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2007 LICENSE AND DUES

Late fees may be assessed on payments

$100 late fee for active members
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Due with payment

www.nmbar.org
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2007-2008
Bench & Bar Directory

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• Firms will be listed geographically in alphabetical order

• Firm logos can be used

• Firm Listings will be accepted through March 31, 2007

Cost $100 per listing

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ADVANCED FAMILY LAW SEMINAR
MARCH 16, 2007
HOTEL ENCANTO
LAS CRUCES, NEW MEXICO

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

For information, or to register by March 2, 2007, please contact
the Law Office of Rosner & Chavez, LLC
at (505) 524-4399

Approved for 5.5 General and 1.0 Professionalism CLE credits
CENTER FOR LEGAL EDUCATION
NEW MEXICO STATE BAR FOUNDATION

MARCH 20TH VIDEO REPLAYS - STATE BAR CENTER

Pro Se Can You See
8 – 10 a.m.
1.0 Ethics & 1.0 Professionalism CLE Credits
☐ $79

Professionalism: All the World is a Stage
10:30 – 11:30 a.m.
1.0 Professionalism CLE Credit
☐ $49

Electronic Legal Resources
11:30 a.m. – 12:30 p.m
1.0 General CLE Credit
☐ $49

Prevention, Reporting & Representing
1 – 4 p.m.
3.2 General CLE Credits
☐ $130

Solo and Small Firm Institute
9 a.m. – 2 p.m.
3.0 General, 1.0 Ethics & 1.0 Professionalism CLE Credits
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FAX: (505) 797-6071, Open 24 hours  INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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City/State/Zip __________________________________________________________________________________________________
Phone ______________________________ Fax ______________________________

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

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Constitutional Limits on States’ Rights to Restrict Advertising in Judicial Election

Campaigns by Norman S. Thayer

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Writs of Certiorari

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Rules/Orders

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In the Matter of the Amendments of Rule 23-106 NMRA of the Supreme Court

General Rules

Opinions

From the New Mexico Supreme Court

From the New Mexico Court of Appeals

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Professionalism Tip

With respect to my clients:
I will advise my client against pursuing matters that have no merit.

Meetings

February

26
Committee for Delivery of Legal Services to People with Disabilities, noon, State Bar Center

28
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room

March

2
Trial Practice Section Board of Directors, noon, State Bar Center

5
Attorney Support Group, 5:30 p.m., First United Methodist Church

6
Criminal Law Section Board of Directors, noon, State Bar Center

State Bar Workshops

February

22
Common Legal Issues Affecting Senior Citizens, 10:15 a.m., Los Lunas Senior Center, Los Lunas

22
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

March

6
Common Legal Issues Affecting Seniors 10:30 a.m., Phil Lovato Senior Center, Taos

7
Common Legal Issues Affecting Seniors 10:30 a.m., Questa Senior Center, Questa

Cover Artist: Tim Prythero has been creating adobe-styled designs for the past 20 years. Northern New Mexico villages and the various Pueblos throughout the state are sources of inspiration. He sculpts the original design in raw clay, adds the details and creates a mold. The various components are then cast in plaster and resin, assembled and hand finished. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
**New Rules Committee and Solicitation of Members**

The Supreme Court has established a new committee called the Metropolitan Court Rules Committee. Previously, rules of procedure for Metropolitan Court were handled by the Rules for Courts of Limited Jurisdiction Committee, which will now be devoted only to magistrate and municipal courts. The new standing committee will have nine members. Judges and attorneys interested in volunteering their time on this committee may send letters of interest and/or resumes to:

Kathleen Jo Gibson, Chief Clerk
PO Box 848
Santa Fe, NM 87504-0848.
Deadline for submission is March 19.

**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 their 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.

**Proposed Revisions to the Rules of Appellate Procedure**

The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court's consideration. The committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court's consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848.
Comments must be received by the clerk on or before March 12 to be considered by the Court. See the Feb. 19 (Vol. 46, #8) Bar Bulletin for reference.

**Second Judicial District Court**

**Court Clinic**

The staff and director of the Court Clinic, along with the 2nd Judicial District Family Court judges, will give a short presentation on the processes of the Court Clinic at noon, March 5. Members of the Family Law Section of the State Bar are encouraged to attend.

**State Bar News**

**Address Changes for Bench & Bar Directory**

State Bar staff is updating information for the 2007–08 Bench & Bar Directory. Address changes will be accepted through April 2.

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**Destruction of Exhibits and Tapes**

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases with exhibits, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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<thead>
<tr>
<th>Judicial District Court</th>
<th>Exhibits or Tapes</th>
<th>May be retrieved through</th>
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<tr>
<td>1st Judicial District</td>
<td>Exhibits for years, 1970–1990</td>
<td>April 27</td>
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<tr>
<td>Court (505) 827-4687</td>
<td>Exhibits in civil cases, 1987–1994</td>
<td>April 12</td>
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<tr>
<td>2nd Judicial District</td>
<td>Exhibits in civil cases, 1995</td>
<td>April 19</td>
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<td>Court (505) 841-7596/5452</td>
<td>Exhibits in civil cases, 1996</td>
<td>May 3</td>
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<tr>
<td>2nd Judicial District</td>
<td>Exhibits in domestic cases, 1981–1990</td>
<td>May 3</td>
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<td>Court (505) 841-7596/5452</td>
<td>Exhibits in criminal cases, 1987–1992</td>
<td>May 3</td>
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<tr>
<td>2nd Judicial District</td>
<td>LR (Metro Court Appeals) cases, 1996</td>
<td>May 3</td>
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<td>Court (505) 841-7596/5452</td>
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Information submitted beyond that date is not guaranteed to be in the new membership directory. To verify attorney information, go to www.nmbar.org, Attorney/Firm Finder and search by name. If changes are necessary, submit in writing to Address Changes, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019; or e-mail address@nmbar.org.

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. See Cle-at-a-Glance in the Feb. 19 (Vol. 26, No. 8) Bar Bulletin for more information. Contact Chair James Jacobsen, jmcjacobsen@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.

Call for Nominations
Bankruptcy Lawyer Award
The Bankruptcy Law Section is seeking nominations for the 5th Annual Bankruptcy Lawyer of the Year Award which will be presented at the Annual Bankruptcy Year in Review Seminar on March 9. Prior recipients of the award include Bill Scholer, the Honorable Stewart Rose, John Greacen, Robert H. Jacobvitz, and the Honorable Joe Johnson.

A candidate for the award must be admitted to practice in New Mexico but does not have to be a member of the Bankruptcy Law Section to be eligible. The work or service recognized by the award must have occurred in New Mexico. The following factors will be considered in making this award; however, a candidate need not meet all of these criteria:
1. significant length of practice in the area of bankruptcy law; 
2. excellence as a bankruptcy attorney; 
3. training or education of or other service to the public or State Bar concerning bankruptcy law issues or matters; 
4. mentorship of junior bankruptcy attorneys; 
5. role model for other bankruptcy attorneys; 
6. involvement in one particularly difficult or important case or negotiation that significantly advanced a bankruptcy law policy or purpose; and 
7. a lawyer whose personal character and dedication to bankruptcy law and service furthers the integrity and reputation of the legal profession.
A discussion as to why the nominee should receive the award is encouraged.
Send nominations by Feb. 28 to Karen H. Bradley, Esq., c/o Susan C. Little & Associates PA, PO Box 3509, Albuquerque, NM 87190-3509; by e-mail to karen-b@littlepa.com; or by fax to (505) 254-4706

Board of Bar Commissioners Fair Judicial Elections Committee Vacancy
The Board of Bar Commissioners has created a Fair Judicial Elections Committee. The functions of the committee are to: 1) monitor judicial election campaigns for compliance with the Code of Judicial Conduct; 2) assist judges, candidates for judicial office, all citizens, citizen groups, advocacy groups, political action organizations and others to understand the standards and expectations of the Code of Judicial Conduct as they relate to statements and advertising in election campaigns for judicial office; and 3) receive, review and investigate statements and advertisements emanating from incumbent judges and lawyers who are candidates in elections for judicial offices, made in or made for the purpose of affecting judicial election campaigns, and to comment privately to those candidates and their campaign committees about statements and advertising that are deemed to violate or fall below the requirements of the Code of Judicial Conduct or that are destructive of or inconsistent with the standards of independence, integrity, impartiality, dignity and decorum that are the philosophical, legal and historical heritage of the judicial branch of government. The board will be appointing eight members to the committee for one-year terms to expire Dec. 31, 2007. Anyone interested in serving should send a letter of interest and resume by March 16 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, or fax to (505) 828-3765.

Meeting Summary
The Board of Bar Commissioners met Feb. 16 at the State Bar Center. Action taken at the meeting follows:
• New Bar Commissioners were sworn in by Supreme Court Justice Patricio Serna. They are: Danny W. Jarrett of Albuquerque, Gary D. Alsup of Clayton, Andrew J. Cloutier of Roswell, Erika E. Anderson of Santa Fe (Young Lawyers Division Chair), and Carolyn L. Cochran of Santa Fe (Paralegal Division Chair).
• Approved the Dec. 15, 2006 meeting minutes as submitted.
• Accepted the pre audit Dec. 2006 financials and executive summaries.
• Reviewed the accounts receivable aging report as well as the directors’ travel reimbursements and credit card file.
• Reviewed and approved the 2007 budget for the New Mexico State Bar Foundation.
• Reviewed and approved dues/license waiver requests for age or impairment, denied waiver request for hardship.
• Tabled discussion of granting Appleseed New Mexico $5,000 from the Bar Foundation.
• Discussed publishing cartoons in the Bar Bulletin focused on the legal profession and decided against publication in deference to member sensitivity about lawyer jokes/cartoons.
• Provided 30 days’ notice of an amendment to the State Bar bylaws to allow individual sections to permit non-voting members to join their sections.
• Appointed David Berlin of Albuquerque to serve as the liaison to the State Bar’s more than 900 active, out-of-state members.
• Approved an amendment to the Public Law Section’s bylaws to permit a chair to hold office more than once.
• Approved recommendations of the Pro Hac Vice subcommittee for distribution of $102,000 in funds collected as part of the Pro Hac Vice registration process. Grants were awarded to Legal FACS, New Mexico Center on Law and Poverty, Enlace Comunitario, Law Access New Mexico, Native American Protection and Advocacy, Catholic Charities, Senior Citizens’ Law Office, Advocacy Inc. and Central New Mexico Community College.
• Approved clarification of e-mail policy allowing section, committee and division chairs discretion in sending messages to their members.

www.nmbar.org
• Approved the Membership Services Committee request to add EsqSites123.com to the State Bar Alliance Program. The company provides affordable and easy ways for attorneys to create, edit and maintain their own Web sites.
• Approved a request from the Committee on Women and the Legal Profession to create an annual State Bar award for “Outstanding Advocacy of Women.”
• State Bar President Dennis E. Jontz reported on a recent meeting held with State Bar officers and senior staff to set priorities for 2007 and beyond. The discussion focused on regulatory issues, public services and membership services.

Note: The minutes in their entirety will be available on the State Bar’s Web site following approval by the Board at the April 27 meeting.

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.

Training on using Casemaker will be held from noon to 1 p.m., Feb. 26, at the Coyote del Malpais Golf Course, 2001 George Hanosh Blvd., Grants. Seating is limited. The training is approved for 1.0 general CLE credit.

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

Employment and Labor Law Section
Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, March 7, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call S. Charles Archuleta, section chair, (505) 346-4646.

Issues Facing the Profession
New Committee

A newly created committee, Issues Facing the Profession, will address current topics facing the legal profession and determine how the State Bar might respond. Younger as well as seasoned attorneys are encouraged to request an appointment. Send a letter of interest by March 16 to State Bar President Dennis Jontz through the State Bar, membership@nmbar.org, or PO Box 92860, Albuquerque, NM 87199-2860.

Prosecutors Section
Annual Meeting

The Prosecutors Section will hold its annual meeting at noon, March 21, during the AODA Conference at the Doubletree Hotel/Albuquerque Convention Center. Agenda items should be sent to Chair Stephen Kovach, skovach@da.state.nm.us or (505) 622-4121.

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 Florenceruth Brown, Frank D. Katz, Douglas Meiklejohn, Martha A. Daly, Charles N. Estes, Mary M. McNerny, 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 furthers the integrity and repute of the legal profession.

Send nominations by 5 p.m., March 1, to Doug Meiklejohn, dmeiklejohn@nmelc.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/solosmallnewsletterOct06.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, telecomm-
munications, 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 5.

**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.

**Brown-Bag Luncheon**

The Young Lawyers Division will host a brown-bag luncheon from noon to 1 p.m., March 15, at the 3rd Judicial District Court, 201 W. Picacho, Las Cruces, with the Honorable Michael T. Murphy of the 3rd Judicial District Domestic Division III.

Lunch will be provided. R.S.V.P. by March 13 to Roxana Chacon, lcrdrmc@nmcourts.com.

**American Bar Association Legal Opportunity Scholarship Fund**

The ABA Legal Opportunity Scholarship Fund is intended to encourage racial and ethnic minority students to apply to law school and to provide financial assistance to these students. The Scholarship Fund will award $5,000 annually to each recipient attending an ABA-accredited law school. The application can be downloaded from the ABA Web site, http://www.abanet.org/fje. Completed applications must be postmarked no later than March 1. Call (312) 988-5137 for additional information.

**Other Bars**

**Albuquerque Bar Association Membership Luncheon**

The Albuquerque Bar Association’s Membership Luncheon will be held at noon, March 6, at the Albuquerque Petroleum Club. United States District Court Judge Bruce D. Black will present A Funny Thing Happened on the Way to (at) the Forum.
Part I

Constitutional Limits on States’ Rights to Restrict Advertising in Judicial Election Campaigns

By Norman S. Thayer

This is the first of a two-part series on New Mexico’s restrictions on candidate advertising and commitments in judicial election campaigns. Part I addresses restrictions imposed by enforceable legal sanctions. Part II, to be published March 5, addresses ethical restrictions.

The decision of the U.S. Supreme Court in Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) leaves unanswered many questions about the power of states to restrict advertising in election campaigns for judicial office. In that case, the Supreme Court of Minnesota had adopted a canon of judicial conduct that prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. The Supreme Court held that such a rule involved state restrictions based on the content of speech in a political campaign and could be sustained only if the state could show that the prohibition was narrowly drawn in support of a compelling state interest. Minnesota argued that its interest in preserving the impartiality and the appearance of impartiality of its judiciary was such a compelling interest. This argument was rejected by the U.S. Supreme Court in a 5-4 decision holding that candidates in judicial elections have First Amendment rights of free speech. For a full scholarly treatment of this case and its effect on the New Mexico rules before their 2004 amendment, see Begaye, “Are There Any Limits on Judicial Candidates’ Political Speech After Republican Party of Minnesota v. White?” 33 N.M.L. Rev. 449 (2003).

The decision in White depended on the majority’s interpretation of “impartiality.” The majority ruled that impartiality referred to a bias for or against parties, whereas the rule was directed at legal issues. The Supreme Court also held that the Minnesota rule was underinclusive in that it did not apply to statements made before the election campaign began or statements made after the election was over. Conceding that another meaning of the term “impartiality” could be a bias for or against a legal view, the Court said that such an interest was not compelling in that it was virtually impossible to find a judge without preconceptions about the law (ignoring the difference between a preconception as to the law and a predisposition as to what to decide). Indeed, the Missouri Constitution required judges to be learned in the law. Therefore, because avoiding judicial preconception as to the law is neither possible nor desirable (to the majority), the “appearance” of doing so also was not a compelling interest. As to the question of whether “impartiality” might mean open-mindedness, the Court simply held that it did not believe the Minnesota Supreme Court had that meaning in mind.

The Supreme Court placed its principal reliance on case law prohibiting restrictions on freedom of speech in election campaigns for political office, not judicial office. The Court held “the First Amendment does not permit … leaving the principle of elections in place while preventing candidates from discussing what the elections were about,” which the Court referred to as “state imposed voter ignorance.”

Justice John Paul Stevens, in dissent, emphasized the difference between judges and other elected public officials, saying that issues of policy rightly are decided by majority vote, but issues of fact and law in litigation are not determined by popular vote. Even though judges may make common law, that is not the result of a mandate from the voters, but of judgment on the merits. He wrote that criticism of court rulings and individual judges based solely on political disagreement with the court’s decision fundamentally misunderstands judicial office. Judicial office is not just another constituency-driven political arm of the government. A judge’s fidelity is to the rule of law regardless of the perceived popular will.

In a dissent by four of the justices, Justice Ruth Bader Ginsburg wrote that politicians represent the voters who put them in office, while judges represent the law, that states should not be required to choose between the polar opposites of elections and free speech,
and that a state may choose to elect its judges and also protect the office for which they are campaigning by restricting campaigning methods. While legislative and executive officials’ primary interest is to advance the interests of their constituents, judges are not political actors and do not represent constituencies. Judge Ginsburg wrote that the First Amendment does not require that judges be treated as politicians just because they are chosen by popular vote. She argued that the outcome of particular cases does not depend on the will of the people nor the outcome of elections and, further, that fundamental rights may not be submitted to a vote. Thus, in her opinion, it was wrong to rely on case law discussing the rights of freedom of speech in political elections with elections for judicial office. She concluded that avoidance of prejudgment corresponds to litigants’ rights to due process of law protected by the 14th Amendment, saying that a fair adjudicative procedure is a powerful and independent constitutional interest. Thus, states are justified in barring campaign promises that threaten the actual bias of the judicial officer. What was at stake, in her view, was due process of law itself, not mere impartiality.

Justice Antonin Scalia, for the majority, responded that if due process requires a judge who has not expressed an opinion on the issues, then the election of judges itself is a denial of due process. He observed that even after election, judges always face the pressure of the voters in making their decisions, rejecting the argument that an election campaign promise would put additional pressure on the judge after he assumed office.

The New Mexico Code of Judicial Conduct, as it read at the time the White case was decided, contained in Rule 21-700 (B)(4) a prohibition against judicial candidates announcing how they would rule on any case or issue that may come before the court. Because the Code of Judicial Conduct is promulgated by the New Mexico Supreme Court and enforced by the Court and the Judicial Standards Commission, the rule constitutes state restriction of candidates’ speech based on the content of that speech. The decision in White indicated that the New Mexico rule was unconstitutional.

In 2003, the American Bar Association promulgated amendments to its model code of judicial conduct. The Code of Judicial Conduct Committee recommended and, in 2004, the N. M. Supreme Court adopted the amendments, so that the pertinent provisions of the existing Rule 21-700 (B) now read as follows:

(4) shall not:
(a) with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

The constitutional question is whether New Mexico has a compelling interest in enforcing the foregoing restrictions. In this respect, one should refer to the preamble to the New Mexico Code, which identifies the objective of the Code as:

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

Thus, the compelling state interest that supports the New Mexico rules is nothing less than justice itself, administered by an independent and honorable judiciary. New Mexico has determined that the independence of its judges is fundamental to the provision of justice, just as Justice Ginsburg, in dissent, argued that impartiality was indispensable to due process of law. The term “independent” must include independence from the perceived wishes of the voters and independence from campaign pledges and promises. The term “honorable” includes impartiality and integrity as emphasized in Rules 21-100 and 21-200 of the Code.

A n independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

If New Mexico’s restrictions on campaign statements should be attacked as unconstitutional, it can be argued that they support the compelling state interest in achieving justice. If the administration of justice is not a compelling state interest, query whether there is any interest sufficiently compelling to meet the standards of the U.S. Supreme Court. Opening the doors to uninhibited advertising in judicial election campaigns will inevitably erode and degrade the nature of judicial office itself. Such a result could open judicial election campaigns to the full barrage of partisan, misleading, vitriolic charges and countercharges that unfortunately characterize elections for political offices. If candidates for judicial office know that the best way to get elected is to make campaign commitments that reflect prejudgment of issues that may come before them after the election, they may decide that their tenure in office may be better secured by following the perceived wishes of the voters, and judicial office will become just another constituent-driven branch of government. The independence of the judicial branch will be destroyed. It is preferable to restrict the pre-election statements and advertising of candidates in judicial elections than to subvert the nature of judicial office, particularly where the restrictions are limited to pledges, promises and commitments that prejudice the impartial adjudication of issues that may come before the court after the election.

About the Author:
Norman Thayer is a senior member of Sutin, Thayer & Browne PC. He is the chair of the Fair Judicial Elections Committee and a member of the Code of Judicial Conduct Committee.
### February

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**WRITS OF CERTIORARI**

As Updated by the Clerk of the New Mexico Supreme Court

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

**Effective February 26, 2007**

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

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<td>Garcia v. Lloyd’s of London (COA 25,985)</td>
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<td>State v. Torro (COA 27,010)</td>
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<td>Esparza v. Arthur (COA 27,060)</td>
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<td>Padilla v. NM Gaming Division (COA 27,163)</td>
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<td>City of Hobbs v. Melot (COA 27,058)</td>
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<td>State v. Chelf (COA 27,146)</td>
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<td>Burke v. Shuya (COA 26,805)</td>
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**Certiorari Granted but not yet Submitted to the Court:**

(For Certiorari granted, but not yet submitted to the Court, see the next page.)

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</tbody>
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www.supremecourt.nm.org

NO. 30,125 State v. Castillo (COA 26,051) 12/14/06
NO. 30,127 State v. Armendariz (COA 24,448) 12/14/06
NO. 30,131 State v. Vargas (COA 24,880) 12/14/06
NO. 30,129 Heath v. La Mariana Apts. (COA 24,991) 1/2/07
NO. 30,118 State v. Castillo (COA 26,051) 12/14/06
NO. 30,127 State v. Armendariz (COA 24,448) 12/14/06
NO. 30,131 State v. Vargas (COA 24,880) 12/14/06

Certiorari Granted and Submitted to the Court:

Submission Date
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NO. 30,162 McNeill v. Burlington (COA 25,469) 2/9/07
NO. 30,193 State v. Hand (COA 25,931) 2/1/07
NO. 30,134 State v. Kathleen D.C. (COA24,540) 2/13/07
NO. 30,158 Benavidez v. City of Gallup (COA 25,373) 12/13/05
NO. 30,195 State v. Cook (COA 24,957) 2/13/07
NO. 30,129 Heath v. La Mariana Apts. (COA 24,991) 1/2/07
NO. 30,118 State v. Castillo (COA 26,051) 12/14/06
NO. 30,127 State v. Armendariz (COA 24,448) 12/14/06
NO. 30,131 State v. Vargas (COA 24,880) 12/14/06

Certiorari Denied:

NO. 29,344 State v. Hughley (on rehearing) (COA 24,732) 11/14/06
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NO. 30,164 State v. Gonzales (COA 26,011) 2/8/07
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### Published Opinions

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<th>Date Filed</th>
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<tr>
<th>No.</th>
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<tr>
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</table>

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

The Committee on Uniform Jury Instructions for Civil Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Civil for the Supreme Court's consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, please send your written comments to:

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

Your comments must be received by the Clerk on or before March 19, 2007, to be considered by the Court.

[NEW MATERIAL]
13-1802B. Suit against original tortfeasor; divisibility of injuries not in dispute; medical treatment.

In this case, if you find that _________(one or more original tortfeasor(s)) [was] [were] negligent and caused injury to the plaintiff, [he] [she] [it] [they] [is] [are] also responsible for any harm caused by medical care that the plaintiff’s injury reasonably required, even if the medical care was negligently performed.

DIRECTIONS FOR USE

This instruction, intended to be a part of UJI 13-1802, is to be given in a successive tortfeasor case where the successive tortfeasor is not a party and the court determines that the tortfeasor responsible for the original injury is also liable for the additional harm caused by subsequent medical treatment for the original injury. If, however, an enhanced injury is so remote in time or likelihood that its foreseeability may not be presumed as a matter of law, the jury would be required to determine the foreseeability of the injury before attributing the total damages to the original tortfeasor. See Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972.

[NEW MATERIAL]
13-1802C. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that _________(the successive tortfeasor(s)) caused injuries that were separate and distinct from, or that caused a measurable worsening of, injuries the plaintiff received from _________(the original injury).

In determining what damages, if any, were caused by _________(the successive tortfeasor(s)), you should award the plaintiff compensation only for [the separate injury caused by _________(the successive tortfeasor(s))] [the measurable worsening of the plaintiff’s condition caused by _________(the successive tortfeasor(s))] [harm that would have been avoided had _________(the successive tortfeasor) [not been negligent][acted within the standard of care]], but not for damages from _________(the first or original injury).

DIRECTIONS FOR USE

This instruction, intended to be a part of UJI 13-1802, should be used when there is no disagreement, or the court determines as a matter of law, that the successive tortfeasor, if liable, caused a separate or causally distinct injury and where the suit is brought only against alleged successive tortfeasors. When there is no jury question regarding divisibility of injuries and there are potential original and successive tortfeasors present, the trial court should use UJI 13-1802D in place of this instruction. This instruction should not be used in those cases presenting only an issue of pre-existing injury but not involving successive torts. In those cases, the general language of UJI 13-1802 and the separate instruction on preexisting condition, UJI 13-1808, provide guidance to the jury.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as “successive tortfeasor” and “original injury,” which likely have little meaning to the jury.

Committee comment. — The need to instruct the jury on successive tortfeasor principles arises when, as a result of a course of events set in motion by one tortfeasor, an intervening act or omission of another causes injury “which can be causally apportioned on the basis of distinct harms.” NMSA 1978, § 41-3A-1(D) (1987). “Because successive-tortfeasor liability is an exception to the general rule of several liability among concurrent tortfeasors, the doctrine is limited to a ‘narrow class of cases,’ in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor.” Payne v. Hall, 2006-NMSC-029, ¶ 36, 139 N.M. 659, 137 P.3d 599. In those cases where the parties stipulate, or the court determines as a matter of law that any injury caused by the defendant is either separate or causally distinct from injuries caused by the original tortfeasor or rendered the original injuries measurably worse, then there is no need to instruct the jury on the divisibility of injuries or the placement of the burden of proving distinct or enhanced injuries. In such cases, the damages instructions should focus the jury’s attention on the distinct or enhanced injuries caused by the defendant’s act or omission.

Throughout the successive tortfeasor instructions, the committee elected to use the terms “successive tortfeasor” and “original tortfeasor” to distinguish between types of defendants, even though the terms are being applied to defendants before any determination that any of them are liable for causing any injury. While it may not be technically correct to employ such terms prior to a determination of liability, the terms are employed for convenience and should be replaced with the names of the parties in the final instructions given to the jury.

[NEW MATERIAL]
13-1802D. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that _________(one or more...
original tortfeasor(s) [was] [were] negligent and caused injury to the plaintiff, and ______________ (one or more successive tortfeasors) [was] [were] negligent and caused injury to the plaintiff, you will first decide the amount of damages from ______________ (the original injury) and you will then decide the amount of damages from ______________ (the successive injury).

You will next compare the negligence of each person whose [negligence] [fault] contributed to the first injury. You will then compare the negligence of each person whose [negligence] [fault] contributed to the second injury.

DIRECTIONS FOR USE

This instruction is to be given in a successive tortfeasor case where the court determines or the parties agree that the case involves separate and distinct injuries and the case includes defendants who are potential original and successive tortfeasors.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as “successive tortfeasor” and “original injury,” which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) that damages are separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix.

[NEW MATERIAL]

13-1802E. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that ______________ (one or more original tortfeasor(s)) negligently caused injury to the plaintiff and ______________ (one or more successive tortfeasors) negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff’s injuries are divisible; or, in other words, whether the negligence of ______________ ([the successive tortfeasor(s)] [the original tortfeasor(s)]) caused an injury that is distinct from any [separate] [enhanced] [or] [avoidable] injury caused by ______________ ([the original tortfeasor(s)] [the successive tortfeasor(s)]).

If you find that the plaintiff’s injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and the defendant will be responsible for its proportionate share of the plaintiff’s damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose [negligence/fault] contributed to ______________ (the first injury) and then compare the negligence of each person whose [negligence/fault] contributed to ______________ (the second injury). The plaintiff would be entitled to recover from ______________ (the original tortfeasor(s)) both the damages related to the distinct injuries caused by ______________ (the original tortfeasor(s)) and any damages from additional or enhanced injuries from subsequent medical treatment necessitated by those injuries. ______________ (The original tortfeasor), in turn, would be entitled to recover from ______________ (the successive tortfeasor) the share of damages caused by the negligence on the part of ______________ (the successive tortfeasor(s)).

________________ says that the plaintiff received injuries caused by ______________ (the original tortfeasor(s)) ______________ (the original tortfeasor(s)) that are distinct from injuries caused by ______________ (the successive tortfeasor(s)) ______________ (the original tortfeasor(s)), therefore bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received an original injury) [a second injury] that is separate and distinct from [a second injury or from enhanced injuries] [the original injury] received [at the place of the original injury] [at the place of second injury] as a result of mechanism of second injury, and the amount of damages and injuries from the separate injuries.

DIRECTIONS FOR USE

This instruction should be given when successive torts are at issue and the jury is to decide whether the plaintiff has suffered divisible injuries.

When suit is brought only against the original tortfeasor, this instruction should be drafted to ask the jury to determine whether the original tortfeasor caused injury that is separate and causally-distinct from any injury caused by the successive tortfeasor. See Payne v. Hall, 2006-NMSC-028, 139 N.M. 659, 137 P.3d 599. However, it may be appropriate in some cases to frame the issue as whether the successive tortfeasor caused an injury that is separate and distinct from an injury caused by the original tortfeasor. Pending further appellate guidance, this issue is for the trial court. Accordingly, the terms “original” and “successive,” describing the tortfeasors, are bracketed so that the order may be changed, depending on the trial court’s determination of how to frame the question of divisibility.

These instructions should be customized to refer to injuries and parties. The instructions should avoid the use of legal terms such as “successive tortfeasor” and “original injury,” which likely have little meaning to the jury.

In drafting the verdict form, attorneys should take care that (1) the jury does not compare the negligence of tortfeasors who caused the original injury with the negligence of the tortfeasors who caused the second injury and (2) that damages are separately determined. These principles are reflected in the exemplar verdict forms appearing in the Appendix.

Committee comment. — When there is conflicting evidence whether the plaintiff suffered injuries that may be separate and distinct, the jury must be permitted to decide the issue. Payne v. Hall, 2006-NMSC-028, ¶ 43, 139 N.M. 659, 137 P.3d 599 (“When the existence of causally-distinct, divisible injuries is not clear, then the question should be given to the jury to decide.”). If the injuries are divisible, the successive tortfeasors are liable, to the extent of their comparative fault, only for the successive injury and the original tortfeasors may be entitled to shift indemnification for the damages caused by successive tortfeasors. Lujan v. Healthsouth Rehabilitation Corp., 120 N.M. 422, 427, 902 P.3d 1025, 1030 (1995) (“In cases involving successive tortfeasors whose separate causal contributions to the plaintiff’s harm can be measured, the doctrine of joint and several liability applies . . . to the enhanced portion of the injury.”); Lewis v. Samson, 2001-NMSC-035, ¶ 14, 131 N.M. 317, 35 P.3d 972 (determining medical provider would be liable for the entirety of an enhanced injury when the plaintiff successfully demonstrated an enhanced injury and the degree of enhancement). This instruction is written on the assumption that the trial court will place the burden of proving divisible injuries on the party asserting divisibility, but the law on this point is not perfectly clear. See Couch v. Astec Indus., Inc., 2002-NMCA-084, ¶ 34, 132 N.M. 631, 53 P.3d 398 (assuming without deciding that the plaintiff asserting enhanced injury bore burden of proof on
[NEW MATERIAL]
13-2222. Successive tortfeasors; sample verdict form; divisible injuries.

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If the answer to Question No. 1 is “No” for each [person] [company] listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is “Yes” as to at least one of the persons or companies listed, you are to answer Question 2.

Question No. 2: For each [person] [company] you found negligent in response to Question No. 1, was the negligence of that [person] [company] a cause of any injury or damage to the plaintiff? For each [person] [company] you found not negligent in answer to Question No. 1, check answer “Not applicable.”

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Yes</th>
<th>No</th>
<th>Not applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 4</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you answered “No” or “Not applicable” as to each [person] [company] listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for all defendants and against the plaintiff, and you will all return to open court. If you answered “Yes” as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

If you answered “No” then you should skip the next question, and your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

If you answered “Yes,” then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [himself] [herself]?

|       | Yes | No |

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

Question No. 5: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $___________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

<table>
<thead>
<tr>
<th>Defendant</th>
<th>%</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defendant 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plaintiff</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total 100%

The court will multiply the percentage of negligence for each defendant by the plaintiff’s total damages. Then the court will enter judgment against each defendant in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

---

**SUPPLEMENTAL QUESTIONS FOR USE WHEN THERE IS NO NEED TO SUBMIT QUESTION OF DIVISIBLE INJURIES TO THE JURY**

Question No. 5: Using the court’s instruction No. ___ regarding distinct injuries, did ___ of the successive tortfeasor(s) [the original tortfeasor(s)] cause an injury that is distinct from any [separate] [enhanced] [or] [avoidable] injury caused by ___ of the successive tortfeasor(s)?

|       | Yes | No |

If the answer to Question No. 5 is “Yes,” then skip Question Nos. 6 and 7 and answer Question Nos. 8 - 11. If the answer to Question No. 5 is “No,” then answer Question Nos. 6 and 7.

Question No. 6: Using the instructions on damages given by the court, we find the total amount of damages suffered by the plaintiff to be $___________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

<table>
<thead>
<tr>
<th>Defendant</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 1</td>
<td></td>
</tr>
<tr>
<td>Defendant 2</td>
<td></td>
</tr>
<tr>
<td>Plaintiff</td>
<td></td>
</tr>
</tbody>
</table>

Total 100%

The court will multiply the percentage of negligence for each defendant by the plaintiff’s total damages. The court
will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom, and you will return to open court.

Question No. 8: Using the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence of (original tortfeasor(s)) and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused by the negligence of (successive tortfeasor(s)).

Answer:
<table>
<thead>
<tr>
<th>Damages caused by</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>[original tortfeasor(s)]</td>
<td>______________</td>
</tr>
<tr>
<td>[successive tortfeasor(s)]</td>
<td>______________</td>
</tr>
<tr>
<td>Total damages</td>
<td>______________</td>
</tr>
</tbody>
</table>

(must be the sum of the two numbers above)

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by (the original tortfeasor(s)) and find a percentage for each. The total of the percentages must equal 100%. [The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing the original injury to [himself] [herself].]

<table>
<thead>
<tr>
<th>Defendant</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 1</td>
<td>______________</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>______________</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>______________</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Go to Question No. 10.

Question No. 10: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by (the successive tortfeasor(s)) and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury. Defendant 3: ______________ %

<table>
<thead>
<tr>
<th>Defendant</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant 3</td>
<td>______________</td>
</tr>
<tr>
<td>Defendant 4</td>
<td>______________</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>______________</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

The court will multiply the percentage of each defendant contributing to (the original injury) and (the successive injury) by the plaintiff’s damages from each injury. The court will then enter judgment for the plaintiff and against each defendant in the proportion of damages for which that defendant is responsible.

Foreperson

DIRECTIONS FOR USE

This sample verdict form is to be used when the trial court will present a second set of questions to the jury, based on the jury’s response to the initial set of questions. In simpler cases, the trial court may prefer to use a single set of questions covering all issues.

When a case presents the potential that the jury will find that successive tortfeasors caused separate and divisible injuries to the plaintiff, the jury should first be presented an initial set of questions designed to permit the court to determine whether there is any need for the jury to make the determination of divisibility. Cf. Payne v. Hall, 2006-NMSC-029, ¶ 44, 139 N.M. 659, 137 P.3d 599 (suggesting that the jury may need to be provided with alternative sets of instructions). Unless the jury finds at least one defendant involved in the original injury to be liable and at least one defendant involved in the subsequent injury to be liable, it is unnecessary to present the question of divisibility to the jury because the defendants liable will be concurrent tortfeasors as regards either the original or successive injuries. This sample special verdict form above asks the jury to identify which parties were negligent and whether they caused injuries to the plaintiff. Question No. 3 should only be included when there is evidence to support a finding of negligence on the part of the plaintiff.

Once the jury has determined which defendants are liable, the court can decide whether there is a need to allow the jury to determine whether injuries are divisible. If there is no such need, the first set of supplemental set of questions allows the jury, as in a routine case, to determine the plaintiff’s total damages and then to compare the fault of each person who contributed to those damages. If there is a need to allow the jury to determine whether damages arising from two incidents are divisible, the second set of supplemental questions asks the jury to make that determination. In the second supplemental set of instructions, if the jury determines the plaintiff’s injuries are not divisible, the jury then determines the plaintiff’s total damages and compares the negligence of all defendants who are liable. If the jury determines the injuries are divisible, the jury determines the portion of damages attributable to each injury and then separately compares the negligence of the parties responsible for the separate injuries.

In drafting a set of questions based on this sample verdict form, the court may find it more convenient, depending on the context, to refer to the divisible injuries as either injuries caused by a particular party (e.g., “injuries caused by Fred Johnson and Mark Jackson” or “injuries caused by Dr. Smith or Dr. Wilger”) or injuries related to a particular incident (e.g., “injuries received in the automobile accident” or “injuries received at the hospital”). The method of shorthand that works best for the particular case should be used consistently throughout the instructions to avoid confusing the jury. The verdict form should be drafted to make clear that the damages and injuries for which an award may be made are those caused by some fault of a defendant.

Because the supplemental sets of questions are to be presented to the jury only after the jury determines which defendants are liable, the questions in the supplemental sets should be customized to eliminate the names of parties the jury has already determined not to be liable.

This sample verdict form contains no question regarding the foreseeability of the risk of a successive injury as a result of the original injury. It will usually be the case that the court will decide this issue as a matter of law. See Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972 (imposing, “as a ‘positive rule of decisional law’ the requirement of joint and several liability upon the original tortfeasor for the original and enhanced injuries”). When the trial court does not decide foreseeability as a matter of law, it may be necessary to draft an additional question on this issue for the jury.

Committee comment. — The trial court should be careful to use the sample verdict form as a guide only. The sample form
and exemplars in the Appendix reflect the state of the law at a particular time and, as the Supreme Court acknowledged in Payne v. Hall, 2006-NMSC-029, ¶ 2, 139 N.M. 659, 137 P.3d 599, the legal issues surrounding successive tortfeasor liability continue to evolve. The court and counsel, therefore, will want to be sure, when drafting successive tortfeasor instructions, to be sensitive to the context of the particular case and any legal developments after the drafting of these guides.

The sample form makes no attempt to inform the jury that a finding of divisibility may cause the original tortfeasor to be jointly and severally liable with the successive tortfeasor for the distinct injuries caused by the latter. The sample form assumes that the trial court will take into account the consequences of the jury’s finding on such issues as joint and several liability and indemnity when entering judgment.

[NEW MATERIAL]

APPENDIX TO CHAPTER 18
Appendix 1. Examples of instructions and special verdict forms for use in successive tortfeasor cases.

INTRODUCTION

This Appendix contains a set of sample instructions and exemplars drafted by the Committee on Uniform Jury Instructions for Civil Cases and is intended to cover many of the situations in which one party or another may argue either that one party is liable for the negligence or fault of another party based on successive tortfeasor principles or that a plaintiff received more than one divisible injury.

For those successive tortfeasor cases where the parties stipulate, or the court rules, that the plaintiff’s injuries are divisible, the Committee considered three scenarios where different instructions would be useful. First, for those cases where suit is brought against the original tortfeasor only and no claim is made against the potential successive tortfeasor, the Committee determined that no special successive tortfeasor instruction on “divisibility” was necessary. In such cases, the Committee contemplated that the jury would determine the original tortfeasor’s liability for enhanced injuries under the rules of proximate cause with the aid of UJI 13-1802B. Counsel can adapt the sample instructions and verdict form in the Appendix to Chapter 11 for use under this first scenario. Second, for those cases where divisibility is not a jury issue and suit is brought against the potential successive tortfeasor only, the Committee contemplated that the trial court would instruct the jury using 13-1802C. A sample set of instructions and a verdict form for this second scenario appear as Example A in this Appendix. Third, in those cases where suit is brought against both the potential original and successive tortfeasors, the Committee contemplated the use of 13-1802D. The sample instructions and verdict form for this third scenario appears in Example B of this Appendix.

For all cases governed by successive tortfeasor principles in which the jury is asked to determine whether injuries are divisible, the Committee contemplated the use of UJI 13-1802E. Two sets of sample instructions and verdict forms, under Examples C and D, appear in this Appendix. Example C was drafted for use in a case where the plaintiff alleges that two defendants each caused a divisible injury. Example D is based loosely on the facts of Payne v. Hall, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599, with a minor variation consisting of the addition of a third-party claim, and demonstrates the use of 13-1802E in a more complex case.

Each of the exemplar instructions and verdict forms was drafted in contemplation that they would be used chiefly in negligence cases. The Committee recommends that particular attention be paid to revising the instructions and verdict forms before they are adapted for use with strict liability, crashworthiness, or so-called “second-injury” or “rollover” cases where successive tortfeasor principles may be at issue.

EXAMPLE A
Statement of facts

The plaintiff, injured in automobile accident, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the health care provider only, and the parties agree, or the court decides as a matter of law, that any injuries received at the hospital are causally distinct from injuries the plaintiff received in the automobile accident.

UJI 13-302A. Statement of theory(ies) for recovery;
UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and
UJI 13-302C. Statement of denial and affirmative defense(s).

In this case the plaintiff seeks compensation from the defendant medical provider for damages the plaintiff says were caused by negligent medical treatment of injuries first received by the plaintiff in an automobile accident. The plaintiff says the defendant caused an injury separate from the first injuries, or made them worse.

To establish negligent medical treatment on the part of the defendant, the plaintiff has the burden of proving that, in treating the plaintiff, the defendant failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances.

The plaintiff has the burden of proving such negligent medical treatment was a cause of a separate injury, or made the first injury measurably worse.

The defendant denies what the plaintiff says.

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed:__________________

(Note: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already suffering.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to be harmed. The defendant is said to “take the plaintiff as he finds [him][her],” meaning that the defendant, if
liable, is responsible for all elements of damages caused by the defendant’s conduct even if some of the plaintiff’s injury arose because the plaintiff was unusually susceptible to being injured.] UJI 13-1802C. Successive tortfeasor only defendant; no question for jury on divisibility of injuries.

In this case, the plaintiff says and has the burden of proving by the greater weight of the evidence that the defendant medical provider caused injuries that were separate and distinct from, or that caused a measurable worsening of, injuries the plaintiff received from the automobile accident.

In determining what damages, if any, were caused by the defendant medical provider, you should award the plaintiff compensation only for the separate injury caused by the medical provider and for any measurable worsening of the plaintiff’s condition caused by the medical provider that would have been avoided had the medical provider acted within the standard of care, but not for damages from the automobile accident.

Special Verdict Form
Example A

An exemplar special verdict form suitable for this fact pattern appears in the appendix to Chapter 11 (Medical Negligence).

EXAMPLE B
Statement of facts

The plaintiff, injured in automobile accident with another driver, is transported to a hospital where he claims he received negligent care. The plaintiff brings suit against the other driver and the other driver brings a third-party complaint against the medical provider, and the parties stipulate, or the court decides as a matter of law, that the injuries received in the automobile accident are divisible from the injuries claimed to have been caused at the hospital.

UJI 13-302A-D. Statement of theory(ies) for recovery; UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; UJI 13-302C. Statement of denial and affirmative defense(s); and UJI 13-302D. Statement of factual contentions of defendant(s), causation and burden of proof.

In this case the plaintiff seeks compensation from the defendant driver for damages the plaintiff says were caused by negligence.

To establish negligence on the part of the defendant driver, the plaintiff has the burden of proving that the defendant driver failed to stop and yield the right-of-way to the plaintiff’s vehicle.

The plaintiff has the burden of proving that such negligence was a cause of injuries and damages.

The defendant denies what the plaintiff says, and the defendant says that the third-party defendant medical provider’s negligent treatment [caused injury separate from the first injuries received in the automobile accident], [or][made the first injury measurably worse] [or] [caused injury which would not have occurred with proper medical treatment].

To establish that negligent medical treatment [caused injury separate from the first injuries] [or] [made the first injuries measurably worse] [or] [caused injury which would not have occurred with proper medical treatment], the defendant has the burden of proving (1) in treating the plaintiff, the medical provider failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances, and (2) such negligent medical treatment [was a cause of separate injury] [or] [made the first injury measurably worse] [or] [caused injury which would not have occurred with proper medical treatment].

UJI 13-1802. Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: ____________________________.

(NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact the plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to “take the plaintiff as he finds [him][her],” meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant’s conduct even if some of the plaintiff’s injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802D. Successive tortfeasors; divisibility of injury not in dispute or decided as a matter of law.

In this case, if you find that the defendant other driver was negligent and caused injury to the plaintiff, and the defendant medical provider(s) were negligent and caused injury to the plaintiff, you will first decide the amount of damages from the automobile accident and you will then decide the amount of damages from the medical treatment.

You will next compare the negligence of each person whose negligence contributed to the injuries caused by the car accident. You will then compare the negligence of each person whose negligence contributed to the injuries caused at the hospital.

Special Verdict Form
Example B

On the questions submitted, the jury finds as follows:
Question No. 1: Were any of the following negligent?
Answer: Yes No
Other Driver ______ ______
Medical Provider ______ ______

If the answer to Question No. 1 is “No” for both the other driver and the medical provider, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is “Yes” as to either the other driver or the medical provider, you are to answer Question 2.

Question No. 2: For each person or company you found negligent in response to Question No. 1, was the negligence of that person or company a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer “Not applicable.”
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 welcomed and the present number is 2.

Answer: Yes No Not applicable
Other Driver ________ ________ ________
Medical Provider ________ ________ _______

If you answered “No” or “Not applicable” as to both defendants listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the defendants and against the plaintiff, and you will all return to open court. If you answered “Yes” as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?
Answer: _____ Yes _____ No

If you answered “No” then you should skip the next question and go to Question No. 5. If you answered “Yes,” then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [him] [her]?
Answer: _____ Yes _____ No

Your foreperson should sign this verdict form, and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS ONLY ONE DEFENDANT NEGLIGENT

Question No. 5: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff and caused by the [defendant driver] [defendant medical provider] to be $________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:
[Other Driver] ________%
[Medical Provider] ________%
[Plaintiff] ________%

Total 100%

The court will multiply the percentage of negligence for each defendant by the plaintiff’s total damages. Then the court will enter judgment for the plaintiff and against each defendant in the proportion of damages for which each defendant is responsible.

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS BOTH DEFENDANT DRIVER AND MEDICAL PROVIDER NEGLIGENT

Question No. 5: Using the instructions given by the court, determine the damages suffered by the plaintiff as a result of the separate injuries caused by the defendant auto accident driver and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:

Foreperson

EXAMPLE C
Statement of facts

The plaintiff, injured at a medical clinic, is transported to hospital where he claims he received additional negligent care. The plaintiff brings suit against the defendant clinic doctors and defendant hospital doctors, contending that each caused distinct injuries, and the issue of divisibility of injuries is for the jury.

UJI 13-302A. Statement of theory(ies) for recovery;
UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and

UJI 13-302C. Statement of denial and affirmative defense(s).

In this case the plaintiff seeks compensation from the defendant clinic doctors for damages from injuries the plaintiff says were caused by negligent medical treatment at the clinic and from the defendant hospital doctors for damages for enhanced and separate injuries the plaintiff says were caused by negligent medical treatment at the hospital.

To establish negligent treatment on the part of the defendant clinic doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury later received at the hospital or, in the alternative, that the plaintiff suffered a single injury caused at least in part by negligence on the part of the clinic doctors.

To establish negligent treatment on the part of the defendant hospital doctors, the plaintiff has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and...
apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff either suffered an injury separate and distinct from any injury the plaintiff received at the clinic, or that the hospital doctors made the plaintiff’s original injuries measurably worse or, in the alternative, that the negligence of the hospital doctors, in combination with the negligence of the clinic doctors, contributed to bring about plaintiff’s injuries and damages.

Both the clinic and the hospital deny what the plaintiff says.

**UJI 13-1802. Measure of damages; general; with preexisting conditions.**

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate [him] [her] for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: ________

**(NOTE: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)**

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to “take the plaintiff as he finds [him][her],” meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant’s conduct even if some of the plaintiff’s injury arose because the plaintiff was unusually susceptible to being injured.]

**UJI 13-1802e. Successive tortfeasors; divisibility of injury is submitted to the jury.**

In this case, if you find that one or more of the clinic doctors negligently caused injury to the plaintiff and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff’s injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff’s injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the injuries and each defendant will be responsible for his or her proportionate share, if any, of the plaintiff’s damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the damages related to the distinct injuries caused by the clinic and any damages from additional or enhanced injuries from subsequent medical treatment at the hospital necessitated by those injuries. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by the negligence on the part of the hospital.

The plaintiff says that the plaintiff received injuries caused by the clinic doctors that are distinct from injuries caused by the hospital doctors. The plaintiff, therefore, bears the burden of proving, by the greater weight of the evidence, both that the plaintiff received an original injury at the clinic that is separate and distinct from a second injury received at the hospital, and the amount of damages and injuries from the separate injuries.

**Special Verdict Form**

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?

<table>
<thead>
<tr>
<th>Answer:</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinic doctor 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clinic doctor 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital doctor 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital doctor 2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If the answer to Question No. 1 is “No” for all persons listed, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is “Yes” as to at least one of the persons listed, you are to answer Question 2.

Question No. 2: For each person or persons you found negligent in response to Question No. 1, do you find that the negligence of that person or company was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer “Not applicable.”

<table>
<thead>
<tr>
<th>Answer:</th>
<th>Yes</th>
<th>No</th>
<th>Not applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinic doctor 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clinic doctor 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital doctor 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hospital doctor 2</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you answered “No” or “Not applicable” as to all the persons or companies listed, you are not to answer further questions. Your foreperson may sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered “Yes” as to one or more of the parties listed, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?

<table>
<thead>
<tr>
<th>Answer:</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you answered “No” then you should skip the next question and go to Question No. 5. If you answered “Yes,” then go to Question No. 4.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Question No. 4: Was the negligence of the plaintiff a cause of any of any injury or damages to [himself] [herself]?

<table>
<thead>
<tr>
<th>Answer:</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Foreperson

**SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST BOTH CLINIC DOCTORS BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF NOT NEGLIGENT**
Question No. 5: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $__________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:
Clinic doctor 1 ____________%
Clinic doctor 2 ____________%

Total ____________ 100%

The court will multiply the percentage of negligence for each defendant by the plaintiff’s total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND TWO CLINIC DOCTORS AND ONE HOSPITAL DOCTOR NEGLIGENT AND THE PLAINTIFF NEGLIGENT AND THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: Using the court’s instruction No. ___ regarding separate and distinct injuries, did the clinic doctors cause an injury that is separate and distinct from any second injury or enhancement of the original injury caused by hospital doctor 2?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is “Yes,” then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is “No,” then answer Question Nos. 6 and 7.

Question No. 6: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $__________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:
Clinic doctor 1 ____________%
Clinic doctor 2 ____________%
Hospital doctor 2 ____________%
Plaintiff ____________%

Total ____________ 100%

The court will multiply the percentage of negligence for each defendant by the plaintiff’s total damages. The court will then enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which each defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:
Damages caused by negligence of clinic doctors _______
Damages caused by hospital doctor 2 _______
Total damages _______

(must be the sum of the two numbers above)

Go to Question No. 9.

Question No. 9: Compare the negligence of the following persons who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to himself at the clinic.

Answer:
Clinic doctor 1 ____________%
Clinic doctor 2 ____________%
Plaintiff ____________%

Total ____________ 100%

Go to Question No. 11.

Question No. 11: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Answer:
Hospital doctor 2 ____________%
Plaintiff ____________%

Total ____________ 100%

Foreperson

EXAMPLE D
Statement of facts

The plaintiff says she was injured as a result of medical treatment at a medical clinic. She also contends and the trial court has determined that, under the “positive rule of decisional law” announced in Lewis v. Samson, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972, 985 (2001), the clinic is liable for any injuries or enhanced injuries the plaintiff received subsequently at a hospital.

The clinic denies that it was negligent and contends that if the plaintiff received negligent medical care, it was at the hospital to which the plaintiff was transferred from the clinic. The clinic brings suit only against the clinic. The clinic has filed a third party claim against the hospital, seeking indemnity against the plaintiff’s claim that the clinic is liable for injuries caused by negligence at the hospital. The trial court has determined that divisibility of injuries is a question for the jury. The physicians at the clinic and hospital are employees of the respective facilities.

UJI 13-302A. Statement of theory(ies) for recovery;
UJI 13-302B. Statement of factual contentions of plaintiff(s), causation and burden of proof; and
UJI 13-302C. Statement of denial and affirmative defenses.
In this case the plaintiff seeks compensation from the defendant clinic for damages from injuries the plaintiff says were caused by negligent treatment at the clinic and for any additional injuries or measurable worsening of her damages she suffered as a result of subsequent treatment required at the hospital.

To establish negligent treatment on the part of the clinic, the plaintiff has the burden of proving that, in treating the plaintiff, the clinic doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers practicing under similar circumstances and that, as a result, the plaintiff suffered an injury.

The plaintiff also says, and has the burden of proving, that the injuries the plaintiff received at the clinic were separate and causally-distinct from any injury or measurable enhancement of her injuries caused by treatment at the hospital.

The clinic denies that it was negligent and contends that, if the plaintiff was injured through negligence, it was the result of treatment she received from doctors at the hospital.

To establish negligent treatment on the part of the hospital, the clinic has the burden of proving that, in treating the plaintiff, the hospital doctors failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified medical providers and that such failure either caused or contributed to plaintiff’s injuries.

UJI 13-1802 Measure of damages; general; with preexisting conditions.

If you should decide in favor of the plaintiff on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate her for any of the following elements of damages proved by the plaintiff to have resulted from the negligence [wrongful conduct] as claimed: ________________

(Note: Here insert the proper elements of damages and, in a personal injury case, the instructions which immediately follow may be applicable but, in other types of litigation, the trial lawyers will need to insert here the proper elements applicable under the proven facts and the particular law governing the specific circumstances.)

Whether any of these elements of damages have been proved by the evidence is for you to determine. [If you find that, before any injury in this case, the plaintiff was already impaired by a physical or emotional condition, the plaintiff is entitled to compensation for the aggravation or worsening of the condition, but not for elements of damages to the extent they were already being suffered.] [However, damages are to be measured without regard to the fact plaintiff may have been unusually susceptible to injury or likely to have been harmed. The defendant is said to “take the plaintiff as he finds [him][her],” meaning that the defendant, if liable, is responsible for all elements of damages caused by the defendant’s conduct even if some of the plaintiff’s injury arose because the plaintiff was unusually susceptible to being injured.]

UJI 13-1802E. Successive tortfeasors; divisibility of injury is submitted to the jury.

In this case, if you find that one or more of the clinic doctors negligently caused injury to the plaintiff and one or more of the hospital doctors negligently caused injury to the plaintiff, then you will need to decide whether the plaintiff’s injuries are divisible; or, in other words, whether the negligence of the clinic doctors caused an injury that is distinct from any separate, enhanced or avoidable injury caused by the hospital doctors.

If you find that the plaintiff’s injuries are not divisible, then you will compare the negligence of all parties you find to be responsible for the plaintiff’s injuries and each defendant will be responsible for its proportionate share, if any, of plaintiff’s damages.

If you find that the plaintiff suffered divisible injuries, then you will compare the negligence of each person whose negligence contributed to the injuries at the clinic and then compare the negligence of each person whose negligence contributed to the injuries at the hospital. The plaintiff would be entitled to recover from the clinic both the damages related to the distinct injuries caused by the clinic and any damages arising from additional or enhanced injuries arising from the subsequent medical treatment necessitated by those injuries. The clinic, in turn, would be entitled to recover from the hospital the share of damages caused by negligence on the part of the hospital.

The plaintiff says that she received injuries caused by the clinic doctors that are distinct from any injuries caused by the hospital doctors. The plaintiff therefore bears the burden of proving, by the greater weight of the evidence, that she received an injury at the clinic that is separate and distinct from a second injury received at the hospital, and the amount of damages and injuries attributable to the separate injuries.

Special Verdict Form

Potential successive tortfeasor issue for the jury

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the following negligent?
Answer: Yes No

Clinic _____ _____
Hospital _____ _____

If the answer to Question No. 1 is “No” for the clinic, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for the defendant and against the plaintiff, and you will all return to open court.

If the answer to Question No. 1 is “Yes” as to the clinic, you are to answer Question 2.

Question No. 2: For each health care provider you found negligent in response to Question No. 1, do you find that the negligence of that provider was a cause of any injury or damage to the plaintiff? For each person or company you found not negligent in answer to Question No. 1, check answer “Not applicable.”

Answer: Yes No Not applicable

Clinic _____ _____
Hospital _____ _____

If you answered “No” as to the clinic, you are not to answer further questions. Your foreperson must sign this special verdict which will be your verdict for all the defendants and against the plaintiff, and you will all return to open court. If you answered “Yes” as to the clinic, then you are to answer the next question.

Question No. 3: Do you find that the plaintiff was negligent?
Answer: Yes No

If you answered “No” then you should skip the next question and go to Question No. 5. If you answered “Yes,” then go to Question No. 4.

Question No. 4: Was the negligence of the plaintiff a cause of any injury or damages to [himself] [herself]?

Answer: Yes No

Bar Bulletin - February 26, 2007 - Volume 46, No. 9
Your foreperson should sign this verdict form and you will now return to open court. After reviewing your answers to the questions above, the court will give you additional questions to answer.

_______________________________
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY FINDS AGAINST CLINIC BUT NOT AGAINST HOSPITAL DOCTORS, PLAINTIFF IS NEGLIGENT

Question No. 5: In accordance with the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $___________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 6.

Question No. 6: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%.

Answer:
Clinic  ____________%
Plaintiff ____________%

Total  100%

The court will multiply the percentage of negligence for the clinic by the plaintiff’s total damages. Then the court will enter judgment against each defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

_______________________________
Foreperson

SUPPLEMENTAL QUESTIONS FOR USE WHEN THE JURY HAS FOUND THE CLINIC AND THE HOSPITAL AND THE PLAINTIFF NEGLIGENT AND THERE IS A SUCCESSIVE TORTFEASOR ISSUE

Question No. 5: Using the court’s instruction No. ___ regarding separate and distinct injuries, did the clinic cause an injury that is separate and distinct from any second injury or enhancement of the original injury caused by the hospital?

Answer: _____ Yes _____ No

If the answer to Question No. 5 is “Yes,” then skip Question Nos. 6 and 7 and answer Question Nos. 8-11. If the answer to Question No. 5 is “No,” then answer Question Nos. 6 and 7.

Question No. 6: Using the damage instructions given by the court, we find the total amount of damages suffered by the plaintiff to be $___________. (Here enter the total amount of damages without any reduction for comparative negligence.)

Go to Question No. 7.

Question No. 7: Compare the negligence of the following parties and find a percentage for each. The total of the percentages must equal 100%.

Answer:
Clinic  ____________%
Hospital ____________%
Plaintiff ____________%

Total  100%

The court will multiply the percentage of negligence for the defendant by the plaintiff’s total damages. The court will then enter judgment against the defendant and in favor of the plaintiff in the proportion of damages for which the defendant is responsible.

You are not to answer further questions. Your foreperson should sign this verdict form at the bottom and you will return to open court.

_______________________________
Foreperson

Question No. 8: In accordance with the instructions given by the court, determine the damages suffered by the plaintiff as a result of the negligence at the clinic and the damages suffered by the plaintiff as a result of the distinct or enhanced injury caused at the hospital. Do not make any reduction for comparative negligence.

Answer:
Damages caused by negligence of clinic ________
Damages caused by negligence of hospital ________
Total damages ________

(must be the sum of the two numbers above)

Go to Question No. 9.

Question No. 9: Compare the negligence of the following parties who contributed to the separate damages caused by negligence at the clinic and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if the plaintiff was not negligent in causing injuries to herself at the clinic.

Answer:
Clinic  ____________%
Plaintiff ____________%

Total  100%

Go to Question No. 11.

Question No. 11: Compare the negligence of the following persons who contributed to the separate or enhanced injuries caused by negligence at the hospital and find a percentage for each. The total of the percentages must equal 100%. The percentage for the plaintiff may be zero if you find the plaintiff was not negligent in causing the separate or enhanced injury at the hospital.

Hospital doctor 2 ________
Plaintiff ________
IN THE MATTER OF THE AMENDMENTS OF RULE 23-106 NMRA OF THE SUPREME COURT GENERAL RULES

ORDER

WHEREAS, this matter came on for consideration upon the Court’s own recommendation to adopt amendments to Rule 23-106 NMRA, and the Court 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 23-106 of the Supreme Court General Rules hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Rule 23-106 of the Supreme Court General Rules shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rule 23-106 by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 12th day of February, 2007.

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

23-106. Supreme Court committees.

A. Authority to appoint. The Supreme Court may appoint standing committees and special or temporary committees to make recommendations to the Court and to assist the Court in drafting and revising rules and instructions of the Supreme Court.

B. Composition of committees. Most standing committees will be comprised of nine members who will be appointed by the Court to reflect geographical balance and to represent the various factions of the bar, i.e., prosecutors, defense attorneys, private attorneys and government attorneys. The following committees will be comprised of more than nine members: Code of Professional Conduct Committee will be comprised of fifteen members; Appellate Rules Committee will be comprised of ten members; Board of Bar Examiners will be comprised of twelve members; and Disciplinary Board shall be comprised of eleven members. Special or temporary committees will be comprised of as many members as the Court deems necessary with the same considerations of balance as for standing committees.

C. Chairperson. The Court may appoint a chair and vice-chair for each standing and special or temporary committee. The chair shall have the authority to call meetings of the committee on whatever basis deemed necessary to ensure that the work of the committee is accomplished. The chair will preside at all meetings. In the absence of the chair, the vice-chair or the chair’s designee shall assume the authority of the chair.

D. Terms of appointment. Standing committee members, including the chair and vice-chair, shall be appointed for a term of three (3) years. No member shall serve for more than two terms unless ordered by Court. Members of special or temporary committees shall be appointed for a term decided by the Court; however, said term shall not exceed three (3) years. If any committee member, including the chair or vice-chair, shall be absent from three consecutive committee meetings, that person is deemed to have resigned from the committee. Said resignation shall be reported to the Court by the chair or vice-chair in writing. Any member, including the chair or vice-chair, may resign at any time during the member’s term by informing the Court in writing.

E. State bar representative. The Board of Bar Commissioners may appoint a liaison to each standing, special or temporary committee.

F. Supreme Court liaison. The chief justice may appoint a liaison justice to a committee.

G. Committee staff. The Court may appoint or contract for such staff as may be needed for each committee. If appointed, the staff attorney will be responsible for notifying the members and the liaison of meetings, taking notes of the committee’s actions, drafting and revising rules and instructions and any other duties requested by the Court or the chair or vice-chair. It shall not be necessary for committees to keep minutes or make any record of their proceedings.

H. Quorum and voting. All appointed members, including the chair and vice-chair, shall have one vote. Staff attorneys, guests and liaisons may participate in meetings, but may not vote. A quorum of the committee, five voting members, must be present and voting before any committee business may be adopted and recommended to the Court. Committees may, however, meet and discuss matters without a quorum present.

I. Rule-making procedure. Committees may make recommendations to the Court on their own motion or upon the request of the Court or the bar.

(1) When a majority of the voting quorum so votes, rules or instructions shall be submitted to the staff attorney appointed by the Court for proper formatting prior to submission to the Court. When formatting all proposed amendments and new rules, gender-neutral language shall be used unless the use of gender-neutral language would alter the meaning of the rule or compromise its clarity. For purposes of this subparagraph, “gender-neutral language” means language that does not explicitly or implicitly refer to one sex to the real or apparent exclusion of the other sex and that does explicitly or implicitly refer to both sexes without distinguishing between them.

(2) Upon submission to the Court, it may publish for comment the proposed amendments or new rules;

(3) If the proposed amendments or new rules are published for comment, after the comment deadline, the Court may request the committee to respond to any comments received by the Court;

(4) Upon receipt of the committee’s responses to the comments, and after its review of the recommended rules or instructions, any comments received by the Court and the committee’s remarks to the comments, the Court shall:

(a) adopt;
(b) reject;
(c) meet with committee representatives to discuss the recommendations;
(d) modify on their own motion; or
(e) send back to the committee for further drafting or revising.

(5) If new rules or amendments are recommended to the Rules of Professional Conduct, Rules Governing Discipline, Rules Governing the New Mexico Bar, Rules Governing Admission to
the Bar, or the Code of Judicial Conduct, said recommendations may be submitted to the president of the New Mexico State Bar prior to the Court’s final action on such proposal in order to provide for input from the bar. Upon final enactment by the Court on such rules or amendments, they may be submitted for publication by the state bar at least forty-five (45) days prior to the effective date. If the Supreme Court determines that it is necessary to have a different effective date than that provided for in this subparagraph, it shall so provide in its order of adoption.

(6) After any rule or instruction has been approved by the Court, arrangements shall be made for publication by the state bar, if necessary, and the compilation commission in New Mexico Rules Annotated. Rules and instructions shall be published by the state bar if they will become effective prior to the next publication date of the NMSA Advanced Annotation Service or yearly supplement or if required by Subparagraph (5) of this Paragraph.

J. Standing committees. The following is a list of Supreme Court standing committees:

(1) Courts of Limited Jurisdiction Committee which is responsible for Rules of Civil Procedure for the Magistrate Courts, Rules of Criminal Procedure for the Magistrate Courts, Rules of Civil Procedure for the Municipal Courts and civil and criminal forms for the magistrate and municipal courts;

(2) Rules of Civil Procedure for the District Courts Committee which is responsible for Rules of Civil Procedure for the District Courts, and Civil Forms for the District Courts;

(3) Appellate Rules Committee which is responsible for Rules of Appellate Procedure;

(4) Rules of Evidence Committee;

(5) Uniform Jury Instructions-Civil Committee;

(6) Uniform Jury Instruction-Criminal Committee;

(7) Rules of Criminal Procedure for the District Courts Committee which is responsible for Rules of Criminal Procedure for the District Courts, and the criminal forms for the district courts;

(8) Children’s Court Rules Committee;

(9) Minimum Continuing Legal Education Committee which is responsible for administering the Minimum Continuing Legal Education program pursuant to Supreme Court rules;

(10) Specialization Board which is responsible for implementing and administering the Supreme Court specialization program;

(11) Board Governing Reporting of Judicial Proceedings;

(12) Board of Bar Examiners;

(13) Disciplinary Board;

(14) Code of Professional Conduct Committee;

(15) Code of Judicial Conduct Committee; and

(16) Metropolitan Courts Rules Committee which is responsible for the Rules of Civil Procedure for the Metropolitan Courts, Rules of Criminal Procedure for the Metropolitan Courts and civil and criminal forms for the metropolitan courts.

K. Failure to comply. Failure to comply with any or all of the provisions of this rule by the Supreme Court shall not affect the validity of any rules adopted by the Supreme Court.
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-003

Topic Index:
Appeal and Error: Standard of Review
Civil Procedure: Statute of Limitations; and Summary Judgment
Statutes: Interpretation
Torts: Medical Malpractice; Statute of Limitations; and Tort Claims Act
Other: Discovery Rule; and Occurrence Rule

PETRA MAESTAS, as personal representative of the ESTATE OF BETTY VARELA, and on behalf of JOE V., a minor,
Plaintiff-Petitioner,

versus

PHILIP G. ZAGER, M.D., DIALYSIS CLINIC, INC., a foreign corporation, DEBORAH BOWEN, FRESENIUS MEDICAL CARE, INC., a foreign corporation, and JOHN DOE #1 and #2,
Defendants-Respondents.

No. 28,997 (filed: January 23, 2007)

ORIGINAL PROCEEDING ON CERTIORARI
JAY G. HARRIS, District Judge

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BENITO SANCHEZ, P.A.
Albuquerque, New Mexico

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Albuquerque, New Mexico

for Amicus Curiae
The New Mexico Trial Lawyers Association

PETRA JIMENEZ MAES, JUSTICE

{1} This appeal arises from a medical malpractice claim brought by Petitioner Petra Maestas, personal representative of the decedent, under the Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2006). The trial court granted a summary judgment motion in favor of Respondent Dr. Philip G. Zager after determining that Petitioner’s claim was barred by the statute of limitations within the TCA, Section 41-4-15(A) (1977). Petitioner appealed the granting of summary judgment to the Court of Appeals, which affirmed, holding that Section 41-4-15 is an occurrence rule that runs from the act of malpractice. We granted certiorari and address two issues: (1) when does the statute of limitations in the TCA, Section 41-4-15(A), begin to run; i.e., whether it constitutes an occurrence rule that runs from the act of malpractice or a discovery rule that begins to run when a plaintiff has discovered the relevant facts to establish a legal cause of action under the TCA; and (2) whether a genuine issue of material fact exists to preclude summary judgment in favor of Respondent. Because we find Section 41-4-15(A) is a discovery-based statute of limitations that accrues when a plaintiff knows or with reasonable diligence should have known of the injury and its cause, we reverse the Court of Appeals and remand to the district court for further proceedings to determine whether Petitioner exercised reasonable diligence in discovering the cause of the decedent’s injury.

BACKGROUND

{2} For the purposes of this appeal, the relevant facts are as follows. See Maestas v. Zager, 2005-NMCA-013, ¶¶ 4-9, 136 N.M. 764, 105 P.3d 317. Petitioner’s sister, the decedent, was a patient at the Dialysis Clinic, Inc. The Dialysis Clinic (the Clinic) is a private facility that serves patients from the University of New Mexico School of Medicine (UNMH). Pursuant to a contract between the Clinic and UNMH, UNMH furnishes physicians to the Clinic. The Clinic physicians in this case, including Respondent, were employees of UNMH, a state agency. It is undisputed that Respondent was a state employee and therefore
covered by the TCA.

{3} On May 17, 1999, the decedent was undergoing dialysis at the Clinic. During her treatment she began to experience serious difficulty breathing and was transported by EMT paramedics to Presbyterian Hospital, where she died shortly after her arrival. Petitioner was appointed personal representative of the decedent, and in October 1999, she hired counsel and obtained the autopsy report and findings from the Office of the Medical Examiner. Those documents attributed the decedent’s death to angioedema (swelling) of the face, throat, and tongue caused by an allergic reaction to the prescription drug Lisinopril. The autopsy report also indicated that the investigation of the Clinic’s dialysis equipment and fluids showed “no abnormalities in the tubing, machines, or compositions of the fluid,” and the decedent’s toxicology report contained nothing of significance. Petitioner also made an initial request for the Clinic’s medical records in November or December 1999; however, because the cost of obtaining the records was $500, Petitioner did not follow up on that request until August 2000. Petitioner received the Clinic records in September 2000.

{4} In August 2000, Plaintiff received the reports of the EMT paramedics who transported the decedent from the Clinic to the hospital. It was these records that first evidenced the possibility of wrongdoing. The EMT record stated that an unidentified employee at the Clinic informed one of the EMT paramedics that the decedent may have experienced a reaction to chlor-ine in her blood due to contamination of the dialysis machine used on the decedent at the Clinic. Based on this information, Petitioner filed the present action against Respondent in March 2002, two years and ten months after the decedent’s death.

{5} Respondent filed a motion for summary judgment based on the assertion that Petitioner’s claim was barred by TCA Section 41-4-15(A), which requires the filing of a claim “within two years after the date of occurrence resulting in loss, injury or death.” (Emphasis added.) The district court granted Respondent’s motion for summary judgment, finding that the TCA statute of limitations commenced to run on May 17, 1999, because the decedent’s injury was manifest when she died and the EMT record was available on that date. See Maestas, 2005-NMCA-013, ¶ 9.

{6} Petitioner appealed the decision of the district court to the Court of Appeals. In their briefing to the Court of Appeals, Pe-
titioner and Respondent agreed that under the settled law of New Mexico, a cause of action brought under Section 41-4-15(A) accrues only after the injury “manifests itself and is ascertainable.” However, the parties differed on whether ascertainability required some indication that the injury may have resulted from some negligence by the government actor involved. Petitioner claimed that the statute does not begin to run until a plaintiff has some information relating the death to the conduct of the defendants, while Respondent argued that, for purposes of Section 41-4-15(A), an injury is ascertainable when it is certain that there is an injury. In its opinion, the Court affirmed the district court’s grant of summary judgment in favor of Respondent, concluding that Section 41-4-15(A) is an “occurrence rule,” Maestas, 2005-NMCA-013, ¶¶ 3, 55, that “fixes the accrual date at the time of the act of malpractice even though the patient may be oblivious of any harm.” Id. ¶ 13 (quoting Cummings v. X-Ray Assocs. of N.M., P.C., 1996-NMSC-035, ¶¶ 47, 121 N.M. 821, 918 P.2d 1321).

{7} In his special concurrence in Maestas, Judge Bustamante agreed with the majority that “the Tort Claims Act statute of limitations expired as a matter of law before Plaintiff filed her claim.” Id. ¶ 57 (Bustamante, J., specially concurring in part and dissenting in part). However, Judge Bustamante characterized the majority’s determination that Section 41-4-15(A) is an occurrence rule accruing from the time of the act of malpractice as “an erroneous and radical construction of the [TCA] statute of limitations.” Id. ¶ 61. Instead, Judge Bustamante described Section 41-4-15(A) as a discovery rule and stated that in medical malpractice cases brought under the TCA, “[t]he inquiry . . . involves whether the plaintiff knew, or with reasonable diligence should have known, of the injury and its cause within the time frame of the applicable statute.” Id. ¶ 59 (citing Roberts v. Sw. Cmty. Health Servs., 114 N.M. 248, 257, 837 P.2d 442, 451 (1992)). He concluded that in cases of obvious injury, it is unnecessary to consider Plaintiff’s knowledge of the cause of injury. Id. ¶ 60. Thus, “[g]iven the obvious injury” in this case, the statute of limitations started running on the date of the decedent’s death and expired before Petitioner filed her claim. Id. ¶ 59. In light of the conflict between the majority’s analysis and Judge Bustamante’s special concurrence, we granted Petitioner’s petition for writ of certiorari in order to clarify when a cause of action brought under TCA Section 41-4-15(A) accrues.

DISCUSSION

Standard of Review

{8} This case requires us to decide when the limitations period for an action for medical malpractice commences under the TCA. Because this case presents an issue of statutory interpretation and requires a determination of whether summary judgment was proper, our review is de novo. See Rutherford v. Chaves County, 2003-NMCA-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Discovery vs. Occurrence

{9} In construing a statute, this Court will not depart from the plain language of the statute “unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions.” Cobb v. State Canvassing Board, 2006-NMSC-034, ¶ 34, 140 N.M. 77, 140 P.3d 498 (quoted authority omitted). “A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses.” State v. Elmquist, 114 N.M. 551, 552, 844 P.2d 131, 132 (Ct. App. 1992).

{10} The language of the statute in issue is ambiguous. Section 41-4-15(A) states: “Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death . . . .” (Emphasis added.) The ambiguity within Section 41-4-15(A) stems from the fact that it encompasses two potentially disparate time frames (the date of the occurrence of the act of malpractice and the date of the resulting loss, injury, or death), without clarifying how to reconcile the two. Another way of framing this ambiguity is whether the statute of limitations under the TCA constitutes an occurrence rule running from the act of malpractice or a discovery rule that accrues when a plaintiff has discovered the relevant facts to establish a legal cause of action.

{11} In its opinion, the Court of Appeals reasoned that the plain language of Section 41-4-15(A) should be interpreted as an occurrence rule, accruing from the date of the act of malpractice, because “the temporal focus of Section 41-4-15(A) seems to be on the date of the occurrence rather than the loss, injury, or death.” Maestas, 2005-NMCA-013, ¶ 20. We find that this analysis is erroneous for two reasons: first,
the Court’s interpretation of Section 41-4-15(A) fails to read the statute as a whole, and second, the Court’s conclusion that Section 41-4-15(A) is an occurrence rule constitutes a drastic departure from established precedent.

{12} When constructing a statute, we read the entire statute as a whole, considering provisions in relation to one another. Cobb, 2006-NMSC-034, ¶ 34. The Court of Appeals’ reading of Section 41-4-15(A), however, gives no effect to the statutory language “occurrence resulting in loss, injury or death.” See Emery v. Univ. of N.M. Med. Ctr., 96 N.M. 144, 148, 628 P.2d 1140, 1144 (Ct. App. 1981) (“Defendant’s contention, that the 90-day notice provision runs from the ‘occurrence’, gives no effect to the statutory language—‘occurrence giving rise to a claim’.”). We cannot say that the temporal focus of Section 41-4-15(A) is merely on the date of occurrence, as there are two potentially different time frames implicated by the language of the statute, both the time of the occurrence and the time of the resulting injury, loss, or death. Contrast this language with that of Section 41-5-13 (1976), the occurrence rule of the Medical Malpractice Act (MMA), NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 1997). The MMA states that “[n]o claim for malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred . . .” Section 41-5-13 (emphasis added); see also Cummings, 1996-NMSC-035, ¶ 52 (“The term ‘occurred’ from the medical malpractice statute does not inquire into whether the act caused an injury, whether the injury is immediate or latent, whether the injury is discovered or not. The focus of this term is on the act without regard to its consequences.”). The MMA’s language plainly and unambiguously focuses on the act of malpractice. This clear singular temporal focus is not present in Section 41-4-15(A).

{13} Further, the Court of Appeals’ conclusion that Section 41-4-15(A) is an occurrence rule constitutes a deviation from our precedent, which has consistently stated that the TCA statute of limitations commences when an “injury manifests itself and is ascertainable, rather than when the wrongful or negligent act occurs.”); see also Bolden v. Village of Corrales, 111 N.M. 721, 721, 809 P.2d 635, 635 (Ct. App. 1990) (holding that under the TCA “the limitation period commences ‘when an injury manifests itself and and is ascertainable rather than when the wrongful or negligent act occurs’” (quoting Long, 105 N.M. at 191, 730 P.2d at 494)); Emery, 96 N.M. at 149, 628 P.2d at 1145 (holding that under the notice of claim provision of the TCA, notice was not required until the “injury manifested itself in a physically objective manner and and was ascertainable”). These prior cases clearly instruct that the TCA statute of limitations is not an occurrence rule which “fixes the accrual date at the time of the act of medical malpractice even though the patient may be oblivious of any harm.”” Cummings, 1996-NMSC-035, ¶ 47. Therefore, our courts have consistently held that the limitations period runs not from the act of medical malpractice, but from the time when the resulting injury manifests itself in a physically objective manner and is ascertainable.

{14} Our analysis next focuses on how to interpret the phrase “manifests itself in a physically objective manner and is ascertainable.” This language was first used by a New Mexico Court in Peralta v. Martinez, 90 N.M. 391, 394, 564 P.2d 194, 197 (Ct. App. 1977). In Peralta, the Court of Appeals “considered a statute of limitations that began to run from the ‘injury’ and held that the limitation period began to run ‘from the time the injury manifests itself in a physically objective manner and is ascertainable.’” Emery, 96 N.M. at 148-149, 628 P.2d at 1144-1445 (quoting Peralta, 90 N.M. at 394, 564 P.2d at 197). In so holding, the Peralta Court stated that the phrase “manifests itself in a physically objective manner and is ascertainable” did not constitute a discovery rule. Peralta, 90 N.M. at 394, 564 P.2d at 197. However, this language clearly does not describe an occurrence rule, which fixes the accrual date at the time of the act of medical malpractice. To the contrary, the Peralta Court stated that “there is no cause of action for malpractice until there has been a resulting injury.” Id. at 393, 564 P.2d at 196.

{15} This Court interpreted the Peralta decision in Roberts, 114 N.M. at 250-55, 837 P.2d at 444-49. In Roberts, we examined the question of when a cause of action for medical malpractice accrues under the personal injury statute of limitations, NMSA 1978, § 37-1-8 (1976), which “bars actions that are not brought within three years of the accrual of the cause of action.” Roberts, 114 N.M. at 252, 837 P.2d at 446. The plaintiff in Roberts had surgery in 1984 and for the next four years experienced medical problems and abdominal pain. Id. at 249, 837 P.2d at 443. In January 1989, the plaintiff learned that her pain was caused by a sponge that had been left in her abdomen during the 1984 surgery, and she consequently had the sponge removed. Id. More than five years after the act of malpractice occurred, the plaintiff filed a cause of action against the defendant, who was not covered by the MMA. Id. In determining whether the plaintiff’s claim was time-barred by the personal injury three-year statute of limitations, the Court found the reasoning of Peralta persuasive and held that when a medical malpractice cause of action is brought under the personal injury statute, an occurrence rule does not control. Id. at 254-55, 837 P.2d at 448-49 (concluding that the “time of the negligent act rule” no longer retains its vitality). The Court in Roberts not only declined to adopt an occurrence rule, but also went further than merely adopting the language of Peralta. The Roberts Court decided that in medical malpractice cases brought under the personal injury statute, a discovery rule controls, id. at 256, 837 P.2d at 450, and “the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.” Id. at 257, 837 P.2d at 451.

{16} In the present case, Petitioner asserts that our decision in Roberts changed the landscape of medical malpractice cases, and that any claim brought outside the MMA should accrue when the plaintiff knows of both the injury and its cause. Petitioner also suggests that Roberts created a dichotomy between individuals who are qualified under the MMA and all other medical malpractice defendants. Petitioner argues that because Respondent is not a qualified healthcare provider under the MMA, the discovery rule set forth in Roberts should control.

{17} Respondent counters that our decision in Roberts did not create a dichotomy between qualified health care providers under the MMA and all other medical malpractice defendants. Respondent asserts that the discovery rule outlined in Roberts should not control the outcome of this case because Petitioner’s claim is covered by the TCA, and Roberts was decided under the personal injury statute of limitations, Section 37-1-8. Respondent urges this Court to follow
the precedent established in Emery, Long, and Bolden and hold that a claim brought under the TCA accrues when the injury is manifest and ascertainable. Respondent argues that under this rule, Petitioner’s claim accrued at the date of death because on that date the injury was both manifest and ascertainable.

{18} While we do not agree with Petitioner’s assertion that Roberts created a dichotomy between qualified healthcare providers covered by the MMA and unqualified providers, we agree that the discovery rule described in Roberts should control the outcome of this case. We find the reasoning set forth in Roberts persuasive and applicable to the instant case. The plaintiff in Roberts began to experience pain immediately after the negligent act. However, she did not discover the cause of her pain for almost four years after the negligent act. Similarly, in this case, decedent’s pain and death occurred immediately after the alleged negligent act. The alleged cause of decedent’s death, however, was not discovered for more than a year. The Roberts Court determined that in medical malpractice cases where a victim is unable to ascertain the cause of injury, the cause of action for medical malpractice does not accrue until “the plaintiff knows or with reasonable diligence should have known of the injury and its cause.” Roberts, 114 N.M. at 257, 837 P.2d at 451. The Court reasoned that a plaintiff should not be punished for “‘blameless ignorance’ by holding a medical malpractice action time-barred before the plaintiff reasonably could know of the harm he has suffered.” Id. at 256, 837 P.2d at 450 (quoted authority omitted).

{19} We see no significant distinction between the facts of Roberts and the facts of the instant case. In Roberts we recognized that the sensation of pain does not necessarily provide the average person with relevant information about an injury. The victim of medical malpractice is in a vulnerable position and should not be punished for his or her lack of medical expertise. “Although the plaintiff in a medical malpractice case may not require any special knowledge or training to know that she suffers from pain, in the absence of such knowledge or training, she may be unable to ascertain the cause of that pain . . . .” Id. (emphasis added). The disparity between doctors and patients places a duty on the law “to protect the patient from injury caused by a negligent act of a physician.” Id. at 257, 837 P.2d at 451. Included within that duty is an obligation to ensure that a person of “ordinary diligence” has an “adequate period of time” to “pursue his claim.” Id. at 256, 837 P.2d at 450 (quoted authority omitted). These principles of fairness which informed our decision in Roberts should dictate the outcome of this case. We hold that medical malpractice cases brought under Section 41-4-15(A) are controlled by a discovery rule and the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.

{20} This decision to adopt a discovery rule is supported by this Court’s decision in Cummings, 1996-NMSC-035, ¶ 47. In Cummings, this Court identified “[t]wo basic standards [that] determine the beginning of the time period in which a patient must file a claim for medical malpractice.” Id. The standards identified by this Court in Cummings were the “discovery rule” and the “occurrence rule.” Cummings indicates that all cases for medical malpractice must be controlled by either a discovery rule or an occurrence rule. When the Cummings Court described these two mutually exclusive rules, it made the language “manifest and ascertainable” employed in Emery, Long, and Bolden obsolete. As we have discussed, the manifest and ascertainable rule is not an occurrence rule, because this rule does not fix “the accrual date at the time of the act of medical malpractice.” Id. However, this language cannot be considered a discovery rule because the Court in Peralta explicitly stated it was “not the ‘discovery’ rule.” Peralta, 90 N.M. at 394, 564 P.2d at 197. Thus, the Peralta rule is a middle ground that was made irrelevant in medical malpractice cases by this Court in Cummings. Because the TCA cannot be interpreted as an occurrence rule for the reasons we discussed, we apply the Roberts discovery rule.

{21} We clarify that the discovery rule we have adopted does not require the plaintiff to discover that the defendant’s actions constitute medical malpractice. Although Petitioner urges this Court to find that her cause of action did not accrue until she had some indication of Respondent’s negligence, we cannot agree. Our holding is consistent with the path taken by the United States Supreme Court in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, the Court held that a claim for medical malpractice accrues when the plaintiff knows both of the existence and cause of his injury, id. at 122, and not when the plaintiff knows that the acts inflicting the injury might constitute medical malpractice. Id. at 123 (“We thus cannot hold that Congress intended that ‘accrual’ of a claim must await awareness by the plaintiff that his injury was negligently inflicted.”); see also Emery, 96 N.M. at 149, 628 P.2d at 1145. A plaintiff’s discovery of relevant facts is distinct from his or her discovery of medical rights. Coslett v. Third St. Grocery, 117 N.M. 727, 735, 876 P.2d 656, 664 (Ct. App. 1994) (“The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.”) (quoting Allen v. State, 826 P.2d 200, 203 (Wash. 1992) (en banc)).

{22} Additionally, a cause of action brought under Section 41-4-15(A) will accrue regardless of whether or not the plaintiff is aware of the full extent of his or her injury. See Bolden, 111 N.M. at 722, 809 P.2d at 636. Once a plaintiff has discovered his or her injury and the cause of that injury, the statute of limitations begins to run. “It is not required that all the damages resulting from the negligent act be known before the statute of limitations begins to run.” Id. (emphasis added). The statute of limitations will not be tolled because the plaintiff has received divergent medical opinions among physicians concerning the cause of his or her injury. Martinez v. Showa Denko, K.K., 1998-NMCA-111, ¶ 24, 125 N.M. 615, 964 P.2d 176 (“[If] ‘the plaintiff knows or should have reasonably known of the general nature and extent of an injury, the running of a statute of limitations is not delayed if there are differing medical opinions regarding whether the plaintiff has incurred a particular medical condition.’”) (citations omitted). A plaintiff’s cause of action accrues when he or she understands the nature of his or her injury; that is, when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.

Application of Discovery Rule

{23} Finally, we must apply the TCA statute of limitations to the facts of the instant case in order to determine whether the trial court’s grant of summary judgment was appropriate. As we have stated, an action for medical malpractice brought under the TCA accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause. In his
dissent, Judge Bustamante articulated this same discovery rule; however, he concluded that Petitioner’s cause of action accrued on the date of death because Petitioner “was necessarily aware upon [decedent’s] sudden death on May 17, 1999, that something had gone tragically wrong–she knew she had suffered an injury.” Maestas, 2005-NMCA-013, ¶ 59. However, this is not a correct interpretation of the discovery rule we have adopted. While there may be cases where death alone triggers the running of the TCA statute of limitations, those cases are limited to instances when the plaintiff knows at the time of death the nature of the injury, including the cause of injury. In contrast, in this case, it did not appear at first that there was any cause of death other than an allergic reaction. The autopsy report that was received in the fall of 1999 supported this conclusion, and there was nothing in the autopsy report to indicate any chlorine contamination. It is possible that a jury would find that these facts could have legitimately caused Petitioner and her attorney to be less than urgent about pursuing further investigation. Whether Petitioner exercised reasonable diligence as required by the discovery rule is a factual question that must be determined by the jury. William v. Stewart, 2005-NMCA-061, ¶ 16, 137 N.M. 420, 112 P.3d 281, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345; see also Kern ex rel. Kern v. St. Joseph Hosp., Inc., 102 N.M. 452, 456-57, 697 P.2d 135, 139-140 (1985) (indicating that when there are genuine issues of material fact regarding when a statute of limitations begins, such questions are “ordinarily for determination by the finder of fact”).

{24} Other factual considerations that may impact a jury’s determination of whether Petitioner exercised reasonable diligence in identifying the cause of death include the reason Petitioner and her lawyer failed to obtain the reports of the EMT prior to August 2000. As the district court pointed out at the hearing on Respondent’s motion for summary judgment, the EMT records were available from the date of death, and Petitioner gave no explanation for the delay of more than one year in obtaining them. It would not be unreasonable for a jury to infer that this protracted delay was a result of Petitioner’s failure to exercise reasonable diligence. Also, while we do not find the fact that Petitioner hired an attorney to be dispositive, this fact may persuade a jury that Petitioner, through her attorney, was not diligent in discovering the cause of her sister’s death.

{25} We leave it to a jury to determine what inferences regarding Petitioner’s reasonable diligence may be drawn from the facts of this case. Because we determine that the issue of reasonable diligence in this case is a factual question for a jury, we hold that summary judgment for Respondent was improperly granted. See Kern ex rel. Kern, 102 N.M. at 456-57, 697 P.2d at 139-140.

CONCLUSION

{26} We reverse the Court of Appeals’ conclusion that the TCA statute of limitations is an occurrence rule and clarify that the discovery rule as applied to the TCA requires that a cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause. Because a factual question remains regarding Petitioner’s exercise of reasonable diligence, we reverse the district court’s grant of summary judgment and remand with instructions for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. Serna, Justice

RICHARD C. BOSSON, Justice

LYNN PICKARD, Judge,

New Mexico Court of Appeals (sitting by designation).
OPINION

PAMELA B. MINZNER, JUSTICE

1. Defendant Raul Salazar appeals his conviction of criminal sexual penetration of a minor under the age of thirteen, contrary to NMSA 1978, § 30-9-11(C)(1) (2001, prior to 2003 amendment). Defendant appeals from a memorandum opinion issued by the Court of Appeals, which affirmed the district court’s finding that Defendant was given adequate time to prepare his defense. State v. Salazar, No. 24,465 (N.M. Ct. App. Aug. 26, 2005). On appeal, Defendant contends that his constitutional rights to present a meaningful defense and to have effective assistance of counsel were violated when his unopposed motion for a continuance was denied. We conclude that the trial court abused its discretion in denying Defendant’s motion. See State v. Torres, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20. We reverse the Court of Appeals and remand for a new trial.

I. BACKGROUND

2. We take the following facts from the Court of Appeals’ Memorandum Opinion. Salazar, No. 24,465, slip. op. at 2. Defendant began living with Irene Hernandez and her three-year-old daughter Gizelle (Victim) in 1993. While living together the couple had three sons. In 1997, Defendant and Ms. Hernandez were living together in a trailer in Las Cruces, New Mexico. The victim, two of the three sons, a friend of Defendant and the friend’s wife also lived in the trailer. While living in Las Cruces, the younger son Jorge became ill and required medical attention. Sometime between August 8, 1997, and October 8, 1997, Ms. Hernandez took Jorge to Albuquerque for medical treatment. The victim testified that while her mother was gone, Defendant raped her.

3. Defendant was indicted by grand jury of one count of criminal sexual penetration of a minor under the age of thirteen on February 20, 2003, and was arraigned on March 3, 2003. Due to personnel problems in the Public Defender Department Defendant had three different attorneys between the time he was arraigned and when his case went to trial. Salazar, No. 24,465, slip. op. at 2. Contract counsel, Stephen Ryan, was substituted as counsel of record on August 5, 2003, at which point he received a file containing no investigative notes or witness interviews.

4. The State petitioned the court for a three-month extension of the six-month rule on August 6, 2003, which was granted, thereby extending the deadline to try its case until December 3, 2003. Defense counsel requested a continuance on August 7, 2003; August 22, 2003; and August 26, 2003, the day of trial. Salazar, No. 24,465, slip. op. at 2. All three motions were denied.

5. In denying Defendant’s final motion for a continuance, the court noted that Defendant had been in jail almost six months and that he had made a speedy trial demand, a request the court considers very seriously. Further, the trial court recognized defense counsel as having considerable skill and noted that the court was convinced Defendant would receive a fair trial.

6. At trial, the State presented no physical evidence to support the allegations. The victim alleged the incident occurred between August and October 1997. She reported the incident to her mother in March 2001. Defendant testified on his own behalf. Defendant claimed he was a strict father but denied the charges. On appeal Defendant argues the strength of the State’s evidence turned on whether the jury believed the testimony of the Victim or Defendant.

7. Other problems arose during trial. The State’s opening statement referenced Victim’s attempt to commit suicide twice; defense counsel had only recently, on the Friday and Monday before trial, become aware of Victim’s mental health issues. Defense counsel moved for a mistrial on the ground that the State’s opening statement was overreaching. The trial court denied the motion on the basis that defense counsel had not objected to the statement. Following complications arose when defense counsel sought a copy of the safe house interview, the State reviewed the case after 2003, but both the State and the court agreed to the trial decided to proceed based on the safe house interview. On the morning of trial, the State notified the court of its intent to call one or both of the Victim’s therapists but failed to produce records or reports of these witnesses’ testimony. The State was allowed to make an offer of proof.

{1} The youngest was born September 7, 1998.
and defense counsel was given fifteen to twenty minutes to interview one therapist before he testified. Defense counsel wanted to use a couple of witnesses listed and subpoenaed by the State but was unable to locate these witnesses on the second day of trial. Therefore, Defendant’s entire defense consisted solely of his testimony. Defendant was convicted and sentenced to eighteen years incarceration.

{8} On appeal, Defendant contends his constitutional rights were violated when his motion for a continuance was denied. Defendant contends the trial court abused its discretion in relying on the court’s policy of no continuances and Defendant’s speedy trial request in denying Defendant’s motion. We agree.

{9} The Court of Appeals affirmed the trial court, holding Defendant was not denied effective assistance of counsel, counsel had an adequate opportunity to prepare a defense, and the motion for a continuance was properly denied. Salazar, No. 24,465, slip. op. at 10, 11. In briefing the issues on appeal to the Court of Appeals, Defendant’s arguments emphasized the Torres factors rather than a claim he was denied effective assistance of counsel. For this reason, we believe the Court of Appeals may have misconstrued Defendant’s claim. Further, in relying on State v. Brazeal, 109 N.M. 752, 790 P.2d 1033 (Ct. App. 1990), we believe the Court of Appeals addressed a different question than Defendant argued. Our case law probably contributed to the difficulty, but the Court of Appeals recently addressed comparable facts in an opinion that we conclude controls this appeal. See State v. Stefani, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCRE-006, 140 N.M. 224, 141 P.3d 1278. Further, we believe that the trial court abused its discretion by relying solely on Defendant’s speedy trial request and the Court’s desire to maintain the trial docket rather than considering the Torres factors. We discuss our reasons at greater length in the discussion that follows.

II. DISCUSSION

{10} The grant or denial of a continuance is within the sound discretion of the trial court, and the burden of establishing abuse of discretion rests with the defendant. State v. Sanchez, 120 N.M. 247, 253, 901 P.2d 178, 184 (1995). “‘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. Rojo, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (quoting State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995)). Defendant must establish not only an abuse of discretion, but also that the abuse was “to the injury of the defendant.” State v. Nieto, 78 N.M. 155, 157, 429 P.2d 353, 355 (1967).

{11} In this appeal, Defendant contends the trial court abused discretion by denying defense counsel’s unopposed motions for a continuance when defense counsel clearly asserted that he was unprepared to proceed to trial. Defendant further contends in argument to this Court that by denying his motion for a continuance he was denied effective assistance of counsel, probably in response to the Court of Appeals’ analysis under Brazeal. Id. at 20. Defendant contends that the trial court granted his motion, his attorney would have had time to secure witnesses for trial, interview all the witnesses listed on the State’s witness list, have the Victim evaluated, and adequately prepare a defense.

{12} Our opinions leave some uncertainty as to the analysis applied in cases raising the issue of trial court denials of motions for continuance. See Torres, 1999-NMSC-010; State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993); Stefani, 2006-NMCA-073; State v. Salazar, No. 24,465 slip. op. at 4; Brazeal, 109 N.M. 752, 790 P.2d 1033. Two approaches have been used to determine if the denial of the defendant’s motion for a continuance should have been granted.

{13} In appeals where the defendant claims that the denial of the motion for a continuance violated his or her right to effective assistance of counsel because counsel did not have an adequate time to prepare for trial, the standard set forth in Brazeal has been used. 109 N.M. 752, 790 P.2d 1033. See also Hernandez, 115 N.M. at 14, 846 P.2d at 320. We use a two-prong analysis to determine whether the denial of the continuance amounts to ineffective assistance of counsel. Id. at 755, 790 P.2d at 1036. The first consideration is whether a per se violation of the defendant’s constitutional rights has occurred. Id. The second consideration is the defendant’s specific claims of ineffective assistance of counsel. Id.

{14} We have applied a different standard in appeals in which the defendant makes two separate claims: abuse of discretion in denying the motion for a continuance and that the denial of the motion ultimately resulted in ineffective assistance of counsel or infringement of another constitutional right. Torres, 1999-NMSC-010. In Torres, this Court held that the defendant’s motion for a continuance should have been granted, because the defendant had properly submitted a subpoena to the sheriff’s department for service and was not notified until the day of trial that the subpoena had not been served. 1999-NMSC-010. In reaching that conclusion, we looked to various factors to evaluate a motion for continuance including: the length of the requested delay, the likelihood that a delay would accomplish the movant’s objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and to the court, legitimacy in motives in requesting the continuance, fault of the movant in causing a need for delay, and the prejudice to the movant in denying that motion. Id. ¶ 10.

{15} With Torres, furthermore, we began to articulate factors, based on federal law and state law, that a New Mexico trial court should consider in ruling on a motion for a continuance. 1999-NMSC-010, ¶ 10. These factors serve important purposes:

In the context of a continuance requested for the purpose of obtaining a witness’s testimony, these factors serve to balance a criminal defendant’s constitutional right to compulsory process, U. S. Const. amends. VI, XIV, with the court’s interest in controlling its docket and the public’s interest in the efficient administration of justice without unnecessary delay.

Id. (footnote omitted). These factors, and they may be not exclusive, provide a framework for evaluating a trial court decision granting or denying a motion for continuance. A significant part of that framework is a focus on the specific facts presented to the trial court in support of or in opposition to the motion. That focus is missing in the record.

{16} In addition to meeting the Torres factors, Defendant must show that the denial of the continuance prejudiced him. “‘No more prejudice need be shown than that the trial court’s order may have made a potential avenue of defense unavailable to the defendant.’” March v. State, 105 N.M. 453, 456, 734 P.2d 231, 234 (1987) (quoting State v. Orona, 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979)). “We do not ask whether the evidence was critical but, instead, whether [the defendant] made a ‘plausible showing of how [the witness’s] testimony would have been both material and favorable to his defense.’” Torres, 1999-NMSC-010.
The court concluded that those were exceptional circumstances, and the State did not oppose this continuance. Further, with respect to inconvenience to the parties, the State did not oppose this continuance. Defendant did not request a specific amount of time for preparation, but presumably adequate time to prepare further witness interviews, all of which the Victim was interviewed, and the State did not oppose this continuance. Defendant was not at fault for causing the delay. Defendant has his third defense attorney because of staffing problems at the Public Defender's office. The court approved the motions for a continuance and the State did not oppose this continuance. The court did not abuse its discretion in denying the motion.

The Court of Appeals concluded that the trial court erred in denying the defendant's request for a continuance. The defendant raised three reasons for the continuance: newness of the case, complexity, and co-defendant's last minute plea agreement with the State. The trial on the morning trial was set to begin. The trial was scheduled to begin on August 20, 2003. Defense counsel made a motion for a continuance on August 19, 2003, and again on the morning of trial.

The State concurred in the motion. At that time, defense counsel informed the court that discovery had been conducted; there were still eleven to twelve witnesses that needed to be interviewed; the defense still needed to obtain an expert; and defense counsel had only been representing the defendant for twenty-eight days at the time of trial. Defense attorney, Stephen Ryan, was appointed to represent the defendant on July 15, 2003. Trial was scheduled to begin on August 20, 2003. Defense counsel made a motion for a continuance on August 19, 2003, and again on the morning of trial.

The trial court denied the motion for a continuance. The State concurred in the motion. The court that discovery had been conducted; there were still eleven to twelve witnesses that needed to be interviewed; the defense still needed to obtain an expert; and defense counsel had only been representing the defendant for twenty-eight days at the time of trial. The defense attorney, Stephen Ryan, was appointed to represent the defendant on July 15, 2003. The trial was scheduled to begin on August 20, 2003. Defense counsel made a motion for a continuance on August 19, 2003, and again on the morning of trial.

The court concluded that those were exceptional circumstances, and the State did not oppose this continuance. Further, with respect to inconvenience to the parties, the State did not oppose this continuance. Defendant did not object to the continuance. The court did not abuse its discretion in denying the defendant's motion for a continuance. The defendant claimed that his new counsel had only twenty-one days to prepare for trial, which the defendant argued was insufficient; however, the record indicates that the new counsel had about three months to prepare. Applying the factors, the Court of Appeals agreed with the district court that the continuance was not necessary. Applying the factors, the Court of Appeals agreed with the district court that the continuance was not necessary. Applying the factors, the Court of Appeals agreed with the district court that the continuance was not necessary.

The Court of Appeals offered several reasons for its conclusion: defense counsel had prepared the reason for the delay, the motion was filed a week before trial, the defendant had already been granted four continuances, the trial had been delayed for more than eight months, and the State had already subpoenaed witnesses and was prepared to proceed. The Court of Appeals concluded that the trial court did not abuse its discretion in denying the motion. Although the Court of Appeals did not describe the defendant's appellate claim as including a claim he had been denied effective assistance of counsel, the court's analysis of a lack of prejudice to him indicates that the court held defense counsel was effective in his representation of the defendant.

In the present appeal, the Court of Appeals did not apply the factors but rather applied Brazeal. The court concluded that Defendant did not meet the requirement for presumptive ineffective assistance of counsel and did not specifically argue any lapses at trial. Defendant was not granted a continuance due process or the right to a fair trial. 109 N.M. 755, 790 P.2d at 1036. Brazeal also made no distinction between federal and state law, and concluded that "except in exceptional circumstances, the court will not ignore the actual conduct of the trial and presume that the defendant has suffered prejudice from ineffective assistance of counsel due to the failure of the trial judge to grant a continuance." 109 N.M. 755, 790 P.2d at 1037. Brazeal concluded that "[s]uch exceptional circumstances" were not present.

Brazeal suggests that absent a presumption of prejudice arising from exceptional circumstances, a trial court's discretion to grant or deny a continuance should be upheld. See id. That is, absent a basis for presuming prejudice, a defendant must establish he or she was denied effective assistance of counsel in order to show on appeal that a motion for a continuance should have been granted. Yet, there are exceptions to the ineffective assistance of counsel standard developed in Strickland v. Washington, 466 U.S. 668 (1984), exceptions in which the defendant may rely on a presumption of prejudice. See United States v. Cronic, 466 U.S. 648, 658-62 (1984). Indeed, in Bell v. Cone, 535 U.S. 685

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(2002), the United States Supreme Court clarified the relationship between Cronic and Strickland. “In Cronic, we identified three situations implicating the right to counsel that involved circumstances ‘so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.’” 466 U.S. at 695 (quoting Cronic, 464 U.S. at 658-59). In this appeal, however, Defendant need not rely on a presumption of prejudice nor primarily on an ineffective assistance of counsel claim.

{26} We note as well that the specific rule generally limiting the time to commence trial, but providing for extensions of time by the district court and this Court, see Rule 5-604 NMRA 2000, has been characterized as a case-management tool in an opinion of this Court, decided after Brazeal. See State v. Manzanares, 1996-NMSC-028, ¶ 6, 121 N.M. 798, 918 P.2d 714 (1996). We have said that “only incidentally may its implementation turn on factors determinative of constitutional rights.” Id. While the holding in Manzanares is that extensions granted under Rule 5-604 do not preclude the trial court from considering a defendant’s subsequent speedy trial motion, id. ¶ 7, that holding should make it easier for a trial court to consider the merits of a motion for a continuance independently of Rule 5-604, at least when, as on these facts, the period of time allowed by the rule has been extended.

{27} In summary, we conclude our case law requires the trial court to consider the Torres factors initially in evaluating a motion for a continuance. If those factors applied logically and in a balanced way support the motion, the motion should be granted. Further, if the motion for a continuance depends on a claim that, absent a continuance, the defendant will have been or will be denied effective assistance of counsel, Brazeal offers guidance on how that claim should be analyzed. Nevertheless, Cronic should be understood as recognizing exceptions to Strickland, particularly “exceptional circumstances,” in which prejudice may be presumed. An inquiry into exceptions should be a separate inquiry, when separately argued, into whether there is prejudice to a defendant that compels a decision granting his or her motion for a continuance. We are not confronted with that situation in this appeal.

{28} A motion for a continuance serves to raise the question of whether both sides are prepared to proceed to trial and if not, why not. In resolving that question, the standard developed in evaluating ineffective assistance of counsel claims may play a role, but in the future that standard should play a subsequent, even subsidiary role to the Torres factors and analysis.

III. CONCLUSION

{29} For the foregoing reasons, Defendant’s motion should have been analyzed by the trial court using the Torres factors rather than solely relying on maintaining the trial docket and Defendant’s speedy trial demand and by the Court of Appeals under Torres rather than Brazeal. See Stefani, 2006-NMCA-073. After applying the Torres factors, we conclude that the motion should have been granted. We further conclude that denial of Defendant’s motion prejudiced Defendant by denying him the right to develop a defense. We reverse and remand for a new trial.

{30} IT IS SO ORDERED.

PAMELA B. MINZNER,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice

OPINION

IRA ROBINSON, Judge

{1} In this case, we must determine whether a police officer had a reasonable suspicion to conduct a lawful stop of Defendant’s vehicle, and whether the officer had sufficient, individualized suspicion that Defendant was violating a law, giving him reason to expand his investigatory scope beyond the initial inquiry. We hold that the stop of Defendant’s vehicle was lawful, but there was not sufficient, individualized suspicion to expand the scope of the initial inquiry upon Defendant and his vehicle. There were no separate, articulable facts that justified extending the stop of Defendant and his vehicle once the forgery suspect was detained.

I. BACKGROUND

{2} On January 19, 2004, Ruidoso Downs Police Officer James Minter responded to a call from the Billy the Kid Casino (casino). “Larry Sinclair” (a/k/a Sinclaire) endorsed and cashed a check payable to “Larry Sinclaire” at the casino, on a date previous to January 19, 2004, which had been returned unpaid and marked “account closed.” The

Certiorari Granted, No. 30,180, January 30, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-021

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
WILLIAM FUNDERBURG,
Defendant-Appellant.
No. 25,591 (filed: December 11, 2006)

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
KAREN L. PARSONS, District Judge

Patricia A. Madrid
Attorney General
Arthur W. Pepin
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

NANCY L. SIMMONS
LAW OFFICES OF
NANCY L. SIMMONS, P.C.
Albuquerque, New Mexico
for Appellant

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office took possession of the check and left the casino. Several hours later, on that same day while on patrol, the officer received a call from dispatch over his police radio. A Fast Funds employee at the casino had called to notify the police that Sinclair had returned to the casino and was now leaving the casino in a “dark[-]colored sedan.” Since he was in the vicinity, the officer immediately drove to the casino and, upon his arrival, saw a dark-colored sedan exiting the casino. The sedan was the only vehicle leaving the casino at that time. The officer then turned his car around and initiated a traffic stop under the suspicion that Sinclair may be in the dark-colored vehicle. Inside the vehicle were two males and a female. The officer made contact with the driver, William Funderburg (Defendant), asking for his driver’s license, registration, and proof of insurance. Defendant’s papers were in order.

{3} The officer then asked the male passenger, Sinclair, for his identification and found he was the suspect in the check forgery. The officer asked Sinclair to get out of the car for questioning. During questioning, Sinclair appeared nervous and repeatedly placed his hands in his right front pocket. The officer asked him if there was anything that he needed to know about and Sinclair advised him that he had a marijuana pipe. After retrieving the pipe, the officer observed a small amount of a green, leafy substance in the pipe, which the officer recognized as marijuana, and Sinclair was arrested. The officer then went to Defendant and asked if there was anything in the car that the officer needed to know about. When Defendant said there was not, the officer asked for his consent to conduct a search of the vehicle. Defendant stated that “he did not care” if the officer searched the car. The officer asked Defendant and the female passenger to step out of the car. During the search of Defendant, the officer found a pipe with a white, powdery residue that, based on his training and experience, he suspected was a methamphetamine pipe and methamphetamine residue. Defendant admitted that it was his pipe and he was arrested. The white substance found during the officer’s search tested positive for methamphetamine.

{4} Defendant was charged with one count of possession of methamphetamine, NMSA 1978, § 30-31-23(D) (2005), a fourth-degree felony, and one count of use or possession of drug paraphernalia, NMSA 1978, § 30-31-25.1 (2001), a misdemeanor. Defendant filed a motion to suppress the evidence, claiming the officer lacked reasonable suspicion for the stop and impermissibly expanded the scope of any lawful detention when asking for consent to search Defendant’s vehicle. The district court denied the motion to suppress the evidence after an evidentiary hearing. Thereafter, Defendant entered a plea of no contest on the paraphernalia charge and the State dismissed the methamphetamine charge. At sentencing, Defendant was given a deferred sentence and placed on supervised probation for a period of three hundred and sixty-four days. He reserved the right to appeal the district court’s denial of the suppression.

II. DISCUSSION

A. Standard of Review

{5} “We review the denial of a motion to suppress as involving a mixed question of law and fact, reviewing the facts under the substantial evidence standard and then conducting a de novo review of the district court’s application of law to those facts.” State v. Afsprung, 2004-NMCA-038, ¶ 6, 135 N.M. 306, 87 P.3d 1088.

B. There was Reasonable Suspicion for the Traffic Stop

{6} Defendant contends, pursuant to Franklin and Boyer, that the officer did not have reasonable suspicion to stop and detain his vehicle. See State v. Franklin, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967) (applying requirement to advance points by the defendant despite attorney’s lack of confidence in their merit); see also State v. Boyer, 103 N.M. 655, 658-59, 712 P.2d 1, 4-5 (same). Specifically, the description of the vehicle as “a dark[-]colored sedan” was not sufficiently specific to create a reasonable suspicion to support a stop of his vehicle.

{7} “A brief detention for investigatory purposes is a seizure entitled to Fourth Amendment protections.” State v. Contreras, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111. All seizures under the Fourth Amendment must be reasonable. See id. “A police officer may, in appropriate circumstances approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.” State ex rel. Taxation & Revenue Dep’t v. Van Ruiten, 107 N.M. 536, 538, 760 P.2d 1302, 1304 (Ct. App. 1988). “The officer, looking at the totality of the circumstances, must be able to form a reasonable suspicion that the individual in question is engaged in or is about to be engaged in criminal activity.” Contreras, 2003-NMCA-129, ¶ 5.

C. There was no Individualized Suspicion Allowing the Officer to Expand the Scope of the Initial Inquiry

{8} Defendant contends that the officer did not have sufficient, reasonable suspicion to expand the scope of his inquiry beyond the initial stop of the vehicle. Defendant submits that the officer’s detention and further investigation of Defendant, once Sinclair was identified as the lawbreaker, was not justified. We agree.

{10} We rely on State v. Patterson, consolidated with State v. Swanson, 2006-NMCA-037, 139 N.M. 322, 131 P.3d 1286. In both cases, police officers approached occupants of vehicles stopped in business parking lots during the late evening hours.
\textit{Id.} ¶ 1. Police found drug paraphernalia in a pat-down search of an occupant in both instances. \textit{Id.} In \textit{Patterson}, the officer also observed an open container of beer on the rear floorboard near where the occupant had been sitting. \textit{Id.} ¶ 3. In both \textit{Patterson} and \textit{Swanson}, the officers asked both the defendant passengers for their identification, after learning that other occupants in the vehicles possessed drug paraphernalia. \textit{Id.} ¶¶ 4, 10. The district courts in both cases denied the defendants’ motions to suppress evidence obtained during the encounters. \textit{Id.} ¶ 1.

\{12\} In \textit{Patterson}, the officer testified that he did not observe the defendant passenger with an open container of alcohol, or observe any open container in the area near him. \textit{Id.} ¶ 28. Thus, the officer did not have an individualized suspicion that the defendant, as a passenger, was violating the open container law. \textit{Id.} Likewise, in \textit{Swanson}, the officer articulated no facts beyond the defendant passenger’s mere presence that could justify individualized suspicion of possession of contraband by the defendant. \textit{Id.} ¶ 29. The officer did not have reasonable suspicion that the defendant was engaged in criminal activity sufficient to detain the defendant for investigation. \textit{Id.} The officer only stated that the defendant and the other occupants of the vehicle exhibited nervous behavior and did not articulate any specific concern with regard to the defendant. \textit{Id.} Thus, this Court reasoned that no individualized suspicion justified the detention of \textit{Patterson} or \textit{Swanson} and, under the Fourth Amendment, their motions to suppress were improperly denied. \textit{Id.} ¶ 1.

\{13\} In the present case, as stated earlier, Defendant’s encounter with the officer resulted from an investigatory detention that was based on “a reasonable suspicion that the law ha[d] been . . . violated.” \textit{State v. Taylor}, 1999-NMCA-022, ¶ 7, 126 N.M. 569, 973 P.2d 246 (internal quotation marks and citation omitted). Defendant was not himself a suspect. The fundamental question here is whether the officer had individualized suspicion that Defendant was violating a law, giving him reason to expand his investigatory scope beyond the initial inquiry, i.e., the stop of Defendant’s vehicle occasioned by the tip regarding Sinclair. “This Court has consistently held that a finding of individualized suspicion requires the articulation of the suspicion in a manner that is particularized with regard to the individual who is stopped.” \textit{Patterson}, 2006-NMCA-037, ¶ 24.

\{14\} The police can stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if they lack probable cause under the Fourth Amendment. \textit{See State v. Jones}, 114 N.M. 147, 149-50, 835 P.2d 863, 865-66 (Ct. App. 1992). Reasonable suspicion entails some minimal level of objective justification for making a stop; that is, something more than an inchoate and unpurparticularized suspicion, but less than the level of suspicion required for probable cause. \textit{Id.}

\{15\} The continued detention of a driver, or detention of a passenger, for other investigative purposes, including investigatory questioning, requires reasonable suspicion proven through specific articulable facts that the driver or passenger has been, or is, engaged in a criminal activity other than the initial traffic violation. \textit{See Affsprung}, 2004-NMCA-038, ¶ 11. A driver or passenger may also be detained under certain circumstances out of an officer’s concern for his safety, specifically whether the detainee is carrying a weapon. \textit{Id.} However, in \textit{Patterson}, this Court referenced \textit{Affsprung}, stating that “the defendant’s mere presence as a passenger in a vehicle stopped for a traffic violation does not provide individualized suspicion for the officer to ask for the passenger’s identification.” \textit{Patterson}, 2006-NMCA-037, ¶ 24.

\{16\} The State nonetheless relies on \textit{State v. Williamson}, 2000-NMCA-068, 129 N.M. 387, 9 P.3d 70, which holds that a law enforcement officer investigating a traffic violation must have a reasonable and articulable suspicion that the driver is impaired in order for the officer to detain the driver to investigate the separate matter of impairment from alcohol. \textit{Id.} ¶ 8. The officer’s investigation is limited to a reasonable inquiry that is designed to satisfy the officer’s reasonable suspicions. The State’s reliance on \textit{Williamson} is misplaced. In \textit{Williamson}, the driver was intoxicated and showed signs of impairment. \textit{Id.} ¶ 5. The passenger had an outstanding municipal court warrant for her arrest. The officer placed the passenger under arrest and searched her fanny pack, finding an illegal substance in the passenger’s possession.

\{17\} This Court, in \textit{Williamson}, held that the law enforcement officer did not exceed the scope of permissible investigation during the traffic stop because after conducting field sobriety tests and deciding that the results did not justify arrest, he asked the defendant driver about drugs and asked whether the defendant would consent to a search of his vehicle. 2000-NMCA-068, ¶ 4.

\{18\} In the case at bar, the discovery of a forgery suspect in Defendant’s vehicle did not justify expansion of the initial inquiry to include questioning Defendant. There was nothing to support the detention of Defendant, or the request to search his vehicle, other than Sinclair’s possession of marijuana. There was nothing to cause suspicion that Defendant had committed any wrongdoing. The officer conceded this point during his testimony. After he discovered a marijuana pipe on Sinclair, he switched his attention to Defendant, solely because Sinclair was found in possession, not because the officer had individualized suspicion of Defendant. The officer stated: “Seeing as how that person [the passenger, Sinclair] had drugs and drug paraphernalia on him, I went to [Defendant] to ask if there was anything in the vehicle I needed to know about.” At the time the officer switched his attention to Defendant, Sinclair was the only occupant suspected of a crime and was the only nervous occupant. Defendant had already provided his identification, registration, and insurance information to the officer upon the initial stop. Defendant had not committed any violation. Defendant’s information was current and valid. The officer had specific information of criminal activity by Sinclair, but not by Defendant. Therefore, as in \textit{Patterson}, the officer did not have any further reason or individualized suspicion to detain or search Defendant. In contrast, in \textit{Williamson}, the officer “had a separate and particular suspicion about [d]efendant.” 2000-NMCA-068, ¶ 14.

\{19\} In \textit{State v. Van Dang}, 2005-NMSC-033, 138 N.M. 408, 120 P.3d 830, the facts are distinguishable from the case at hand. In \textit{Van Dang}, our Supreme Court held that the defendant had no standing to challenge the constitutionality of the search of the vehicle because it was a rental car and he was not on the contract as the renter or authorized driver. \textit{Id.} ¶ 5. However, while the defendant did have standing to challenge the constitutionality of his own detention, the twenty-five minute detention was lawful because the officer had the right to detain the defendant, pending his reasonable investigation of the circum-

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stances surrounding what appeared to be an unauthorized use of a rental vehicle. *Id.* ¶ 1. The officer’s questioning about drugs was based on specific, articulable facts, giving rise to a reasonable suspicion that the defendant may have been transporting drugs. *Id.* Consequently, the duration and scope of the defendant’s detention was reasonable under the circumstances. *Id.*

{20} In *Van Dang*, the officer was able to articulate specific facts based upon his experience as a law enforcement officer, addressing why the defendant’s apparent unauthorized use of a rental car led to a reasonable suspicion of drug trafficking. *Id.* ¶ 16. Specifically, in addition to the defendant’s nervousness, the defendant was from out-of-state, he and his passenger had inconsistent stories about travel plans, and the defendant had an inconsistent story about his authority to use the rental vehicle. *Id.* “Although the rental contract is not part of the record, it is undisputed that the rental contract did not list Defendant as the renter or as an authorized driver.” *Id.* ¶ 1. In *Van Dang*, the police officer had eleven years of experience and, during eight of those years, the officer participated in the drug interdiction program, which involved exercises on the freeways in various counties. *Id.* ¶ 16. He was also in the drug task force for that particular region for three years. *Id.* The officer explained his prior experience at trial:

He estimated making an average of five drug trafficking arrests per year during that time, with up to eighty-five percent of those arrests involving rental cars. He testified that, in his experience, it was common to find rental cars being used to transport drugs, frequently where the actual renter of the vehicle was not present.

*Id.* The Supreme Court said that because of the “totality of the circumstances and the officer’s training and experience, [it] conclude[d] that the officer’s suspicion about drugs was based on specific, articulable facts and the reasonable inferences that could be drawn from those facts.” *Id.*

{21} In the present case, Defendant was only stopped because he had a possible forgery suspect riding in his automobile. He had not committed any driving infractions and was not a suspect in the forgery. Defendant provided current and correct paperwork (i.e., license, registration, and insurance) upon the officer’s request. The officer acknowledged, during his testimony, that the only reason that he believed that there were drugs and/or paraphernalia inside Defendant’s car was because he found them on Sinclair. The officer in *Van Dang* clearly had substantially more facts to support expanding the scope of the initial stop than the officer had to justify shifting his attention from Sinclair to Defendant. Other than the fact that Defendant was transporting Sinclair, there was nothing indicating Defendant was involved in any illegal activity. For these reasons, *Van Dang* is distinguishable.

III. CONCLUSION

{22} We conclude that, under the totality of the circumstances, the officer had reasonable suspicion to conduct a lawful stop of the vehicle due to the suspected criminal activity of Sinclair. However, since the officer did not have sufficient, individualized suspicion to conduct a search of Defendant, he could not expand the scope of the inquiry. Here, any reason to detain Defendant terminated at the latest once the officer checked Defendant’s paperwork and identified Sinclair as the suspect. We reverse the district court’s decision denying Defendant’s motion to suppress.

{23} IT IS SO ORDERED.

IRA ROBINSON, Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

JONATHAN B. SUTIN, Judge (concurring in part and dissenting in part)

SUTIN, Judge (concurring in part and dissenting in part)

{24} I agree that the officer had reasonable suspicion to stop and detain the vehicle Defendant was driving. I respectfully disagree with the majority that the officer unlawfully expanded his inquiry.

{25} After stopping Defendant’s vehicle because of information that a forgery suspect was in the vehicle, the officer’s first inquiry was directed to Defendant, who was driving the vehicle. The inquiry related to Defendant’s license, registration, and insurance. The officer’s next inquiry was directed to Sinclair, who was a passenger. That inquiry related to Sinclair’s identification as the forgery suspect. The officer next asked Sinclair to exit the vehicle for further questioning. Outside the vehicle, after he developed concerns about Sinclair repeatedly putting his hand in his front right pocket, the officer asked whether Sinclair had anything in there he needed to know about. Sinclair told the officer that he had a marijuana pipe, and upon retrieval of the pipe, the officer observed marijuana in it, and Sinclair was arrested.

{26} After arresting Sinclair, the officer again turned his attention to Defendant. The officer inquired of Defendant as to whether there was anything in the vehicle that the officer needed to know about. It is this inquiry that is under the constitutional microscope in this case, giving rise to the issue whether the detention that occurred by the inquiry was unreasonable under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant contends that the officer did not have reasonable suspicion “to expand the scope of his inquiry beyond his detention of [Sinclair]” by “[i]nclud[ing] questioning the driver about drug possession.”

{27} It is reasonable to infer that the officer expanded his investigation from Sinclair’s possession of drugs and drug paraphernalia to other possible drugs within the vehicle of which Defendant may have had knowledge. The officer testified: “Seeing as how [Sinclair] had drugs and drug paraphernalia on him, I went to the driver and asked if there was anything in the vehicle I needed to know about.” This expanded investigation could reasonably have stemmed from two suspicions, both of which were reasonable: (1) other drugs or drug paraphernalia may be present in the vehicle, including on Defendant himself; and (2) if there were other drugs or drug paraphernalia in the vehicle, Defendant as driver or owner might be in unlawful possession of contraband.

{28} The question is: Did the totality of the circumstances following the initial lawful stop, the lawful inquiry and behavior of Sinclair, and Sinclair’s ensuing arrest, provide a reasonable suspicion to inquire of Defendant whether there was anything in the vehicle about which the officer should know? *See State v. Urioste*, 2002-NMSC-023, ¶ 10, 132 N.M. 592, 52 P.3d 964 (“In determining whether reasonable suspicion exists in a particular case, ‘the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.’” (citation omitted)); *State v. Williamson*, 2000-NMCA-068, ¶ 6, 129 N.M. 387, 9 P.3d 70 (“[W]e examine, as a matter of law, the totality of the circumstances to determine whether the officers illegally detained the defendant and whether [the officer] impermissibly expanded his scope of inquiry.”). I see no constitutional impediment to the inquiry.

{29} We are bound to weigh protection of an individual’s privacy against the interests of the State, and to consider the level of
intrusiveness of an officer’s inquiry. See Brown v. Texas, 443 U.S. 47, 50-51 (1979); Terry v. Ohio, 392 U.S. 1, 21 (1968); Williamson, 2000-NMCA-068, ¶ 6. Further, “we view the facts in the manner most favorable to the State, indulging in all reasonable inferences supporting the order and disregarding inferences or evidence to the contrary.” Williamson, 2000-NMCA-068, ¶ 6.

{30} Criminal activity was afoot in Defendant’s vehicle based on Sinclair’s possession of drugs and drug paraphernalia while he was in the vehicle. See id. ¶ 8 (“The officer may expand this investigation if the officer has reasonable suspicion that other criminal activity has been or may be afoot.” (internal quotation marks and citation omitted)). The one-question inquiry was minimally intrusive. Investigation of the suspicion proceeded diligently. See id. (stating that “the officer’s investigation of any reasonable suspicion must proceed diligently”). While the inquiry in question may not have been justified based directly on the reason Defendant’s vehicle was stopped, the inquiry was reasonable based on the suspected felon’s possession of drugs in the vehicle. See id. ¶¶ 10-11 (holding that the passenger’s possession of drugs “was sufficient to reasonably arouse [the officer’s] suspicion that [the driver] also had drugs”). Looking at the totality of the circumstances to justify the minimal detention for further investigative inquiry, the circumstances are not comparable to the hypothetical advanced by Defendant of a soccer mom chauffeur surprised by a child passenger’s possession of a hidden marijuana pipe. Affirming the district court in this case will not open the door to unlimited questioning of a driver based on a passenger’s criminal activity. The discovery of drugs on Defendant was not tainted by the officer’s inquiry.

{31} I see Williamson as closer than the two cases in State v. Patterson, 2006-NMCA-037, 139 N.M. 322, 131 P.3d 1286. Different than in Patterson, in Williamson the defendant was the driver. While a driver is not automatically charged with knowledge of a passenger’s criminal activity, the circumstances in the present case were sufficient to permit investigation of the officer’s articulated suspicion. Cf. State v. Van Dang, 2005-NMSC-033, ¶¶ 5, 13-16, 138 N.M. 408, 120 P.3d 830 (holding twenty-five minute detention of driver to investigate a suspected unauthorized use of a rental vehicle, during which the officer developed a reasonable suspicion of drug activity based on the totality of the circumstances and the officer’s training and experience, to be lawful). {32} I would affirm the district court’s denial of Defendant’s motion to suppress.

JONATHAN B. SUTIN, Judge

Certiorari Denied, No. 30,197, February 8, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-022

STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
RICHELLE DAVIS,
Defendant-Appellee.
No. 26,091 (filed: January 10, 2007)

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
GRANT L. FOUTZ, District Judge

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JOHN BIGELOW
Chief Public Defender
WILL O’CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellee

OPINION
LYNN PICKARD, Judge

{1} The State appeals the district court order dismissing the reinstatement of charges against Defendant for her failure to comply with the preprosecution diversion (PPD) program. Although the PPD Act provides that participation in a PPD program may not exceed two years, the Act does not state specifically a time limit for the State to refile charges or to otherwise proceed with the prosecution. See NMSA 1978, § 31-16A-7(A) (1984). In this case, we must determine, in the absence of statutory command, the timeliness of the State’s reinstatement of charges, filed just after the expiration of Defendant’s unsuccessful participation in the two-year diversion period. We determine that the Legislature did not intend to limit the State’s ability to refile charges against Defendant as the district court did in this case. Therefore, we reverse the district court’s dismissal of the criminal charge against Defendant.

Factual and Procedural Background

{2} On January 22, 2003, the State charged Defendant by criminal information with the crime of embezzlement of property having a total value of $5,000, a third degree felony punishable by three years of imprisonment and a fine. See NMSA 1978, § 30-16-8(E) (2006); see also NMSA 1978, § 31-18-15(A)(8) (2005). Defendant waived arraignment and pleaded not guilty. Thereafter, on April 22, 2003, Defendant and the State entered into a PPD agreement, under which Defendant waived her rights to a timely trial, pleaded guilty to the charge of embezzlement, and agreed to abide by the agreement’s many conditions and requirements in exchange for the State’s suspension of the criminal proceedings against her. See NMSA 1978, § 31-16A-6 (1981). Accordingly, Defendant pleaded guilty to embezzlement, and the State filed a nolle prosequi, explaining that due to Defendant’s acceptance into the PPD program, it would not prosecute Defendant on that charge.

{3} Conditions for Defendant’s compliance with the PPD agreement required Defen-
tant, among other things, to refrain from violating the law and consuming alcoholic beverages or other controlled substances, to complete 100 hours of community service, to make restitution payments in the amount of $3,000, to obtain a GED certificate, and to maintain gainful employment. Pursuant to the agreement and the PPD statute, Defendant was required to make restitution payments within a year and achieve the rest of the requirements, at most, within two years of the commencement of her participation in the PPD program. See § 31-16A-7(A) (stating that a defendant may be diverted for “no less than six months and no longer than two years”). On May 17, 2005, two years and less than a month after Defendant began her participation in the PPD program, the State moved to terminate the program and to reinstate the charge of embezzlement, alleging that Defendant failed to meet the requirements of the agreement. The district court granted the State’s motion to reinstate the criminal information charging Defendant with embezzlement. Defendant entered a plea of not guilty. Thereafter, Defendant filed a motion to dismiss the charge for untimeliness, arguing that Defendant completed the program and the State failed to file notice of termination within the two-year statutory period. Without entering any legal conclusions, the district court granted Defendant’s motion and dismissed the charges against her with prejudice. The State filed the present appeal.

DISCUSSION

{4} On appeal, the State argues that the district court erred by ruling that the diversion period contained in the PPD Act controls the time in which the State is required to prosecute a defendant who has not complied with the conditions of the PPD agreement. The State contends that upon an unsuccessful completion of the PPD program, the State may refile charges or otherwise proceed with the prosecution, subject to the time limitations in the Rules of Criminal Procedure, namely the six-month rule contained in Rule 5-604(B) NMRA. The State further argues that because the filing of charges less than a month after the expiration of the diversion period was not done for purposes of delay or to circumvent the six-month rule, which was far from expiration, the district court improperly dismissed the charges for untimeliness.

{5} In response Defendant argues that, pursuant to the PPD Act, when the two-year diversion period ended without termination of the PPD agreement, the State’s authority over Defendant ceased. In support of her argument, Defendant refers to the PPD Act and draws an analogy to the case law holding that the district court’s authority over a defendant ends upon the expiration of the sentence suspension or deferment period. Defendant argues that, like the expiration of a suspension, deferment, or probation period without violation, a defendant who has participated in the diversion program without a termination of the PPD agreement has successfully completed the program and may not thereafter be prosecuted on the diverted charges. We are not persuaded by Defendant’s arguments.

{6} In determining the timeliness of the State’s reinstatement of charges against Defendant, we must examine the enabling statute, NMSA 1978, §§ 31-16A-1 to -8 (1981, as amended through 1984), authorizing and governing PPD agreements. Statutory construction involves legal questions, which we review de novo. See State v. Smith, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022.

We begin the search for legislative intent by looking first to the words chosen by the Legislature and the plain meaning of the Legislature’s language. . . . Under the plain meaning rule statutes are to be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason.

State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (internal quotation marks and citation omitted). While interpreting our statutes, we are mindful of “the high duty and responsibility of the judicial branch of government to facilitate and draw an analogy to the case law holding that the district court’s authority over a defendant ends upon the expiration of the sentence suspension or deferment period. Defendant argues that, like the expiration of a suspension, deferment, or probation period without violation, a defendant who has participated in the diversion program without a termination of the PPD agreement has successfully completed the program and may not thereafter be prosecuted on the diverted charges. We are not persuaded by Defendant’s arguments.

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{7} Consistent with our rules of statutory construction, we begin our analysis by examining the language of the governing act. The only provisions of the PPD Act relating to the timing of a defendant’s participation in, and the State’s termination of, a PPD program state the following:

A. A defendant may be diverted to a preprosecution diversion program for no less than six months and no longer than two years. A district attorney may extend the diversion period for a defendant as a disciplinary measure or to allow adequate time for restitution, provided that the extension coupled with the original period does not exceed two years. . . .

B. If a defendant does not comply with the terms, conditions and requirements of a preprosecution diversion program, his participation in the program shall be terminated, and the district attorney may proceed with the suspended criminal prosecution of the defendant.

Section 31-16A-7. Contrary to Defendant’s contention, in no section of the PPD Act does the Legislature’s plain language require the State to refile the diverted charges or otherwise proceed with the suspended prosecution within the diversion period. Also directly bearing on the timing of the State’s ability to proceed with its prosecution, the PPD Act is silent as to the effect of the expiration of the diversion period on the State’s or the court’s authority over a defendant.

{8} In contrast, the sentencing statutes specifically address the effect of the expiration of the deferment and suspension periods and the time in which the district court shall dismiss the deferred criminal charges or enter a certificate of successful completion of the sentence:

Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges. NMSA 1978, § 31-20-9 (1977).

Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts . . . NMSA 1978, § 31-20-8 (1977).

{9} Our case law construing this language in the sentencing statutes holds that the district court’s authority to impose a deferred or suspended sentence or to revoke
probation is terminated by statute upon the expiration of the deferment, suspension, or probation term. See State v. Travarez, 99 N.M. 309, 311, 667 P.2d 636, 638 (Ct. App. 1983) (holding that the district court lacked jurisdiction to proceed in the case beyond the deferment period after the Legislature repealed the statute permitting execution of a sentence at any time it is found that the defendant violated the sentence deferment terms and enacted Section 31-20-9, “which terminates a defendant’s criminal liability when his term of deferment expires”); see also State v. Lara, 2000-NMCA-073, ¶¶ 6-7, 10, 12-13, 129 N.M. 391, 9 P.3d 74 (holding that the district court lacked jurisdiction to enter the order of unsatisfactory discharge from probation after the expiration of the probation term and that the defendant was entitled therefore to rely on Section 31-20-8 and expect a certificate of satisfactory completion of probation). This line of cases relies entirely upon the language of the sentencing statutes and “the power of the legislature alone to define the court’s jurisdiction over the sentencing of offenders.” Lara, 2000-NMCA-073, ¶ 10 (quoting Travarez, 99 N.M. at 311, 657 P.2d at 638); see also State v. Gaddy, 110 N.M. 120, 122-23, 792 P.2d 1163, 1165-66 (Cl. App. 1990) (holding that a district court may not enhance a defendant’s sentence for habitual offenses after the defendant has served the underlying sentence even where the criminal information was filed prior to the sentence term and drawing an analogy to Travarez on the basis that “it reflects this court’s perception of a legislative intent to deprive trial courts of jurisdiction to alter sentences once those sentences have been satisfied”). Although we have recognized the penal character of PPD agreements, a participating defendant, obviously, has not been sentenced for any offense. See State v. Jimenez, 111 N.M. 782, 786-87, 810 P.2d 801, 805-06 (1991) (recognizing that PPD agreements are drafted to meet a state’s penal interests). Therefore, the jurisdictional concerns about a court’s power to impose an illegal sentence do not apply to a court’s ability to review a participating defendant’s performance in the PPD program after the diversion period has lapsed. See State v. McDonald, 2003-NMCA-123, ¶ 20, 134 N.M. 486, 79 P.3d 830 (“A district court does not have jurisdiction to impose an illegal sentence because its power to sentence is derived exclusively from statute.”) (internal quotation marks and citation omitted), aff’d in part, rev’d in part on other grounds, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667.

{10} To the extent that Defendant’s argument draws on due process principles to argue that she was entitled to rely upon the expiration of the diversion period for finality in the process, we are not persuaded. Our case law establishing that defendants who have completed their sentences have a reasonable expectation in the finality of their sentences, which thereafter cannot be altered under principles of due process and double jeopardy, applies to defendants who have been sentenced and have satisfied their criminal liability, according to the language of the sentencing statute. See, e.g., March v. State, 109 N.M. 110, 111, 782 P.2d 82, 83 (1989) (analyzing the district court’s jurisdiction to enhance the defendant’s sentence after he completed the sentence under principles of due process and double jeopardy, and holding that “the defendant’s objectively reasonable expectation of finality was violated by the State’s filing the information as to enhanced sentencing after the defendant’s earning of meritorious deductions brought his service of sentence to an end”); see also Gaddy, 110 N.M. at 122, 792 P.2d at 1165; Lara, 2000-NMCA-073, ¶ 14. Thus, our case law indicates that a defendant’s reasonable expectation of finality under due process principles exists where the governing statute creates the expectation. Defendant in the present case has not persuaded us that anything in the PPD Act or the PPD agreement creates a similar due process right to an expectation of finality in the diversion period. For these reasons, we will not apply our construction of the sentencing statutes to the PPD Act by terminating a court’s authority over a defendant upon the expiration of the diversion period in the absence of any legislative language in the PPD Act directing us to do so.

{11} We believe that our case law construing the legislative intent behind the PPD Act supports the result we reach in the present case. First, we have observed that “[t]he Act contemplates a successful termination of a diversion program, and impliedly, but not specifically, provides that a prosecution is barred if a diversion program is successfully terminated.” State v. Trammel, 100 N.M. 543, 544, 673 P.2d 827, 828 (Cl. App. 1983) (holding that the State may unilaterally terminate a PPD program, but that decision is subject to judicial review regarding the defendant’s compliance with the program) (citation omitted). Therefore, our case law supports the view that the Legislature did not intend that the mere lapse of time without ultimately satisfying the terms of the agreement amounts to a successful completion of the PPD program.

{12} Second, our case law has refused to read into the PPD Act limitations on the State not expressed by the Legislature on grounds that it serves our public policy and the purposes of the PPD Act to “allow the State greater flexibility in dealing with those who participate in a PPD [program].” State v. Altherr, 117 N.M. 403, 406, 872 P.2d 376, 379 (Cl. App. 1994) (permitting the date of waiver of arraignment to control the running of the six-month rule contained in Rule 5-604 rather than the date of termination from the PPD program in order to facilitate the success of the diversion and to satisfy the intent of Rule 5-604); see also State v. Hastings, 116 N.M. 344, 347, 862 P.2d 452, 455 (Cl. App. 1993) (reversing the dismissal of charges for violation of the six-month rule because in part the PPD Act does not specifically require the State to file notice of termination from the PPD program with the district court and the defendant did not suffer prejudice as a result of the State’s failure to file the notice). {13} The Legislature explained that [t]he purposes of the Preprosecution Diversion Act are to remove those persons from the criminal justice system who are most amenable to rehabilitation and least likely to commit future offenses, to provide those persons with services designed to assist them in avoiding future criminal activity, to conserve community and criminal justice resources, to provide standard guidelines and to evaluate preprosecution programs.

Section 31-16A-2 (citation omitted). In our attempts to serve these purposes, we have afforded the State flexibility to permit “the parties to reach an agreement of mutual benefit,” an arrangement that satisfies the State’s legitimate penal interests and encourages successful rehabilitation for the eligible and amenable defendants. Altherr, 117 N.M. at 406, 872 P.2d at 379 (allowing the State “either to suspend the first proceeding or to dismiss the first indictment” in order to facilitate an agreement between the parties); see also Jimenez, 111 N.M. at 786-87, 810 P.2d at 805-06 (noting that alternatives to termination of the PPD program should be considered that would also meet the State’s penal interests); see also Hastings, 116 N.M. at 348-49, 862 P.2d at 456-57 (overlooking irregularities
in the procedure based in part on the theory that “[t]he delay necessary to determine whether the defendant is suitable for a PPD program is clearly for the defendant’s benefit”).

{14} In the present case, rather than immediately terminating the agreement, the State attempted to assist Defendant in complying with the terms of the agreement and afforded her leeway for her failures, giving her additional opportunities for redemption. Specifically, the State extended the twelve-month diversion period to the maximum permitted by law to allow Defendant more time to make restitution payments. Thereafter, the State abided the full two-year statutory period before evaluating her compliance with the program. Holding off on termination of the program for the length of the maximum diversion term is a lenient action taken for the benefit of Defendant, to encourage her compliance, and to satisfy the State’s own penal interests. In short, the State’s actions in this case serve the purposes of the PPD Act, actions that we will not prohibit without language in the Act expressing a legislative intent to do so.

{15} In Defendant’s final argument, she contends that her rights to due process were violated by the State’s failure to terminate the PPD agreement until after the two-year period had run because the State “eked every advantage from the relationship” and unfairly benefitted from Defendant’s restitution payments. We are not persuaded that Defendant has suffered a due process violation. First, we note that it is the victim of Defendant’s embezzlement, not the State, that ultimately benefits from and receives the restitution payments. Second, Defendant fails to cite any authority in support of this argument. See In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that an appellate court will not consider an issue if no authority is cited in support of the issue). Third, Defendant may refuse to participate in, or withdraw from, the PPD program and should not benefit from her repeated noncompliance where the State attempted to assist her compliance. Fourth and lastly, although we can imagine a case in which a defendant has substantially complied with the PPD program, such that termination following two years of great efforts may be inequitable, this is not such a case. The record indicates, and Defendant does not challenge, that she failed to satisfy numerous conditions of her PPD agreement. Defendant failed to complete 100 hours of community service, failed to obtain her GED, failed to maintain gainful employment, and failed to make about $450 of the $3,000 in restitution payments she owed. Thus, without a record indicating an inequity created by substantial compliance with the agreement or an abuse of the process, we are not persuaded that the State’s failure to terminate the agreement denied Defendant due process.

{16} Finally, we note that although the delay does not rouse concerns in the present case, we can conceive of a case in which prejudice results from the State’s delay in refiling charges long after the diversion period. Cf. Hastings, 116 N.M. at 347, 349, 862 P.2d at 455, 457 (looking for but detecting no prejudice to defendant from the irregularities in the process or from any delay resulting from either the determination of defendant’s unsuitability for the PPD program or the State’s failure to file notice of termination from the PPD program with the defendant or the district court, where the State instead sent the defendant notice of nonacceptance into the PPD program); cf. Gonzales v. State, 111 N.M. 363, 364, 805 P.2d 630, 631 (1991) (establishing that preaccusation delay may result in a due process violation requiring dismissal of charges where a defendant proves actual and substantial “prejudice and an intentional delay by the state to gain a tactical advantage”). The record reveals that the State filed its motion to terminate the PPD program and its motion to reinstate the charge of embezzlement against Defendant twenty-five days after the expiration of the diversion period. The State claimed below that the delay constituting less than a month resulted from its administrative process evaluating Defendant’s compliance with the PPD program at the end of the diversion period. Because the record is without any indication of prejudice to Defendant by the twenty-five- day period of time between the expiration of the diversion period and the reinstatement of the charge or any indication of bad faith from the State, this is not a case that raises concerns with delayed process.

CONCLUSION

{17} We reverse the district court’s order granting Defendant’s motion to dismiss the reinstated charges.

{18} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

JAMES J. WECHSLER, Judge
who was five to six months pregnant, was supporting the petition alleged that Mother, in June 1999, when Child was alleged to be neglected and/or abused. This resulted in CYFD’s intervention and the court found that probable cause existed to believe that Child was abused or neglected and that her remaining in the home would be contrary to Child’s best interest. See § 32A-4-16. After the requisite ten-day custody hearing, the court found that legal custody remain with CYFD.

4. Mother entered a voluntary plea of no contest at the adjudicatory hearing as to the allegations that Child was without proper parental care, control, and supervision. See § 32A-4-19. In the stipulated adjudication judgment filed September 1999, the trial court found that Child was neglected and/or abused, as defined in the Children’s Code, on the basis of the facts alleged in the affidavit supporting the ex parte custody order. The court ordered legal custody to remain with CYFD and further ordered CYFD to implement, and Mother to participate in, the proposed treatment plan. After a dispositional hearing, the trial court found that CYFD made and continued to make reasonable efforts to reunify Child with Mother but that it was in the best interest of Child to remain in the custody of CYFD. See § 32A-4-22(A)(9).

5. In January 2000, CYFD filed a motion asking the trial court to appoint Child’s maternal grandmother (Grandmother) as Child’s permanent guardian. See §§ 32A-4-31, -32. Mother supported Grandmother’s appointment as permanent guardian. In the order granting guardianship, the court adopted the findings in CYFD’s motion for permanent guardianship. The court further found that reasonable efforts had been made to reunite the family, that further efforts by CYFD would be unproductive at that time, and that neither reunification nor termination of parental rights was in Child’s best interests at that time. The court granted legal custody of Child to Grandmother who was “vested with all the rights and responsibilities of a parent with respect to [Child].” The court expressly retained jurisdiction to enforce, revoke, or modify its order. See § 32A-4-32(H)-(K). The court found that the reasons for CYFD’s intervention had been addressed by the granting of permanent guardianship to grandmother, and the court therefore relieved the attorneys of further responsibility in the matter by dismissing the abuse and neglect petition without prejudice.

B. November 2001 Allegations

6. More than twenty months after Grandmother was appointed Child’s permanent guardian, CYFD filed a new petition, alleging neglect and/or abuse of Child and naming Mother, Father, and Grandmother as respondents. The affidavit supporting the petition in the new case alleged that Grandmother “was using heroin and nodding off while driving with [Child] in the truck” and that Mother was living in the home and using illegal drugs in the Child’s presence. The affidavit further stated that Grandmother admitted to using heroin and methadone, admitted that Mother had been using drugs in Child’s presence, and admitted that Mother left “drug paraphernalia lying around” where [Child] could get hold of it.” The trial court issued an ex parte custody order transferring custody from Grandmother to CYFD. The court found that probable cause existed to believe Child was abused or neglected and that her remaining in Grandmother’s home would be contrary to Child’s welfare because of Grandmother’s drug use.

7. After a ten-day custody hearing, at which Mother’s attorney was present, the trial court issued a custody hearing order providing that legal and physical custody...
of Child should remain with CYFD. The court found that CYFD was excused from making reasonable efforts to prevent Child’s removal from Grandmother’s home because of her operation of a vehicle while under the influence of heroin with Child in the vehicle. The court also found that CYFD was excused from making reasonable efforts to place the child with Mother because (1) Mother had “no current legal right to care for the child” as a result of Grandmother’s appointment as Child’s permanent guardian, (2) Mother continued to use drugs, and (3) CYFD planned to move for revocation of Grandmother’s permanent guardianship and then move for termination of parental rights because Mother had failed to participate in treatment plans ordered by the court in the first abuse and neglect cause concerning Child. The trial court incorporated the facts alleged in the affidavit supporting the ex parte custody order and the facts pleaded in the abuse and neglect petition. Subsequently, CYFD filed an amended petition, which included additional facts supporting allegations of abuse and neglect. One week later, CYFD filed a motion to revoke Grandmother’s permanent guardianship, see § 32A-4-32(I), and a motion to revive and reinstate the first neglect and abuse cause of action, pursuant to NMSA 1978, § 32A-1-18(A) (1995) (“When it appears from the facts during the course of any proceeding under the Children’s Code that some finding or remedy other than or in addition to those indicated by the petition or motion are appropriate, the court may, either on motion by the children’s court attorney or that of counsel for the child, amend the petition or motion and proceed to hear and determine the additional or other issues, findings or remedies as though originally properly sought.”) (citation omitted)). Counsel for all parties stipulated to the filing of both motions.

{8} In the petition for extension of time filed in mid-January 2002, CYFD explained its actions in filing a new cause of action and the reasons for the motion to revive and reinstate the original cause. The new cause of action was mistakenly filed by another children’s court attorney while the regularly assigned attorney was on vacation. CYFD observed that a motion to revoke the permanent guardianship, instead of a new cause of action, should have been filed in the original cause. CYFD’s petition stated that there was “no known opposition to this motion [or] the relief sought, so long as [Grandmother was] afforded a hearing on the merits as to the status of her permanent guardianship.” {9} After a hearing in late January 2002, in which the trial court granted the motion to revive and reinstate, the court issued a restraining order in the original cause of action; the order prohibited Mother from contacting Child, Grandmother, or Child’s foster parents, because of Mother’s drug use in Child’s presence and Child’s access to drug paraphernalia. The following month, the court entered a written order reinstating the original cause of action, status quo ante January 11, 2000, the date on which Grandmother was appointed permanent guardian and the neglect and abuse petition was originally dismissed without prejudice. In the same order, the court dismissed the new cause of action without prejudice.

{10} The trial court held a hearing in May 2002 with regard to permanency review, implementation of a treatment plan for Grandmother, and a request for extension of custody. At that hearing, Mother’s attorney stated that Mother “wants her child to be safe—understand—she can’t provide [that] kind of safety for her but thinks that her mother can.” Mother advised the court, through her attorney, that she wanted Child to be returned to Grandmother under any kind of supervision the court deemed necessary to ensure Child’s safety, “so that the child could be back home with [the person] she’s always known as her mother.”

{11} Subsequently, the trial court entered a judgment adopting the treatment plan for Grandmother and Mother and establishing that the permanency plan was reunification with Grandmother. Because Mother was incarcerated at the time, her treatment plan simply provided that she immediately contact the social worker to discuss the case when Mother was released from jail. The treatment plan also provided for the possibility of visits between Mother and Child during Mother’s incarceration, at the discretion of CYFD and based on therapist recommendations.

{12} After a periodic judicial review hearing in December 2002, the trial court restored permanent guardianship with Grandmother and consequently dismissed the original petition without prejudice again. A second permanent restraining order was issued, which prohibited Mother from having any contact with Child, Grandmother, and Child’s school and treatment professionals. Grandmother’s guardianship was subject to her enforcement of the restraining orders issued against Mother.

C. March 2004 Allegations

{13} In March 2004, CYFD was awarded emergency custody of Child when Grandmother and Mother were arrested for possession of illegal drugs and child abuse. The trial court again issued an ex parte custody order granting custody of Child to CYFD. The court found that Child’s placement in the home would be contrary to her welfare because Grandmother was using, possessing, and providing illegal drugs to the residence shared by Child and because Grandmother had failed to enforce the restraining order prohibiting Mother’s contact with Child. When CYFD filed its affidavit in support of the ex parte custody order, it also filed a petition to revive and reinstate, for the second time, the original neglect and abuse cause, effective status quo ante January 11, 2000. The cause was “revived for further relief based on recent allegations of abuse and neglect of [Child], and on the allegation that the current permanent guardian violated an Order previously issued.” After a custody hearing with respect to Grandmother as permanent guardian, the court ordered custody to remain with CYFD. Mother did not appear, in person or by attorney, at the custody hearing because she had not yet been served.

{14} In June 2004, CYFD filed a request for a change in the permanency plan from permanent guardianship to termination of parental rights and adoption. See § 32A-4-25.1(E); see also § 32A-4-28. The following month, CYFD filed a motion for termination of parental rights. After a hearing at which Mother and Grandmother were present and represented by counsel, the trial court ordered the permanent guardianship revoked. Pursuant to the Children’s Code, the court found that Child was abused and neglected, as alleged in the motion to revoke guardianship, and the court ordered that custody remain with CYFD.

{15} After hearings at which Mother was present and represented by counsel, the trial court approved the change in the permanency plan from permanent guardianship to termination of parental rights and adoption. The court adopted the findings and conclusions submitted by CYFD, with amendment. As part of the judgment and order, the court specifically found (1) that Child “is and has been a neglected child as defined in the . . . Act,” (2) that “[f]urther efforts by [CYFD] to assist the mother in reuniting with her child would not make any difference and are not necessary,” (3) that CYFD “made reasonable efforts to assist [Mother] in adjusting the conditions that render [her] unable to properly care for [Child],” and (4) that “the conditions and causes of the neglect are unlikely to change in the foreseeable future[,] despite the reasonable efforts that were made by
We address each argument in turn.

II. STANDARD OF REVIEW

{16} Finally, after contested evidentiary hearings, the trial court issued a judgment terminating Mother’s parental rights. In the court’s findings and conclusions, it stated that it took judicial notice of the previous findings and conclusions, as well as the judgment and order, which were issued by the court in May 2005, when it ordered the change in the permanency plan, as requested by CYFD. The parties “stipulated that the [c]ourt could . . . receive[,]” as admissible evidence on the elements of [CYFD’s] motion to terminate parental rights, all of the matters . . . set forth in” those documents. The court observed that the judgment and order regarding the change in the permanency plan also “incorporated and included the [c]ourt’s earlier supporting findings of fact and conclusions of law.” The parties further stipulated, and the court found, that these incorporated documents “established by clear and convincing evidence . . . each of the allegations set forth in [CYFD’s] motion for termination of parental rights to the extent that evidence was presented to prove a particular allegation.” (Emphasis omitted.) In addition, the court found that these incorporated documents “established by clear and convincing evidence . . . each of the allegations set forth in [CYFD’s] motion for termination of parental rights to the extent that evidence was presented to prove a particular allegation.”

{18} The question of adequate due process in an abuse and neglect proceeding is reviewed de novo. State ex rel. Children, Youth & Families Dep’t v. Maria C., 2004-NMCA-083, ¶ 36, 136 N.M. 53, 94 P.3d 796. When reviewing the trial court’s determination that CYFD made reasonable efforts, we ask “whether the trial court’s conclusion, when viewed in the light most favorable to the decision below, was supported by substantial evidence, not whether the trial court could have reached a different conclusion.” State ex rel. Children, Youth & Families Dep’t v. Patricia H., 2002-NMCA-061, ¶ 31, 132 N.M. 299, 47 P.3d 859.

III. DISCUSSION

A. Due Process

{19} According to Mother, the revival of the original abuse and neglect petition allowed CYFD to circumvent the procedures provided by the Act and thus deprive her of due process. Mother contends that after the allegations of abuse and neglect in 2004, she was entitled to custody, adjudicatory, and dispositional hearings, pursuant to Sections 32A-4-18, -19, -22(C) of the Act. Thus, she argues that the failure to provide her with these hearings resulted in a denial of her constitutional rights to due process.

{20} Parental rights cannot be terminated without due process of law. State ex rel. Children, Youth & Families Dep’t v. Mafin M., 2003-NMSC-015, ¶ 18, 133 N.M. 827, 70 P.3d 1266. Process is due when a proceeding could affect or interfere with the relationship between a parent and a child. Maria C., 2004-NMCA-083, ¶ 24. Termination proceedings, in particular, must be held with “scrupulous fairness” to the parent. State ex rel. Children, Youth & Families Dep’t v. Robert E., 1999-NMCA-035, ¶ 19, 126 N.M. 670, 974 P.2d 164 (internal quotation marks and citation omitted), because a parent’s right to a relationship with her child is a fundamental right “far more precious . . . than property rights.” Mafin M., 2003-NMSC-015, ¶ 20 (internal quotation marks and citation omitted). Due process rights are flexible, depending on the nature of the proceeding, the interests involved, and the nature of subsequent proceedings. Maria C., 2004-NMCA-083, ¶ 25 (recognizing that more process is due at termination proceedings than at proceedings in which a parent is “resisting state intervention into ongoing family affairs” (internal quotation marks and citation omitted)). “Because the statutory scheme is unitary in nature, the process due at each stage should be evaluated in light of the process received throughout the proceedings.” Id. ¶ 35.

{21} To provide the necessary context for our discussion, we begin with an overview of the procedures provided by the Act. We then review the procedure used by the trial court in reviving and reinstating the original petition. Lastly, we use the test from Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), to evaluate the process given to Mother.

1. Procedures Provided by the Act

a. Abuse and Neglect Procedural Statutes

{22} When a child alleged to be neglected or abused is in CYFD’s temporary custody, a custody hearing must be held within ten days of the filing of the petition. Section 32A-4-18(A). Notice is required, and CYFD must make “[r]easonable efforts . . . to preserve and reunify the family, with the paramount concern being the child’s health and safety.” Section 32A-4-18(B), (D). Thereafter, an adjudicatory hearing is held within sixty days. Section 32A-4-19(A). The trial court hears evidence at this hearing if the allegations of abuse or neglect are denied. Section 32A-4-20(G). If the allegations are admitted or there is clear and convincing evidence of neglect or abuse, the court may proceed immediately or at a postponed hearing to make disposition of the case. Section 32A-4-20(H).

{23} Generally, a dispositional hearing must be held within thirty days of the adjudicatory hearing. Section 32A-4-22(A). At the dispositional hearing, the trial court is required to make a number of findings, including findings relative to CYFD’s efforts to prevent the child’s removal from the parents’ home in the first place, as well as the efforts to reunify the child with the parents after the removal. Section 32A-4-22(A)(9). The trial court is also required to order CYFD to implement, and the parties to cooperate with, any treatment plan approved by the court. Section 32A-4-22(C). While Section 32A-4-22(C) requires that reasonable efforts be made to preserve and reunify the family, the statute is clear that the paramount concern is the health and safety of the child. Consistent with this concern, reasonable efforts are not required if the efforts would be futile or if the child has been subject to aggravated circumstances created by the parent, guardian, or custodian. Section 32A-4-22(C)(1), (2).

{24} If the trial court determines that no reasonable efforts at reunification are required, Section 32A-4-22(J) directs that the next step is a permanency hearing. This is held pursuant to Section 32A-4-
20. Thus, we focus on the typical case, once the custody, adjudicatory, and dispositional hearings have concluded, other proceedings involving the parties and their attorneys occur. For example, periodic reviews are held to monitor the progress of the case. Section 32A-4-25. However, when a permanent guardianship is established, the procedural requirements change because the terms of the guardianship control. Sections 32A-4-31, -32. The trial court retains jurisdiction to enforce the judgment of permanent guardianship. Section 32A-4-32(H). When the trial court dismissed this case without prejudice, the court recognized the procedural changes and made a finding that the purpose of the dismissal was to relieve the attorneys of further statutory duties in the matter because CYFD’s intervention had been addressed by the court’s granting permanent guardianship to Grandmother.

25.1, and the purpose is to determine what permanency plan is in the child’s best interest. See NMSA 1978, § 32A-1-4(P) (2005) (defining “permanency plan” as a determination that the interest of the child is best served by one of several options, including reunification, adoption, and permanent guardianship); see also § 32A-4-22(J); Rule 10-325(A) NMRA. Reasonable efforts must be made “to implement and finalize the permanency plan in a timely manner.” Section 32A-4-22(J).

b. Guardianship Statutes

25. To establish a permanent guardianship, the trial court must first find that the guardianship is in the best interests of the child. Section 32A-4-31(C). Additionally, the court must find the following four factors: (1) the child has been adjudicated as abused or neglected; (2) reasonable efforts have been made by CYFD to reunite the child with the parent and further efforts would be unproductive; (3) reunification is not in the child’s best interests because the parent continues to be unwilling or unable to adequately care for the child; and (4) the possibility of adoption is remote, or termination is not in the child’s best interests. Id.; see also Rule 10-325. When a permanent guardianship is granted, the parent is divested of legal custody or guardianship of the child, but parental rights are not terminated. Section 32A-4-32(F).

26. The trial court retains jurisdiction to enforce its judgment of permanent guardianship. Section 32A-4-32(H). Any party may move for revocation based on a significant change of circumstances, and the trial court may revoke the guardianship “when a significant change of circumstances has been proven by clear and convincing evidence and it is in the child’s best interests to revoke the order granting guardianship.” Section 32A-4-32(I), (K). A “significant change of circumstances” includes those instances when “(1) the child’s parent is able and willing to properly care for the child; or (2) the child’s guardian is unable to properly care for the child.” Section 32A-4-32(I). Except for the right to file a motion to revoke the permanent guardianship, there are no specific procedures relating to parents that must be followed during the revocation process.

2. Revival and Reinstatement of the Original Petition

27. Mother asserts that CYFD and the trial court circumvented the procedures required by the Children’s Code by reviving and reinstating the original abuse and neglect petition relating to Child. We disagree. Again, we look to the statutes. In a typical case, once the custody, adjudicatory, and dispositional hearings have concluded, other proceedings involving the parties and their attorneys occur. For example, periodic reviews are held to monitor the progress of the case. Section 32A-4-25. However, when a permanent guardianship is established, the procedural requirements change because the terms of the guardianship control. Sections 32A-4-31, -32. The trial court retains jurisdiction to enforce the judgment of permanent guardianship. Section 32A-4-32(H). When the trial court dismissed this case without prejudice, the court recognized the procedural changes and made a finding that the purpose of the dismissal was to relieve the attorneys of further statutory duties in the matter because CYFD’s intervention had been addressed by the court’s granting permanent guardianship to Grandmother.

28. Preliminarily, we observe that from a procedural point of view, dismissals are generally governed by Rule 1-041 NMRA. See Rule 1-041(E) (providing that the court shall reinstate a case dismissed without prejudice pursuant to Rule 1-041(E) if a motion to do so is made within thirty days of the order of dismissal and good cause is shown). We recognize that proceedings pursuant to the Children’s Code are not governed by Rule 1-041 and that the time limits of the rule therefore do not apply. Rule 1-041(F)(4). However, the rule supports the basic proposition that courts may dismiss a case without prejudice and subsequently reinstate the case. This procedure is not new.

29. We read the provisions of the Act with reference to each other. See In re Termination of Parental Rights of Reuben & Elizabeth O., 104 N.M. 644, 650, 725 P.2d 844, 850 (Ct. App. 1986) (stating that statutory provisions of the Act should be read in pari materia). In our case, the trial court dismissed the petition without prejudice because the terms of the guardianship were controlled by statute; thus, there was no need to continue the proceedings under other provisions of the Act. See § 32A-4-32(E)-(G). Thus, when the motion for revocation of guardianship was filed under the court’s continuing jurisdiction, pursuant to Section 32A-4-32(H), (K), the trial court was within its power to reinstate the original cause because it was from this original cause that the guardianship emanated. Cf. Gonzales v. Maes, 106 N.M. 342, 344, 742 P.2d 1047, 1049 (1987) (concluding that a conditional motion to dismiss without prejudice did not become a final order because the plaintiff satisfied the condition by requesting reinstatement); In re Daniel H., 2003-NMCA-063, ¶¶ 20-22, 133 N.M. 630, 68 P.3d 176 (stating that a dismissal under NMSA 1978, § 32A-2-21(G) (1995), based on the incompetency of a minor, is without prejudice and that the charge against the minor may thus be reinstated if the child becomes competent). Finally, we observe that Mother made no objection in 2002 and, in fact, agreed to the revival and reinstatement of the original action at that time. For all of these reasons, we conclude that the trial court did not err by reviving and reinstating the original neglect and abuse petition.

3. Mathews Test

30. Except for her arguments regarding the reinstatement of the original petition, which we addressed above, Mother does not point to any language in the statutes that would entitle her to custody, adjudicatory, and dispositional hearings before her rights were terminated. Rather, she argues that due process entitled her to these hearings. 31. We use the balancing test in Mathews to evaluate whether due process was satisfied when parental rights were terminated. Mafin M., 2003-NMSC-015, ¶ 19. We weigh three factors: (1) the mother’s interest, (2) the risk to the mother of an erroneous deprivation through procedures used and the probable value of additional or substitute procedures as safeguards, and (3) the government’s interest. Id. In our case, Mother’s interest in retaining a relationship with Child is great, and CYFD’s interest in protecting Child’s welfare is equally significant. See id. ¶ 20. Thus, we focus on the second factor in the Mathews test: the risk of erroneous deprivation and the value of additional procedural safeguards. See In re Pamela A.G., 2006-NMSC-019, ¶¶ 13, 139 N.M. 459, 134 P.3d 746; Mafin M., 2003-NMSC-015, ¶¶ 19, 20. Our conclusion does not depend on a showing that Mother would have been successful if she had been provided with the additional procedures she alleges should have been provided; rather, Mother need only show “that there is a reasonable likelihood that the outcome might have been different.” Maria C., 2004-NMCA-083, ¶ 37.

a. Erroneous Deprivation

32. Specifically, Mother contends that CYFD’s failure to provide her with the custody, adjudicatory, and dispositional hearings after the March 2004 petition resulted in (1) deprivation of the benefit of judicial reviews, (2) deprivation of her right to an adjudication of the neglect and abuse, and (3) deprivation of an opportunity for a treatment plan. See §§ 32A-4-18, -19, -22(C). We do not agree.

33. Over the course of several years, Mother was afforded numerous opportuni-
ties to be heard and to present a defense. See Mafin M., 2003-NMSC-015, ¶¶ 18, 21 (stating that procedural due process requires that an individual be afforded an opportunity to be heard and to present a defense, in a meaningful manner and at a meaningful time). The following appearances are most relevant to Mother’s arguments regarding a lack of due process after the March 2004 petition was filed. Mother was present and represented by counsel at the pre-adjudicatory hearing meeting on May 10, 2004, at the adjudicatory hearing regarding the revocation of guardianship, at the hearing regarding the change in the permanency plan, and at the hearing regarding termination of her parental rights. Mother proffered evidence, testified extensively, and cross-examined all of CYFD’s witnesses at both the change in the permanency plan hearing and the termination of parental rights hearing. Considering all of these opportunities for judicial review, we conclude that Mother was not erroneously deprived of the benefits of judicial review.

{34} We also conclude that Mother was not erroneously deprived of an adjudication of abuse and neglect regarding the allegations in 2004. After the March 2004 petition, the trial court specifically found, by clear and convincing evidence, that Child “is and has been a neglected child as defined in the . . . Act.” This adjudication of neglect was premised on new facts, alleged in the 2004 pleadings and subsequently issued as findings of fact, to which Mother stipulated.

{35} We further conclude that Mother was not erroneously deprived of an opportunity for a treatment plan. Mother requested the imposition of a treatment plan at both the hearing for a change in the permanency plan and the hearing to terminate parental rights. However, the trial court determined that reunification, whereby a treatment plan would be ordered, was not a feasible permanency plan alternative. Consequently, the court concluded that further efforts for reunification, including a treatment plan, were not required. Thus, Mother was not erroneously deprived of an opportunity for a treatment plan.

b. Value of Additional Procedures

{36} Moreover, we see no probable value in providing Mother with additional process through custody, adjudicatory, and dispositional hearings in 2004. Given Mother’s history of drug abuse, the lack of a parent-child relationship, the restraining orders prohibiting Mother’s contact with Child, and Mother’s arrest and incarceration on child abuse and drug charges, there is no realistic possibility that custody would have been given to Mother at that time. Further, under these circumstances, there is no realistic possibility that Child would not have been adjudicated as neglected within the requisite time frame for an adjudicatory hearing. Mother testified that she was convicted of criminal child abuse as a result of her arrest in March 2004, when she entered an Alford plea acknowledging that sufficient evidence existed for conviction. See North Carolina v. Alford, 400 U.S. 25 (1970). This is clear and convincing evidence that supports the trial court’s adjudication of Child as abused and neglected after the March 2004 petition was filed. See § 32A-4-20(H) (equating an admission of the allegations of the petition with clear and convincing evidence); Rule 10-307(A)(1), (2) NMRA (stating that an admission is made by “admitting sufficient facts to permit a finding that the allegations of the petition are true; or . . . declaring [an] intention not to contest the allegations”). Providing additional hearings under these circumstances would be a needless and inefficient use of CYFD’s scarce resources.

See State ex rel. Children, Youth & Families Dep’t v. Amy B., 2003-NMCA-017, ¶ 17, 133 N.M. 136, 61 P.3d 845 (stating that government resources are limited and that the state “has a legitimate interest in making the best use of its limited resources” (internal quotation marks and citation omitted)).

{37} We also see no additional value in providing Mother a dispositional hearing pursuant to Section 32A-4-22. Our review of the record reveals that the court considered the factors enumerated in Section 32A-4-22(A) and issued relevant findings, to which Mother stipulated. Further, as discussed in paragraph 44 of this opinion, the trial court considered whether reasonable efforts were required, just as the court is directed in Section 32A-4-22(C). Thus, we see no value in requiring a dispositional hearing for Mother after the guardianship was revoked.

{38} In conclusion, we hold that providing Mother with additional process through custody, adjudicatory, and dispositional hearings after the guardianship was revoked would have little, if any, value. Cf. Maria C., 2004-NMCA-083, ¶ 47 (“The facts in this case sealed the family’s fate, not [the m]other’s presence or absence at the permanency hearings.”). Mother was provided with the requisite proceedings in the initial stages of the abuse and neglect proceeding; at that time, the court concluded that it was in Child’s best interests to have a permanency plan of permanent guardianship. Given the facts to which Mother has stipulated and the opportunities she has had to be heard, we do not believe “that there is a reasonable likelihood that the outcome might have been different.” Id. ¶ 37 (emphasis omitted). A parent is not entitled to “start over” when a permanent guardianship is revoked. Rather, the parent has an opportunity to show that it is in the child’s best interest to have a change of the permanency plan from a permanent guardianship to reunification. Mother had this opportunity at the change in the permanency plan hearing and at the termination hearing. In various circumstances, different procedural protections and safeguards provide the “scrupulous fairness” required under the Act. See In re Pamela A.G., 2006-NMSC-019, ¶ 18 (observing that when the trial court considers the admission of hearsay evidence for each case, the court must determine the proper procedure and safeguards, based on the nature of the parent-child relationship and the age and emotional state of the child) (internal quotation marks and citation omitted).

{39} Our conclusion is consistent with the procedures provided by the Act. Because a permanent guardianship under the Act is ordinarily granted as a permanency plan, see § 32A-4-25.1(B)(3); see also § 32A-1-4(P)(3), a hearing to review and change the permanency plan, pursuant to Section 32A-4-25.1, should be the next step when a permanent guardianship is revoked. See § 32A-4-25.1(B)-(D). At that time, a parent has the opportunity to present evidence that the permanency plan should be reunification. See § 32A-4-25.1(B), (D). If after hearing the evidence, the trial court determines that the child should be returned to the parent’s custody, the court may then impose any conditions, including a treatment plan. See § 32A-4-25.1(D)(3).

{40} “Parents do not have an unlimited time to rehabilitate and reunite with their children.” Maria C., 2004-NMCA-083, ¶ 21; see also Patricia H., 2002-NMCA-061, ¶ 26 (using the federal fifteen-month period for time-limited reunification services as guidance in assessing the duration of reasonable efforts under state law); New Mexico Child Welfare Handbook: A Legal Manual on Child Abuse and Neglect § 20.2 (N.M. Judicial Educ. Ctr., Inst. Pub. Law 2003) (providing a timeline under the Children’s Code); id. § 20.4.3 (“The court must determine a permanency plan . . . within 12 months of the date the child is considered to have entered foster care[,]”). We are mindful of the detrimental effects on a child that occur from prolonged uncertainty and instability. See Maria C., 2004-NMCA-083, ¶ 45. Given the history of CYFD’s intervention on behalf of Child
since 1999, we believe that she had a pressing need for permanency. See Mafin M., 2003-NMCA-015, ¶ 24 (“When balancing the interests of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children’s interests.”) (internal quotation marks and citation omitted); Maria C., 2004-NMCA-083, ¶ 45 (“Prolonged uncertainty and instability are [are] particularly detrimental to the child.”). {41} Child has not been in Mother’s custody since June 1999. Grandmother has been the primary caregiver for Child’s entire life, as if Grandmother were Child’s mother. Child was first in CYFD custody from June 1999 until January 2000, when Grandmother was appointed permanent guardian. During the permanent guardianship, Child was removed from Grandmother’s home and again placed in CYFD’s custody from November 2001 until January 2003. Mother’s presence in Child’s life during the permanent guardianship was so detrimental that the trial court entered two permanent restraining orders prohibiting Mother from contacting Child or Child’s caregivers. Child was placed with adoptive foster parents approximately eleven months before the trial court ordered the change in the permanency plan. The legislature has made clear that the paramount concern is the welfare of the child. Since the undisputed facts show the detrimental effect of Mother’s presence in Child’s life from June 1999 through March 2004, we cannot conclude that the court erred by putting Child’s interests first.

B. Reasonable Efforts to Assist Mother with Reunification and Remedy the Causes and Conditions of Neglect

{42} Mother also argues that CYFD failed to prove, by clear and convincing evidence, that it made reasonable efforts to assist Mother with reunification and remediing the causes and conditions that led to Child’s removal because CYFD made no efforts after the March 2004 petition. Mother contends that the “minimal efforts” made when the original petition was filed are not sufficient to support a determination that further efforts were not required. CYFD admits that it made no additional efforts to assist Mother after the March 2004 petition was filed. Mother misreads the Act. {43} A permanent guardianship may be established only when the trial court finds, inter alia, that “further efforts by [CYFD] would be unproductive.” Section 32A-4-31(C)(2). Thus, once the guardianship was granted, CYFD was no longer required to make reasonable efforts. When a guardianship is revoked on grounds that the guardian is no longer able to properly care for the child, the permanency plan does not automatically become reunification, thereby reasonable efforts are required. See § 32A-4-32(I)(2); see generally §§ 32A-4-25.1, -32(I)-(K). Rather, as in a permanency review hearing, the court will determine what the new permanency plan should be. See § 32A-4-25.1(D). Only if the court determined that the permanency plan should be reunification would the court order CYFD to implement a treatment plan. See § 32A-4-25.1(D)(3). {44} Moreover, reasonable efforts are not required if such efforts would be futile. Maria C., 2004-NMCA-083, ¶ 23 (“CYFD has a continuing duty to make reasonable efforts to preserve and reunify the family, until the district court finds that its efforts would be futile.”). See generally § 32A-4-22(C)(1) (regarding futurity and the disposition of a child who has been adjudicated abused or neglected); § 32A-4-25(H)(5) (regarding futurity and periodic review of dispositional judgments); § 32A-4-28(B)(2) (regarding futurity and termination). In our case, the trial court initially found that further efforts would be unproductive when the permanent guardianship was granted. Again, in late 2001, the court found that CYFD was excused from making reasonable efforts to place Child with Mother because she did not have custody, she continued to use drugs, and CYFD planned at that time to move for child abuse. Mother consented to CYFD’s custody from June 1999 through March 2004, we believe that she had a pressing need for permanency. See Mafin M., 2003-NMCA-015, ¶ 24 (“When balancing the interests of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children’s interests.”) (internal quotation marks and citation omitted); Maria C., 2004-NMCA-083, ¶ 45 (“Prolonged uncertainty and instability are [are] particularly detrimental to the child.”).
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9:00 a.m.  SURVEY OF ADR AND AVAILABLE FORMATS
          The Uniform Act, AAA, and others
          Rita Siegel, Esq.
          (60 Minutes - 1.0 Credit)

10:00 a.m.  ADR IN THE 2ND JUDICIAL DISTRICT
            • Status & Operation of the Program
            • Dealing with Procedural Issues
            • Questions & Answers
            David Levin, Esq.
            (60 Minutes – 1.0 Credit)

11:00 a.m.  Break

11:15 a.m.  UTILIZING STRUCTURES AND ANNUITIES
            IN ADR PROCEEDINGS
            Kelly Ramsdale
            (45 Minutes – 0.7 Credit)

12:00 noon Lunch (on your own)

1:30 p.m.  PREPARING AND PRESENTING
          MEDICAL DOCUMENTATION AND INFORMATION
          Linda Rios, Esq. and Chris Cecil, D.C. (60 Minutes – 1.0 Credit)

2:30 p.m.  UTILIZING POWER POINT AND
          FOCUS GROUPS IN ADR
          Kristina Bogardus, Esq.
          (45 Minutes – 0.7 Credit)

3:15 p.m.  Break

3:30 p.m.  WHAT WORKS - WHAT DOESN’T: A Report of
          What the Mediators and Arbitrators Have to Say
          David Martinez, Esq.
          (45 Minutes - 0.7 Credit)

4:15 p.m.  TAXATION ASPECTS OF SETTLEMENTS
          AND CONFIDENTIALITY CLAUSES.
          IS SILENCE GOLDEN?
          Bruce F. Malott, Meyners & Co.
          (45 Minutes - 0.7 Credit)

5:00 p.m.  Adjourn

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A non-profit organization with over 40 years of service history to Native American Pueblos in Northern New Mexico seeks qualified applicants to assist in Tribal and Bureau of Indian Affairs law enforcement matters. The incumbent will provide technical assistance in criminal cases of domestic violence, sexual assault and/or stalking including drafting/revising related protocols and code procedures. Juris Doctorate degree required from accredited institution. Must be licensed to practice in the State of New Mexico as well as familiar with tribal and state courts systems. Experience developing and providing educational presentations also required. Position located in Espanola, NM. To apply contact the Human Resources Office at 505-747-1593 or submit a letter of interest and a resume to bursd@windstream.net. ENIPC is an Alcohol, Tobacco and Drugfree Workplace. A pre-employment drug screen is required.

Attorney
The New Mexico Aging & Long-Term Services Department is accepting resumes for the position of Attorney in Santa Fe. Applicants must have a valid New Mexico Bar Membership. Applicants must have the following qualifications: Juris Doctorate plus five (5) years of experience in the practice of law in the public or private sector of which two (2) must have been experience in Adult Protective Services or related adult advocacy. This position will provide senior level professional legal services for Adult Protective Services in litigation, counsel, interpretation of law, research, analysis, mediation, development of policies and procedures and legislation. The position will also provide legal support to the General Counsel in numerous areas of state and federal law such as The Older Americans Act, HIPPA, ADA, Inspection of Public Records Act, State Procurement Code, Medicaid, and Social Security. Starting salary will range from min $20.70 to max $36.80 per hour. Applicants must apply with State Personnel Office, (http://www.state.nm.us/spo/). Please reference job ID # 5437. In addition please submit a hard copy of your resume to: ALTSD, Patrick Lopez, General Counsel, Toney Anaya Building, 2550 Cerrillos Road, Santa Fe, NM, 87505. The deadline for submitting resume is March 11, 2007.

**Lawyer B Position**
The New Mexico Public Education Department (PED) is seeking an attorney in the Office of General Counsel. This attorney will carry out all aspects of complaint management and resolution functions pursuant to the Individuals with Disabilities Education Act’s state-level complaint procedures. Working within state and federal special education laws and timelines, the attorney will perform intake, investigate complaints, prepare complaint resolution reports, and recommend and monitor corrective actions. The attorney will also carry out some general legal duties. Must hold a valid NM Bar license. Must have at least 3 years of legal experience in special education laws and/or regulations, or secondarily, 3 years of experience in school law or general state or federal administrative law would be required. Salary: $34,050 – 60,528 per year w/benefits, depending on experience. The position is Term. See State Personnel Office website “Job Openings,” Job ID #5613. Apply online by March 9, 2007 as per website instructions, and include a copy of a letter of interest, and your résumé. Also, fax a copy of your Bar Card and an under 15-pg writing sample to the PED at (505) 827-5066. The State of NM is an EOE.

**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@bhfs.com or fax to 505.244.9266.

**Legal Secretary/Paralegal**
Legal asst. wanted for Plaintiff’s civil litigation firm. Growing uptown office seeks full time, experienced legal assistant that is well organized, detail oriented and has the ability to work independently. Candidate must have prior experience in civil litigation w/an emphasis in personal injury. 5 years experience preferred. Computer skills a must. Send resume to Hiring Partner: Bleus & Assocs. LLC, 2633 Toney Street, NE Albuquerque, NM 87109, fax 833-3040, or email admin@littleldranttel.com

**Receptionist/Legal Secretary**
Full-time or 3/4 time receptionist/legal secretary needed with a minimum of 2 years legal experience for a small firm. Must be a self-starter and be organized. Because of the size of firm, must be willing to do a variety of duties as needed. Benefits provided and a very pleasant work environment. Must be proficient with WordPerfect and Excel. Salary D.O.E. Please fax resume with references to Office Manager at 842-8200, or mail to Office Manager, 116 14th Street, S.W., Albuquerque, NM 87102.

**New Mexico Legal Aid Staff Attorneys Openings**
New Mexico Legal Aid (NMLA) has Staff Attorney openings in the following offices: Silver City, Las Cruces, Roswell, Gallup, and Albuquerque, Santa Ana Pueblo. The Santa Ana Pueblo is only 20 minutes from Albuquerque. NMLA is currently seeking attorneys to provide advice, brief service, and representation for domestic relations clients focusing on family law and to handle cases in other areas of general poverty law including housing, public benefits, consumer, and federal Indian and tribal law. Applicant must be computer literate and be willing to conduct community education and outreach to the low income community and service providers. Qualifications: Dedication and commitment to serving the legal needs of the low income people, excellent research, writing and communication skills. Proficiency in Spanish is a plus. New Mexico bar license is preferred, but will consider recent law school graduate who will take the next NM State bar exam. NMLA offers a generous benefits package, including opportunities for training. NMLA will consider applicants who want part-time employment. Send letter of interest, resume, writing sample and two references to: Gloria Molinar, New Mexico Legal Aid, 300 North Downtown Mall, Las Cruces, NM 88001, or email: gloriam@nmlegalaid.org. Please state which office you wish to apply. Salary: DOE. NMLA is an EEO/AA Employer. Deadline: when filled.

**Legal Assistant**
Legal Assistant w/exp needed for law firm. Must thrive in a fast paced environment. Great ben include hol, vac, sick leave, health, dental, retire plan & more. Submit in confidence cover letter, resume, sal his & req to: 7430 Washington Street, NE Albuquerque, NM 87109, fax 833-3040, or email admin@littleldranttel.com

**Legal Secretary**
Legal secretary with extensive prior experience needed for civil litigation firm. Requires excellent organizational, communication & word processing/computer skills. Salary DOE. Excellent benefits. Resumes only to office manager, Atkinson & Thal, PC, 201 Third Street NW, Suite 1850 Albuquerque, NM 87102 or fax to 764-8374.

**Paralegal/Admin. Assistant**
Larry Zamzok seeks bright NSI to assist both me and my office mgr. at P.I./coll’n practice. P.I. exp. req’d. Acc’g exp. pref’d. Fax resume/salary to Duane @ 898-7313.

**Title/Escrow Coordinator**
Title/Escrow coordinator with exp needed to assist on title claims, title closings, and real property litigation. Legal exp a plus but not req. Must multi task in a high volume, fast paced practice. Submit in confidence cover letter, resume, sal his & req to: 7430 Washington Street, NE Albuquerque, NM 87109, fax 833-3040, or email admin@littleldranttel.com

**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@highdesertstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.
Services

Transcription
Prosource24-7 offers secure, networking base digital transcription. Tapes and CD’s are also accepted. Best Rates and fast turn around. Also ask about our website/hosting services. Call Sharon 385-9133

For Sale

Closing Office- For Sale
NM Reports 1-137 with NM Digest $975; Conference Table 94”X 45” w/ 6 Chairs Like New $1200 firm; Sm conf. table w/ 3 Chairs $250; Reception Room Table w/ 3 Chairs $295; Am. Legal Forms (not current) $100; Misc items. Call 843-8500 for appointment.

Office Space

Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Very Desirable Uptown Location
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.

Downtown Office
Extremely close to all courts. Space for two offices with staff and reception. Beautiful hard wood floors. Security wrought iron on all windows and doors. Tons of parking in rear. Remodeled kitchen with new stove, sinks and cabinets. Plenty of space for copiers, fax, storage. Reasonable rent. 205-6141

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.

Office Space for Lease
Beautiful fully refurbished office space available March 1, 2007 in desirable uptown district. 4 offices and adjoining Conference room available either as an entire leasehold or separate units. Office space approximately 1200 sq. ft. including break area and conference room. Easy access to highway and minutes from downtown. 2633 Dakota NE. Contact Tony for immediate showings (505) 884-9300.

Downtown Albuquerque
Extremely close to all courts. Space for two offices with staff and reception. Beautiful hard wood floors. Security wrought iron on all windows and doors. Tons of parking in rear. Remodeled kitchen with new stove, sinks and cabinets. Plenty of space for copiers, fax, storage. Reasonable rent. 205-6141

Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $165 per month. Call Orville, (505) 867-6566 or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Ethics Advisory Opinions

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

Easy to Use

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

More Resources

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

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

State Bar of New Mexico
HOW TO WIN YOUR NEXT JURY TRIAL
USING THE POWER TRIAL METHOD

Friday, March 16, 2007 • State Bar Center, Albuquerque
6.0 General CLE Credits
☐ Standard and Non-Attorney $199
☐ Government, Legal Services Attorney, Paralegal $189

Litigation partner David J. F. Gross of Faegre & Benson (Minnesota) was recently named one of the nation's 50 “Rising Litigation Stars” by The American Lawyer. Gross is a magna cum laude graduate of Harvard Law School, a former clerk to the Honorable Levin H. Campbell of the U.S. Court of Appeals for the First Circuit in Boston, and a former Trial Attorney for the Civil Division of the U. S. Dept of Justice in Washington, D.C. Gross is co-author of the NITA publication The Power Trial Method and he has taught trial practice seminars to attorneys across the country. Attendees from his 2004 seminar at the State Bar of New Mexico called it “very worthwhile, entertaining…and practical.”

In this full-day seminar, Gross will explore the various elements that go into successful preparation and presentation at trial to include how to avoid making mistakes and how to handle serious challenges at trial. Attendees will also receive a complimentary copy of The Power Trial Method.

8:30 a.m. Registration
9:00 a.m. Morning Session
10:30 a.m. Break
10:45 a.m. Morning Session (continued)
Noon Lunch (provided at State Bar Center)
1:00 p.m. Afternoon Session
3:00 p.m. Break
3:15 p.m. Afternoon Session (continued)
4:30 p.m. Adjourn

Please Note: No auditors permitted

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours  INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name ____________________________________________ NM Bar # _________________________________
Street __________________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________________
Phone __________________________________ Fax  ____________________________________________________
E-mail __________________________________________________________

☐ Purchase Order (Must be attached to be registered) ☐ Check enclosed $ ____________ Make check payable to: CLE
Credit Card # _____________________________________________________________________________ Exp. Date _________________
Authorized Signature _______________________________________________________________________________________________
2007 Annual Meeting
July 12-15, 2007

Inn of the Mountain Gods
Mescalero, NM

Justice Sandra Day O’Connor – Keynote Speaker

The State Bar has reserved room blocks at the following hotels. Be sure to mention the “State Bar of New Mexico” to receive the special discounted rates.

**Inn of the Mountain Gods**
287 Carrizo Canyon Road, Mescalero - $159 (1-800-545-9011)

**The Lodge at Sierra Blanca** (formerly Hawthorn Suites)
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)