate, we do not think that a bright-line test or blanket rule must be established that says that any deviation from pre-planned procedure will violate the Fourth Amendment. We will examine the totality of the circumstances in each case. See State v. Johnson, 2006-NMSC-049, ¶ 13, ___ N.M. ___, ___ P.3d ___ (stating that, in deciding the issue of exigent circumstances in knock and announce cases, “there are no bright-line rules,” and the appellate courts “must look at the totality of the circumstances”); State v. Lopez, 2005-NMSC-018, ¶¶ 16-17, 19, 28, 138 N.M. 9, 116 P.3d 80 (disavowing a bright-line test or blanket rule “delineating reasonableness in knock and announce cases involving the exigency exception[,]” and stating that the “appellate court must consider the totality of the circumstances”); State v. Gomez, 1997-NMSC-006, ¶¶ 35, 39-45, 122 N.M. 777, 932 P.2d 1 (refusing to follow the federal bright-line automobile exception under the Fourth Amendment in interpreting our State Constitution, and applying a totality-of-circumstances test that recognizes variations in facts and circumstances). Thus, we decline to fix a deviation from a script of questions as a constitutional infirmity, without contemporaneous inquiry more broadly into the invasiveness and intrusion of the contact.

\{40\} In the present case, as we have stated earlier in this opinion, Defendant’s detention was brief during the initial contact, and nothing about the context, content, scope, or purpose of the question about drinking has been attacked. Defendant attacks the question because it was not in the script. We are unpersuaded. The breach of procedure in this case was too insubstantial to constitute constitutional harm. At the point the question was asked, the deviation did not change the detention from one of reasonable detention to one of unreasonable detention or require an individualized suspicion of intoxication. The constitutional status of the roadblock remained intact during the brief, minimally intrusive initial contact, and the reasonableness of the initial contact and detention was not diminished by the question about drinking.

\{41\} On a cautionary note, however, our grant of slight latitude in this particular case should not be read as allowing broad officer discretion in questioning motorists or deviating from a supervisory plan or script. Close questions as to when the threshold of minimal discretion at DWI roadblocks is reached should be resolved in favor of privacy, not a broadening of discretion. Supervisors and field officers must exercise prudence and caution in DWI roadblock investigations. We neither fall on the side of a bright-line approach by which any deviation from a plan or script will render the roadblock unreasonable, nor on the side of incremental intrusion into privacy by deviating field officers. Compare Commonwealth v. Anderson, 547 N.E.2d 1134, 1138 (Mass. 1989) (holding mere deviation unconstitutional), with Brouhard, 125 F.3d at 660 (holding that no authority exists demanding “that an officer be held either to a script or denied reasonable discretion which is necessary to conduct a series of traffic stops occurring in a free and unstructured world”). What is required is keeping the exercise of discretion to a minimum and reasonable, not the absolute elimination of discretion. Certainly, it cannot be “left to the discretion of the officer to decide how intimidating he wishes[s] to be.” United States v. Huguenin, 154 F.3d 547, 562 (6th Cir. 1998). What is called for is, as Brown states, “a plan embodying explicit, neutral limitations on the conduct of individual officers[,]” with the end that un fettered governmental intrusion into privacy is constrained and minimal. 443 U.S. at 51; Delaware v. Prouse, 440 U.S. 648, 662-63 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976); Bates, 120 N.M. at 463, 902 P.2d at 1066; Betancourt, 105 N.M. at 658-59, 735 P.2d at 1164-65.

CONCLUSION

\{42\} We affirm Defendant’s conviction of DWI.

\{43\} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

CYNTHIA A. FRY, Judge
Certiorari Denied, No. 30,113, January 19, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-013

RODEO, INC., d/b/a “COWBOYS”, A New Mexico Corporation, RON COWDREY, PHYLLIS COWDREY, GENE ELLIS HINKLE, HINKLE PROPERTIES, LLC, MONTGOMERY-EUBANK CO., LTD., a New Mexico General Partnership, and RITA TRUJILLO,
Third Party Plaintiffs/Appellees/Cross Appellants

versus

COLUMBIA CASUALTY COMPANY,
Third-Party Defendant/Appellant/Cross Appellee.
Nos. 25,648 & 25,652 (filed: October 27, 2006)

APPEAL FROM THE DISTRICT COURT OF VALENCE COUNTY
WILLIAM A. SANCHEZ, District Judge

L. HELEN BENNETT
Albuquerque, New Mexico

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Albuquerque, New Mexico

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for Third Party Plaintiffs/Appellees/Cross Appellants

BRYAN QUERY
Albuquerque, New Mexico

OPINION
MICHAEL D. BUSTAMANTE,
CHIEF JUDGE

{1} This interlocutory appeal involves an issue of first impression: whether an insurer is required to return unearned premiums before cancellation of an insurance policy financed by a premium finance company can be effective. We decide that NMSA 1978, § 59A-45-11 (1984) requires the return of unearned premiums. We therefore affirm the district court’s judgment that the policy remained in effect until the insurer returned the unearned premiums. Because of our disposition, we do not reach the merits of the conditional cross-appeal, which concern the notice requirements for additional insureds.

FACTS AND PROCEDURE
{2} Appellee/Cross-Appellant Rodeo, Inc. (Rodeo) owns and operates a country-western bar in Albuquerque, New Mexico, named Cowboys. In September 2000, Rodeo sought commercial general liability and liquor liability insurance coverage for Cowboys through an insurance broker, Northern Insurance (Northern). Northern was unable to place Rodeo’s risk with an authorized New Mexico insurer, and therefore sought surplus lines insurance. See NMSA 1978, § 59A-14-2 (1991) and § 59A-14-3 (1993) (providing that surplus lines insurance may be placed with a qualified foreign insurer not otherwise authorized to sell insurance in New Mexico when the particular amount or type of insurance cannot be obtained from insurers authorized to do business in New Mexico). Northern obtained a quote from Skanco International, Ltd. (Skanco), a wholesale surplus lines insurance broker, for an insurance policy issued by Columbia Casualty Company (Columbia). After Rodeo accepted Skanco’s quote, Columbia issued a policy that became effective on December 1, 2000. Gene Hinkle, who leased the property on which Cowboys is located, and Rita Trujillo, who owned Cowboys’ liquor license, were both named by Rodeo as additional insureds in endorsements to the Columbia policy.

{3} Instead of paying the annual premium in a lump sum, Rodeo entered into an insurance premium finance agreement with a company called Premium Finance Spe-
cialists, Inc. (PFS). In a premium finance agreement, a premium finance company pays the premium in full to the insurer and the insured makes payments to the premium finance company for the amount advanced to the insurer. See NMSA 1978, § 59A-45-2 (1984). In the agreement, the insured gives the premium finance company a power of attorney to cancel the policy if the insured defaults on a payment; however, in New Mexico, cancellation pursuant to such agreements is controlled by specific statutes governing premium financing. See § 59A-45-11. According to the financing agreement between Rodeo and PFS, PFS agreed to pay the full $7,998.98 annual premium to Columbia. Rodeo agreed to make an initial payment of $2,305.73 to PFS, followed by nine monthly payments of $670.71. The premium finance agreement between PFS and Rodeo appointed PFS as Rodeo’s attorney-in-fact with the specific authority to cancel the Columbia policy on behalf of Rodeo in the event Rodeo defaulted on its payment obligations to PFS. Neither Skanco nor Columbia were parties to the premium finance agreement or had an agency relationship with PFS.

{4} The common policy conditions of the Columbia policy contained a cancellation section, which provided that the first named insured (Cowboys) “may cancel this policy by mailing or delivering to us advance written notice of cancellation.” The cancellation section also provided: “Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.” The policy also stated:

If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

{5} In January and February 2001, Rodeo was late in making payments to PFS under the financing agreement and PFS sent Rodeo notices of intent to cancel. Rodeo made its payments and avoided cancellation. On March 12, 2001, PFS sent Rodeo another notice of intent to cancel because Rodeo’s March payment was past due. The notice stated that if PFS did not receive payment by March 22, 2001, PFS would cancel Rodeo’s insurance policy with Columbia. The notice stated: “MAKE YOUR PAYMENT NOW TO KEEP YOUR INSURANCE IN FORCE. THIS IS THE ONLY
NOTICE YOU WILL RECEIVE BEFORE CANCELLATION IS MADE." On March 29, 2001, PFS sent Rodeo a notice that pursuant to its power of attorney PFS would cancel Rodeo’s insurance effective April 1, 2001, unless payment was received. The notice of cancellation, which was also sent to Northern and Skanco, instructed the insurer to forward gross unearned premiums to PFS “promptly for credit to the insured’s account.” Rodeo made its March payment on April 3, 2001, and on May 11, 2001, also tendered payments for April and May, which were accepted by PFS.

[6] By May 9, 2001, Northern received a cancellation endorsement from Skanco, which indicated that the policy was cancelled for non-payment and that there was “a 90% of pro rata return premium of $4604.00.” On May 15, 2001, PFS sent Skanco a request for reinstatement, which stated: “If the insurance is to remain cancelled, please forward PFS the return premium promptly.”

[7] On May 20, 2001, a patron died after being escorted from Cowboys. On May 22, 2001, Columbia rejected PFS’s request to reinstate the insurance policy. A wrongful death action was filed against Rodeo by the patron’s estate. Rodeo submitted the defense and indemnification of the claim to Columbia, which was rejected on grounds that the policy had been cancelled by Rodeo’s attorney-in-fact on April 1, 2001. Columbia did not refund any of the unearned premium until June 11, 2001, when Skanco returned to Northern the unearned balance of premiums paid. Rodeo did not receive a refund for the unearned premium from Northern until November 9, 2001. Our review of the record reveals no indication that PFS ever received the balance of the unearned premium.

[8] Rodeo, Hinkle, and Trujillo filed third-party complaints against Columbia, alleging that Columbia had a duty to defend and indemnify them in the wrongful death action, and also claimed breach of contract, breach of duty of good faith and fair dealing, and violations of the New Mexico Insurance Code. The parties filed cross-motions for summary judgment on Columbia’s duty to defend. After a hearing, the district court initially granted Columbia’s motion for summary judgment against Rodeo, concluding that Columbia had no duty to defend Rodeo. The district court found that Rodeo’s insurance policy was cancelled by Rodeo’s attorney-in-fact on April 1, 2001, the date stated in the notice of cancellation, and was never reinstated. The district court also found that Rodeo had no reasonable expectation of insurance coverage after April 1, 2001. As to Hinkle and Trujillo, the district court denied Columbia’s motion for summary judgment, finding under the doctrine of reasonable expectations that notice of cancellation was required as to Hinkle and Trujillo, and a question of fact remained as to whether they received proper notice. All parties filed motions for reconsideration. Following argument, the district court reversed its previous order. The district court found that Columbia did not have a duty to notify Hinkle and Trujillo of the cancellation of the policy. The district court ruled, however, that Rodeo’s policy with Columbia remained in effect until the unearned premium was returned by Skanco, a decision which meant that Rodeo, Hinkle, and Trujillo were all covered at the time of the incident underlying the wrongful death action. The district court certified its order for interlocutory appeal, which was granted by this Court. See NMSA 1978, § 39-3-4 (1999); Rule 12-203 NMRA.

[9] In this interlocutory appeal, Columbia seeks review of the district court’s ruling that cancellation of an insurance policy by a premium finance company, acting pursuant to a power of attorney from the insured, is not effective until the unearned premium is returned to the insured. Hinkle and Trujillo also filed a conditional cross-appeal to determine whether the district court erred in ruling that Hinkle and Trujillo were not entitled to notice of the policy’s cancellation. Because we affirm the district court’s ruling that the policy remained in effect until Columbia refunded the unearned premium on June 11, 2001, we do not address the merits of the cross-appeal. Although the parties dispute whether this Court should review the issue of whether Rodeo had a reasonable expectation of coverage after April 1, 2001, we do not need to address this issue based on our proposed disposition.

DISCUSSION

[10] The only issue we address in this appeal is whether, under our statutory provisions for cancellation of an insurance policy by a premium finance insurance company, the date of cancellation is rendered ineffective by an insurer’s failure to return unearned premiums. Columbia argues that this Court should reverse the district court’s interlocutory order in part and hold that the cancellation of an insurance policy by a premium finance company acting pursuant to a power of attorney is effective on the date specified in the notice of cancellation and not on the date the unearned premium is returned to the insured. In response, Rodeo argues that the return of the premium took place well after the alleged cancellation, and after the incident that is the subject of the underlying lawsuit. Rodeo urges us to affirm the interlocutory order and hold that the cancellation of an insurance policy by a premium finance company acting pursuant to a power of attorney is not effective until the unearned premium is returned to the insured. Accordingly, our review is limited to whether the Columbia policy was in effect at the time of the incident that led to the wrongful death suit.

STANDARD OF REVIEW

[11] This appeal presents a question of law which this Court reviews de novo. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (stating that the grant or denial of summary judgment is reviewed de novo). The interpretation of insurance contracts and statutes also presents questions of law we review de novo. Rummel v. Lexington Ins. Co., 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970 (stating that interpretation of an insurance contract is a matter of law appellate courts review de novo); Meyers v. W. Auto., 2002-NMCA-089, ¶ 13, 132 N.M. 675, 54 P.3d 79 (stating that interpretation of a statute is a question of law reviewed de novo).

New Mexico Insurance Premium Financing Law

[12] Columbia’s appeal requires us to construe the provisions of the New Mexico Insurance Premium Financing law. See NMSA 1978, §§ 59A-45-1 to -16 (1984, as amended through 1999). Cancellation of an insurance policy by a premium finance company for default is controlled by express statutory provisions, which require both premium finance companies and insurers to follow certain steps to effect cancellation. See § 59A-45-11. Those provisions are:

A. When a premium finance agreement contains a power of attorney enabling the premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled by the premium finance company unless such cancellation is made in accordance with this article.

B. Not less than ten (10) days written notice shall be mailed to the insured of the intent of the premium finance company to cancel
the insurance contract unless the default is cured within the ten-day period.

C. After expiration of the ten-day period, the premium finance company may thereafter request, in the name of the insured, cancellation of such insurance contract or contracts by mailing to the insurer or its licensed agent a notice of cancellation, and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract or contracts. The premium finance company shall also mail a notice of cancellation to the insured at his last known address.

D. All statutory, regulatory and contractual restrictions providing that the insurance contract may not be given to a governmental agency, mortgagee or other third party, shall apply where cancellation is made under this section. The insurer or its licensed agent shall give the prescribed notice on behalf of itself or the insured to any governmental agency, mortgagee or other third party on or before the tenth (10) [10th] business day after the day it receives the notice of cancellation from the premium finance company and shall determine the effective date of cancellation, taking into consideration the number of days’ notice required to complete the cancellation.

E. Whenever an insurance contract is cancelled in accordance with this section, the insurer or its licensed agent shall return whatever gross unearned premiums are due under the insurance contract to the premium finance company effecting the cancellation for the account of the insured or insureds.

F. In the event that the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium finance company shall refund such excess to the insured provided that no such refund shall be required if it amounts to less than one dollar ($1).

{13} Rodeo argues that subsection (A) of the statute requires that all of the conditions in subsections (B) through (F) in Section 59A-45-11 be met prior to cancellation, including the return of unearned premiums in subsection (E). In contrast, Columbia argues that all statutory obligations for cancellation were met once PFS fulfilled the notice provisions of subsection (C), and that subsection (E) was not a condition precedent to cancellation.

{14} According to 59A-45-11(C), Columbia argues, cancellation by a premium finance company under these circumstances is as if such notice of cancellation had been submitted by the insured himself. See § 59A-45-11(C) (providing that a premium finance company may request cancellation in the name of the insured “and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself”). According to the terms of the policy, if Rodeo cancelled, the policy period would end on the date stated in the notice of cancellation. In the notice of cancellation, PFS designated that cancellation would be effective April 1, 2001. Because cancellation of the policy by PFS was equivalent to cancellation of policy by Rodeo itself, Columbia contends, the policy was cancelled on April 1, 2001, as soon as PFS met its statutory obligations to provide notice under subsection (C). Thus, nothing further was required of Columbia to make cancellation effective.

{15} Before assessing Columbia’s statutory arguments, we first note that we are constrained in our ability to interpret the cancellation provisions of Section 59A-45-11 by the rules of statutory construction. In determining whether strict compliance is required in the interpretation of a statute, “we must ascertain the intent of the legislature and analyze whether this intent would be frustrated by anything less than strict compliance.” Green Valley Mobile Home Park v. Mulvaney, 1996-NMSC-037, ¶ 11, 121 N.M. 817, 918 P.2d 1317. We observe that by passing the Insurance Premium Financing Law, the legislature intended to regulate premium financing in New Mexico. See §§ 59A-45-1 to -16. In general, premium financing legislation addresses abuses in premium financing; its purpose is to protect the insured and potential innocent tort victims from summary, unannounced cancellation of a policy by a premium finance company and an insurer. See Gov't Employees Ins. Co. (GEICO) v. Taylor, 310 A.2d 49, 52 (Md. 1973). Thus, premium financing statutes generally provide that an insurance contract can be cancelled by a premium finance company only through strict compliance with procedures mandated by statute. See Frank A. Valenti, Comment, Insurance Premium Financing, 19 Buff. L. Rev. 656, 666 (1970); see also 45 CJS Insurance § 515 (1993) (“As the statutory requirements are mandatory, and strict adherence to the mandated procedure is necessary, the insurance company may not consider the policy canceled if defeasants exist in the cancellation process[.]” (footnotes omitted)).

{16} In Section 59A-45-11, our legislature dictated that specific procedures must be followed when a premium finance company cancels an insurance policy. Those procedures include a requirement that unearned premiums be returned to the premium financing company. Subsection (E) provides:

E. Whenever an insurance contract is cancelled in accordance with this section, the insurer or its licensed agent shall return whatever gross unearned premiums are due under the insurance contract to the premium finance company effecting the cancellation for the account of the insured or insureds.

By its own terms, subsection (E) makes return of unearned premiums a mandatory procedure when an insurance policy is cancelled by a premium finance company.

{17} We observe that Columbia did not return the unearned premium to the premium finance company as directed in Subsection E. Columbia concedes that it sent the refund of unearned premiums to Northern instead of directly to PFS as is required by Subsection E and argues that the record does not reflect that PFS raised any objections to this. We agree with Columbia that sending the refund to Northern makes no difference in our analysis because the issue rests on the failure of Columbia to refund the unearned premium to anyone for over two months after receipt of the notice of cancellation from PFS. Subsection E provides that unearned premiums returned to the premium financing company are “for the account of the insured.” Section 59A-45-11(E). Given this language and the policy behind the Insurance Premium Financing Law, to protect the insured, we construe Columbia’s violation of Subsection E in light of its effect on the insured.

{18} Columbia urges us not to give such a strict construction to subsection (E). In Columbia’s view, the only way to read
subsection (E) is as an independent requirement unrelated to cancellation. We are unable to do so.

19 A fundamental rule of statutory construction is that all provisions of a statute must be read together to ascertain legislative intent. Martinez v. Sedillo, 2005-NMCA-029, ¶ 9, 137 N.M. 103, 107 P.3d 543. Not only is the language in subsection (E) mandatory, but the cancellation provisions begin with subsection (A), which provides:

A. When a premium finance agreement contains a power of attorney enabling the premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled by the premium finance company unless such cancellation is made in accordance with this article.

Under Columbia’s reading, subsection (A) does not apply to subsection (E). Section 59A-45-11(A) (emphasis added). However, individual portions of a statute cannot be viewed in isolation but must be interpreted by reference to the statute as a whole so that no part is rendered superfluous. See Gordon v. Sandoval County Assessor, 2001-NMCA-044, ¶ 19, 130 N.M. 573, 28 P.3d 1114; Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236. The only way to construe the cancellation provisions as a whole is to read subsection (A) in conjunction with subsection (E). In addition, the legislature did not designate a period of time in which to allow the insurer to return the unearned premiums after cancellation. Thus, the plain language of the statute indicates that subsection (E) is not optional or aspirational, as Columbia would like us to conclude. Rather, it is more likely that the legislature intended to make subsection (E) a requirement that must be met by the insurer before cancellation is valid.

20 By construing the statute as a whole, we also recognize the importance of subsection (F). See Cummings v. X-Ray Assocs. of N.M., 1996-NMSC-035, ¶ 45, 121 N.M. 821, 918 P.2d 1321 (noting that statutes must be read in their entirety and all provisions construed together to create a harmonious whole). Subsection (F) requires the premium finance company to refund excess return premiums to the insured. This requirement benefits the insured, providing “an added protection ensuring notice to the insured.” See Bow-

man v. State Roofing Co., 616 S.E.2d 699, 704 (S.C. 2005). Thus, the subsections that mandate the return of the unearned premiums are not independent requirements unrelated to the cancellation procedures, but mandatory components of a legislative scheme intended to protect the insured by ensuring that notice is provided when an insurance policy is cancelled by a premium financing company. Such notice, and the return of premiums, allows the insured to take steps to protect itself by acquiring other insurance. We observe that our holding today could be interpreted to mean that a policy is not effectively cancelled until the premium finance company has complied with Subsection F and returned the excess to the insured. See § 59A-45-11(F).

However, the posture of this case does not present that question; thus, we express no opinion regarding this issue. Because the legislature provided that cancellation by a premium finance company can only occur through strict compliance with the statute, we conclude that an insurer’s compliance with subsection (E) is mandatory for cancellation to be effective.

New Mexico Case Law

21 Our construction of the statute does not conflict with New Mexico case law, which has not yet addressed the cancellation provisions at issue. Arguing to the contrary, Columbia points to Gendron v. Calvert Fire Insurance Co., 47 N.M. 348, 143 P.2d 462 (1943). In Gendron, our Supreme Court was presented with the question of whether the return of an unearned premium was a condition precedent to cancellation of an insurance policy, a question that was decided prior to adoption of the Insurance Premium Financing Law. Id. at 356, 143 P.2d at 466. Instead of being controlled by statutory language, the Supreme Court was called upon to construe the contractual language of a policy. Id. at 351, 143 P.2d at 463. The Gendron Court concluded that, as long as the insurer complied with the terms of the policy, the policy did not require an affirmative act on the part of the insurance company as a condition precedent for making effective the cancellation of the policy, including the return of the unearned premium. Id. at 356, 143 P.2d at 466. Columbia argues that Gendron not only controls in this case, but was reaffirmed in Russell v. Starr, 56 N.M. 49, 51, 239 P.2d 735, 736 (1952) (holding that, in the absence of statutory or policy provisions, no particular form of notice is required as long as it gives the insured a definite understanding that a policy is cancelled).

22 We have no quarrel with Columbia’s proposition that Gendron presents a general rule that, absent an express statutory provision, the return of an unearned premium is not required to effect cancellation under New Mexico law. However, Gendron does not apply under these circumstances.

23 The analysis in Gendron and Russell turns on the language of the policy and does not address the statute at issue here, which was passed many years later. See Padilla v. State Farm Mut. Auto. Ins. Co., 2002-NMCA-001, ¶ 10, 131 N.M. 419, 38 P.3d 187 (observing that cases are not authority for propositions not considered). Because we are faced with a statute that provides specific, exclusive procedures that must be met for cancellation under premium finance arrangements, we cannot rely on Gendron to conclude that the return of an unearned premium is not required under these circumstances. In effect, Columbia asks us to ignore the statute. However, the Insurance Premium Financing Law requires a different analysis because it provides statutory obligations for cancellation in clear and unambiguous terms. We must read those obligations into the policy. See Bauer v. Bates Lumber Co., Inc., 84 N.M. 391, 393, 503 P.2d 1169, 1171 (.Ct. App. 1972) (“If there is a conflict between statutory provisions on the one hand, and the provisions of the policy on the other, the former must, on public policy grounds, prevail.”) Section 59A-45-11 requires notice of cancellation and requires refund of any unearned premium in order for a premium finance company to cancel insurance contracts, regardless of policy language to the contrary.

Other Jurisdictions

24 Our construction of the statute is supported by the decisions of other states faced with interpreting a similar statute. We find authority for strictly interpreting our statute in the Maryland Court of Appeals’ decision in GEICO, 310 A.2d at 53. Construing language in a premium financing act that was substantially similar to New Mexico’s, including a subsection almost identical to our subsection (E), the GEICO court determined that cancellation of an insurance policy by a premium finance company does not become operative until the insurer returns the unearned premium to the premium finance company. Id. In so holding, the GEICO court recognized that strict compliance with statutory requirements was necessary to achieve the benefits of the statute and was consistent with that of other states that had enacted premium...
finance laws. Id. at 53 & n.7.

{25} Similarly, the South Carolina Supreme Court held that the return of an unearned premium was required by statute to make cancellation valid in Bowman, 616 S.E.2d at 705. In Bowman, the court was faced with interpreting the following provision: “Whenever an insurance contract is canceled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured.” Id. at 704. The Bowman court determined that the statute provided the exclusive means for cancellation of an insurance contract by a premium finance company, and that any violation of the section of the statute invalidated cancellation. Id. Because the insurer did not refund the unearned premium, the insurer did not comply with the statutory requirements, and the cancellation was invalid. Id. Thus, the return of unearned premium was part of the insured’s obligation under the statute and a condition precedent to an effective cancellation. Id.

{26} Columbia argues that this Court should not rely on GEICO because the Maryland legislature subsequently changed its legislation. Columbia urges us to disregard GEICO because the statutory changes indicate that the court got it wrong. Although we acknowledge that the Maryland legislature made several changes to its statute after GEICO, we are not persuaded by Columbia’s argument. The Maryland legislature amended its statute to provide that unearned premiums must be returned to the premium finance company “within a reasonable time not to exceed 60 days after the receipt by the insurer of the notice of cancellation, or after the completion of any payroll audit necessary to determine the amount of premium earned while the policy was in force.” Great Sw. Fire Ins. Co. v. Huss, 433 A.2d 1169, 1174 (Md. Ct. Spec. App. 1981) (describing amendments to Maryland’s premium finance law). Not only did the Maryland legislature substantially change the subsection that was similar to our subsection (E), but it added the phrase “effective as of the date specified in the notice” after the word “canceled” in the subsection that was similar to our subsection (C). Id. at 1175. Thus, the amended subsection stated that, upon receipt of a cancellation notice by the insurer, “the insurance contract shall be cancelled as of the date specified in the notice as if the aforesaid notice of cancellation had been submitted by the insured himself.” Id. at 1175 n.11 (emphasis added). Although Columbia urges us to construe our statute in light of Maryland’s subsequent changes to a similar statute, we decline to do so. If our legislature amends Section 59A-45-11 by adding similar provisions, or by expressly directing that the return of unearned premiums is not required prior to cancellation, we would be able to reach a different result. But until the legislature has spoken, we are constrained to construe the statutory provisions for cancellation strictly.

{27} Although Columbia maintains that GEICO is contrary to the weight of authority from other jurisdictions, we are not persuaded. Columbia’s strongest support for interpreting a statute similar to ours as not requiring a return of unearned premium is an unpublished opinion from a lower court in Connecticut. See Colagiovanni v. Premium Fin. Specialists, Inc., No. CV 950370642S, 1996 WL 457006 (Conn. Super. Ct. July 22, 1996). We are not inclined to give an unpublished opinion from a lower court more persuasive authority than GEICO and Bowman.

{28} Further, we are not persuaded by the other authority cited by Columbia. While Columbia claims that most jurisdictions do not require the return of unearned premiums, the treatise and cases upon which Columbia relies do not involve the interpretation of specific statutory provisions that mandate the return of unearned premiums for cancellation by a premium finance company. See 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 32:62 (3d ed. 1995) (discussing the rule that in absence of a statute the return of unearned premium is not required when the insured cancels in accordance with the terms of the insurance policy); Coe v. Farmers New World Life Ins. Co., 257 Cal. Rptr. 3d 411 (Cal. Ct. App. 1989) (discussing an insurance contract); Hardware Mut. Cas. Co. v. Beals, 158 N.E.2d 778 (Ill. App. Ct. 1959) (discussing the terms of an insurance policy); Country-Wide Ins. Co. v. Wagoner, 395 N.Y.S.2d 300 (N.Y. App. Div. 1977) (discussing neither a premium finance agreement nor a statutory provision for cancellation), rev’d on other grounds by 384 N.E.2d 653 (N.Y. 1978); Hayes v. Hartford Accident & Indem. Co., 161 S.E.2d 552 (N.C. 1968) (discussing the express provisions of the insurance policy). Therefore, we reject Columbia’s argument that the weight of authority from other jurisdictions requires us to interpret our statutory provisions contrary to the legislative intent to require the return of unearned premiums before cancellation becomes effective.

Policy

{29} In its present form, our statute mandates that an insurer must return unearned premiums. Section 59A-45-11(E). Subsection (A) specifically provides that the insurance contract shall not be cancelled by a premium finance company unless such cancellation is made in accordance with this article. If all provisions of the statutes are not followed, the policy is not cancelled.

{30} Construing the statute to require strict compliance is the best way to realize legitimate intent. The statute provides an incentive to insurers to return unearned premiums promptly to accomplish cancellation, which protects an insured in the event the insurer delays for many weeks. Although Columbia argues that it returned the unearned premium within a reasonable time, we disagree. The refund to Northern was not made until almost two and one-half months after cancellation, and almost three weeks after the incident that gave rise to the wrongful death action. Columbia offers no explanation for the delay. It was Columbia’s independent decision not to return the premium until June 11, 2001, which permitted the policy to be operative at the time of the incident on May 20, 2001. Accord GEICO, 310 A.2d at 54.

{31} Columbia argues that insureds or their attorneys-in-fact should be able to cancel their insurance effective immediately by notifying the insurer of the cancellation. However, the legislature has recognized that the relationships between parties are different when a premium finance company is involved, which is why the legislature created a different rule when a premium finance company cancels pursuant to a power of attorney. While it is true that when a premium finance company cancels an insurance contract the insurance contract shall be cancelled as if by the insured, the statute also requires an insurer to return unearned premiums. See 59A-45-11. The justification for allowing cancellation by an insurer to be effective immediately applies to prevent an insurer from collecting additional premiums, while not providing coverage. In a premium finance arrangement, the insurer already has the premium. There is no justification for allowing the insurer to keep the premium if the insurer does not intend to provide coverage, which is why the statute imposes a duty on insurers to return the premium to the premium finance company.

{32} According to the statute, cancel-
Statute also promotes important public policy considerations by protecting other insureds and innocent accident victims. Because Columbia does not show that it complied with the provision of the law requiring the return of unearned premiums prior to cancellation, we find that the court below was correct in its holding that the policy in question was in full force at the time of the accident and was not cancelled until June 11, 2001.

CONCLUSION

Because Columbia failed to meet the requirement of subsection (E) of Section 59A-45-11 that it refund unearned premiums, cancellation was invalid under subsection (A) of the statute. We therefore affirm the district court’s judgment and remand for proceedings consistent with this opinion.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

CELIA FOY CASTILLO, Judge

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Certiorari Denied, No. 30,160, January 18, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-014

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JUSTO RUIZ,
Defendant-Appellant.
No. 24,536 (filed: November 22, 2006)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

MICHAEL E. VIGIL, District Judge

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OPINION

IRA ROBINSON, JUDGE

Justo Ruiz (Defendant) appeals multiple convictions for criminal sexual penetration of a minor (CSPM) and criminal sexual contact with a minor (CSCM). He raises eight issues challenging (1) the denial of a motion to recuse; (2) the procedure utilized by the district court in order to assess the admissibility of the victim’s testimony; (3) the admission of evidence of prior bad acts; (4) the admission of hearsay statements by the victim; (5) the exclusion of a demonstrative aid; (6) the exclusion of a character witness for the defense; (7) the admission of the testimony of a “surprise” rebuttal witness; and (8) the refusal of a proposed jury instruction concerning a viewing of the scene. We reject Defendant’s assertions of error and, therefore, affirm.

I. BACKGROUND

Defendant’s convictions stem from a series of incidents that occurred between November 1, 1995 and January 31, 1998. Throughout that time frame, the victim was a friend of one of Defendant’s daughters and she frequently visited the Ruiz household.

In July of 1998, Officer Stan Mascarenas contacted S.G.’s mother. He indicated that Defendant’s eldest daughter, Lupita, claimed to have witnessed an incident in which Defendant looked between S.G.’s legs. A safehouse interview was scheduled several days later. In the interim, S.G.’s mother repeatedly questioned S.G. in an effort to determine whether a sexual assault of some sort had occurred. Initially, S.G. denied that anything serious had happened. Upon further inquiry, however, S.G. disclosed that Defendant had touched her. Thereafter, S.G. described increasingly grave assaultive episodes.

In light of S.G.’s allegations, Defendant was charged with numerous counts of CSPM and CSCM. These charges were combined with a number of additional counts arising out of Defendant’s alleged misconduct with two other child victims and tried to a jury in December of 1999. Although the jury returned a number of guilty verdicts, Defendant’s convictions were reversed on grounds that the counts associated with different victims were improperly tried in a single proceeding, rather than severed.

On remand, Defendant was charged with two counts of CSCM and three counts of CSPM based exclusively on S.G.’s allegations. Prior to trial, Defendant filed two related motions. In the first motion, Defendant urged the district judge to recuse himself based on certain expressions of personal opinion that had been articulated at the sentencing hearing in the course of the first trial. In the second motion, Defendant sought a ruling on the admissibility of S.G.’s testimony, arguing that suggestive and/or coercive interview techniques had so severely compromised her credibility that she should be barred from appearing as a witness. Both motions were denied.

The prosecution’s key witness was S.G., who testified that Defendant had begun touching her when she was in the third grade. The touching later progressed to penetration. S.G. also testified that Defendant would cause her to touch him and to perform fellatio. S.G. indicated that this course of conduct continued throughout the fourth and fifth grades until she ceased visiting the Ruiz household.

Defendant’s eldest daughter, Lupita,
testified at trial as well. She described an incident in July 1997, where she witnessed Defendant touching S.G.’s vagina. Lupita explained that she told her mother about this incident a year later. Her mother then notified the authorities, triggering the official inquiry. Lupita further testified that she wrote about the incident in her diary, which her mother later turned over to investigating officers.

Among other witnesses, the State also called S.G.’s mother. She described her efforts to learn what, if anything, had happened to S.G. at the Ruiz household. She also testified to warning signs that she had missed over the years, including questions and/or comments that S.G. had made, suggesting that she had been the victim of sexual assaults.

Finally, the State called Dr. Cheryl Whitman, a physician who had conducted a sexual assault examination in this case. She testified that the exam revealed two partial transections of the hymen and the hymenal opening was abnormally large for a girl of S.G.’s age. Dr. Whitman opined that these conditions were consistent with sexual abuse, although she acknowledged that her findings could not be characterized as conclusive.

The theory of the defense focused on credibility. Although Defendant’s character witness was not permitted to describe his reputation for truthfulness, Defendant was permitted to call a forensic psychologist, Dr. Ned Siegel, who opined that Defendant did not fit the standard profile for pedophilia. Defendant also called two expert witnesses to attack S.G.’s credibility. One of the witnesses, Dr. Charles Glass, testified that, in light of S.G.’s personality type, she would be highly susceptible to suggestion. The other witness, Dr. Phillip Esplin, identified suggestive interview techniques and described the negative impact of such techniques on the reliability of sexual abuse reporting. In response to a series of hypothetical questions, Dr. Esplin opined that the repetitive questioning to which S.G. was subjected, as well as the relative lack of specificity and the increasing gravity of her allegations, over time gave rise to concerns about false memories, which could then result in false accusations. Over Defendant’s objection, the State was permitted to call an expert witness in rebuttal, Dr. Michael Jepsen, who testified that it was unlikely that the sort of questioning that took place in this case would generate false memories.

Upon Defendant’s motion, the jury was also transported to the Ruiz home to view the scene. After the viewing, Defendant requested an instruction, clarifying that the jurors should not assume that the furnishings that they saw had been in the same locations as they had been at the time of the alleged sexual assaults. The requested instruction was denied.

At the conclusion of the four-day trial, the jury deliberated briefly before returning guilty verdicts on all counts. Defendant was sentenced to sixty years. This appeal followed.

II. DISCUSSION

A. Recusal

Defendant contends that the district court erred in denying his motion to recuse. We review the district court’s decision for abuse of discretion. See State v. Cherryhomes, 114 N.M. 495, 500, 840 P.2d 1261, 1266 (Ct. App. 1992).

Defendant asserts that the district judge should not have presided over the second trial because he expressed a bias in the course of his remarks at the sentencing hearing, which followed the first trial. Specifically, the judge described his historical experiences dealing with allegations of sexual abuse and his efforts over the years to develop a sense about the veracity of such allegations. He then stated that, in light of this backdrop of experience, he thought that S.G. and the other victims involved in the first trial were being truthful and he believed that Defendant had sexually abused the victims.

“In order to require recusal, bias must be of a personal nature against the party seeking recusal.” State v. Hernandez, 115 N.M. 6, 20, 846 P.2d 312, 326 (1993). Moreover, the bias must “stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.” United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 247, 629 P.2d 231, 323 (1980) (internal quotation marks and citation omitted).

In satisfaction of the extrajudicial source requirement, Defendant relies upon the district judge’s comments concerning his training and experiences in dealing with cases involving allegations of sexual abuse. However, these are not extrajudicial sources. As we have previously observed, “members of . . . all courts . . . are human beings. They cannot avoid having histories or opinions; indeed, they may well have been selected for their offices in part on that basis. Recognition of this reality counsels us against requiring that every decision-maker start with a clean slate.” Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-031, ¶ 26, 123 N.M. 239, 938 P.2d 1384.

Nor does the judge’s comments “stem from . . . some basis other than what [he] learned from his participation in the case.” United Nuclear Corp., 96 N.M. at 247. 846 P.2d at 323 (internal quotation marks and citation omitted). To the contrary, his opinions were based precisely upon what he heard and observed in the course of the proceedings. To the extent that Defendant suggests that the proceedings on remand constituted a separate case, we reject the argument. See State v. Belgarde, 815 P.2d 812, 816-17 (Wash. Ct. App. 1991) (observing that a defendant’s retrial, following reversal of an earlier conviction, constituted further proceedings in the same case as opposed to new proceedings or a new case).

Our reported decisions indicate that, in cases such as this where a new trial is conducted on remand, “whether the original judge would reasonably be expected . . . to have substantial difficulty in putting out of his or her mind previously-expressed views or findings,” is to be taken into consideration. State v. Ricky G., 110 N.M. 646, 649, 798 P.2d 596, 599 (Ct. App. 1990) (internal quotation marks and citation omitted). Defendant asserts that the application of this standard to the case at hand indicates that the district judge should have recused himself, primarily in light of the critical importance of credibility determinations throughout the proceedings.

As a practical matter, we acknowledge that the expression of personal opinion about the credibility of a complaining witness and the guilt of a defendant gives rise to question whether the judge could put such opinions out of his or her mind in order to ensure that the defendant received a fair trial on remand. However, authorities establish a presumption that judges will be able to set aside previously-expressed opinions and preside in a fair and impartial manner on remand. See, e.g., United States v. Howard, 218 F.3d 556, 556 (6th Cir. 2000) (holding that the fact that the judge on remand had presided over the defendant’s first trial and had expressed the opinion that the victim’s testimony was highly credible did not support recusal for bias); United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983) (holding that the judge’s stated belief that the defendant was guilty did not disqualify the judge from presiding on remand); In re S.G., 91 P.3d 443, 447 ( Colo. Ct. App. 2004) (observing that “a judge’s opinion
formed against a party from evidence before the court in a judicial proceeding, even as to the guilt or innocence of a defendant, is generally not a basis for disqualification’’; Frederick v. State, 37 P.3d 908, 951-52 (Okla. Crim. App. 2001) (rejecting a claim of judicial bias based on comments that the defendant’s first conviction and sentence should have been affirmed and that retrial was unnecessary where the record demonstrated that the judge conducted proceedings appropriately on remand). Although we seriously question the ability of any judge to perform in anything but a normal human capacity as shown by these expressly partial or biased statements and opinions, we are not inclined to contravene that weight of authority. We, therefore, reject Defendant’s argument as a basis for reversal of his convictions.

B. Assessment of Admissibility of Testimony of S.G.

{20} Defendant contends that the district court applied the wrong legal standard when assessing the admissibility of S.G.’s testimony. We apply de novo review. See State v. Torres, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 (“[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.”).

{21} Prior to trial, Defendant filed a motion seeking to exclude S.G.’s testimony on the theory that suggestive and/or coercive interview techniques had so severely undermined the reliability of her memories that she should be prohibited from testifying. Defendant, therefore, sought a “taint” hearing pursuant to a novel procedure employed in New Jersey as set forth in the case of State v. Michaels, 642 A.2d 1372 (N.J. 1994). Although the district judge expressed some doubt about the applicability of the Michaels approach, he conducted a hearing in order to assess the admissibility of S.G.’s testimony. At the hearing, Defendant presented the testimony of two experts, Drs. Esplin and Glass. They characterized the questioning to which S.G. had been subjected as suggestive and identified problematic features of her reporting. Dr. Esplin concluded that there was a “substantial likelihood that some of the information obtained from S.G. was not reliable” and Dr. Glass opined that S.G.’s memories were “not . . . necessarily valid.” The State responded through cross-examination and argument, asserting that, while any negative effect that the various interviews might have had on the reliability of S.G.’s recollections, it did not provide an adequate basis for the wholesale exclusion of her testimony. At the conclusion of the hearing, the district judge announced that Defendant’s motion to exclude S.G.’s testimony would be denied. The ruling was later memorialized in a written order.

{22} On appeal, Defendant contends that the district court erred in failing to strictly adhere to the approach outlined in Michaels. We disagree. Although New Mexico’s courts have recognized the dangers associated with suggestive interviewing techniques in cases of this nature, see In re Troy P., 114 N.M. 525, 528, 842 P.2d 742, 745 (Ct. App. 1992), neither this Court, nor the New Mexico Supreme Court, has adopted the novel Michaels approach, which places a heavy burden on the proponent of child victim testimony to establish its reliability. Like many other states, New Mexico rejects Michaels in favor of our well-established competency jurisprudence. See, e.g., Pendleton v. Kentucky, 83 S.W.3d 522, 525-26 (Ky. 2002), superseded by Jones v. Kentucky, 2003 WL 21713776, at *1 (Ky. Ct. App. July 25, 2003); English v. State, 982 P.2d 139, 145-47 (Wyo. 1999); In re A.E.P., 956 P.2d 297, 307 (Wash. 1998) (Talmadge, J., dissenting) (en banc); State v. Ohah, 767 N.E.2d 755, 758-60 (Ohio Ct. App. 2001); Ardolino v. Warden, Me. State Prison, 223 F. Supp. 2d 215, 237-39 (D. Me. 2002).

{23} In New Mexico, we apply a general presumption that all persons are competent to appear as witnesses. See Rule 11-601 NMRA. When an individual’s competency to testify is challenged, the district courts are merely required to conduct an inquiry in order to ensure that he or she meets a minimum standard, such that a reasonable person could “put any credence in their testimony.” State v. Hueglin, 2000-NMCA-106, ¶ 22, 130 N.M. 54, 15 P.3d 1113 (internal quotation marks and citation omitted). This methodology stems from a core principle of modern civil and criminal procedure, whereby questions of credibility are consigned to juries, rather than judges. Id.; State v. Stampley, 1999-NMSC-027, ¶ 34, 127 N.M. 426, 982 P.2d 477 (“The jury alone is the judge of the credibility of the witnesses and determines the weight afforded to testimony.”).

{24} Our analysis of the record, transcript, and briefs indicates that the district judge proceeded in an appropriate manner. As previously stated, a hearing was conducted at which Defendant was permitted to present extensive expert testimony identifying potential weaknesses in S.G.’s capacity to credibly testify. Dr. Esplin concluded that there was a substantial likelihood that some of the information obtained from S.G. was not reliable, and Dr. Glass opined that S.G.’s memories were not necessarily valid. In light of this testimony, the district judge acknowledged a “possibility that taint occurred.” However, the district court did not find the experts’ testimonies, or the underlying facts and circumstances, to so severely undermine S.G.’s credibility as to warrant the exclusion of her testimony. Although Defendant does not challenge the propriety of this determination as such, we note no abuse of discretion.

{25} Defendant has challenged the State’s reliance upon our competency jurisprudence as a basis for affirmance on grounds that this legal theory was not specifically advanced at the district court level. However, we note that the applicability of the Michaels approach was the subject of debate below and, as such, the broader procedural issue was clearly presented for the district court’s consideration. Insofar as questions of procedure are quintessentially legal in nature, we reject Defendant’s suggestion that reliance upon our competency jurisprudence implicates a fact-dependent inquiry, which cannot properly be considered in the first instance on appeal. See State v. Franks, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct. App. 1994). In summary, therefore, we conclude that the procedure employed by the district court below was appropriate and we reject Defendant’s second assertion of error.

C. Evidence of Prior Bad Acts {26} Defendant contends that highly prejudicial evidence of uncharged misconduct was improperly presented to the jury. We review the admission or exclusion of evidence of this nature for abuse of discretion. State v. Otto, 2005-NMCA-047, ¶ 10, 137 N.M. 371, 111 P.3d 229, cert. granted, 2005-NMCERT-004, 137 N.M. 455, 112 P.3d 1112.

1. Lupita Ruiz’s Testimony

{27} Defendant’s eldest daughter, Lupita, described an incident in July 1997, wherein she witnessed Defendant touching S.G.’s genital area. Defendant contends that this testimony constitutes evidence of prior bad acts and, as such, it should have been excluded pursuant to Rule 11-404(B) NMRA. We disagree.

{28} Rule 11-404(B) provides in relevant part: “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” The inclusion of the word “other” connotes crimes, wrongs, or
acts that are not the subject of the proceedings—viz—uncharged misconduct.

29 As described at greater length above, Defendant was charged with five offenses, which were essentially distinguishable by their general nature (contact versus penetration) and timing (annualized). Lupita’s testimony provided evidentiary support for one incident of CSCM occurring in July 1997. Insofar as Defendant was charged with a single count of CSCM within that time frame, Lupita’s testimony provided direct evidence in support of that charge. Thus, Lupita’s testimony cannot properly be classified as evidence of uncharged misconduct, rendering Rule 11-404(B) inapplicable.

30 In his briefs to this Court, Defendant urges this Court to reject the foregoing analysis on grounds that the arguments were not framed in this manner below. Although the parties focused on Rule 11-404(B) and the historical “lewd and lascivious disposition” exception below, our review of the record reveals that the State also argued that the challenged evidence provided support for the single count of CSCM charged for the 1997 calendar year. As a result, we do not hesitate to rely on this position as grounds for affirmance.

2. Cindy Ruiz’s Testimony

31 At trial, the State was permitted to read the prior testimony of Defendant’s ex-wife, Cindy Ruiz, into evidence. In pertinent part, this testimony described a specific incident that occurred when S.G. was spending the night as a guest. Believing that Defendant was taking an unusually long time to wish the children good night, she looked into their room and observed Defendant crouching beside S.G.’s bed, stroking her forehead and speaking softly to her.

32 Defendant objected to the admission of this testimony on grounds that it was irrelevant and it served only to prejudice Defendant by demonstrating that his ex-wife was willing to testify against him. He renews these arguments on appeal, adding that the incident could be classified as a prior bad act subject to exclusion under Rule 11-404(B). We are unpersuaded.

33 As the State argued below, the occurrence described by Cindy tended to establish that Defendant behaved in an unusual manner, displaying a peculiar form and degree of attention toward S.G. The challenged testimony, therefore, tended to rebut two arguments advanced by the defense that (1) Defendant could not have committed the alleged assaults because they occurred in a very small house and the other occupants did not witness anything suspicious; and (2) Defendant could not have committed the alleged assaults because he did not pay special attention to S.G., or otherwise endeavor to “groom” her for sexual abuse in the typical manner of pedophiles. As a result, we conclude that Cindy’s testimony was both relevant and admissible for purposes apart from the prohibited realm of prior bad acts evidence. To the extent that Cindy’s willingness to testify against Defendant prejudiced him, the district court acted well within its discretion in determining that the probative value of her testimony outweighed its prejudicial effect. See Rule 11-403 NMRA; State v. Chamberlain, 112 N.M. 723, 726, 819 P.2d 673, 676 (1991) (“The trial court is vested with great discretion in applying Rule 11-403, and it will not be reversed absent an abuse of that discretion.”).

D. Hearsay

34 Defendant also argues that the district court erred by admitting two out-of-court statements that S.G. made to her mother, contending that this evidence constituted impermissible hearsay. Generally speaking, we review evidentiary rulings, including the admission of hearsay, for abuse of discretion. See State v. Lopez, 2000-NMSC-003, ¶ 10, 128 N.M. 410, 993 P.2d 727.

35 The challenged statements were made by S.G. to her mother sometime in the winter of 1997 or 1998, and evinced concern about pregnancy and/or rape. The State first attempted to introduce evidence of these statements through the testimony of S.G.’s mother on direct examination. Defendant raised a hearsay objection, which the State disputed. After a bench conference, the district court ruled that the statements might be introduced if S.G. was recalled to testify about them. The State complied.

36 On re-direct examination, S.G. was only able to recall in a very general sense that she had asked her mother about these subjects. The district court then permitted the State to recall S.G.’s mother to the stand. She specifically testified that S.G. had stated, “Mom, I think I’ve had sex” and “Mom, I think I’ve been raped.” This testimony is the subject of Defendant’s challenge on appeal.

37 As an initial matter, we must determine whether the statements constitute hearsay. Hearsay is generally defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 11-801(C) NMRA. A statement which is not offered to prove the truth of the matter asserted does not fall within the scope of the general prohibition. Accordingly, a statement offered merely to prove that it was made, and not to prove truth, is characterized as a “verbal act” that is admissible irrespective of any limitations on hearsay testimony. See State v. Glen Slaughter & Assocs., 119 N.M. 219, 222, 889 P.2d 254, 257 (Ct. App. 1994); State v. Aragon, 85 N.M. 401, 402, 512 P.2d 974, 975 (Ct. App. 1973). Similarly, an out-of-court statement made by a witness who testifies at trial is not hearsay if it is offered to rebut an express or implied charge of recent fabrication or improper influence. See Rule 11-801(D)(1)(b) NMRA.

38 As previously noted, the primary theory of the defense was that S.G.’s allegations were the product of suggestive and/or coercive interview techniques. Defendant argued that S.G.’s memories of assaultive episodes were false, having been contrived in the course of the investigatory process. As partial support for this theory, Defendant focused the jury’s attention on S.G.’s failure to report the abuse at any time prior to the police investigation. In light of the defense strategy, the challenged statements could properly have been admitted as disclosures. Insofar as Defendant made an issue of S.G.’s failure to report, the fact that the statements were made had probative value independent of truth. This brings them within the verbal acts exception. Insofar as Defendant developed the theory of recent fabrication and/or improper influence, the fact that the statements were made prior to the criminal investigation also tended to rebut this theory. This brings the statements within the exception articulated in Rule 11-801(D)(1)(b). Accordingly, we conclude that the statements could properly have been admitted as non-hearsay.

39 We acknowledge that the district court appears to have admitted the statements on a different legal theory. As a general rule, however, we will uphold the decision of a district court if it is right for any reason. See State v. Beachum, 83 N.M. 526, 527, 494 P.2d 188, 189 (Ct. App. 1972) (“A decision of the trial court will be upheld if it is right for any reason.”). Given that the State advanced the disclosure argument below, we affirm on that basis. See generally State v. Fairbanks, 2004-NMCA-005, ¶ 12, 134 N.M. 783, 82 P.3d 954 (expressing reluctance to affirm based on an argument not advanced below).

E. Demonstrative Evidence

39 Defendant contends that the district court erred in prohibiting him from showing the jury photographic images from a medical treatise, which he sought to utilize
in the course of cross-examining a witness for the prosecution. We review for abuse of discretion. See State v. Worley, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984) (holding that the admission or exclusion of evidence is within discretion of the trial court and that such determinations will not be disturbed on appeal absent clear abuse of discretion); see also State v. Brown, 1998-NMSC-037, ¶ 25, 126 N.M. 338, 969 P.2d 313 (noting that abuse of discretion is the standard of review for limitations on cross-examination).

{40} The images in question related to the various procedures that may be utilized in order to examine juvenile sexual assault victims. As mentioned above, the State called Dr. Whitman to describe her findings. She testified that she had observed two partial transsections of S.G.’s hymen, which are generally regarded as indicative of trauma consistent with sexual abuse. On cross-examination, Defendant sought to undermine the significance of these findings by highlighting shortcomings associated with the “frog leg” examination position that Dr. Whitman had utilized. To this end, she attempted to display two images from a medical treatise, demonstrating how inferences from different images related to the “frog leg” position, may disappear when a subject is examined in the “frog leg” position, may disappear when a subject is moved to the “knee-chest” position. The State objected on grounds that Defendant had failed to disclose the images in the course of pretrial discovery. The district court sustained the objection.

{41} The Rules of Criminal Procedure provide that a defendant must disclose “books, papers, documents, [and] photographs,” which are in his possession and which “he intends to introduce in evidence at the trial[.]” Rule 5-502(A)(1) NMRA. Defendant contends that because he did not intend to introduce the images from the medical treatise as exhibits, they were not subject to the disclosure requirement. As authority for this position, Defendant relies upon his characterization of the images as “demonstrative evidence.” Insofar as the term “demonstrative evidence” encompasses all material that is “addressed directly to the senses of the court or jury. . . as where various things are exhibited in open court,” Defendant’s characterization is probably accurate. State v. Tollarado, 2003-NMCA-122, ¶ 10, 134 N.M. 430, 77 P.3d 1023. However, Rule 5-502(A)(1) does not exempt demonstrative evidence from a defendant’s duty to disclose. To the contrary, it expressly applies to forms of evidence that are classically demonstrative, such as “tangible objects.” Id. As such, we reject Defendant’s suggestion that demonstrative evidence is subject to a blanket exemption from the general duty of disclosure.

{42} Defendant may rely upon the distinction between the use of demonstrative material as an aid to cross-examination and the designation of such material as “evidence” that is fit for use as a formal exhibit. See State v. Gallegos, 92 N.M. 370, 379, 588 P.2d 1045, 1054 (Ct. App. 1978) (holding that the district court erred in requiring the defense to disclose a report, which the defense did not intend to introduce into evidence, and which was merely designed to aid in the cross-examination of a witness for the State). However, even if we were to assume that the images should have been exempted from Rule 5-502(A)(1) in this manner, we do not regard their exclusion as reversible error.

{43} Our review of the transcript reveals that Defendant cross-examined Dr. Whitman very thoroughly on the various examination procedures and the danger of false findings of trauma where the subject is examined in the frog leg position alone. Although the images from the treatise might have bolstered Defendant’s argument, there can be no question that the weaknesses in Dr. Whitman’s approach and the inconclusive nature of her findings were conveyed to the jury through Dr. Whitman’s testimony. As a result, we cannot say that there is a reasonable possibility that the excluded images might have affected the jury’s verdict. See generally State v. Balderama, 2004-NMSC-008, ¶ 41, 135 N.M. 329, 88 P.3d 845 (observing that “[e]xclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury’s verdict”); State v. Woodward, 121 N.M. 1, 12, 908 P.2d 231, 242 (1995) (concluding that the refusal to admit cumulative evidence was not an abuse of discretion).

F. Character Witness

{44} Defendant challenges the district court’s exclusion of character evidence that he sought to introduce through the testimony of a defense witness, Denise Kusel. We review the district court’s ruling for abuse of discretion. See State v. Ewing, 97 N.M. 235, 237, 638 P.2d 1080, 1082 (1982) (observing that the admission or exclusion of character testimony is committed to the sound discretion of the district court).

{45} Generally speaking, evidence of “a pertinent trait of character” of the accused in a criminal case may be introduced through reputation or opinion testimony. Rule 11-404(A)(1) NMRA; Rule 11-405(A) NMRA. Below, Defendant specifically stated that he sought to call Kusel to testify to Defendant’s “reputation for truth in the community.” The State objected on grounds that Defendant’s truthfulness was not a pertinent trait of character and was not an issue, insofar as Defendant had not yet testified. The district court agreed. We perceive no abuse of discretion, particularly in light of the district court’s invitation to call Kusel after Defendant testified. Although Defendant later elected not to testify, he made no further effort to recall Kusel, or to otherwise renew the matter. Because the district court lacked any opportunity to reconsider in light of the altered defense strategy, it would be inappropriate to second-guess the district court’s approach with the benefit of hindsight. See generally In re Rubin D., 2001-NMCA-006, ¶ 21, 130 N.M. 110, 18 P.3d 1063 (“Preservation requires a party to apprise the court of possible error in a timely and specific manner so that the court can prevent it.”).

{46} Below, Defendant argued that his character for truthfulness became a pertinent issue after one of his expert witnesses, Dr. Siegel, related the fact that Defendant had denied the charges. The district court rejected this argument on grounds that Dr. Siegel’s hearsay comment did not constitute substantive evidence. It merely described a portion of the basis for his opinions. We note that the comment was not offered for the truth of the matter asserted. Under such circumstances, the district court could reasonably have concluded that Dr. Siegel’s testimony did not render Defendant’s character for truthfulness a pertinent matter within the scope of Rule 11-404(A)(1).

{47} On appeal, Defendant has taken the position that Defendant’s character for truthfulness automatically became a “pertinent trait of character” when the jury was informed of the charges. Because this argument was not advanced below, it is not properly before us on appeal. See generally State v. Lucero, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986) (rejecting a claim of error where the lower court “had no opportunity to consider the merits of, or to rule intelligently on, the argument defendant now puts before us”) (citation omitted). Even if the argument had been properly preserved, its merit seems doubtful. Insofar as all of the pending charges were sex crimes, rather than crimes of fraud or deceit, it is unclear how Defendant’s
character for truthfulness was implicated. Cf. State v. Trejo, 113 N.M. 342, 346, 825 P.2d 1252, 1256 (Ct. App. 1991) (observing that a crime of violence has less bearing upon the honesty of a witness than a crime involving fraud or deceit).

{48} Finally, Defendant has suggested that Kusel should have been permitted to testify to other pertinent character traits apart from truthfulness. However, she was not offered for alternative purposes below. We, therefore, have no idea what other pertinent traits, if any, Kusel was competent to testify about. Absent an offer of proof, we are incapable of engaging in a reasoned analysis. See generally Rule 11-103(A)(2) NMRA; State v. Garcia, 100 N.M. 120, 123, 666 P.2d 1267, 1270 (Ct. App. 1983) (concluding that the defendant failed to make an offer of proof as required in order to preserve an issue of whether the district court properly excluded testimony). As a result, the matter is not subject to appellate review. See State v. Ryan, 2006-NMCA-044, ¶ 46, 139 N.M. 354, 132 P.3d 1040.

G. Surprise Rebuttal Witness

{49} Defendant asserts that a surprise rebuttal witness for the State, Dr. Jepsen, was improperly permitted to testify at trial. Both the admission of rebuttal testimony and the election of remedies for discovery violations are within the discretion of the court. See State v. Simonson, 100 N.M. 297, 302, 669 P.2d 1092, 1097 (1983); State v. Wilson, 2001-NMCA-032, ¶ 39, 130 N.M. 319, 24 P.3d 351, abrogated by State v. Montoya, 2005-NMCA-078, ¶ 11, 137 N.M. 713, 114 P.3d 393. We, therefore, review for abuse of discretion only.

{50} In order to evaluate Defendant’s assertion of error, we must consider the following factors: (1) whether the State breached some duty, or intentionally deprived Defendant of evidence; (2) whether the evidence was material; (3) whether the non-disclosure of the evidence prejudiced Defendant; and (4) whether the district court cured the failure to timely disclose the evidence. State v. McDaniel, 2004-NMCA-022, ¶ 8, 135 N.M. 84, 84 P.3d 701.

{51} With regard to the first factor, we will assume that the State breached a duty, insofar as its failure to timely disclose could have violated Rule 5-501(A)(5) NMRA. However, none of the remaining factors weigh in Defendant’s favor.

{52} The second factor—materiality—is established upon a showing that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” McDaniel, 2004-NMCA-022, ¶ 11 (internal quotation marks and citation omitted). In this case, Defendant has not indicated how early disclosure would have affected the outcome of his trial. Because Defendant has neither challenged the sufficiency of the evidence that led to his convictions, nor claimed that earlier disclosure would have changed his defense at trial, he has not made a showing of materiality. Id. ¶ 13.

{53} The third factor—prejudice—similarly depends upon an affirmative demonstration of harm. See id. ¶ 6. Although Defendant claims that the failure to timely disclose impeded his cross-examination of the witness, he has not shown how his cross-examination would have been improved by earlier disclosure, or how he would have prepared differently for trial. Moreover, our review of the record reveals that defense counsel’s cross-examination was clear, focused, and efficacious. As a result, Defendant has not made a showing of prejudice. See id. ¶ 15.

{54} The fourth and final factor—curative action—concerns the form of remedy, or sanction imposed by the district court in response to the untimely disclosure. The transcript indicates that the district court granted defense counsel “ample opportunity” to interview the witness before he testified, recessing for approximately an hour to that end. This appears to have been an appropriate response under the circumstances. See, e.g., State v. Padilla, 91 N.M. 800, 803, 581 P.2d 1295, 1298 (Ct. App. 1978).

{55} In summary, Defendant had failed to demonstrate materiality, prejudice, or that the district court’s curative action was inadequate. We, therefore, reject his challenge to the admission of the testimony of the State’s rebuttal witness.

H. Jury Instruction

{56} Finally, Defendant contends that the district court erred in refusing to instruct the jury about alterations to the arrangement of furnishings in the Ruiz household. We review the matter de novo. See State v. Salazar, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996 (“The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo.”).

{57} Defendant’s proposed instruction was as follows: “This morning you were provided with a jury view of the house. You should not assume that any of the furniture in the house or garage is the same as it was five to eight years ago, during the time period at issue in this case.” Through this instruction, Defendant sought to minimize the impact that a bed, positioned in the garage at the time of the viewing, might have had on the jurors.

{58} Defendant’s proposed instruction appears to be unique. The only legal basis advanced in its support is the use note prefacing the uniform jury instructions, which provides that the courts may give brief, impartial instructions for matters not otherwise specifically covered. We believe this is so generalized as to be unhelpful.

{59} By and large, jury instructions describe principles of law, such as the elements of offenses, burdens of proof, and presumptions for the benefit of the jury. Guidance is also provided with respect to other matters relating to the jury’s performance of its duties, such as providing parameters for the deliberative process itself. These generalizations illustrate the novelty of Defendant’s proposed instruction. Unlike the more common forms of jury instructions, Defendant’s proposed instruction is addressed to the evaluation of specific evidence. Such argument concerning the weight or inferences to be drawn from the evidence is to be presented at trial. Usually, this is most appropriately and effectively accomplished in the course of opening and/or closing statements. We note that the district court took this approach below, suggesting that Defendant advance his argument concerning the positioning of the furnishings in his closing statement. Because jury instructions are not intended to provide an additional platform for the parties to present evidentiary arguments, and because Defendant was provided the opportunity to present the matter to the jury in his closing statement, we perceive no error.

III. CONCLUSION

{60} For the foregoing reasons, we reject Defendant’s assertions of error, both individually and cumulatively. See generally State v. Fry, 2006-NMSC-001, ¶ 57, 138 N.M. 700, 126 P.3d 516 (observing that where no error has been established, there is no basis for a claim of cumulative error). Defendant’s convictions are therefore affirmed.

{61} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge
MICHAEL E. VIGIL, Judge
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Here’s a chance to do well by doing good, protecting abused and neglected children. The Children’s Court Attorney in Las Cruces, NM represents matters in the Las Cruces area and surrounding counties. The ideal candidate will have a heart as well as legal smarts and solid courtroom experience. New Mexico licensure required. Benefits include medical, dental, vision, paid vacation, and a retirement package. The salary range is $38-$67K annually, depending on experience and qualifications. To learn more, contact Ed Schissel at (505) 524-6433, ext 160, or e-mail edward.schissel@state.nm.us. The State of New Mexico is an EOE. Please apply on-line no later than March 2, 2007. In addition to applying on-line, send a copy of your application and required transcripts/documents by March 2, 2007 to Ed Schissel, SW Regional Managing Attorney, P.O. Box 2135, Las Cruces, NM 88004. To apply for this job go to www.state.nm.us/spo/ and click on JOBS, then click on Apply for a Job Online.

Water Law Attorney

The Davidson Law Firm, LLC, a Corrales-based firm, is seeking an attorney with 1-3 years of experience, preferably in water law. Excellent academic credentials, demonstrated research and writing skills, loyalty, dedication, and a strong work ethic required. Please send a resume, references, writing sample, and salary requirements to P.O. Box 2240, Corrales, NM, 87048, or email to staff@tessadavidson.com.

Lawyer Position

Guebert, Bruckner & Bootes, P.C., seeks an attorney with one to three years of experience and the desire to work in tort and commercial litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert, Bruckner & Bootes, P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Farmington Attorney

Val R. Jolley, P.C. Law Firm seeks a full-time attorney with 3-5 years experience to handle Civil, Probate, Business, and Family Law. Salary DOE. Please forward a cover letter, resume, writing sample and references to vjolley@valjolleypc.com or mail to P.O. Box 2364, Farmington, NM 87499. All inquiries held in strict confidence.

Attorney - Commercial Real Estate

Sutin, Thayer & Browne seeks a commercial real estate/lending attorney with at least two years experience to join our Albuquerque office for an immediate opening. Applicants must be licensed in New Mexico. All replies will be kept confidential. Please send a letter of interest, resume, writing sample and transcript to Recruiting Coordinator, Sutin, Thayer & Browne, P.O. Box 1945, Albuquerque, NM 87103 or email to dsh@sutinfirm.com or fax to 505-888-6565.

Entry Level Attorney

Law Access New Mexico seeks one fulltime attorney with 0 – 2 years experience. Attorney will work under close supervision. Attorney will be trained to assist clients via telephone helpline on poverty law problems such as housing and family law. Salary is commensurate with experience. Law Access keeps applications on file for 3 months. Law Access is a non-profit statewide legal telephone helpline free to low income New Mexicans and is an EEO employer. Send resume, references, law school transcript, and writing sample. Respond to: lawaccess@lawaccess.org.

Assistant Attorney General

The Litigation Division of the Attorney General of the State of New Mexico. NM bar admission required. The position offers an opportunity to work in a variety of areas such as administrative law, consumer protection, condemnation, civil rights, and other professional responsibilities. Send resume, references, and a copy of your law school transcript. Respond to: dsh@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

Assistant District Attorney

Wanted for immediate employment in the Ninth Judicial District Attorney’s Office, which includes Curry and Roosevelt Counties. We are accepting resumes for positions of Associate Trial Attorney to Senior Trial Attorney. This position will be based in Clovis. Qualifications and salary pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Ninth Judicial District Attorney Matthew Chandler at (505) 742-2083, or mailed to 417 Gidding, Suite 200, Clovis, NM 88101.

Attorney Positions

The New Mexico Human Services Department, Office of General Counsel seeks to fill five Lawyer-O positions for child support enforcement legal services: one in Roswell (Job ID #4829), one in Silver City (Job ID #3349), one in Socorro (Job ID #3350), one in Deming (Job ID #3357) and one in Farmington (Job ID #3526). One Lawyer-A position is available in Alamogordo (Job ID #3388). All positions require a Juris Doctor and current licensure with the State Bar of New Mexico. In addition, the Lawyer-O requires 1 year of legal experience, the Lawyer-A requires 3 years of domestic relations experience. Salary ranges from $18.350 to $32.634 per hour for the Lawyer-O and $20.70 to $36.80 for the Lawyer-A. To apply: Access the website for the NM State Personnel Office (SPO): http://www.state.nm.us/spo/ and select Search and Apply for Jobs Online. Upon completion of the PeopleSoft application process, please send a copy of your resume, bar card and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. Applications will be accepted until the positions are filled. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

Trust Officer

REDW The Rogoff Firm has an immediate, full-time position for a Trust Officer. This position is responsible for directing and coordinating trust activities relative to the administration of personal and corporate trusts, probate, and court ordered guardianship trusts and performs certain management duties. Qualified candidate must be able to develop working relationships with clients, attorneys and other professionals in the industry. A minimum of a bachelor’s degree is required. CTFA certification is preferred; experience or additional education such as a law degree may be substituted. REDW offers competitive compensation and great benefits to our team members. Qualified candidates may email their cover letter and resume to mebrown@redw.com or fax to 505-998-3333. Visit us at www.REDW.com.
Chief Hearing Officer
The New Mexico Taxation and Revenue Department seeks candidates for Chief Hearing Officer (CHO) to direct operations of the TRD Hearing Bureau. The position is responsible for the management of a staff of 14 attorneys and non-attorney personnel in Santa Fe, Albuquerque, Las Cruces and Farmington. Some travel is required. The CHO oversees and conducts administrative hearings under the Motor Vehicle Code (with the major caseload being DWI cases, which may result in an administrative revocation of a driver’s license), the Tax Administration Act and the Property Tax Code. The CHO also administers budget and grant programs applicable to the Bureau, such as a Traffic Safety grant through the New Mexico DOT designed to help address the DWI problem. Preferred candidate will have a solid background in management, strong research and writing skills and some experience in tax or criminal law. The classified position requires the following qualifications: Graduation from an accredited law school; membership in the State Bar of New Mexico and licensure by the Supreme Court of New Mexico; 10 years experience in the practice of law, preference will be given to candidates who have supervisory, management or business operation experience. Candidate must be current with all tax payments and reporting requirements and hold a valid drivers license. Applicants must apply through the State of New Mexico State Personnel Website (http://www.spo.state.nm.us/NMSite_Recruitment/NMRecruitment_JobSearch.htm) Please apply for job number 5246. No paper applications will be accepted. Please send a copy of your resume, writing sample and New Mexico State Bar card to: Tina Rael, Paralegal, Hearing Bureau, Taxation and Revenue Department, P.O. Box 630, Santa Fe, New Mexico 87504-0630. The deadline for application is February 26, 2007. For application assistance, please contact Karen Spehar at 505-827-0277.

Associate Attorney
Sturges, Houston & Sexton, P.C. seeks a motivated associate attorney with 3-5 years insurance defense experience and strong research and writing skills. Excellent professional opportunity, working environment and benefits. Please forward résumé and writing sample to ksexton@sturgeshouston.com or Managing Shareholder, P.O. Box 36210, Albuquerque, NM 87176.

Experienced Prosecutor
Attorney wanted for employment with the First Judicial District Attorney’s Office in Rio Arriba County. This is a general attorney position in the Espanola office. Salary will be based upon experience. Please email resume to sweinstein@da.state.nm.us or mail to Shari Weinstein, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM, 87504-2041.

Office of the Secretary
Office of General Counsel
The New Mexico Department of Transportation, Office of General Counsel, seeks a Lawyer-Operational to provide the Department high quality legal services in civil and administrative legal matters, including litigation, in areas such as civil rights, personnel, labor relations, garnishments, collections, and administrative law. Position is located in Santa Fe. Position is a Pay Band 75, hourly salary range $18.35 to $32.63 with all state benefits to apply. This classified position requires the following qualifications: Juris Doctor from an accredited law school; licensure in good standing before the Supreme Court of New Mexico. Writing sample will be requested. Experience in the practice of law totaling five years. Special conditions of employment: Must be eligible for commission as a Special Assistant Attorney General of New Mexico upon employment; some evening and weekend work and overnight travel required; possession of current valid New Mexico driver’s license. Working conditions: Primarily in an office setting; ability to independently handle complex and multiple work assignments; ability to interact with others professionally and courteously. Applicants must apply through the State Personnel Office: http://www.state.nm.us/spo/ by the closing date of February 16, 2007. In addition, please send a copy of your application and resume to the attention of Brenda Rael, NMDOT, P.O. Box 1149, Santa Fe, NM 87504-1149.

Law Clerk Position
The Fifth Judicial District Court of Chaves, Eddy and Lea Counties is seeking a law clerk. This is a one year position beginning July 1, 2007 and ending June 30, 2008, and will be located in Lovington, Lea County, NM. Salary is $40,346.00 annually plus benefits. Must be a graduate of an accredited law school. Send resume and 3-5 pages of your writing skills to: Hon. Gary L. Clingman, Chief Judge, 100 N. Main, Box 6-C, Lovington, NM 88260, by 5:00 P.M., on March 15, 2007. The New Mexico Judicial Branch of Government is an Equal Opportunity Employer. You may visit our web site at www.fifthdistrictcourt.com.

Legal Assistant
Legal Assistant needed for Santa Fe, NM Plaintiff Civil Litigation firm. Bi-lingual preferred min. 3 yrs. Civil Litigation exp., knowledge of Word Perfect and MS Office required, and must be familiar with state & federal court rules. Salary negotiable based on experience. Full benefits provided. Fax resume to 505/986-0632.

Legal Support
High Desert Legal Staffing seeks legal secretaries and paralegals with strong computer skills for both temporary and permanent positions with leading firms in Albuquerque and Santa Fe. E-mail: LBrown@highdeserstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.

Secretary/Legal Assistant/Paralegal
FT position available for secretary/legal assistant/paralegal for small, extremely busy firm. Candidate should have a minimum of 5 yrs. experience, preferably in transactional work, excellent typing skills and work well in a team setting. Strong word processing skills a must. Competitive salary and benefit package. Please submit resume to rgomez@bhtls.com or fax to 505.244.9266.

Legal Assistant
Established medium-sized law firm seeks full time legal assistant. Applicants should have 3 years experience in civil litigation. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd. NE, Albuquerque, NM 87113 or email to fruiiz@ylawfirm.com. No phone calls please.

Part-time Paralegal
Part-time paralegal need for busy criminal defense practice. Fax resume to the office of Lisa Torraco 244-0532 - no phone calls please!

Legal Secretary
Busy and growing downtown law firm seeks experienced legal secretary for established lawyers. The successful candidate should know Microsoft Word, possess a strong work ethic, exceptional communication and organizational skills and a commitment to consistent quality work. Must have prior experience. Additionally, experience in workers’ compensation cases a plus. We offer an excellent work environment, competitive salary package. For consideration, please forward your resume, references & salary requirements to: Office Manager, P.O. Box 1578, Albuquerque, NM 87103-1578, fax to 505-247-8125, or email to Nichole@maestasanduggett.com

Receptionist/Legal Secretary
The Disciplinary Board is seeking a full-time phone receptionist/legal secretary. Must be proficient in Microsoft Word and have good people skills. Excellent benefits. Salary DOE up to $30,000 annually. Please FAX resume to 766-6833 or mail to PO Box 1809, Albuquerque 87103-1809
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Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Attractive Office Available
One attractive office available in the downtown historic Hudson House. Rent includes telephone, equipment, access to fax, copier, conference rooms, parking, library and reference materials. Referrals and co-counsel opportunities. For more info., call the offices of Leonard DeLayo at 243-3300, ask for Jodi.

Downtown Offices
Up to three (3) offices with secretarial areas available in downtown area (4th 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.

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

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Beautiful, newly renovated single story building w/ two individual offices available starting Feb 1, 2007. Shared conference room and reception area. Perfect setting for business consultant, accountant, attorney or therapist requiring a short commute from the NE Heights. $525.00 per office (including utilities, Janitorial and internet access). Call Sharon @ 385-9133.

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3 blocks from courts 4 offices, front reception, conference room, 1,400ft. $950/mo. Call 462-3191 or email mhanners@pmcsolutions.com.

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All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication. The Bar Bulletin publishes every Monday. Advertising will be accepted for publication in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication requests. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact Marcia C. Ulibarri at (505) 797-6058, e-mail ads@nmbar.org or fax (505) 797-6075.

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The Bar Bulletin
February 12, 2007 - Volume 46, No. 7

www.nmbar.org
22nd Annual Bankruptcy Year-In-Review

Friday, March 9, 2007 • State Bar Center, Albuquerque

6.0 General and 1.0 Ethics CLE Credits

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The seminar will focus on developments in case law and bankruptcy practice, and ethics issues, resulting from enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The seminar will also cover, in a more abbreviated form than in past years, developments in case law on bankruptcy issues in 2004, both nationally and locally, with special emphasis on decisions by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP and New Mexico bankruptcy judges.

8:00 a.m. Registration
8:30 a.m. Annual Bankruptcy Case Review

10:00 a.m. Break
10:15 a.m. Annual Bankruptcy Case Review (continued)

11:15 a.m. Presentation by Clerk of the Bankruptcy Court
Norman H. Meyer Jr., Clerk U.S. Bankruptcy Court, District of N.M.

11:45 a.m. Presentation by the Office of the United States Trustee
Felicia S. Turner, United States Trustee

12:15 p.m. Lunch (provided at the State Bar Center)

1:15 p.m. Discussion from the Bench
Honorable Mark B. McFeeley, U.S. Bankruptcy Judge, D.N.M.; Honorable James S. Starzynski, U.S. Bankruptcy Judge, D.N.M.

2:00 p.m. Chapter 11 Developments
Jeffrey H. Davidson, Stutman, Treister & Glatt P.C., Los Angeles, CA

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Jeffrey H. Davidson, Stutman, Treister & Glatt P.C., Los Angeles, CA

3:00 p.m. Chapter 13 Developments
Chris W. Pierce; P. Diane Webb

4:00 p.m. Ethics Panel Discussion
Daniel J. Behles; Manuel Lucero

5:00 p.m. Adjourn and Reception
(State Bar Center Lobby)

Please Note: No auditors permitted

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107 Sierra Blanca Drive, Ruidoso - $119 – $139 (1-866-211-7727)

**The Holiday Inn Express**  
400 West Highway 70, Ruidoso - $109 (1-505-257-3736)