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Special Insert:

CLE-At-A-Glance

www.nmbar.org
Friday, March 30, 2007 • State Bar Center, Albuquerque

4.2 General CLE Credits

☐ Standard Fee $189

Dean Boland is a former computer crime prosecutor, appellate court clerk, frequent law and technology lecturer and criminal defense attorney. His focus is upon the defense of state and federal computer crime, importuning and child pornography matters. Boland was graduated from Case Western Reserve University School of Law in 1995. He is a past adjunct professor of technology law at Case Western Reserve Law School and Cleveland State University School of Law. He has taught law and technology seminars and provided training for judges, prosecutors, attorneys and the public for more than ten years. Joining him will be Donna Payne, CEO and Founder of Payne Consulting Group, a training and development company headquartered in Seattle, Washington. Payne is an original member of Microsoft Legal Advisory Council and a frequent speaker at legal and technical conferences worldwide on the subject of metadata and preventing accidental disclosure.

8:30 a.m. Registration
9:00 a.m. Pre-Trial Hearings, Locking in Prosecution Witnesses
Dean Boland, Esq., Lakewood, Ohio
9:30 a.m. Pre-Trial Motions – What They Are, When to File, and Why
Fair Trial, Vagueness, Overbreadth, First Amendment
Motions in limine – Authentication
What Experts You Need, How, and Why to Use Them
Dean Boland, Esq.
10:00 a.m. Break
10:15 a.m. The Best Prosecution Strategies
The Best Defenses to Those Strategies
Using Prosecution Experts as Your Witnesses
Dean Boland, Esq.
10:45 a.m. Actual Digital Image and Digital Video Exhibits from Cases
Update on the Latest in Image and Video Manipulation Techniques
Setting Up Your Appeal
Dean Boland, Esq.
11:15 a.m. Mitigation from Initial Client Contact to Sentencing
The Attacks on the New Amendments to 18 U.S.C. 3509
Dean Boland, Esq.
11:45 a.m. Lunch (provided at the State Bar Center)
12:45 p.m. Metadata: How to Protect Against Accidental Disclosure and the Sharing of Privileged Information
Donna Payne, Payne Consulting Group, Seattle, Washington
2:15 p.m. Q & A
Dean Boland, Esq. & Donna Payne
2:30 p.m. Adjourn

FOUR WAYS TO REGISTER

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

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Street _______________________________________________________________________________________
City/State/Zip ___________________________________________________________________________________
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E-mail _______________________________________________________________________________________
☐ Purchase Order (Must be attached to be registered) ☐ Check enclosed $ __________ Make check payable to: CLE
Credit Card # __________________________________________________________________________ Exp. Date __________________
Authorized Signature ___________________________________________________________________________
FAIR HOUSING* TRAINING
FOR ATTORNEYS
April 17-18, 2007

10.0 General CLE Credits
1.0 Ethics CLE Credit
1.0 Professionalism CLE Credit

Alamosa Community Center
6900 Gonzales Rd. SW, Albuquerque, NM

Presenters: Carnis Salisbury, long-time local civil rights activist
Richard Weiner, Fair Housing Coordinator, Albuquerque Human Rights Office
Reed Colfax, Fair Housing attorney, Relman & Associates, Washington, DC
Rebecca Bond, Deputy Chief, Housing and Civil Enforcement Section,
Civil Rights Division, U.S. Department of Justice
James Chavez, landlord rights attorney, Vance, Chavez & Associates
Christopher Brancart, Fair Housing attorney, Brancart & Brancart, Pescadero, CA

* “Fair Housing” refers to the body of civil rights laws that prohibit discrimination
in housing. The training is free of charge, except for the MCLE’s $1-per-CLE-credit fee, to
be paid during registration to the New Mexico Human Rights Coalition.

To sign up or to obtain more information, call the Albuquerque Human Rights
Office at (505) 924-3380, NM Relay: 1-800-659-8331, or e-mail: rweiner@cabq.gov.

The Albuquerque Human Rights Office provides education, training, and technical
assistance in Fair Housing and also accepts and investigates discrimination complaints in the
areas of housing, employment, and public accommodation.

Co-sponsored by the New Mexico Human Rights Coalition.
MARCH 29TH VIDEO REPLAYS - STATE BAR CENTER

Lawyers as Problem Solvers: 2007 Professionalism
9 – 10 a.m.
1.0 Professionalism CLE Credit
☐ $49

The New Challenge of Professional Liability Insurance
10:30 – 11:30 a.m.
1.0 General CLE Credit
☐ $49

Search and Seizure
2:30 – 3:30 p.m.
1.0 General CLE Credit
☐ $49

Cybersleuth’s Guide to the Internet
9 a.m. – 3:30 p.m.
6.0 General CLE Credits
☐ $189

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

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 _______________________________________________________________
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- **2007-NMCA-026, No. 25,612:** State v. Diaz .................................................. 32

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**Professionalism Tip**

With respect to my clients:

I will advise my client that civility and courtesy are not weaknesses.

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### Meetings

**March**

- **14**
  - Children’s Law Section Board of Directors, noon, Juvenile Justice Center
- **15**
  - Membership Services Committee, noon, State Bar Center
- **16**
  - Public Legal Education Committee, 10 a.m. - 5 p.m., State Bar Center
- **17**
  - Health Law Section Board of Directors, noon, State Bar Center
- **18**
  - Family Law Section Board of Directors, 9 a.m., via teleconference
- **19**
  - Indian Law Section Board of Directors, 9 a.m., State Bar Center
- **20**
  - State Bar Workshops

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### State Bar Workshops

**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
- **9**
  - Legal Clinic, Consultations, 8 a.m. to noon and 1 to 4 p.m., Catron County Senior Center, Reserve
- **22**
  - Consumer Debt/Bankruptcy Workshop, 5:30 p.m., Branigan Library, Las Cruces
- **28**
  - Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center, Albuquerque

**April**

- **25**
  - Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center, Albuquerque
- **26**
  - Consumer Debt/Bankruptcy Workshop, 5:30 p.m., Branigan Library, Las Cruces

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**Cover Artist:** Kristeen Rizkalla sculpts unique figures of wisdom, strength and tenderness using stains, glazes and high/low-fired clay to bring out the character in the faces and clothing. The essence of her work is to reflect the human connection through the nurturing of the human spirit. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
NOTICES

COURT NEWS

N.M. Supreme Court Board Governing the Recording of Judicial Proceedings

Expired CCR Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications are no longer in effect:

DeYoung, Kelley #054
4961 San Marque Circle
Carmichael, CA 95608

Fabok, Glinda, #242
PO Box 1001
Pinedale, Arizona 85934

Hidalgo, Eloise, #241
3605 Chelwood Park Blvd. NE
Albuquerque, NM 87111

Manansan-Wagner, Margo, #018
8501 Rio Grande Blvd. NW
Albuquerque, NM 87114

O’Bryant, Robert, #187
1152 Third Avenue E
Sheridan, WY 82801

O’Brien, Patricia, #001
1010 Los Arboles NW
Albuquerque, NM 87107

Roy, David, #111
3270 Darvany Drive
Dallas, Texas 75220

Shollenberger, Kim, #137
6509 Avenida La Cuchilla
Albuquerque, NM 87107

Traban, Michele, #053
1402 Acton Street
Berkeley, CA 94702

Law Library

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

Notice of Vacancies

Supreme Court Committees

The New Mexico 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. The deadline for judges and attorneys interested in volunteering their time on this committee is March 19.

Two attorney vacancies exist on the UJI- Criminal Committee due to the resignation of two members. The deadline for attorneys interested in volunteering time on this committee is April 2.

Send letters of interest and/or resumes to:
Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848.

Proposed Revisions to the Uniform Jury Instructions—Civil

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. Comments on the proposed amendments set forth below must be received by the clerk on or before March 19 to be considered by the Court. Send written comments to:
Kathleen J. Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

See the Feb. 26 (Vol. 46, #9) Bar Bulletin for reference.

Santa Fe Municipal Court Brown-Bag Lunch

Santa Fe Municipal Judge Ann Yalman invites all attorneys who practice in the Santa Fe Municipal Court to meet with her at Municipal Court at 11:30 a.m., March 21, for a discussion of practice and procedures in the Municipal Court.

U.S. Bankruptcy Court Brown-Bag Presentations

The U.S. Trustee will present brown-bag presentations in Roswell and Las Cruces on completing the means test form (Official Form 22A).

The first presentation will be held at 11:30 a.m. or immediately following the conclusion of the §341 docket, April 19, at 500 N. Richardson, Roswell.

The second presentation will be held at 1:30 p.m. or immediately following the conclusion of the §341 docket, April 25, at the Staybridge Suites, Suite 137, 2651 Northrise Drive, Las Cruces. Contact Tamara Barner, bankruptcy analyst, Tamara.L.Barner@usdoj.gov, for more information.

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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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. 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.

Annual Meeting
According to its bylaws, the State Bar is required to hold an annual meeting of its members. As part of this year’s annual meeting, which will be held at the Inn of the Mountain Gods in Mescalero, the State Bar will conduct a CLE session on discussion topics from 3 to 4:45 p.m., July 12. Possible discussion topics include non-partisan judicial elections, reciprocity, tort reform and electronic filing. Members who have suggestions on other possible topics or are interested in speaking to a specific topic or moderating a discussion, contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.

Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., April 2, 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.

Board of Bar Commissioners
Bar President Visits
State Bar of New Mexico President Dennis E. Jontz will meet with local attorneys in five locations April 15–17 to discuss the state of the State Bar and issues facing the profession. More information will be forthcoming. Contact jconte@nmbar.org with any questions.

Las Cruces: 5 p.m., April 17,
Hotel Encanto de Las Cruces
*Held in conjunction with the regular local bar meeting.

Board Appointment
Access to Justice Commission
The Board will make one appointment to the New Mexico Access to Justice Commission for the remainder of an unexpired term through December 2008. Members desiring to serve should send a letter of interest and brief resume to April 13 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Board Appointment
DNA – People’s Legal Services, Inc.
The Board will make two appointments to the board of DNA–People’s Legal Services, Inc. for two-year terms. Board members agree to provide direction, leadership and stewardship that ensure DNA’s ability to provide high quality legal services to its clients. The function of the board is to provide governance for DNA, represent the organization in the community and accept ultimate legal authority for the organization.

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

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.
Paralegal Division Compensation, Utilization and Benefits Survey

The Paralegal Division of the State Bar is conducting a Paralegal Compensation, Utilization and Benefits Survey from March 1 to April 15. The division is urging every paralegal practicing in New Mexico to complete this very important survey. An easy link to the online version of the survey can be found on the State Bar Web site, www.nmbar.org. A printed survey is available in this issue of the Bar Bulletin; or e-mail PD@nmbar.org. Send the completed printed surveys to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. The deadline for submission of the survey is April 15. Confidentiality of all personally identifiable information will be strictly maintained at all times.

Monthly Brown-Bag CLE

The Paralegal Division invites members of the legal community to bring a lunch and attend the At-Will Doctrine: Employment Law’s Misunderstood Rule, presented by Daniel Faber, Attorney at Law. The program will be held from noon to 1 p.m., March 14, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff. For more information, contact Cheryl Passalaqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

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.

Solo and Small Firm Practitioners Section Luncheon Presentation

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

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

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: Brent Moore, Deputy Superintendent Insurance Division Public Regulation Commission 1120 Paso de Peralta PO Box 1269 Santa Fe, New Mexico 87504-1269 Applications must be postmarked by March 31. Direct questions to J. Brent Moore, (505) 476-3783.

Brown-Bag Luncheon March 15

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 Roxanna Chacon, lcrdrmc@nmcourts.com.

Brown-Bag Luncheon March 27

The Young Lawyers Division will host a brown-bag judicial luncheon with members of the federal judiciary: the Honorable Judith C. Herrera, the Honorable James O. Browning, the Honorable William P. Johnson, and the Honorable Lorenzo F. Garcia. Luncheon will take place from noon to 1:30 p.m., March 27, at the U.S. District Courthouse, Albuquerque, sixth floor judges library. Topics will include practice advice to new attorneys from the perspective of the federal bench. Lunch will be provided. Space is limited. R.S.V.P. by March 20 to Martha Chicoski, mmchicoski@gmail.com.

Junior Judges Community Service Program

The Young Lawyers Division is seeking volunteer attorneys for its 2nd annual Junior Judges Program. Volunteer attorneys will lead discussions with third, fourth and fifth grade students about judging for themselves what the right choice may be in difficult situations, as well as the potential consequences of bad behavior. Topics include stealing, bullying, cheating, drugs and alcohol, and gangs and weapons. The program will take place in Albuquerque elementary schools April 13 in approximately one-hour units. Volunteer attorneys will show a brief video to the class and then engage students in discussion about the possible choices and consequences of particular situations. A full curriculum and teaching video will be provided as well as a brief orientation which will be held during the week of April 2. For more information or to volunteer, contact Martha Chicoski, mmchicoski@gmail.com, or (505) 550-6446 by March 23.

OTHER BARS

American Bar Association E. Smythe Gambrell Professionalism Awards

Nominations are now being accepted for the 17th Annual E. Smythe Gambrell Professionalism Awards, recognizing projects that enhance professionalism among lawyers. Bar associations, law schools, law firms and other not-for-profit law-related organizations are eligible for the
awards. Three awards of $3,500 each will be presented during the 2007 ABA Annual Meeting in San Francisco. The deadline for entries is March 30. Entry forms, guidelines and information about previous award recipients are available online at www.abanet.org/cpr/gambrell.html. Questions regarding the awards should be directed to Kathleen Maher, (312) 988-5307, or e-mail: maherk@staff.abanet.org. See the Jan. 15 (Vol. 46, No. 3) issue of the Bar Bulletin for more details.

Paul G. Herne Award

The American Bar Association Commission on Mental and Physical Disability Law is pleased to announce that nominations for the seventh annual Paul G. Herne Award for Disability Rights are now being accepted. The award is presented to an individual or an organization that has performed exemplary service in furthering the rights, dignity and access to justice for people with disabilities. The 2006 award went to Louise A. McKown, a disability rights advocate and systems change analyst. Other past recipients include The Honorable Rhonda J. Brown, Anil Lewis, Robert Perske, Professor Stan Herr, Maryloy Breslin and Professor Jim Ellis.

Submit a nomination form and all related documents electronically. The form can be completed at http://www.abanet.org/disability or download the print version and e-mail it to Jonathan Simeone, simeonej@staff.abanet.org. Direct questions to (202) 622-1576. Nominations must be received by April 1.

N.M. Defense Lawyers Association
2007 Outstanding Civil Defense Lawyer Nominations

Nominations are being accepted for the 2007 Outstanding Civil Defense Lawyer. The award will be presented at the 2007 DLA Annual Meeting on October 18 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability.

Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199; fax to (505) 858-2597; or e-mail nmdefense@nmdla.org.

Deadline for submissions is May 31.

Member Luncheon

The N.M. Defense Lawyers Association Member Luncheon will be from 11:30 a.m. to 1 p.m., March 15, at the Hotel Albuquerque. The Honorable Alan Torgerson will present Recent Filing and Case Management Changes Impacting the U.S. District Court for the District of N.M. An open-floor discussion will follow. Contact NMDLA, (505) 797-6021, for more information or visit www.nmdla.org.

N.M. Women’s Bar Association Bi-Monthly Luncheon

Interested in running for office? Want to know what is involved in running a political campaign? Emerge, a political leadership training program for democratic women in New Mexico, will give a presentation at the New Mexico Women’s Bar Association’s Bi-monthly Luncheon from noon to 1:30 p.m., March 14, at NYPD Pizza, 215 Central NW, Albuquerque. Julie Koob, founder of Emerge New Mexico, will be the guest speaker along with two graduates of Emerge, Christina Argyes and Marie Ward. Representation from Republican leadership was not possible because the party does not have a similar New Mexico program. However, suggestions for a comparable presentation are welcome.

Lunch is ordered and paid for individually. R.S.V.P. to Patricia Baca, womensbarnm_admnasst@msn.com.

UNM School of Law Fellowship Fund-Raiser

The Association for Public Interest Law cordially invites all members of the State Bar to attend the 7th Annual Public Interest Law Fellowship Fund-Raiser from 6 to 9 p.m., April 5, at the Carom Club, 301 Central NW, Albuquerque. APIL will host a live and silent auction. The funds raised at this event will benefit APIL’s summer fellowship fund for students who are working in the public interest during the summer of 2007. All donations are tax deductible. For more information about the event or to make a donation to the auction or the fellowship fund, contact Robert Lara, lararo@law.unm.edu, or (505) 610-1374.

Library Spring Hours

Building and Circulation

Monday–Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 4 p.m.

Reference

Monday–Friday 9 a.m. to 6 p.m.
Saturday Noon to 1 p.m.
Mar. 12–16, Spring Break 8 a.m. to 6 p.m.

Phone: (505) 277-6236

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
Anatomy for Litigators
by Professor Samuel D. Hodge, Jr., Temple University
by Carl Bettinger, M.D, J.D.

Hodge’s book is a useful primer for practitioners dealing with cases involving anatomical injuries or issues. The author’s point of view is unabashedly defense oriented, with chapters sometimes ending in comments such as, “what to do when defending a [type of] claim,” or how the defense can “level the playing field” with an IME. However, in pointing out how the defense uses anatomy and anatomical studies, the author discloses the very tactics which should help plaintiff’s counsel.

The author’s use of a clinical vignette to begin most topics is engaging. The schematic diagrams are somewhat amateurish and very two dimensional, but essentially accurate and quickly convey basic information. The discussion of anatomic terminology is a lucid reference which is easy to use. The author’s listing of Internet sources, West key cites and applicable review articles should be particularly useful to the busy litigator and support staff.

The discussion on medical records is well organized, to the point, and provides the litigator with what he or she will need for requesting and organizing both outpatient records and hospital records. The discussion of charting errors, particularly in discharge summaries, is on point and correct. However, the chapter lacks any discussion of nursing home records, which have a content and organizational structure quite distinct from doctors’ outpatient notes or hospital records.

The chapter on imaging studies lays out the various imaging modalities and their pitfalls, including the sometimes poor correlation between clinical findings and imaging findings.

The discussion on musculoskeletal injuries, including fractures, quickly identifies the different categories of sprains, strains and fractures in an easy-to-reference format.

The chapters on neuroanatomy and the spine have good textual explanations, but the diagrams are too small and two dimensional to be of much use. In all fairness to the author, this incredibly complex anatomy would best be described pictorially in a more substantive textbook such as Netter’s. The discussion of laminectomies, laminotomies, discectomies and fusions is well done and easy to follow.

The chapter on the hand is well illustrated with schematics which quickly convey basic anatomy and anatomical terms. The knee diagrams are less useful, and one would be better served by a classic textbook on anatomy. The dental anatomy is also well covered with basic terms and conventions clearly set forth.

The author does a thorough job describing the different medical specialties which might be called on for an IME, including a humorous account of the need for caution in examining an “expert’s” credentials, the case in point being that of a very highly credentialed expert who turned out to be a cat. See www.dreichei.com/drzoe.htm. There is a helpful discussion on approved medical specialty boards as well as their contact information.

Overall, Anatomy for Litigators would be better deemed Anatomy for Defense Litigators, but it is a nice basic reference that should be useful to all.

About the Author:
Carl Bettinger has been practicing since 1990, currently with Dan Shapiro and Greg Chase at Shapiro Bettinger Chase LLP. The firm focuses on medical negligence, nursing home neglect and complicated personal injury. Carl received his M.D. from Boston University, completed an internal medicine residency at UNM and then went to law school at UNM.

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Submitted articles should be e-mailed to the editor at dseago@nmbar.org. Articles should be no longer than 1500 words, including endnotes, and will be reviewed by the board of editors. For more information on submission guidelines, contact Dorma Seago, (505) 797-6030, or dseago@nmbar.org.
When the Court Interpreter Cannot Hear,

**Due Process Stops**

By A. Samuel Adelo
Federal and State Certified Court Interpreter

One of the best kept courtroom secrets may be that court interpreters frequently cannot hear courtroom discourse. The interpreter usually sits next to the defendant and defense counsel, the most difficult place for the interpreter to adequately hear all the parties who speak during a hearing. Moreover, the interpreter's voice overlaps the speaker's voice, making it even more difficult to hear what is being said. By contrast, court reporters and monitors are positioned where their ability to hear every word spoken is maximized.

All objective criterion-referenced studies concerning the court interpreter's task conclude that the principal causes of interpreter fatigue are faulty acoustics, prolonged periods on task, lack of familiarity with relevant subject matter, complex terminology and excessively fast and incoherent discourse. Interpreters are under intense pressure because they know that the life and liberty of the defendant depends on the interpreter's ability to interpret precisely and exactly what is being said. The interpreter is acutely aware that misinterpretation or omission of any part of the discourse will violate the defendant's constitutional rights.

The discourse to be interpreted completely and accurately includes legal and technical terms, jargon, slang, mumbo jumbo, hesitations, false starts, repetitions and inaccuracies. The court interpreter faces very demanding and stressful working conditions compared with interpreters who work in non-legal settings.

This article is offered to respectfully solicit the judges' enlightened cooperation to enable court interpreters to interpret hearings accurately and to comply with their professional obligations and ethically do their part to meet out constitutional due process and equal protection. Close-knit teamwork is necessary in cases wherein linguistically challenged defendants require the services of an interpreter. The following recommendations are respectfully offered so all parties in the courtroom form a team that ensures ethnic and racial fairness to defendants who require the services of an interpreter.

1. Speak directly to the defendant, witness or party and avoid prefacing questions or statements directed to the interpreter, such as “ask [or tell] the defendant … .”
2. Before a hearing begins, brief the interpreter. Explain the basic issue(s) of the case and summarize the evidence you plan to introduce.
3. Refrain from using false starts, unnecessary fillers and foggy terms. Instead, use familiar, concrete, crisp and concise terms.
4. Refrain from using ambiguous terms, double negatives and lawyerly clichés.
5. Before the hearing, ask the interpreter if there is any relationship between the interpreter and any of the parties that may create a conflict of interest or an appearance of a conflict of interest.
6. Before the hearing, ask the interpreter if he or she has previously interpreted in any stage of the case now before the court.
7. As the case progresses, do not ask the interpreter for his or her opinion concerning any aspect of the case.
8. If you disagree with any part of the interpretation, do not object on the record; instead, ask for permission to address the court and explain your objection to the judge with other counsel and the interpreter present.
9. Do not ask the interpreter to do a sight translation of a document without your being present to answer questions the defendant raises while the interpreter orally interprets the content of the document.
10. From time to time, ask the interpreter if he or she needs a break to avoid interpreter fatigue.

In view of the above, all parties who actively participate in hearings are reminded to speak at reasonably understandable, audible levels not to exceed 140 words per minute. Courtroom discourse spoken at a moderate speed makes it possible for the interpreter to effectively assist the court to ensure that defendants clearly understand the discourse interpreted. Consequently, the court will have taken all reasonable steps to ensure compliance with the defendant's constitutional rights of equal protection and racial ethnic fairness.

About the Author:
Sam Adelo, now retired, has been a freelance court interpreter for 24 years in the U.S. District Court and the New Mexico state district courts. He taught court interpreting for the Haury Court Interpreter Institute at the University of Arizona. He has interpreted in Texas, Oklahoma, Nebraska and Arizona. Adelo served as chair of the New Mexico Court Interpreters Advisory Committee to the New Mexico Supreme Court.
## March

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- **E = Ethics**
- **P = Professionalism**
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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 March 12, 2007**

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**Certiorari Granted and Submitted to the Court:**

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

| No. 29,058 | Sanchez v. Pellicer (COA 25,082) | 9/29/05 |
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| No. 29,160 | Benavidez v. City of Gallup (COA 25,373) | 12/13/05 |
| NO. 29,218 | Montoya v. Ulibarri (12-501) | 4/10/06 |
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| No. 30,143 | Trujillo v. atch (12-501) | 2/27/07 |
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| NO. 29,751 | State v. Bricker (COA 24,719) | 2/27/07 |
| NO. 29,954 | State v. Cook (COA 24,957) | 2/27/07 |
| NO. 29,373 | State v. Martinez (COA 25,376) | 2/27/07 |
**OPINIONS**

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

Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925

**EFFECTIVE MARCH 2, 2007**

### Published Opinions

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

### Clerk Certificates

**From the New Mexico Supreme Court**

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<td>Albuquerque, NM 87158-0806</td>
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<td><strong>Darcy S. Bushnell</strong></td>
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**CLERK CERTIFICATES**

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<tr>
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<td>(505) 842-9960 (505) 842-0761</td>
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CLE REGISTRATION FORM

For More Information About Our Programs
Visit: www.nmbarcle.org

FOUR WAYS TO REGISTER:

PHONES (505) 797-6400, 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 9286, Albuquerque, NM 87109

Name ____________________________ NL/Bar # ____________________________
Street ____________________________ Phone ____________________________
City/State/Zip ______________________ Email ____________________________
Program Title ______________________ Program Location __________________
Program Date ______________________ Program Cost ______________________
Program Location __________________
Purchase Order (Must be attached to order registered)
Check enclosed $ __________________ Mail check payable to CLE
VISA MC AMERICAN EXPRESS DISCOVER
Credit Card # __________ Exp. Date __________
Audit Fee $100,家住 ________

REGISTRATION FORM

People with Disabilities: Our meetings are held at facilities which are fully accessible to persons with mobility disabili-
ties. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBNM office one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

MCLE CREDIT INFORMATION: Courses have been approved by the New Mexico MCLE Board. CLE of SBNM will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

ATTENTION PERSONS WITH DISABILITIES: Our meetings are held at facilities which are fully accessible to persons with mobility disabili-
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PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if atten-
dance is insufficient. Pre-registered will be notified by phone and full refunds given.

TAPE RECORDING OF PROGRAMS IS NOT PERMITTED.

CLE AUDIT POLICY: Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff having defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $100, space permitting. Course materials, breaks and lunch, if applicable, may be purchased at an additional cost of $25. Auditors should contact the CLE office in advance and notify staff of their intent to audit. “Work” of auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events.

SCHOLARSHIPS: Please note, scholarships are available on an as-need basis for up to 40% of any given seminar. The amount of the scholarship is equivalent to a 10% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6400.

NOTE: Programs subject to change without notice.

Upcoming Events

April
13 Medical Malpractice
19 Medicaid Fraud / Health Law
Legislative Update
May
4-5 NM Collaborative Law
18 1031 Exchanges
June
15 Tax Symposium

Register for Courses and LIVE WEBCASTS Online

- Go to www.nmbarcle.org
- Browse by Topic, Type of Credit, or Media
- Choose a program of interest
- Click on Purchase Program (login required).
  (If you have not previously created an account directly through www.nmbarcle.org, you must do so with ID being your bar ID and password being your last name).
- For Live Courses, complete purchase online.
- For Online Self-Study and Live Webcasts, you will be given instructions for launching the program. Live Webcasts MUST be viewed at actual time of broadcast.
You must complete the following steps for your credits to be filed:
- Click on Evaluate Program and complete
- Click on Submit For Credit
Your credits will be filed by CLE automatically within 30 days.

WHAT EVERY LAWYER SHOULD KNOW ABOUT IP

This program will focus on an overview of the various types of intellectual property protection, how to assess which form of protection to pursue, common pitfalls to avoid, and the elements of copyright and trademark infringement. The seminar will be taught by Michele Huff, Managing Partner of the Archer Law Group, LLC in Santa Fe. Huff is an intellectual property lawyer with over 20 years of experience in the high tech industry as co-founder and COO of a software start-up, 8 years of experience supporting engineering groups at Sun Microsystems (to include the original JavaTM team), and 3 years as a litigation associate at a high tech law firm, representing Apple and Intel.

HOW TO WIN YOUR NEXT JURY TRIAL USING THE POWER TRIAL METHOD

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.

Thursday, March 15, 2007 - State Bar Center, Albuquerque
2.7 General CLE Credits
Standard Fee $95
- Infringing Intellectual Capital: Copyright and Trademark
Michele Huff, Esq., Archer Law Group
Noon Adjourn and Lunch (provided at the State Bar Center)

Friday, March 16, 2007 - State Bar Center, Albuquerque
6.0 General CLE Credits
Standard and Non-Attorney $199
- Government, Legal Services Attorney, Paralegal $189
**TIME MASTERY FOR LAWYERS: 68 WAYS TO MAXIMIZE YOUR PRODUCTIVITY AND SATISFACTION**

**Friday, April 20, 2007 • State Bar Center, Albuquerque**

*4.5 General, 1.0 Ethics & 1.0 Professionalism CLE Credit*

**Presenter:** Frank Sanitate  
**Moderator:** TBA

The seminar will focus on the immeasurable value of using your time to enhance your effectiveness. Sanitate is a frequent speaker for state and provincial bar associations throughout North America and has taught tens of thousands of lawyers and other professionals over the past two decades how to better manage their professional practices.

Using his book *Don’t Go To Work Unless It’s Fun: State-of-the-Art Time Management*, Sanitate will provide attendees with sixty-eight tips on how to increase your productivity by better managing your legal practice.

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<tr>
<th>Time</th>
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<tr>
<td>8:00 a.m.</td>
<td>Registration</td>
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<td>9:00 a.m.</td>
<td>Self-Analysis: Weaknesses, Objective, Where My Time Goes</td>
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<td>9:30 a.m.</td>
<td>One Way to Shift Your Attitude: “I don’t have enough time!”</td>
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<td>9:50 a.m.</td>
<td>Eight Ways to Work on What Counts</td>
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<td>10:30 a.m.</td>
<td>Break</td>
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<td>10:45 a.m.</td>
<td>Five Ways to Delegate</td>
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<td>11:05 a.m.</td>
<td>Two Ways to Plan Your Life: Working to Live v. Living to Work</td>
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<td>11:40 a.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
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<td>1:00 p.m.</td>
<td>Effective and Ethical Communication with Clients (1.0 Ethics)</td>
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**March 20th**

- 9:00 a.m. - 10 a.m.  **Ethics** & **Professionalism CLE Credits**
  - 1.0 Ethics & 1.0 Professionalism CLE Credits: $79

**March 29th**

- 9:00 a.m. - 10 a.m.  **Ethics** & **Professionalism CLE Credits**
  - 1.0 Ethics & 1.0 Professionalism CLE Credits: $189

**VIDEO REPLAYS**

1. **March 20th**
   - 1 – 4 p.m.
   - 8:30 a.m. and 10 a.m.:
     - 1.0 General CLE Credit: $130
   - 9 a.m.:
     - 1.0 Professionalism CLE Credit: $49
   - 9 a.m.:
     - 1.0 General CLE Credit: $109

2. **March 29th**
   - 1 – 2 p.m.:
     - 1.0 Ethics & 1.0 Professionalism CLE Credits: $249
   - 9 a.m.:
     - 1.0 General CLE Credit: $49
   - 2:30 – 3:30 p.m.:
     - 1.0 Ethics & 1.0 Professionalism CLE Credits: $219

**ROAD AND ACCESS LAW**

**Saturday, March 24, 2007 • State Bar Center, Albuquerque**

*3.0 General CLE Credits*

**Co-Sponsor:** Paralegal Division

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<td>1:30 p.m.</td>
<td>Road and Access Law</td>
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<td>Road and Access Law (continued)</td>
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Please Note: No auditors permitted

**ADVANCING THE HR/ATTORNEY RELATIONSHIP:**

**Friday, March 23, 2007 • State Bar Center, Albuquerque**

*5.5 General CLE Credits*

**Co-Sponsors:** Employment & Labor Law Section, State Bar of New Mexico Human Resource Management Association of New Mexico (HRMA)

**Standard Fee $159**

**Employment and Labor Law Section Member $149**

**Government, Legal Service Attorney, Paralegal $149**

**Human Resource Professional $149**

**Incorporated by the New Mexico State Bar**

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Please Note: No auditors permitted
1.0 General CLE Credits

17 Real Estate Workouts: Tax and Non-Tax Aspects
1.0 General CLE Credits

years of a substantial growth and appreciation in the real estate market, rising interest rates and a general settling in values have caused many marginal real estate deals to come apart. As more deals and their promoters fall into insolvency or file for bankruptcy, real estate workouts have become more common. This program will examine of negotiating with creditors over defaults in commercial real estate.

$67

15 Employee Overtime: Determining Who is “Exempt” 1.0 General CLE Credits

Whether an employee is entitled to overtime is a complicated legal question – and, according to Labor Department audits, many employers are not properly classifying employees as exempt or non-exempt. This program will provide counsel advising employers with a real-world guide through governing Fair Labor Standards Act regulations in this area and advice on avoiding common pitfalls.

$61

22 Fundamentals of Trade Secrets in Business Law 1.0 General CLE Credits

Trade secrets – the know-how, methods, practices, and other confidential information that forms the basis of many businesses – are often overlooked in business transactions. Trade secrets, if not properly protected by agreement and actual practice, can be easily lost, and substantially the diminish the practical value of a business. This program will discuss methods for protecting the value of trade secrets and ensuring the business value they create.

$67

29 Fiduciary Income Taxation: The Basics 1.0 General CLE Credits

The use of trusts and the creation of other fiduciary relationships, plagues legal counsel into the complicated world of fiduciary income taxation. This program is an intermediate-level guide to the intricacies of the fiduciary income taxation of trusts and estates.

$67

1/2 2007 Attorney Ethics Update Part 1 & 2 2.0 Ethics CLE Credits

This annual two part update on practical lawyer ethics will focus on developments under the Model Rules of Professional Responsibility, as adopted by most states. As in years past, the program will use a scenario-driven format for the panel. The program will focus on the practical ethical concerns that arise for lawyers in everyday practice.

$129

10/11 Update for Attorneys Advising MDs, Part 1 & 2 2.0 Ethics CLE Credits

As LLCs have become the default entity for many businesses, more deals and their promoters fall into insolvency or file for bankruptcy. This program will focus on heightened duties of LLC managers as the insolvency increases, too. This program will review the major bankruptcy filings of LLCs and the current legal environment governing physician practices, and business and tax law developments that particularly impact medical practices. This program is an essential update for transactional counsel advising medical practices.

$67

ACCOUNTING FOR LAWYERS

Wednesday, March 28, 2007 • State Bar Center, Albuquerque
6.0 General CLE Credits

Presenter: Douglas R. Smith, CPA
Moderator: TBA

Standard Fee $199

8:00 a.m. Registration
8:30 a.m Basic Concepts Underlying Financial Reporting (Generally and as they relate to bank and firm reports)
• Generally Accepted Accounting Principles (GAAP) and non-GAAP reporting
• Levels of assurance provided by CPA-prepared financial statements
• Net income vs. cash flow
• Depreciable assets
• Capitalizing vs. expensing
• Inventory
• Other basic concepts

2.30 p.m. Break

10:00 a.m. The Financial Statements
• Balance Sheet
• Income Statement
• Statement of Cash Flows
• Notes to the Financial Statements

10:15 a.m. Accountants’ Report
• Sample professional firm financial statement
• Sample public company financial statement
Lunch (provided at the State Bar Center)

3:45 p.m. Q & A
Adjourn

Please Note: No auditors permitted

DEFFENDING COMPUTER CRIME CASES

Friday, March 30, 2007 • State Bar Center, Albuquerque
4.2 General CLE Credit

Standard Fee $189

Dean Boland is a former computer crime prosecutor, appellate court clerk, frequent law and technology lecturer and criminal defense attorney. His focus is upon the defense of state and federal computer crime, importuning and child pornography matters. Boland was graduated from Case Western Reserve University School of Law in 1995. He is a past adjunct professor of technology law at Case Western Reserve Law School and Cleveland State University Law School. He has taught law and technology seminars and provided training for judges, prosecutors, attorneys and the public for more than ten years. Joining him will be Donna Payne, CEO and Founder of Payne Consulting Group, a training and development company head-quartered in Seattle, Washington. Payne is an original member of Microsoft Legal Advisory Council and a frequent speaker at legal and technical conferences worldwide on the subject of metadata and preventing accidental disclosure.

9:30 a.m. Pre-Trial Motions – What They Are, When to File, and Why Fair Trial, Vagueness, Overbreadth, Pre-Trial Hearings, Locking in Prosecution Witnesses
11:15 a.m. Dean Boland, Esq.
Lakewood, Ohio

10:00 a.m. Dean Boland, Esq.

10:15 a.m. The Best Prosecution Strategies
12:45 p.m. The Best Defenses to Those Strategies

Q & A
Adjourn

Please Note: No auditors permitted

Mitigation from Initial Client Contact to Sentencing
The Pre-Trial Tack on the New Amendments to 18 U.S.C. § 3509

Dean Boland, Esq.
Lunch (provided at the State Bar Center)

Dean Boland, Esq.

Donna Payne, Payne Consulting Group, Seattle, Washington

Dean Boland, Esq.

$49

$67

$110

$209

$189

$199

$199

$49

$67
TRUCK ACCIDENT LITIGATION IN A NUTSHELL

Thursday, April 12, 2007 • State Bar Center, Albuquerque

3.7 General CLE Credits

This seminar features trucking accident expert David N. Nissenberg, Esq. of the Truck Litigation Resource Center, LLC in La Jolla, California. Nissenberg is a frequent speaker on trucking accidents having presented his seminars in 47 states over the past five years. He is the author of The Law of Commercial Trucking: Damages to Persons and Property (Lexis Nexis, 3rd Edition).

8:30 a.m. Registration
9:00 a.m. Truck Accident Litigation In A Nutshell
1:00 p.m. Lunch (provided at the State Bar Center)

Please note: There will be a 15 minute break during this seminar at approximately 10:30 a.m. Topics to be covered include the following:

- De-mystifying Interstate Commerce Law
- The Language and Documents of Trucking
- One Tractor-Trailer, Nine Possible Defendants
- Statutory Employees and Placed Liability
- Liability for Accidents Under Federal Motor Carrier Safety Regulations
- Standard of Care
- Analysis of Common Types of Accidents: Jackknifing to Unsecured Loads
- Underrides, Defective Brakes, and Other Products Liability Theories
- Violation of Federal Safety Standards and Federal Pre-emption
- Federal Safety Regulations as Basis of Negligence
- Liability by Spillage or Explosion of Hazardous Cargo
- Loading Docks, Forklifts, and Duty to Provide A Safe Workplace
- Negligent Hiring, Deliberately Unsafe Equipment, and Other Employer Liability Punitive Damages
- Understanding Commercial Truck Insurance Policies and the All Important MCS-90 Endorsement
- Document and Log Retention Requirements
- Driver Qualifications and Competence
- Liability of Truck Owners and Equipment Lessors
- Expanding Sources of Discovery
- Recent Judicial Decisions Affecting Trucking Company Liability

FOURTH ANNUAL ELDER LAW SEMINAR

Friday, April 13, 2007 • State Bar Center, Albuquerque

2.7 General & 1.0 Ethics CLE Credits

Co-Sponsor: Elder Law Section

12:30 p.m. Registration
1:00 p.m. Introductory Remarks
1:05 p.m. Science, Ethics, and Law at the End of Life (1.0 E)
2:05 p.m. Elder Law and Long Term Care Issues: An Agency Perspective

Please Note: No auditors permitted
**TRUCK ACCIDENT LITIGATION IN A NUTSHELL**

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**FOURTH ANNUAL ELDER LAW SEMINAR**

**Friday, April 13, 2007 • State Bar Center, Albuquerque**

2.7 General & 1.0 Ethics CLE Credits

Co-Sponsor: Elder Law Section

Standard Fee $129

Elder Law Section Member, Legal Services Attorney, Government, Paralegal $119

12:30 p.m. Registration
1:00 p.m. Introductory Remarks
Amanda H. Hartmann, Chair, Elder Law Section

1:05 p.m. Science, Ethics, and Law at the End of Life (1.0 E)
David A. Bemmels, MD, Professor Emeritus of Medicine, Family and Community Medicine, and Law, UNM Health Sciences Center Institute of Ethics

2:05 p.m. Elder Law and Long-Term Care Issues: An Agency Perspective
Deborah Ann Armstrong, Esq., Agency Director, NM Aging & Long-Term Services Department

2:55 p.m. Break
3:05 p.m. Overview of the 2007 Legislative Session & Impact On the Elderly
Angélica Anaya-Allen, Esq., Executive Director, Senior Citizens Law Office

4:05 p.m. Bench View of Cases Involving the Elderly: Proceedings for Guardian and Conservatorships & Other Matters
Hon. Richard J. Knowles, 2nd Judicial District Court

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

Please Note: No auditors permitted

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years of substantial growth and appreciation in the real estate market, rising interest rates and a general settling in values have caused many marginal real estate deals to come apart. As LLCs have become the default entity for many businesses, defaults in commercial real estate, bankruptcy, real estate workouts have become more common. More deals and their promoters fall into insolvency or file for bankruptcy and tax issues that arise when transactional counsel advising employers with a real-world guide through governing rules on developments under the Model Rules of Professional Responsibility, as adopted by most states. As in years past, the program will use a scenario-driven format for the panel. The program will focus on the practical ethical concerns that arise for lawyers in everyday practice.

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15 Employee Overtime: Determining Who is “Exempt”

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Whether an employee is entitled to overtime is a complicated legal question — and, according to Labor Department audits, many employers are not properly classifying employees as exempt or non-exempt. This program will provide counsel advising employers with a real-world guide through governing Fair Labor Standards Act regulations in this area and advice on avoiding common pitfalls.

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22 Fundamentals of Trade Secrets in Business Law

1.0 General CLE Credits

Trade secrets -- the know-how, methods, practices, and other confidential information that forms the basis of many businesses -- are often overlooked in business transactions. Trade secrets, if not properly protected by agreement and actual practice, can be easily lost, and substantially diminish the practical value of a business. This program will discuss methods for protecting the value of trade secrets and ensuring the business value they create.

1.0 General CLE Credits

29 Fiduciary Income Taxation: The Basics

1.0 General CLE Credits

The use of trusts and the creation of other fiduciary relationships, plagues, legal counsel into the complicated world of fiduciary income taxation. This program is an intermediate-level guide to the intricacies of the fiduciary income taxation of trusts and estates.

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10/11 Update for Attorneys Advising MDs, Part 1 & 2

As LLCs have become the default entity for many businesses, the number of LLCs filing for bankruptcy or falling into insolvency increases, too. This program will review the major bankrupcty and tax issues that arise when transactional counsel advise a financially distressed LLC. Among other areas, this program will cover heightened duties of LLC managers as the LLC enters the vicinity of insolvency, LLC member issues, disharmony of indebtedness income concerns, and the preservation of net operating losses for later use.

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The Best Defenses to Those Strategies

What Experts You Need, How, and Why to Use Them

First Amendment Motions in limine – Authentication

Pre-Trial Hearings, Locking in Prosecution Witnesses

Pre-Trial Motions – What They Are, When to File, and Why

First Amendment Movements in Limine – Authentication

What Experts You Need, How, and Why to Use Them

Dean Boland, Esq.

Dean Boland is a former computer crime prosecutor, appellate court clerk, frequent law and technology lecturer and criminal defense attorney. His focus is upon the defense of state and federal computer crime, importing and child pornography matters. Boland was graduated from Case Western Reserve University School of Law in 1995. He is a past adjunct professor of computer and information law with the Northwestern University School of Law. He has taught law and technology seminars and provided training for judges, prosecutors, attorneys and the public for more than ten years.

Please Note: No auditors permitted

Friday, March 30, 2007 • State Bar Center, Albuquerque

4.2 General CLE Credit

Moderator: TBA

Standard Fee $189

Presentation Fee $30

Please Note: No auditors permitted

12:00   Lunch (provided at the State Bar Center)

Presentation Fee $30

Presentation Fee $30

Dean Boland, Esq. & Donna Payne

Dean Boland, Esq. & Donna Payne

Dean Boland, Esq. & Donna Payne

Dean Boland, Esq.

Dean Boland, Esq.

Dean Boland, Esq. & Donna Payne

Dean Boland, Esq.

Presentation Fee $30

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Dean Boland, Esq.

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Dean Boland, Esq.
LAWYER AS PROBLEM SOLVER: 2007 PROFESSIONALISM

Thursday, March 22, 2007 • State Bar Center, Albuquerque
Program begins at 10 a.m. • 1.0 Professionalism CLE Credit
Co-Sponsor: SBNM Commission on Professionalism

Presenters: Hon. Edward L. Chavez, Chief Justice, New Mexico Supreme Court
Sean Olivas, Esq., Kiebler & McLeod PA
Monica O'Verteva, Esq., New Mexico General Services Department
Susan Page, Esq. Public and Legal Services Department, State Bar of New Mexico

Lawyers do more than just represent clients or agencies in legal matters. They also solve problems by helping people navigate through the legal system, by sharing knowledge of resources, by bringing resolution to disputes, and by working to improve systems. All of these activities draw upon a lawyer's interpersonal and intrapersonal skills and knowledge base. By envisioning themselves as problem solvers, lawyers can become more effective and bring increased satisfaction to their practice of law. This seminar will examine this perspective using examples from lawyers with diverse practice areas to help others to incorporate problem solving into their own practice.

Please Note: No auditors permitted

ADVANCING THE HR/ATTORNEY RELATIONSHIP: Enhancing Employer Practices for Any Size Business

Friday, March 23, 2007 • State Bar Center, Albuquerque
5.5 General CLE Credits
Co-Sponsors: Employment & Labor Law Section, State Bar of New Mexico Human Resource Management Association of New Mexico (HRMA)

Standard Fee $159 • Employment and Labor Law Section Member $149
Government, Legal Service Attorney, Paralegal $149 • Human Resource Professional $149

8:30 a.m. • Registration
8:55 a.m. • Introductory Remarks
Charles Archuleta, Esq., Chair, Employment & Labor Law Section
12:00 p.m. • Technology Update and Developing a Technology Policy
Ben Feuchter, Esq. & David Schneider, Keleher & McLeod, P.A.

9:00 a.m. • Human Resource Management Association of New Mexico (HRMA)

10:00 a.m. • Retention Policies
James C. Cook, Esq., Nooding & Jarrett

10:15 a.m. • e-Discovery, Preservation, Recovery and Document Retention Policies
Jon HR, President & CEO, miCorn Networks Inc.

11:00 a.m. • Panel Discussion: HR and Attorney Interactions
Attorneys: Charles Archuleta, Esq. & Whitney Warner, Esq., Moody & Warner PC
HR: Melissa Smith, SPHR, HR Director, Apogen Technologies, Inc.
Cheryl Ebner, Human Resources Director, Gardunos Restaurants

11:45 a.m. • Lunch (provided at the State Bar Center)
12:30 p.m. • Employer Case Study: Technology Controls
Ben Feuchter, Esq. & David Schneider, Kiebler & McLeod, P.A.

12:45 p.m. • Q & A (stemming from panel discussion and lunch conversations)
Attorneys: Charles Archuleta, Esq., Whitney Warner, Esq., Moody & Warner PC
HR: Melissa Smith, SPHR, HR Director, Apogen Technologies, Inc.
Cheryl Ebner, Human Resources Director, Gardunos Restaurants

Please Note: No auditors permitted

ROAD AND ACCESS LAW

Saturday, March 24, 2007 • State Bar Center, Albuquerque
3.0 General CLE Credits
Co-Sponsor: Paralegal Division

Standard Fee $90 • Government, Legal Service Attorney, Paralegal $90

This seminar will focus upon the creation and use of public and private roads, vacation of public roads, termination of private easements, common resources, and access issues, to include problems that may arise during a real estate transaction, how to recognize and resolve them, and steps and tactics in litigating a road and access case.

1:30 p.m. • Road and Access Law
Alexis Constantaras, Esq., Simons & Slattery LLP
Charlotte Hetherington, Esq., Kiebler & McLeod PC
3:00 p.m. • Break

Please Note: No auditors permitted

TIME MASTERY FOR LAWYERS: 68 WAYS TO MAXIMIZE YOUR PRODUCTIVITY AND SATISFACTION

Friday, April 20, 2007 • State Bar Center, Albuquerque
4.5 General, 1.0 Ethics & 1.0 Professionalism CLE Credit
Presenter: Frank Sanitate
Moderator: TBA

Standard Fee $219

As Frank Sanitate, president of Frank Sanitate Associates, will tell you the value of time management is not control of your time, but how you can best use your time to enhance your effectiveness. Sanitate is a frequent speaker for state and provincial bar associations throughout North America and he has taught tens of thousands of lawyers and other professionals over the past two decades how to better manage their professional practices. Using his book Don't Go To Work Unless It's Fun: State-of-the-Heart Time Management, Sanitate will provide attendees with sixty-eight tips on how to increase their productivity by better managing their legal practice.

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Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to 10% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-4620.

CLE AT-A-GLANCE
MONTHLY GUIDE TO LEGAL EDUCATION PROGRAMS
March 2007

WHAT EVERY LAWYER SHOULD KNOW ABOUT IP

This program will focus on an overview of the various types of intellectual property protection, how to assess which form of protection to pursue, common pitfalls to avoid, and the elements of copyright and trademark infringement. The seminar will be taught by Michele Huff, Managing Partner of the Archway Law Group, LLC in Santa Fe. Huff is an intellectual property lawyer with over 20 years of experience in the high tech industry as co-founder and CDO of a software start-up. 8 years of experience supporting engineering groups at Sun Microsystems (to include the original JavaTM team), and 3 years as a litigation associate at a high tech law firm, representing Apple and Intel.

WHAT EVERY LAWYER SHOULD KNOW ABOUT IP

Thursday, March 15, 2007 • State Bar Center, Albuquerque
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☐ Standard Fee $95

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 Click on Purchase Program (login required).

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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

Ligitation 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.

Friday, March 16, 2007
Time
Activities
10 a.m. Registration
10:15 a.m. Infringing Intellectual Capital: Copyright and Trademark
Michele Huff, Esq., Archway Law Group
10:00 a.m. Break
Noon Adjourn and Lunch (provided at the State Bar Center)

$40.00 Adjourn

10:45 a.m. Morning Session (continued)
3:15 p.m. Afternoon Session (continued)

$30.00 Breakfast

$20.00 Lunch (provided at State Bar Center)

$20.00 Breakfast

$15.00 Adjourn
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-006

Topic Index:
Appeal and Error: Timeliness of Appeal
Attorneys: Attorney-Client Privilege; Conflict of Interest; Effective Assistance of Counsel; and Professional Responsibility
Criminal Procedure: Effective Assistance of Counsel

ANDY RAEL,
Petitioner,
v.
LANE BLAIR, Warden,
Respondent.
No. 29,717 (filed: February 9, 2007)

ORIGINAL PROCEEDING ON CERTIORARI
MICHAEL E. VIGIL, District Judge

JOSEPH NEWTON RIGGS III
NATALIE A. BRUCE
Albuquerque, New Mexico
for Petitioner

GARY K. KING
Assistant Attorney General
RALPH E. TRUJILLO
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

On direct appeal, the Court of Appeals reversed the conviction for racketeering, affirmed the five convictions for trafficking and remanded for re-sentencing. See State v. Rael, 1999-NMCA-068, ¶ 1, 127 N.M. 347, 981 P.2d 280. Represented by the Public Defender’s Department, Defendant filed a Petition for Habeas Corpus that was denied on all grounds on February 21, 2003. Defendant then filed a pro se Petition for Habeas Corpus, but no action was taken on the Petition until attorney Joseph Riggs III entered his appearance and filed an Amended Petition.

I. BACKGROUND

Defendant was convicted of five counts of trafficking a controlled substance contrary to NMSA 1978, § 30-31-20 (1990, prior to 2006 amendment) and one count of racketeering contrary to NMSA 1978, § 30-28-2 (1963); he also had been charged with one count of trafficking controlled substances contrary to § 30-31-20 and one count of conspiracy to traffic controlled substances contrary to NMSA 1978, § 30-28-2 (1979) (CR-96-664). The same defense attorney that represented Defendant on the charges of trafficking and racketeering was appointed to represent Grant and entered his appearance in both matters on July 24, 1996. Cause number CR-95-799 ended with a Recommendation for Satisfactory Discharge from Probation and Order of Dismissal (Conditional Discharge) on May 11, 1998. With respect to the drug trafficking charges, Grant became a confidential informant in exchange for dismissal of the charges in cause number CR-96-664. Cause number CR-96-664 ended with an Administrative Order closing the case on March 13, 2000. The record indicates that Grant introduced the undercover agent to Defendant in 1996, after defense counsel was appointed to represent Grant.

[5] During preparations for trial, defense counsel thought Grant was going to be a defense witness. However, on June 16, 1997, the State filed a Supplemental Witness List listing Grant as a prosecution witness. Defense counsel learned on June 24, 1997, that Grant was the confidential informant who had introduced Defendant to the undercover agent. Defendant was convicted by jury verdicts on July 22, 1997.

[6] The Amended Petition for Habeas Corpus was denied by the First Judicial District Court, which found that the conflict of interest on which the Amended Petition relied did not prejudice Defendant’s defense. The district court first announced its decision in a letter decision to counsel dated January 12, 2006, and later entered an order denying the Amended Petition on January 30, 2006. Defendant filed his Petition for Certiorari on March 15, 2006.

[7] On certiorari, Defendant contends the district court’s findings of fact are not supported by substantial evidence and its conclusions of law are erroneous. The State raises an initial, threshold question: whether this Court lacks jurisdiction because the petition for certiorari was not timely filed.
See Rule 12-501(B) (requiring petitions for certiorari to be filed within thirty days of district court’s denial of petition for writ of habeas corpus); Rule 5-802(H) (same). We address the State’s jurisdictional argument first.

II. DISCUSSION

{8} Defendant notes that on February 14, he moved for an extension of time for filing a petition for certiorari until March 15. He also notes that the district court granted the motion and extended the time for filing a petition until March 15. The State notes that there is no specific provision in the rules for extending the time for filing a petition for certiorari. See Rule 12-501(B); Rule 5-802(H); see generally Rule 12-201(E) NMRA 2005 (providing for extensions of time for filing a notice of appeal both before and after the thirty day period has run but not after sixty days from the time the appealable order is entered). Cf. Rule 5-104(B) NMRA 2006 (prior to Supreme Court Order No. 06-8300, Dec. 18, 2006) (providing for enlargements of time under the rules of criminal procedure for district court). Neither Rule 5-104(B) nor Rule 12-201(E) specifically address petitions for certiorari.

{9} We conclude that Rule 5-104(B)(1) authorized the district court to extend the time period provided by Rule 5-802(H). The motion was made before the thirty-day period expired, and the court extended the period by a period comparable to the period allowed by Rule 12-201(E)(1) and for good cause. We think we would be elevating form over substance to hold that the Amended Petition was not timely filed. We do, however, note the validity of the State’s concern about the text of Rule 5-104(B) and Rule 12-201(E) and direct the appropriate rules committees to consider that concern and make such recommendations as seem appropriate. We next address Defendant’s argument that the district court erred in denying his petition.

{10} “The right to effective assistance of counsel free from conflicts of interest is guaranteed by the Sixth Amendment of the United States Constitution.” State v. Sosa, 1997-NMSC-032, ¶ 20, 123 N.M. 564, 943 P.2d 1017. Ordinarily, a claim of ineffective assistance of counsel has two parts. Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant must show “counsel’s performance was deficient [and] . . . that the deficient performance prejudiced the defense.” Id. At the hearing on the Amended Petition for Habeas Corpus, the district court found that the outcome of the trial in 1997 was not affected by the conflict on which the Amended Petition relied, and the record contains nothing to suggest that this finding is erroneous. Nevertheless, in addition to competent representation, an attorney owes his or her client “a duty of loyalty, a duty to avoid conflicts of interest.” Id. at 688. Further, in some circumstances involving a conflict of interest, prejudice is presumed. Id. at 692. Consequently, the analysis of an ineffective assistance of counsel claim based on a conflict of interest requires a different analysis than the more typical ineffective assistance of counsel claim based on lack of competence and resulting prejudice.

{11} In Strickland, the United States Supreme Court identified cases in which a defendant has been denied counsel or in which the State has interfered with counsel’s assistance as cases in which prejudice is presumed because “[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.” Id. The court also identified another “type of actual ineffectiveness claim [that] warrants a similar, though more limited, presumption of prejudice.” Id. “[P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.” Id. Nevertheless, prejudice is not automatically presumed. A defendant must show that counsel, “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his [or her] lawyer’s performance.” Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980)); see also State v. Martinez, 2001-NMCA-059, ¶ 24, 130 N.M. 744, 31 P.3d 1018 (“[T]o invoke such a presumption of prejudice, there must be an actual, active conflict that adversely affects counsel’s trial performance; the mere possibility of a conflict is insufficient.”).

{12} In this case, Defendant is alleging an actual conflict of interest existed in defense counsel’s representation of both Defendant and State witness Clint Grant. Defendant must establish that counsel was the attorney for both Grant and himself. There must be a showing that the representation of both Defendant and Grant adversely affected counsel’s trial performance on behalf of Defendant. Yet, we must be mindful of the fact that the test apparently differs from the prejudice prong of a more typical Strickland claim of ineffectiveness and that the United States Supreme Court has said “unconstitutional multiple representation is never harmless error.” Cuyler, 446 U.S. at 349.

A. {13} The United States Supreme Court has decided two key cases dealing with ineffective assistance of counsel claims based on a conflict of interest. See id. at 337; Holloway v. Arkansas, 435 U.S. 475 (1978). In Holloway, one attorney was appointed to represent three co-defendants. 435 U.S. at 477. When he asked to be removed from the case because of possible conflicts of interests in the co-representation of the multiple defendants, the trial court refused. Id. The Supreme Court held that when the trial court is made aware of a conflict of interest because of multiple representation and counsel is forced to proceed, prejudice need not be shown. Holloway, 435 U.S. at 488-91. In Cuyler, the Supreme Court addressed a situation in which trial counsel did not alert the trial court to a conflict of interest. The Court held that “a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” Cuyler, 446 U.S. at 348 (footnote omitted).

{14} Defendant claims that Holloway is the correct standard to apply in this case. However, we view Holloway as applicable to different circumstances, circumstances in which defense counsel is required to represent co-defendants over objection and has shown in making the objection a basis for concluding that his or her performance was affected. In Holloway, the objection was made at trial, and the post-conviction remedy was an evidentiary hearing. In this case, Defendant did not make an objection at trial. We apply Cuyler, which requires a showing of an actual conflict of interest that adversely affected performance. We have distinguished the potential for conflict from an actual conflict. See State v. Robinson, 99 N.M. 674, 678, 662 P.2d 1341, 1345 (1983).

{15} “Although not essential to our analysis, the adverse effects of actual conflicts can also be demonstrated when ‘some plausible defense might have been pursued but was not because it would be damaging to another’s interest.’” Martinez, 2001-NMCA-059, ¶ 33 (quoting State v. Santillanes, 109 N.M. 781, 783, 790 P.2d 1062, 1064 (Ct. App. 1990)). Defendant suggests that defense counsel did not cross-examine Grant as vigorously as he might
have done otherwise, because the State’s willingness to dismiss the charges against Grant depended in part on his testimony against Defendant. Defendant also notes that the facts demonstrating a disqualifying conflict of interest were raised by the State at a pre-trial conference. While the focus seemed to have been on protecting Grant, rather than Defendant, the prosecutor noted that there was evidence she could not disclose to defense counsel, although she would have been able to disclose that evidence had he not also represented Grant. Finally, Defendant noted that there is a memorandum in the record that demonstrates the State was aware of the conflict before its pre-trial disclosure and before defense counsel knew of Grant’s role in the investigation and the State deliberately concealed the relevant facts.

{16} A review of the record shows that the representation did overlap. However, overlapping representation ordinarily is not enough to justify the presumption of prejudice that arises under Strickland when there is an actual conflict that adversely affects trial counsel’s performance. See Strickland, 466 U.S. at 658 (describing when prejudice is presumed in a conflict of interest case as opposed to the automatic presumption of prejudice that arises when a defendant is denied counsel or when the State frustrates a defendant’s constitutional right to effective assistance of counsel).

B.

{17} Other states have addressed this same issue. Some have found no conflict of interest was shown, others have ordered an evidentiary hearing by the trial court to determine if there is an actual or potential conflict of interest, and others have found a per se conflict of interest based on the facts. See Brooks v. State, 866 So. 2d 1285 (Ala. Crim. App. 1996); In re Darr, 191 Cal. Rptr. 882 (Ct. App. 1983); Craddock v. State, 325 S.E.2d 804 (Ga. Ct. App. 1984); People v. Daly, 792 N.E.2d 446 (Ill. App. Ct. 2003); State v. Duncan, 435 N.W.2d 384 (Iowa Ct. App. 1988). The opinions also note the relevance of whether the representation is simultaneous or successive and whether the dual representation bears a sufficient relationship to justify further inquiry. Some suggest the trial court has a duty to inquire about the conflict; others would not impose that duty.

{18} In Brooks, the Alabama court found that there was an actual conflict of interest when defense counsel had previously represented the confidential informant witness whose evidence led to the arrest of the defendant. 686 So. 2d at 1286-87. In that case, the court noted that the defendant was not required to show prejudice. Id. at 1287. In Darr, the California court noted that defense counsel could not adequately represent the defendant and the prosecution witness, who had a pending probation violation charge in which defense counsel was supposed to represent the witness, because counsel could not adequately protect both parties’ interests. 191 Cal. Rptr. at 890-92. Further, the court held that under the circumstances in that case the trial court had a duty to inquire sua sponte into the possibility of a conflict when it was revealed in the course of trial. Id. at 892-93. In Duncan, the Iowa court held that an actual conflict of interest existed in defense counsel’s dual representation of the prosecution witness and the defendant. 435 N.W.2d at 385, 387. In Duncan, the witness refused to waive the attorney-client privilege on cross-examination. Id. at 385. The court determined that the facts relating to the previous relationship of the witness with the defendant, and the reasons why the witness had become a confidential informant, were key in defendant’s trial and were not elicited because of the attorney’s dual representation. Id. at 387.

{19} In Daly, the Illinois court held there is a per se conflict of interest if there is contemporaneous representation of a defendant and a witness. 792 N.E.2d at 450. In that case, a paid confidential informant had been represented previously by defense counsel on charges as a result of which he became a confidential informant. Id. at 448. Defense counsel’s previous representation of the confidential informant, who later became a witness in the defendant’s case, was of significance to the defendant’s case because the charges against the informant were dismissed as a result of his favorable testimony. Id. at 451. “In a situation where defense counsel has previously represented one of the State’s witnesses, a per se conflict of interest exists if the professional relationship between counsel and the witness is contemporaneous with counsel’s representation of defendant.” Id. at 450. Daly makes clear that contemporaneous representation does not mean simultaneous representation. Id. The court noted that the professional relationship of defense counsel to the witness continues indefinitely, at least to the extent that defense counsel would be called upon to cross-examine the witness or former client on matters concerning defense counsel’s representation of that witness. Id. “A professional relationship is ongoing, even if formal representation has ended, if circumstances exist such that the attorney-client privilege may be violated.” Id.

{20} In Craddock, however, the Georgia court held that the defendant failed to show an actual conflict of interest on the part of his attorney who also represented the confidential informant in his case. 325 S.E.2d at 805. The court noted that defense counsel represented the confidential informant on an unrelated matter, and the defendant had failed to show on the record that an actual conflict of interest or potential conflict had actually impaired the attorney’s representation or performance at trial. Id. at 805.

“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial . . . [u]nless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.” Id. at 806 (quoting Cuyler, 446 U.S. at 346-47) (footnotes omitted).

C.

{21} The analysis in Daly is persuasive. Under Daly, Defendant must show that while counsel represented Defendant there was an ongoing professional relationship between Grant and defense counsel that requires the protection of the attorney-client privilege. Further, Defendant must show that counsel’s representation of Grant involved a matter relevant to Defendant’s trial. If there is significant relevance, a per se conflict of interest can be identified. See Daly, 792 N.E.2d at 451. There is no doubt in this case that defense counsel represented both Defendant and Grant. Counsel testified that his representation of Grant was finished when counsel started representing Defendant, and he no longer had a professional relationship with Grant. However, the record indicates that there was an overlap in the representation of Defendant and Grant. During the course of representing Defendant, defense counsel learned that Grant was actually the confidential informant who introduced Defendant to the undercover agent. In Grant’s testimony, he testified to introducing and being present during the course of representing both Defendant and Grant. Counsel testified that his representation of Grant was finished when counsel started representing Defendant, and he no longer had a professional relationship with Grant. However, the record indicates that there was an overlap in the representation of Defendant and Grant. During the course of representing Defendant, defense counsel learned that Grant was actually the confidential informant who introduced Defendant to the undercover agent. In Grant’s testimony, he testified to introducing and being present for at least one buy by the undercover agent. Furthermore, the duties an attorney owes to a client can extend beyond the termination of representation. See id.

{22} We conclude that defense counsel was operating under a conflict of interest in representing both Grant and Defendant. As Defendant points out, defense counsel could not effectively cross-examine Grant.
because of his confidential relationship resulting from counsel’s prior representa-
tion.
{23} Further, the record suggests that defense counsel’s prior representation of Grant affected cross-examination. In this case, defense counsel was representing Defendant on trafficking and racketeering charges while also representing Grant in a pending probation violation, which was later dismissed apparently in exchange for his testimony against Defendant. Further, in this case defense counsel had been the attorney of record at the time of the plea agreement in which Grant became a confidential informant in anticipation that pending charges against him would be subsequently dismissed. During cross-examination, defense counsel did elicit testimony from Grant concerning his prior use of drugs, but he did not elicit much information on his plea agreement. He also did not attack Grant’s character or credibility.
{24} This case is difficult because early on the State became aware of a potential conflict of interest. However, the State did not immediately disclose this potential conflict; rather, the State tried to exploit the conflict. Through Grant, the State contacted and recorded Grant’s conversations with Defendant and Grant’s conversations with defense counsel, and later the State attempted to use these conversations to revoke Defendant’s bond.
{25} This case is exactly the situation the Illinois court sought to avoid in Daly. The court in that case cautioned against situations in which counsel has an ongoing professional relationship with the witness and the defendant. 792 N.E.2d at 450. The dismissal of the charges in the drug case and the probation violation were related to defense counsel’s representation of Defendant. Unlike other cases in which no conflict was identified, the charges of trafficking and racketeering were related to defense counsel’s prior representation of Grant. Counsel’s representation of Grant involved a matter of significant relevance to Defendant’s trial.
{26} We conclude that defense counsel had an ongoing professional relationship with Grant, which precluded his representation of Defendant. Counsel’s representation of Defendant was adversely affected by his representation of Grant. We think the State’s untimely disclosure contributed to the resulting conflict of interest in this case. The State’s late disclosure, the statement of the prosecutor that information was not disclosed because of the conflict, and defense counsel’s limited cross-examination are a sufficient showing of an actual conflict of interest that adversely affected counsel’s performance. Defendant was deprived not only of the knowledge of the conflict but also the opportunity to waive the conflict. Because the State failed to timely disclose a conflict of which it was well aware, Defendant’s right to a conflict-free representation was withheld and the trial judge was prevented from conducting an evidentiary hearing to determine the extent of the conflict.
{27} Further, we would like to note that prosecutors do have a duty to disclose, earlier rather than later, potential conflicts of interest. See Bruce A. Green, Her Brother’s Keeper: The Prosecutor’s Responsibility When Defense Counsel Has A Potential Conflict of Interest, 16 Am. J. Crim. L. 323, 335-38 (1989). Timely disclosure of potential conflicts of interest can avoid problems arising later in trial or retrials. See Wheat v. United States, 486 U.S. 153, 161-64 (1988); Mannholt v. Reed, 847 F.2d 576, 583-84 (9th Cir. 1988); United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir. 1986); United States v. Mitchell, 572 F. Supp. 709, 714 (N.D. Cal. 1983).

The prosecution, therefore, had ample opportunity to bring the potential conflict to the trial judge’s attention and move for disqualification if appropriate. Such a process would have also enabled [the defendant] if he so desired to waive any conflict on the record after adequate warning. We trust that this opinion will ensure a pre-trial disposition of such conflict of interest issues in the future.

Mannholt, 847 F.2d at 584.

The reversal here is the direct result of the prosecution’s using defense counsel’s conflict of interest as a means of affecting the evidence going before the jury instead of moving for his disqualification before the trial.

The prosecutors here were aware of defense counsel’s conflict of interest at an early stage and were invited by the district judge to make a disqualification motion in writing. Iorizzo, 786 F.2d at 59.

{28} The prosecutor’s faithful compliance with his or her duty to disclose not only enables the trial judge to evaluate the conflict for purposes of relying on motions to disqualify. Compliance with that obligation also enables the trial judge to rule appropriately on waivers. In Wheat v. United States, the United States Supreme Court was confronted with the issue of whether a district court judge can refuse to accept waivers of conflict when multiple co-defendants that would testify against each other wanted to waive their right to conflict-free representation. 486 U.S. at 154. In Wheat, the prosecutor aware that a potential conflict could develop alerted the trial court which decided, based on the facts in that case, that defense counsel could not represent all three defendants. Id. at 155, 164. The Court held:

[We] think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

Id. at 163.

III. CONCLUSION

{29} We therefore conclude Defendant has shown an actual conflict of interest that adversely affected his counsel’s representation of him. He is entitled to a new trial. We reverse and remand for further proceedings consistent with this opinion.

{30} IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. SENA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-007

Topic Index:
Appeal and Error: Appellate Review; Fundamental Error; Harmless Error; Prejudicial Error; and Preservation of Issues for Appeal
Criminal Procedure: Charging; and Severance
Evidence: Admissibility of Evidence; Character Evidence; and Prior Acts or Statements
Judges: Abuse of Discretion

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
LEONARDO GALLEGOS,
Defendant-Respondent.
No. 29,538 (filed: February 23, 2007)

ORIGINAL PROCEEDING ON CERTIORARI
MARK A. MACARON, District Judge

GARY K. KING
Attorney General
STEVEN S SUTTLE
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

JOHN BIGELOW
Chief Public Defender
KARL ERICH MARTELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

{1} Having granted the parties motions for rehearing, we withdraw our opinion filed on February 1, 2007 and substitute the following in its place.

{2} Arguing that the trial court abused its discretion when it denied his motion to sever charges related to two victims, Defendant Leonardo Gallegos appeals his convictions of one count of criminal sexual contact of a minor (“CSCM”) and two counts of aggravated indecent exposure. The Court of Appeals reversed Gallegos’s convictions after determining that Gallegos was prejudiced by the trial court’s denial of his motion to sever. State v. Gallegos, 2005-NMCA-142, ¶¶ 32-33, 41, 138 N.M. 673, 125 P.3d 652. On certiorari, the State contends that Gallegos was not prejudiced because the evidence pertaining to each victim would have been cross-admissible had separate trials occurred.

{3} We conclude that, because the evidence would not have been cross-admissible at separate trials, the trial court abused its discretion in failing to sever the charges. Nonetheless, we reverse the Court of Appeals’s reversal of Gallegos’s two convictions of aggravated indecent exposure. We do so because we do not believe that, under the circumstances, the jury misused the CSCM evidence to convict Gallegos of indecent exposure. At the same time, however, we affirm the Court of Appeals’s reversal of Gallegos’s conviction of CSCM. Under the circumstances of this case, we are not confident the jury did not misuse the evidence pertaining to another victim to convict Gallegos of CSCM.

I. BACKGROUND

{4} Gallegos went to trial on a single indictment charging twelve counts stemming from incidents that occurred while he was a guard at the Youth Diagnostic and Detention Center (“YDDC”). In seven of those counts, the State alleged that Gallegos used his position of authority to commit CSCM against a female YDDC resident, Jamie S. At trial, Jamie S. testified that her encounters with Gallegos were consensual, that Gallegos did not use his authority to coerce her, and that out of the seven alleged incidents she only objected once—when Gallegos placed her hand on his penis. Because of this, the trial court granted Gallegos’s motion for a directed verdict on six of the seven counts pertaining to Jamie S. Gallegos was convicted of the remaining count of CSCM.

{5} The other five counts pertained to incidents involving Ursula C., another female YDDC resident. Gallegos was charged with three counts of aggravated indecent exposure for allegedly exposing himself and masturbating in front of Ursula C. while she was housed in a solitary observation room. At the time of the incidents, Gallegos was in a control room separated from Ursula C. by a glass window. Gallegos was also charged with two counts of contributing to the delinquency of a minor for allegedly asking Ursula C. to disrobe on two different occasions.

{6} The trial court dismissed one of the contributing to the delinquency counts because only one was supported by the evidence adduced at trial. Gallegos was ultimately convicted of two of the three indecent exposure counts submitted to the jury, but acquitted of the remaining contributing to the delinquency count. The trial court consecutively sentenced Gallegos for a total of six years of incarceration—three years for CSCM and eighteen months each for the two indecent exposure convictions—conditionally suspended on five years of supervised probation.

{7} Before trial, Gallegos filed a motion to sever the counts pertaining to Jamie S. and Ursula C. Gallegos’s main argument to the trial court was that prejudice would result from a joint trial of the offenses because evidence pertaining to each victim would not be cross-admissible as “other crimes” if the trials were held separately. The State responded that no prejudice would result because evidence pertaining to each victim would be cross-admissible at separate trials to help the jury in each trial “understand the defendant’s motive, intent, preparation, plan, and identity.” Concluding that the evidence pertaining to both victims would be cross-admissible at separate trials, the trial court denied the motion. The trial court based its ruling on its belief that Gallegos used his position as a guard at YDDC as an opportunity to prey on girls for sexual purposes. Thus, according to the trial court, evidence pertaining to each victim would be cross-admissible at separate trials to show Gallegos’s “continuing scheme or plan” under Rule 11-404(B) NMRA.

{8} The Court of Appeals reversed Gallegos’s convictions and remanded for two
new trials. Gallegos, 2005-NMCA-142, ¶ 1. The Court concluded that if separate trials were held, evidence specifically pertaining to Jamie S. and Ursula C. would not be cross-admissible at the other trial under Rule 11-404(B)’s “common plan or scheme” exception. Id. ¶ 24-27. Further, according to the Court, “[w]hen evidence of prior bad acts evidence is admitted in violation of Rule 11-404(B)” at a trial of joined offenses, “prejudice is established when there are convictions’ because ‘we will not speculate that the erroneous admission of other crimes did not cause a compromise verdict of guilty of some charges and not guilty of others.’” Id. ¶ 32 (quoting State v. Jones, 120 N.M. 185, 190, 899 P.2d 1139, 1144 (Ct. App. 1995)). However, even though the State did not raise the issue, the Court went on to “assume, without deciding,” that the separate evidence would be cross-admissible under Rule 11-404(B)’s “opportunity” exception. Id. ¶ 30. After conducting an analysis pursuant to Rule 11-403 NMRA, the Court of Appeals determined that evidence pertaining to each victim would, nonetheless, not be cross-admissible at separate trials due to its overwhelming prejudicial impact and limited probative value. Id. ¶¶ 30-31. Finally, assuming the evidence to be admissible at separate trials under Rule 11-404(B), but not under Rule 11-403, the Court conducted a harmless error analysis. The Court of Appeals ultimately concluded that Gallegos was prejudiced by a joint trial because there was a reasonable probability that the erroneously combined evidence contributed to his three convictions. See id. ¶ 33.

II. DISCUSSION

A. Even Though Offenses Are Properly Joined, a Trial Court Abuses Its Discretion in Failing to Sever

When the Defendant Is Prejudiced at the Time the Motion Is Made

¶ 9 In its brief-in-chief, the State appears to argue that the trial court did not abuse its discretion in rejecting Gallegos’s motion to sever because joinder of the offenses was proper. We agree that joinder was proper as an initial matter. However, this does not alter the fact that a trial court may abuse its discretion in failing to sever charges. The issue of joinder is not so inextricably linked with the issue of severance such that a prosecutor’s proper exercise of the former means that a court never abuses its discretion when it refuses to exercise the latter. ¶ 10 Regarding joinder of offenses, our rules provide:

Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Rule 5-203(A) NMRA (emphasis added). It is important to recognize that Rule 5-203(A) is not a discretionary or permissive rule; it demands that the State join certain charges. At common law, whether charges should be joined in the same indictment “was a matter of prudence and discretion which . . . rest[ed] with the judges to exercise.” State v. Compton, 57 N.M. 227, 240-41, 257 P.2d 915, 924 (1953) (quoted authority omitted). Our rule as originally promulgated was discretionary and reflected the common law. See NMSA 1953, § 41-23-10 (1972) (providing that “[t]wo . . . or more offenses may be joined”); see also Fed. R. Crim. P. 8(a) (“The indictment or information may charge a defendant in separate counts with 2 or more offenses . . . .”). The original rule was based on the 1968 draft of the American Bar Association Standards Relating to Joinder and Severance, Section 1.1. Rule 5-203 NMRA committee commentary, see also State v. Gregory, 333 A.2d 257, 262 n.4 (N.J. 1975) (noting that the ABA rule “does not require procedural joinder of the charges by the prosecuting attorney”). The primary focus of such a discretionary rule is the promotion of judicial efficiency. See 1A Charles Alan Wright, Federal Practice and Procedure § 141, at 5 (3d ed. 1999).

¶ 11 We recognized over thirty years ago, however, that requiring prosecutors to “get[] their facts straight, their theories clearly in mind and trying all charges together” has the salutary effect of avoiding prejudice to the defendant. State v. Tijerina, 86 N.M. 31, 36, 519 P.2d 127, 132 (1973). Around the same time as Tijerina, and based on this same concern, numerous other jurisdictions began requiring prosecutors to charge together all crimes arising from a defendant’s conduct or series of acts. This was done either legislatively, through interpretation of a particular state’s constitution or statute, or through a court’s general supervisory power over rules of criminal procedure. Allan D. Vestal & Douglas J. Gilbert, Preclusion of Duplcative Prosecutions: A Developing Mosaic, 47 Mo. L. Rev. 1, 15-22 (1982); see also Susan R. Klein, Double Jeopardy’s Demise, 88 Cal. L. Rev. 1001, 1031 n.104 (2000) (book review) (noting that “[a] number of advisory groups have suggested mandatory joinder of all offenses arising from the same transaction as a legislative fix to vexatious prosecutions”). ¶ 12 For instance, in 1975 the Supreme Court of New Jersey became “satisfied that the time for the adoption of [compulsory joinder was] well due.” Gregory, 333 A.2d at 263. The court gave three reasons: (1) “fairness and reasonable expectations” of the defendant; (2) “justice, economy, and convenience”; and (3) “consistent and rational sentencing” of all of a defendant’s relevant conduct. Id. (quoted authority omitted). Gregory recognized that the then-current trend toward mandatory joinder in order to protect a defendant from multiple prosecutions was largely motivated by the American Law Institute’s Model Penal Code. Id. at 261.

¶ 13 The Model Penal Code requires joinder of “offenses based on the same conduct or arising from the same criminal episode” when the prosecutor knows of such offenses and when a court has jurisdiction over them. Model Penal Code § 1.07(2); see also id. § 1.07 explanatory note for sections 1.07-1.11 (“In prohibiting multiple trials in many situations where multiple convictions are permissible, the section thus imposes compulsory joinder.”). The court in Gregory was also persuaded by Justice Brennan’s concurrence in Ashe v. Swenson, 397 U.S. 436 (1970), calling for the adoption of a “same transaction” test for purposes of double jeopardy. Gregory, 333 A.2d at 261; see Ashe, 397 U.S. at 453-54 (Brennan, J., concurring) (“In my view, the Double Jeopardy Clause requires the prosecution . . . to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.”). Thus, although the court in Gregory did not rest its decision on constitutional double jeopardy grounds, the court exercised its “administrative and procedural powers” to formally adopt section 1.07(2) of the Model Penal Code. Gregory, 333 A.2d at 261, 263.

¶ 14 As New Jersey did in Gregory, we exercised our supervisory powers in 1979 to change the rule regarding joinder of offenses from permissive to mandatory. Our 1979 order states: “When a person is charged with more than one crime and the crimes can be incorporated in one information or indictment in separate counts, this
practice shall be followed.” Rule 5-203 NMRA committee commentary (emphasis added). Our order in 1979 may have resulted from our decision in State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), where we formally rejected the “same transaction” test espoused by Justice Brennan in Ashe as a constitutional rule. Id. at 335-36, 540 P.2d at 815-16; see State v. Manzanares, 100 N.M. 621, 624, 674 P.2d 511, 514 (1983).

In Tanton, however, we adopted as “judicial policy” our distaste for “piecemeal prosecutions” as described two years earlier in Tijerina. Tanton, 88 N.M. at 336, 540 P.2d at 816. Thus, in order to avoid “disorderly criminal procedures” that “threaten the existence of our judicial system [and] risk . . . prejudice to the accused,” Tijerina, 86 N.M. at 36, 519 P.2d at 132, we require the State to join those offenses as laid out in Rule 5-203(A).

{15} In this case, pursuant to the requirements of Rule 5-203(A), the State appropriately and necessarily charged the offenses related to Jamie S. and those related to Ursula C. in the same indictment. In both cases, Gallegos engaged in inappropriate sexual activities with minors in his care as a guard at YDDC. At the very least, Gallegos’ acts towards Jamie S. and Ursula C. were “of the same or similar character” regardless of whether they were “part of a single scheme or plan.” See Rule 5-203(A)(1) NMRA.

{16} However, even though offenses are properly joined, a trial court abuses its discretion in failing to sever when there is prejudice to the accused. We emphasize that our rules provide for severance when it appears that there “is prejudice[ ] by a joinder.” Rule 5-203(C) NMRA. Thus, by its very nature, Rule 5-203(C) does not come into play unless and until there is a proper joinder pursuant to Rule 5-203(A). See 1A Wright, supra, § 221, at 465 (stating that the federal rule for severance is applicable “only if the original joinder was proper”); see also, e.g., State v. Griffin, 116 N.M. 689, 693, 866 P.2d 1156, 1160 (1993) (determining first that joinder was proper before ruling on the trial court’s refusal to sever); State v. McCaum, 87 N.M. 459, 461, 535 P.2d 1085, 1087 (Ct. App. 1975) (same).

{17} Admittedly, we have not always made this distinction clear. For example, in a case where the defendant argued that he was prejudiced when the trial court refused to sever his possession of drug paraphernalia charge from his murder trial, we stated that our review of whether charges are “properly joined” is narrow. State v. Duffy, 1998-NMSC-014, ¶ 42, 126 N.M. 132, 967 P.2d 807. We concluded in Duffy that, “even if the joinder of charges was an abuse of discretion, [the defendant failed to show that] he was prejudiced by a lack of severance.” Id. ¶ 45. The language in Duffy is misleading in that the issue there was entirely whether the trial court abused its discretion in failing to sever the offenses, not whether the offenses were properly joined. Moreover, given that our rule regarding joinder is mandatory, we believe that our review of an improper joinder—or of a failure to properly join defenses—is a question of law to be reviewed de novo. We clarify our language in Duffy and hold that simply because offenses are properly joined does not mean that a trial court never abuses its discretion for denying a motion to sever. See also, e.g., State v. Ruiz, 2001-NMCA-097, ¶ 11, 131 N.M. 241, 34 P.3d 630, the Court of Appeals stated that “even when Rule 5-203(A) is satisfied, charges should be joined only if joinder does not unfairly prejudice either party.” Again, we clarify. Charges should be joined whenever Rule 5-203(A) is satisfied; if either party believes it is prejudiced as a result, the proper procedure is to file a motion for severance with the trial court pursuant to Rule 5-203(C).

{18} Even when the trial court abuses its discretion in failing to sever charges, appellate courts will not reverse unless the error actually prejudiced the defendant. In State v. Gunthorpe, 81 N.M. 515, 521, 469 P.2d 160, 166 (Ct. App. 1970), the Court of Appeals held that “the mere denial of a request for severance is not a basis for reversal unless abuse of discretion and prejudice is shown.” More recently, it was said that a trial court’s denial of a motion to sever will not be reversed “without a showing of an abuse of discretion, which resulted in prejudice to the accused.” State v. Nguyen, 1997-NMCA-037, ¶ 5, 123 N.M. 290, 939 P.2d 1098. Furthermore, in a case involving the trial court’s failure to sever defendants, we first held that the trial court did not abuse its discretion. State v. Rondeau, 89 N.M. 408, 417, 553 P.2d 688, 697 (1976). We then went on to state that, even if the trial court had abused its discretion, we “will not reverse a defendant’s conviction if said error is harmless.” Id. We do not see any reason to review the denial of a motion to sever offenses any differently than a motion to sever defendants.

B. The Trial Court Abuses Its Discretion in Not Severing Offenses When Evidence Pertaining to Each Charge Would Not Be Cross-Admissible at Separate Trials

{19} As noted above, in ruling on a motion to sever the trial court’s job is to determine if, at the time of the motion, the defendant “is prejudiced.” Rule 5-203(C) NMRA. If such prejudice exists at the time of the motion, the trial court abuses its discretion in neglecting to sever. A defendant “is prejudiced” in this context if there is an appreciable risk that reversal will be warranted because of a later determination of actual prejudice. “A defendant might [actually] be prejudiced if the joinder of offenses permit[s] the jury to hear testimony that would have been otherwise inadmissible in separate trials.” State v. Jacobs, 2000-NMSC-026, ¶ 15, 129 N.M. 448, 10 P.3d 127; Beam v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998) (acknowledging “there is a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible” (quoted authority omitted)). On the other hand, “[c]ross-admissibility of evidence dispels any inference of prejudice.” Jacobs, 2000-NMSC-026, ¶ 15.

{20} Our first task, then, is to determine whether evidence separately pertaining to Jamie S. and Ursula C. would have been admissible had Gallegos gone to trial only on the charges pertaining to one of them. If the evidence would have been cross-admissible, then any inference of prejudice is dispelled and our inquiry is over. If the evidence pertaining to each victim would not have been cross-admissible, then the trial court abused its discretion in failing to sever the charges. However, even if the trial court abused its discretion we must consider whether that error actually prejudiced Gallegos at his trial; that is, whether the error was harmless. See State v. Williams, 117 N.M. 551, 559, 874 P.2d 12, 20 (1994) (concluding that evidence was inadmissible under Rule 11-404(B), but holding the error harmless). For our first task, we turn to Rule 11-404(B).

{21} Rule 11-404(B) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes,
such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 11-404(B) NMRA. The nearly universal view is that other-acts evidence, although logically relevant to show that the defendant committed the crime by acting consistently with his or her past conduct, is inadmissible because “the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect.” Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoted authority omitted); see also, e.g., Michelson v. United States, 335 U.S. 469, 476 (1948) (“The overriding policy of excluding [propensity] evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”); Ruiz, 2001-NMCA-097, ¶ 13 (“Rule 11-404(B) is a specialized rule of relevance that . . . limits the admissibility of evidence that, although relevant, is unfairly prejudicial to the accused.”). But see Williams, 117 N.M. at 557, 874 P.2d at 18 (stating that other-acts evidence that only goes to propensity is excluded because “such evidence is not probative of the fact that the defendant acted consistently with his past conduct in committing the acts at issue”). We clarify our view that, although logically relevant, evidence of how a person acted on a particular occasion is not legally relevant when it solely shows propensity and should be automatically excluded under Rule 11-404(B) because it is unfairly prejudicial as a matter of law.

(22) Regardless of whether the second sentence of Rule 11-404(B) is read as an exception to a general rule stated in the first sentence, see State v. Bea, 101 N.M. 323, 328, 681 P.2d 1100, 1105 (1984), or as a “simple clarificat[ion] that the first sentence does not always exclude other-acts evidence,” State v. Lamure, 115 N.M. 61, 69, 846 P.2d 1070, 1078 (Ct. App. 1992) (Hartz, J., specially concurring), at least four things remain constant. First, the rule prohibits the use of otherwise relevant evidence when its sole purpose or effect is to prove criminal propensity. Second, other-acts evidence may be admissible if it is relevant to an issue besides the inference that the defendant acted in conformity with his or her character. The list of allowable purposes found in the second sentence of Rule 11-404(B) is not exclusive, but is illustrative. State v. Martinez, 1999-NMSC-018, ¶ 27, 127 N.M. 207, 979 P.2d 718; see also State v. Lara, 109 N.M. 294, 296, 784 P.2d 1037, 1039 (Ct. App. 1989). Third, the proponent of the evidence is required to identify and articulate the consequential fact to which the evidence is directed before it is admitted. State v. Lucero, 114 N.M. 489, 492, 840 P.2d 1255, 1258 (Ct. App. 1992). Finally, even if other-acts evidence is relevant to something besides propensity, such evidence will not be admitted if the probative value related to its permissible purpose is substantially outweighed by the factors enumerated in Rule 11-403.

(25) We reaffirm that it is incumbent upon the proponent of Rule 11-404(B) evidence to identify and articulate the consequential fact to which the evidence is directed. Part of the proponent’s responsibility is also to cogently inform the court—whether the trial court or a court on appeal—the rationale for admitting the evidence to prove something other than propensity. In other words, “more is required to sustain a ruling admitting [other-acts] evidence than the incantation of the illustrative exceptions contained in the Rule.” State v. Stevens, 558 A.2d 833, 842 (N.J. 1989). We address the State’s “lewd and lascivious” argument first. We then turn to the Court of Appeals’ ruling on whether the evidence would be cross-admissible to show Gallegos’s “plan” or “opportunity.”

1. Lewd and Lascivious Disposition
(26) The State relies upon State v. Casaus, 1996-NMCA-031, 121 N.M. 481, 913 P.2d 669, and State v. Landers, 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1992), to argue that evidence pertaining to Jamie S. and Ursula C. would be cross-admissible at separate trials to show Gallegos’s “lewd and lascivious” disposition. Gallegos notes that the “lewd and lascivious” doctrine was never argued below or ruled on by the trial court or Court of Appeals. Although the State did not raise the “lewd and lascivious” issue below, we will affirm the trial court’s decision if it was right for any reason so long as it is not unfair to the appellant for us to do so. Maralex Res., Inc. v. Gilbreath, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626. In this case, we are persuaded by Gallegos’s argument that the evidence would not be cross-admissible as “lewd and lascivious” evidence since the bad acts in question pertained to different victims. See Landers, 115 N.M. at 518-19, 853 P.2d at 1274-75 (affirming that the “lewd and lascivious” doctrine can only be used to admit evidence of misconduct involving the same victim for which the defendant is on trial); see also Williams, 117 N.M. at 561-62, 874 P.2d at 22-23 (Montgomery, J., specially concurring) (arguing that the
“lewd and lascivious” doctrine is simply a euphemism for character evidence and should be rejected.

2. Common Scheme or Plan

{27} The Court of Appeals correctly held that the evidence pertaining to Jamie S. and Ursula C. would not be cross-admissible at separate trials as probative of Gallegos’s “common scheme or plan.” Gallegos, 2005-NMCA-142, ¶ 27. In its opinion, the Court of Appeals distinguished between two theories of admissibility for other-acts evidence purportedly tending to prove a “plan.” The first theory uses extrinsic evidence to prove a larger act of which the defendant is charged. Id. ¶ 23; see also 3 Fishman, supra, § 17:44, at 425 (describing use of “common plan or scheme” evidence in situations where “the extrinsic act was committed as preparation for the charged act, or vice versa, or when both the extrinsic and charged acts were committed as preparation for yet another act”). A common example is where evidence that a defendant stole a vehicle used as a getaway car is admitted to prove that the defendant committed the crime of bank robbery. See, e.g., United States v. Leftwich, 461 F.2d 586, 589 (3d Cir. 1972). Such evidence is logically relevant in two ways. First, it shows that the defendant was more likely to rob the bank because he or she was predisposed to stealing. Second, the other-acts evidence is logically relevant because it tends to show that the defendant was more likely to have robbed the bank because he or she stole a vehicle that was used to facilitate the larger plan or scheme of bank robbery. Although logically relevant in two ways, the getaway car evidence is only legally relevant, thus potentially admissible, because it is probative of the defendant’s guilt in a way other than showing propensity.

{28} Under this theory of admissibility, evidence of Gallegos’s acts against Ursula C. would not be admissible under Rule 11-404(B) at a separate trial on the charges related to Jamie S. The extrinsic acts of indecent exposure and contributing to the delinquency of a minor were not committed “as preparation for” Gallegos’s criminal sexual contact with Jamie S. Nor were the acts committed against both Jamie S. and Ursula C. done “as preparation for yet another act.” See 3 Fishman, supra, § 17:44, at 425. Such evidence would only be logically relevant because, in the State’s own words, it would tend to show that Gallegos “had a penchant for young girls and for engaging in sexual behavior with or in front of them.” In other words, the only logical relevance the extrinsic evidence would have would be to show that Gallegos acted in conformity with his inclination to use his authority to engage in inappropriate sexual behavior with young girls. See XI The Oxford English Dictionary 463 (2d ed. 1991 reprint) (defining “pennchant” as “[a] (strong or habitual) inclination; a favourable bias, bent, liking”). This is pure propensity evidence and is exactly the type of evidence Rule 11-404(B) excludes. Although the State contends that evidence of Gallegos’s penchant for engaging in sexual acts with young girls is the “essence” of why the evidence would be cross-admissible at separate trials, it is, in fact, the essence of why it would not be admissible.

{29} The second definition of “common plan or scheme” evidence that the Court of Appeals described is “where the same ‘plan’ is used repeatedly to commit separate crimes that are markedly similar to the way in which the crime charged was committed.” Gallegos, 2005-NMCA-142, ¶ 25. The Court of Appeals concluded that New Mexico does not read “plan” so broadly and that, even if we did, the evidence would not be cross-admissible because the crimes against Jamie S. and Ursula C. were not “strikingly similar.” Id. ¶ 26; see also Jones, 120 N.M. at 187, 899 P.2d at 1141 (noting that the case law in New Mexico has developed such that “it is now clear that a more detailed analysis needs to be done than simply comparing superficial similarity”). We agree with the Court of Appeals that the term “plan” in Rule 11-404(B) cannot be used to introduce extrinsic-act evidence based solely on its similarity—no matter how similar—with the charged crime. Thus, we do not consider whether Gallegos’s crimes against each girl were “strikingly similar.”

{30} It appears that jurisdictions that incorporate such a reading of “plan” into their rules prohibiting propensity evidence do so for one of two reasons. First, this view of “plan” “is a variation on the ‘signature crime’ theme: extrinsic acts which have several characteristics in common with the charged crime may be admissible to prove identity, even if the similarities do not add up to a unique ‘signature.’” 3 Fishman, supra, § 17:44, at 425. In New Mexico, however, “character evidence is admitted under Rule [11-]404(B) as evidence of identity only when the strict test for relevance is met. This test requires that the ‘pattern and characteristics’ of the prior acts must be so distinctive . . . to constitute the defendant’s signature.” Williams, 117 N.M. at 558, 874 P.2d at 19 (quoted authority omitted). Using “plan” to prove identity in this manner would undermine our holding in Williams regarding the “identity” exception of Rule 11-404(B).

{31} Second, when the issue is whether the crime in fact occurred, and not the identity of the perpetrator (as is the situation in the present case), some jurisdictions allow evidence that the defendant committed acts similar to the crime charged simply because “the existence of a design . . . evidenced by a pattern of past behavior is probative.” State v. DeVincenzi, 74 P.3d 119, 123 (Wash. 2003) (en banc). We are hard pressed to determine how such evidence is probative other than by its tendency to establish that the defendant committed the charged crime because he committed a “strikingly similar” crime in the past. This is propensity evidence pure and simple and, albeit logically relevant, is exactly the kind of evidence that Rule 11-404(B) is meant to exclude. Allowing evidence of a pattern of similar behavior under the guise of “plan” would create an end run around the first sentence of Rule 11-404(B). This we are unwilling to do. See Jones, 120 N.M. at 189, 899 P.2d at 1143 (“Although the State argues that the other crime would be admissible to show ‘common scheme’ and to rebut the claim of consent, the way the evidence accomplishes this is through the prohibited method of proving propensity.”); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5244, at 555 (Supp. 2005) (rejecting State v. Bennett, 672 P.2d 772 (Wash. Ct. App. 1983), because it allowed other-act evidence “to prove that [the] defendant had engaged in intercourse as part of a plan to take advantage of runaways in [a similar] fashion”).

{32} The Court of Appeals held in State v. Montoya, 116 N.M. 72, 74, 860 P.2d 202, 204 (Ct. App. 1993), that “the fact that . . . two crimes were ‘planned’ in the same way is not enough . . . . There must be some overall scheme of which each of the crimes is but a part.” As the Court of Appeals recognized, an overly broad reading of “plan” would eviscerate Rule 11-404(B)’s general  

3 Of course the same is true if Gallegos was on trial solely for the crimes relating to Ursula C. and the State was attempting to introduce evidence of Gallegos’s actions toward Jamie S.
proscription against propensity evidence. The State attempts to distinguish Montoya by pointing out that the evidence at issue in Montoya was “uncharged conduct,” whereas the other acts in the instant case were properly joined and, thus, “charged conduct.” We fail to see the distinction. As discussed above, simply because charges are properly joined does not mean that the charges should not be severed. Moreover, in using Rule 11-404(B) to determine whether properly joined charges should be severed, the other-acts evidence in question will always be “charged conduct.”

3. Opportunity

{33} We turn now to the issue of opportunity. On Gallegos’s direct appeal, the State did not argue that evidence pertaining to Jamie S. and Ursula C. would be cross-admissible at separate trials to show that Gallegos had the opportunity to commit the crimes. Gallegos, 2005-NMCA-142, ¶ 28. Nonetheless, the Court of Appeals addressed the issue of opportunity because the trial court stated that “evidence from both cases could be used in the other to show there was opportunity.” Id. (internal quotation marks omitted). In its analysis, the Court of Appeals assumed, without deciding, that the extrinsic evidence would be cross-admissible under 11-404(B) at separate trials to show Gallegos’s opportunity to commit the crimes against Jamie S. and Ursula C. because Gallegos “was a guard at YDDC and therefore had access to the inmates and was familiar with the facility.” Id. ¶ 30. The Court went on to hold, however, that the evidence would not be admissible under Rule 11-403 largely because “it was uncontested at trial that Defendant was a guard at YDDC with access to the inmates and familiarity with the facility.” Id.

{34} On certiorari to this Court, the State again does not specifically argue that the extrinsic evidence would be admissible as probative of Gallegos’s opportunity to commit the crimes. Normally, we would consider this issue addressed. See State v. Hernandez, 104 N.M. 268, 274, 720 P.2d 303, 309 (Ct. App. 1986) (“A contention on appeal is deemed abandoned if appellant fails to cite authority or to explain the claim.”). However, since the Court of Appeals addressed the issue, we believe it necessary that we do so as well.

{35} “The initial threshold for admissibility of prior uncharged conduct is whether it is probative on any essential element of the charged crime.” State v. Aguayo, 114 N.M. 124, 128, 835 P.2d 840, 844 (Ct. App. 1992). In this case, as the Court of Appeals noted, it was undisputed that Gallegos (1) was a guard at YDDC, (2) had access to Jamie S. and Ursula C., and (3) was familiar with YDDC. Because there would be no need for extrinsic-act evidence probative of these issues if there were separate trials, a trial court would err by not excluding the evidence under Rule 11-404(B). In other words, if a fact is wholly undisputed, the only additional probative value extrinsic-act evidence would have on that issue would be to show a person’s propensity. Evidence solely having value as propensity evidence is inadmissible under Rule 11-404(B) and is to be excluded under that rule automatically. See also State v. Kim, 897 A.2d 968, 973 (N.H. 2006) (“To be relevant under Rule 404(b), the proffered evidence must be pertinent to an issue that is actually in dispute.”). Because of our holding, we do not use this case to divine the mystery of the “opportunity” exception of Rule 11-404(B). See Gallegos, 2005-NMCA-142, ¶ 29; 22 Wright & Graham, supra, § 5241, at 484 (1978).

{36} Thus, because the evidence pertaining to each victim would not have been cross-admissible at separate trials, the trial court abused its discretion when it failed to sever the charges. We must now consider whether that error caused actual prejudice to Gallegos at his trial. In other words, we consider whether that error was harmless.

C. A Defendant Was Actually Prejudiced by a Denial of a Motion to Sever Charges If There Was a Risk That the Jury Was Confused or That It Misused the Evidence

{37} Relying on Jones, the Court of Appeals held that when evidence is not cross-admissible because of Rule 11-404(B), a conviction at a trial of joined offenses establishes prejudice. Gallegos, 2005-NMCA-142, ¶ 32; see also Ruiz, 2001-NMCA-097, ¶ 11 (“A defendant is unfairly prejudiced when joinder allows the jury to consider evidence that would not otherwise be admissible under Rule 11-404(B) . . . .”). Only if the extrinsic act evidence was properly admitted under Rule 11-404(B), but wrongly admitted under Rule 11-403, would the Court of Appeals conduct a deeper inquiry into prejudice. Id.

{38} Although the Court of Appeals’s rule is enticing because of its bright-line nature, we reverse the Court of Appeals on this point since its holding is in conflict with our precedent. As noted above, we stated in Jacobs that “[a] defendant might be prejudiced if the joinder of offenses permitted the jury to hear testimony that would have been otherwise inadmissible in separate trials.” 2000-NMSC-026, ¶ 15 (emphasis added). Granted, we did not explicitly hold in Jacobs that the possibility of prejudice occurs no matter whether the evidence would have been inadmissible because of Rule 11-404(B) or because of Rule 11-403. However, this is because we understood that the distinction did not matter. For example, we held in Williams that testimony regarding the defendant’s enjoyment of anal sex should not have been admitted at his trial because it violated Rule 11-404(B). 117 N.M. at 559, 874 P.2d at 20. Having so determined, we did not do a Rule 11-403 analysis. Nonetheless, we determined that the admission of the testimony was harmless and, thus, reversal was not warranted. Id.

{39} In the context of an erroneous admission of evidence under Rule 11-404(B), we held in Williams that there were three factors appellate courts should consider in determining whether the error was harmless: (1) substantial evidence without reference to the improper evidence, (2) a greater proportion of admissible evidence in relation to inadmissible evidence such that it would not appear the wrongly admitted evidence contributed to the conviction, and (3) a lack of substantial conflicting evidence such that the State’s testimony was discredited. 117 N.M. at 559, 874 P.2d at 20. While these factors may be helpful, we conclude that in a case such as this involving the question of whether a defendant was actually prejudiced by the trial court’s wrongful denial of a motion to sever joined offenses, other factors should be considered.

{40} Cases from other jurisdictions which do not make the distinction we have just made between potential and actual prejudice, and which, as a result, necessarily conflate the roles of trial and appellate courts, have typically adopted some form of the “simple and distinct” test found in Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). See, e.g., State v. Lott, 555 N.E.2d 22 Wright & Graham, supra, § 5164 (1978 & Supp. 2005) (discussing differing views as to whether an undisputed fact is a fact of consequence and, thus, relevant).

{41} The initial threshold for admissibility of propensity evidence is whether it is probative on any essential element of the charged crime. See State v. Lott, 555 N.E.2d 29 (Ohio 1990). The Court of Appeals determined that the admission of the extrinsic act evidence was prejudice.

{42} Any error committed by the trial court in admitting extrinsic act evidence would have been harmless.

For purposes of this discussion, we assume that these facts were “consequential” within the meaning of Rule 11-401 NMRA. See generally 22 Wright & Graham, supra, § 5164 (discussing differing views as to whether an undisputed fact is a fact of consequence and, thus, relevant).
When simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the non-admissibility of evidence of these crimes as ‘other acts’ under . . . 404(b).” See also 4 Wayne R. LaFave et al., Criminal Procedure § 17.1(d) n.49 (2d ed. 1999) (noting that “the mere fact there would be no cross-admissibility of evidence were there a severance is not, standing alone, a basis for a severance”). And see Herring v. Meachum, 11 F.3d 374, 378 (2d Cir. 1993).

{42} However, Drew “has been criticized on the ground that it puts too much faith in limiting instructions to the jury and ignores the rationale of the rule against proof of other crimes.” 1A Wright, supra, § 222, at 482; see also Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale. L.J. 553, 556-60 (1965). Thus, while other jurisdictions suggest that the trial court is to weigh the Drew factors, we believe they are more appropriate for an appellate court’s use, particularly in light of the fact that most involve situations which the trial court simply cannot anticipate.

{43} We now apply and balance these various factors to the instant case. Particularly in its closing argument, the State urged the jury to consider together the evidence pertaining to Jamie S. and Ursula C. For example, at the very beginning of her closing, one of the prosecutors stated: “This case was about control and the defendant being in control of two young girls, two young inmates housed at YDDC. He was in control. They had no choice. They had no choice to be there; they had no choice as to what he did to them.” Later, in the State’s closing rebuttal, another prosecutor said the following:

[H]e got to use [taxpayer] money that he received in that job to use YDDC as his own personal dating service. He had his own girls gone wild there. He could ask the girls to flash him. He could feel them up, kiss them. He could do those things, and why could he do those things? Because he was a guard and he had control.

Moreover, in presenting its case, the State intertwined the evidence relating to the separate offenses by presenting the testimony of Jamie S. and Ursula C. back-to-back at the very beginning of trial. The facts linking the charges were similar in that the charges stemmed from Gallegos’s actions toward girls in his care as a guard at YDDC. Although the charges pertaining to each victim were distinct, all of them, as a general matter, were highly inflammatory in that they were offenses of a sexual nature involving children. See, e.g., Montoya, 116 N.M. at 75, 860 P.2d at 205 (“Evidence that a defendant committed a prior illegal sex act against a child is extremely prejudicial.”). However, the highly inflammatory nature of a typical CSCM charge was tempered by the fact that Jamie S., who was nearly eighteen-years old at the time of the incidents, testified that her encounters with Gallegos were consensual, that he did not use his position of authority to coerce her, and that she considered him her boyfriend. Finally, although this was a relatively short and simple trial, the jury was only instructed that “[e]ach crime charged in the indictment should be considered separately.” See UJI 14-6004 NMRA. While this instruction would generally suffice in situations where evidence pertaining to each charge would be cross-admissible at separate trials, we have grave doubts that it is “a vigilant precision in speech far beyond that required in the ordinary trial” that adequately protects a defendant at a trial of joined offenses when evidence of the offenses would not be cross-admissible.

{44} The balance thus far is in favor of finding actual prejudice. After considering the evidence and verdicts related to each victim, we conclude that Gallegos was actually prejudiced by the admission of evidence pertaining to Ursula C., but not by the admission of evidence pertaining to Jamie S. As just noted, the evidence relating to Jamie S. was not strong; nonetheless, Gallegos was convicted of the sole charge submitted to the jury in which Jamie S. was the victim. As such, we cannot be confident that the jury did not misuse the evidence that Gallegos masturbated in front of Ursula C. and asked her to disrobe when it found Gallegos guilty of using his position of authority to commit CSCM against Jamie S. Thus, we affirm the Court of Appeals’s reversal of Gallegos’s conviction of CSCM.

{45} The evidence pertaining to Ursula C.,
on the other hand, was somewhat stronger. Ursula C. testified that she saw Gallegos masturbating in front of her three times but that the first time it happened, she did not really know what Gallegos was doing. Ursula C. also testified that Gallegos asked her either to take her shirt off or to “flash” him. However, at times Ursula C.’s testimony was vague and confusing. Moreover, there was no other evidence linking Gallegos to these crimes. Nonetheless, we believe the fact that Gallegos was acquitted of one of the three indecent exposure charges and of the contributing to the delinquency of a minor charge shows that the jury was not confused or improperly influenced by the admission of evidence pertaining to Jamie S. when it considered the four charges pertaining to Ursula C. Thus, notwithstanding the trial court’s error in failing to sever the charges, we hold that Gallegos suffered no actual prejudice on the charges related to Ursula C. We reverse the Court of Appeals on this point and affirm Gallegos’s two convictions of aggravated indecent exposure.

By this conclusion, however, we do not mean to imply that acquittals of some charges will always mean that a defendant was not actually prejudiced when he or she went to trial on joined offenses where the evidence pertaining to each would not have been cross-admissible at separate trials. See, e.g., Woodard, 719 A.2d at 973. Furthermore, we again note that in determining whether a defendant was actually prejudiced by the trial court’s denial of his motion to sever, we have the luxury of conducting a hindsight review. Thus, our job is different than the trial court’s. The trial court’s focus is on whether, at the time the motion to sever is made, the defendant “is prejudiced” to the extent there is an appreciable risk of reversal on appeal. If the evidence pertaining to each charge would not be cross-admissible at separate trials under Rule 11-404(B) or Rule 11-403, the trial court abuses its discretion when it fails to sever. However, on appeal we must determine whether this abuse actually prejudiced the defendant, warranting a new trial.

III. CONCLUSION

The State is obligated to join offenses pursuant to Rule 5-203(A). However, even though offenses are properly joined, a trial court may abuse its discretion when it denies a motion to sever. If evidence pertaining to each charge would not be cross-admissible at separate trials, the trial court abuses its discretion when it decides not to sever joined offenses. Before reversal is warranted on appeal, however, a defendant must show that he or she was actually prejudiced by the trial court’s error. In this case, the trial court abused its discretion in failing to sever because the evidence pertaining to each charge would not have been cross-admissible at separate trials as evidence of Gallegos’s “plan” or “opportunity.” We conclude that Gallegos was actually prejudiced by the admission of evidence pertaining to Jamie S. Affirming Gallegos’s two convictions of aggravated indecent exposure, we reverse the Court of Appeals on this point and remand this portion of the case to the Court of Appeals so that it may address Gallegos’s remaining claims. See Gallegos, 2005-NMCA-142, ¶ 40. At the same time, we affirm the Court of Appeals’s reversal and remand for a new trial of Gallegos’s conviction of CSCM.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
{1} Defendant was convicted of driving a vehicle while under the influence of liquor or drugs (DWI). He was adjudged a felon, and sentenced to an enhanced mandatory prison term after the State established at the sentencing hearing that he had four prior DWI convictions. Defendant finished serving the prison term imposed, and he was on probation when the State attempted to reimprison him and enhance his sentence again because it had recently discovered an additional prior DWI conviction. The trial court denied the State’s motion, and the State appeals.

{2} We conclude that all prior DWI offenses which could be used to enhance Defendant’s DWI sentence had to be proved by the State at the sentencing hearing. Therefore, the felony DWI sentence resulting from that hearing was not illegal or improper. Moreover, Defendant had a reasonable expectation of finality in that sentence such that further increasing it after he was released from prison could violate double jeopardy and due process. Accordingly, we affirm the order of the trial court denying the State’s motion to increase the felony DWI sentence originally given to Defendant.

{3} A defendant who has prior DWI convictions may be adjudged guilty of a felony and thereby subject to a mandatory prison term under NMSA 1978, Section 66-8-102 (2005). Subsection (H) directs that “[u]pon a fifth conviction . . . an offender is guilty of a fourth degree felony and . . . shall be sentenced to a term of imprisonment of two years, one year of which shall not be suspended, deferred or taken under advisement.” Subsection (I) then states that “[u]pon a sixth conviction . . . an offender is guilty of a third degree felony and . . . shall be sentenced to a term of imprisonment of thirty months, eighteen months of which shall not be suspended, deferred or taken under advisement.” Subsection (J) contains directions for seventh or subsequent DWI convictions that are not applicable here. The dispute in this case is whether the enhancement under Subsection (H) for a fourth degree felony with a mandatory prison term of one year or the enhancement under Subsection (I) for a third degree felony with a mandatory prison term of eighteen months is applicable.

{4} The indictment charged Defendant with DWI, and alleged that Defendant was subject to a felony DWI sentence because of prior DWI convictions. Defendant was then found guilty of DWI by a jury. Prior to the sentencing hearing, the State alleged that six prior DWI convictions were applicable to Defendant’s sentence. At the sentencing hearing, the trial court determined that there was insufficient proof that two of the alleged prior DWIs could be used to enhance Defendant’s sentence and concluded that four prior DWI convictions would be used in sentencing Defendant. The State’s request for a continuance to obtain further proof relating to the two disputed prior DWIs was denied. Therefore, the trial court concluded that this was Defendant’s fifth DWI conviction for sentencing purposes. Consistent with Subsection (H), the trial court imposed a two-year prison term, required Defendant to serve the one-year mandatory term, suspended the second year, and placed Defendant on five years of probation.

{5} When Defendant had approximately two months remaining to be served in prison, the State filed a motion denominated as a “Motion to Correct Illegal Sentence.” The motion recited that the State had “recently” learned of another DWI conviction, and asserted that Defendant’s sentence should therefore be changed to reflect a sixth DWI conviction. This would result in elevating Defendant’s conviction from a fourth degree felony to a third degree felony, and increasing the mandatory prison term from one year to eighteen months as required by Subsection (I). When the State’s motion was heard, Defendant had completed serving his prison term, and he was serving his probation. The State argued that because Defendant’s sentence would not be complete until he finished serving his probation, his original sentence was subject to being increased, and double jeopardy was not implicated. Defendant argued that the State had the burden of proving all prior convictions at the time of sentencing, that he had a right to finality in the sentence he received, and that increasing his sentence at that time was unfair and would violate his constitutional right to be free from double jeopardy.

{6} The trial court filed a written order denying the State’s motion, finding that Defendant’s original sentence was not illegal and that while it had discretion to increase Defendant’s original sentence on the basis of the DWI conviction discovered after sentence was originally imposed, it would not exercise its jurisdiction to reopen the sentence because Defendant had already completed serving his prison term. The State appeals from this order.

{7} The question presented in this appeal
is whether the trial court was required to further increase Defendant’s original felony DWI sentence when a prior DWI conviction is discovered by the State after the original sentence was imposed and Defendant has completed serving the term of imprisonment, but has not completed probation. While New Mexico courts have addressed this question in the context of habitual offender enhancement, the question of whether the same rule applies to increased punishment for repeat DWI offenders under Section 66-8-102 is an issue of first impression. Resolution of this issue requires us to interpret the sentencing provisions of Section 66-8-102. We are therefore presented with a question of law, and our review is de novo. See State v. Coyazo, 2001-NMCA-018, ¶ 5, 130 N.M. 428, 25 P.3d 267 (stating that whether an enhanced felony DWI sentence was subject to an additional habitual offender enhancement required statutory interpretation, a question of law subject to de novo review); State v. Guerra, 2001-NMCA-031, ¶ 6, 130 N.M. 302, 24 P.3d 334 (stating that the power of a trial court to sentence is derived exclusively from statute and issues of statutory construction and interpretation are questions of law which are reviewed de novo).

(8) Defendant’s original felony sentence was not illegal or improper; it was a valid sentence when it was imposed, and therefore subject to the general prohibition against being increased once he started serving it. “It is a well-established principle of New Mexico law that a trial court generally cannot increase a valid sentence once a defendant begins serving that sentence.” State v. Porras, 1999-NMCA-016, ¶ 7, 126 N.M. 628, 973 P.2d 880. A limited exception is when the original sentence is illegal or improper. Id. The State seeks to avoid application of this rule, making two arguments.

(9) The State first asserts that the reasoning applicable to habitual offender enhancements, where a habitual offender’s sentence may be enhanced at any time before the underlying prison term, period of probation, or period of parole expires also applies to enhanced DWI sentencing. See id. ¶ 8 (“A defendant’s sentence may be enhanced as a habitual offender at any time prior to the expiration of the underlying sentence or period of parole.”). It first argues that there is nothing in the DWI statute that expressly forbids the sentencing court from imposing an additional enhancement once a defendant has begun serving his sentence. Furthermore, it argues, DWI sentencing and habitual offender enhancement proceedings are alike because enhanced sentences are mandatory under both statutes upon proof of prior convictions, and the sentencing court is not given discretion to ignore the proven prior convictions.

(10) We reject the State’s argument because it overlooks two critical key features of habitual offender enhancement that distinguish it from DWI sentencing. First, the habitual offender statute expressly grants the sentencing court jurisdiction to enhance a defendant’s sentence after a defendant has started serving his original sentence, but the DWI sentencing statute does not. Second, the sentencing on the underlying charge and the enhancement of that sentence for habitual offenders involve two separate proceedings, but DWI sentencing involves only one proceeding.

(11) The habitual offender statute clearly grants the sentencing court jurisdiction to adjudicate a charge of habitual offender status after a defendant has started serving the original sentence imposed for the underlying charges. NMSA 1978, Section 31-18-19 (1977) directs: If at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender. NMSA 1978, Section 31-18-18 (1977) also imposes a duty on prison, probation, and parole officers. If they learn that a “person charged with or convicted of a noncapital felony” is a habitual offender they are required to report the facts to the district attorney “who shall then file an information.” Id. NMSA 1978, Section 31-18-20(A) (1983) then directs the court in which the defendant was originally convicted to bring before it a person charged as a habitual offender “whether he is confined in prison or not,” and conduct a hearing to determine if he is a habitual offender, and if he is, “the court shall sentence him to the punishment as prescribed.” Section 31-18-20(C). Given these broad statutory mandates, we have observed that “[t]he trial court’s jurisdiction seems to be of indefinite duration” limited only by the constitutional prohibition against double jeopardy. State v. Roybal, 120 N.M. 507, 510, 903 P.2d 249, 252 (Ct. App. 1995). In this context, once a defendant has completely served his sentence, his punishment for the crime has come to an end, and double jeopardy forbids enhancing the sentence. Id.

(12) The DWI sentencing statute is significantly different. Unlike the habitual offender statutes, Section 66-8-102 does not expressly grant a trial court jurisdiction to increase a defendant’s DWI sentence after he has started serving the original sentence. On the contrary, Section 66-8-102 provides in Subsections (G), (H), (I), and (J) that the enhanced sentence is to be imposed “upon conviction.” This is a statutory directive to the State to present all of its evidence of any prior DWIs when a defendant appears for sentencing on the DWI conviction. Further, this statutory sentencing structure does not allow for an additional enhancement to be imposed after an enhanced sentence is imposed. “Statutes authorizing a more severe punishment as conviction for a second offense are deemed highly penal and therefore must be strictly construed.” State v. Keith, 102 N.M. 462, 465, 697 P.2d 145, 148 (Ct. App. 1985). Moreover, to the extent there is any doubt in the statute concerning when proceedings to increase the original sentence may be brought, that doubt must be resolved in Defendant’s favor under the rule of lenity.

Id.; see State v. Russell, 113 N.M. 121, 124, 823 P.2d 921, 924 (Ct. App. 1991) (quoting and applying Keith). Our Supreme Court applied these same propositions to enhanced felony DWI sentencing in State v. Anaya, 1997-NMSC-010, ¶ 30, 123 N.M. 14, 933 P.2d 223, which quoted Swafford v. State, 112 N.M. 3, 16, 810 P.2d 1223, 1236 (1991) as follows: “When it cannot be said with certainty that the legislature intended to authorize the imposition of an enhanced sentence under particular circumstances . . . we presume that the legislature did not so intend.” Anaya, 1997-NMSC-010, ¶ 30.

(13) The second reason a court has authority to enhance a habitual offender’s sentence after the offender has started serving the original sentence is that habitual offender enhancement proceedings are separate from the sentencing proceeding for the underlying charges. As already noted, a habitual offender proceeding is initiated by the filing of a criminal information, followed by a hearing. This denotes a proceeding that is separate from those relating to the underlying charges. In this regard, we have specifically stated, “the proceedings involving the underlying charges and the proceedings involving the habitual offender charges are separate in New Mexico.” Porras, 1999-NMCA-016, ¶ 11. “An unenhanced sentence remains
a valid sentence until it is determined that defendant is a habitual offender and that the underlying sentence is subject to enhancement.” State v. Gaddy, 110 N.M. 120, 122, 792 P.2d 1163, 1165 (Ct. App. 1990). Up to the point that a defendant is proved to be a habitual offender, “anything could happen in the habitual proceedings—the state could decide not to pursue them, or fail to prove its case.” Id. at 123, 792 P.2d at 1166. However, once the separate habitual offender proceeding results in a determination that a defendant is a habitual offender, the sentence originally imposed for the underlying offense is “no longer an authorized sentence because supplanted by the enhanced sentence mandated for an habitual offender.” State v. Harris, 101 N.M. 12, 15, 677 P.2d 625, 628 (Ct. App. 1984).

{14} To illustrate, in Porras, the defendant was originally given a sentence of ninety days incarceration, which he immediately started serving. 1999-NMCA-016, ¶ 3. He was subsequently proved to be a habitual offender, and the trial court increased the underlying, original ninety-day sentence to three years, and imposed an additional eight-year habitual offender enhancement for a total prison term of eleven years. Id. ¶¶ 4-5. On appeal, the defendant did not contest the eight-year habitual offender enhancement; he only contested the jurisdiction of the trial court to increase the underlying sentence from ninety days to three years. Id. ¶ 12. We held that the defendant had an expectation of finality in the original sentence for the underlying charges once he began to serve it, and concluded that while the State could seek to enhance the defendant’s sentence in a separate proceeding under the habitual offender statute, this had no effect on the original sentence imposed for the underlying charges. Id. ¶ 11-12. Increasing the underlying sentence once the defendant started serving it violated the defendant’s double jeopardy rights protected by both the United States and New Mexico Constitutions. Id. ¶ 1. Thus, there are two separate proceedings with two separate consequences. In the underlying case once a valid sentence is imposed and the defendant begins serving that sentence, the court has no jurisdiction to increase it. In the separate habitual offender proceeding, the original sentence as originally imposed is subject to being enhanced. “[T]here is no doubt that the original sentence is subject to enhancement after the defendant has begun serving it and before he has been discharged from custody.” March v. State, 109 N.M. 110, 112, 782 P.2d 82, 84 (1989) (emphasis added).

{15} On the other hand, sentencing for DWI does not entail a proceeding that is separate and apart from the DWI case itself. In Anaya, 1997-NMSC-010, ¶ 18, our Supreme Court concluded that when the legislature created felony DWI based on prior DWI convictions it did not change the elements of the offense itself, and a jury is not required to determine if a felony sentence is applicable based on the number of prior DWI convictions. Id. ¶ 19. While a bifurcated trial is provided for in other states, so that the jury decides whether the defendant committed the charged DWI offense before hearing evidence of prior convictions, id., “our legislature has made no express provision for a bifurcated proceeding.” Id. We have also noted that while the basic elements of a DWI offense have not changed, the punishment has, and when the DWI offense is proved, “[s]entencing is thereafter set by and tied to the number of times an offender has been convicted of the offense.” State v. Hernandez, 2001-NMCA-057, ¶ 23, 130 N.M. 698, 30 P.3d 387. “Habitual offender enhancements, on the other hand, despite the mandatory tone of the statute, are not automatically included in any sentence imposed on a defendant.” Gaddy, 110 N.M. at 123, 792 P.2d at 1166. Finally, “DWI sentences based on repeat convictions do not impose a separate sentence on top of a basic sentence [as occurs for a habitual offender enhancement]. Instead, repetition of offense is accounted for by increasing the basic punishment per numbered conviction.” Hernandez, 2001-NMCA-057, ¶ 30. These differences, coupled with the statutory mandate that a felony DWI sentence based upon prior convictions is to be imposed “upon conviction,” persuade us that the same logic applicable to habitual offender proceedings does not apply here.

{16} The State’s second argument is that apart from the rationale applicable to habitual offender proceedings, the construction placed upon the statutory enhancement for armed robbery in State v. Stout, 96 N.M. 29, 627 P.2d 871 (1981), allows Defendant’s sentence to be increased in this case. The armed robbery statute provides in pertinent part: “Whoever commits robbery while armed with a deadly weapon, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.” NMSA 1978, § 30-16-2 (1973). In Stout, the defendant was convicted of robbery with a firearm and sentenced as a first offender to a prison term of not less than fifteen nor more than fifty-five years. 96 N.M. at 31, 627 P.2d at 873. Eight months after he began serving his sentence, the State filed an information alleging the defendant had previously been convicted of armed robbery, and that he should therefore be sentenced to life imprisonment in accordance with Section 30-16-2. Stout, 96 N.M. at 31, 627 P.2d at 873. Following a trial on the supplemental information in which a jury determined that the defendant was previously convicted of armed robbery as alleged, the trial court vacated the original sentence and sentenced the defendant to life imprisonment. Id. After noting that the defendant had served only eight months of his sentence before the enhanced sentence was sought, our Supreme Court approved of this procedure, stating, “[w]e hold that the defendant’s initial sentence was the valid and appropriate sentence until it was proven that he was a prior offender under the appropriate enhancement statute.” Id. at 32, 627 P.2d at 874 (emphasis added). Our Supreme Court subsequently decided Anaya, in which it concluded that the elements of DWI do not change, whether it is a first or subsequent offense, as in Stout, where the elements of armed robbery are the same, whether it is a first or subsequent offense. Anaya, 1997-NMSC-010, ¶¶ 20-21. “The armed robbery statute at issue in Stout was similar to New Mexico’s DWI statute in that it provided both for a higher degree of offense and a more severe penalty for repeated violations.” Id. ¶ 21. The State therefore argues that by analogy, there is no bar to the State seeking to increase Defendant’s DWI sentence in this case. We disagree.

{17} The statute and facts in Stout are materially different from those in this case. A time is specified for imposing an enhanced sentence under the DWI sentencing statute: the enhanced sentence is to be imposed “upon conviction.” On the other hand, no such time is specified under the armed robbery enhancement statute: the enhanced sentence is imposed “for second and subsequent offenses.” The State’s argument also overlooks the fact that in this case, the sentencing hearing based on Defendant’s prior DWIs was already held and that Defendant not only started serving the increased sentence which resulted from that hearing, he completed serving the prison term imposed. The State now seeks to further increase Defendant’s sentence. That is clearly not what occurred in Stout, where
there was only one hearing to enhance the defendant's sentence, and one enhanced sentence imposed. Finally, the defendant had only served eight months of a prison term of not less than fifteen nor more than fifty-five years when the underlying sentence was enhanced in Stout, whereas in this case, Defendant had already completed serving his enhanced prison term when the State attempted to reimprison him and again enhance his sentence.

{18} We therefore conclude that the original felony sentence imposed upon Defendant based on five DWI convictions was a valid sentence. A contested hearing to determine how many DWI convictions Defendant had was held. To the extent the court could have sentenced Defendant based upon six DWI convictions, it was the State’s burden to present proof of those convictions at the sentencing hearing. See State v. Gaede, 2000-NMCA-004, ¶ 8, 128 N.M. 559, 994 P.2d 1177 (“[T]he State bears the initial burden of presenting evidence of the validity of each of [a defendant’s] prior convictions.”). Once the hearing was concluded, the trial court imposed the prison term provided by Section 66-8-102. See State v. McDonald, 113 N.M. 305, 307, 825 P.2d 238, 240 (Ct. App. 1991) (stating that a sentence authorized by law constitutes a legal sentence); see also State v. Baros, 78 N.M. 623, 625, 435 P.2d 1005, 1007 (1968) (“This court has held that sentences must be imposed as prescribed by statute.”).

{19} We conclude by noting that the State’s arguments overlook Stout’s recognition that fundamental fairness and due process concerns may prohibit enhancing a sentence. “[W]e assume that in some case it could violate the defendant’s rights to wait a substantial period of time before enhancement is sought.” Id. at 32, 627 P.2d at 874. Stout thus aligns itself with cases acknowledging that due process may be denied by enhancing a sentence that is substantially or fully served. Breest v. Helgemoe, 579 F.2d 95, 101 (1st Cir. 1978), states that the power to correct a sentence, even one that is statutorily invalid, is subject to some temporal limit under principles of fundamental fairness. Id. Thus, due process may be denied when a defendant has already served so much of the original sentence imposed that “his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them.” United States v. Lunden, 769 F.2d 981, 987 (4th Cir. 1985). For example, in DeWitt v. Ventetoulo, 6 F.3d 32 (1st Cir. 1993), after the state released the defendant from prison, and he had served eight months of parole, his sentence was increased to conform with state law, and he was ordered reimprisoned. Id. at 33. The defendant had obtained work, and resumed his relationship with family members and his girlfriend while on parole. Id. Concluding he was denied due process, the United States District Court granted the defendant a writ of habeas corpus, and the First Circuit Court affirmed. Id. at 34, 37. In concluding that the line of fundamental fairness was crossed, the court considered various factors, including the reasonableness of the defendant’s reliance on the sentence he received, his release from prison and formation of new roots, and the tardiness of the state in seeking to correct the error. Id. at 36.

{20} In State v. Hardesty, 915 P.2d 1080 (Wash. 1996) (en banc), the state and the defendant entered into a plea agreement that contained an agreed criminal history revealing two prior felonies. Id. at 1082. Based on the plea and criminal history, the defendant was sentenced to fourteen months in prison, and he was released after serving approximately nine months. Id. After the defendant was released, the state fortuitously discovered that the defendant had two additional prior felony convictions, which had not been entered on a national computer base when the original plea agreement was made. Id. at 1082-83. The state therefore filed a motion requesting that the defendant be resentenced to twenty-nine months imprisonment based on the additional felonies. Id. at 1082. While acknowledging that United States v. DiFrancesco, 449 U.S. 117, 121 (1980), rejected a per se rule against increasing an erroneous sentence under the double jeopardy clause, the Court also recognized that the double jeopardy clause continues to play a role, albeit limited, in sentencing proceedings:

In an ordinary sentencing proceeding to correct an erroneous sentence, the analytical touchstone for double jeopardy is the defendant’s legitimate expectation of finality in the sentence, which may be influenced by many factors such as the completion of the sentence, the passage of time, the pendency of an appeal or review of the sentencing determination, or the defendant’s misconduct in obtaining the sentence.

Hardesty, 915 P.2d at 1085. The court concluded that a defendant acquires a legitimate expectation of finality in a sentence that is substantially or fully served unless he is on notice the sentence may be modified, due to either a pending appeal or the defendant’s own fraud in obtaining the sentence. Id. The enhanced sentence was therefore vacated because the court concluded that the state failed to prove that the defendant committed fraud upon the state when he originally made the plea agreement. Id. at 1088-89.

{21} Further enhancing Defendant’s sentence in this case would violate the fundamental fairness and due process concerns expressed in Stout. The State had its opportunity to prove what sentence was appropriate at the sentencing hearing. The State was able to prove that four prior DWI convictions were applicable, the appropriate enhanced felony sentence was imposed, and Defendant started serving his prison term. When Defendant had only about two months remaining to be served in prison, the State sought an additional six month term of imprisonment based on an additional prior DWI conviction it “recently” learned about. The State’s motion was then heard after Defendant had completed serving the prison sentence imposed, and he was out of prison serving five years of probation.

CONCLUSION

{22} We hold that Defendant received a legal sentence as a result of the sentencing hearing at which the State alleged that Defendant had prior DWIs. Further, he had a reasonable expectation of finality in the length and structure of the enhanced sentence that was imposed, and once Defendant completed serving that prison sentence, the trial court was within its discretion in ruling that due process prohibited the sentence from being further increased because of the additional DWI conviction that was subsequently discovered. We affirm the trial court order denying the State’s “Motion to Correct Illegal Sentence.”

{23} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LYNN PICKARD, Judge
CYNTHIA A. FRY, Judge
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NM Federal Public Defender seeks full time experienced Investigator for Albuquerque office. Duties include but not limited to: conducting interviews to corroborate reports and facts already contained or presented in records, discovery material or various other formats; locating fact witnesses and experts; conducting open ended interviews with witnesses and other sources of information to explore and develop new facts and information; initiating new areas of investigation after being assigned the case and discussing it with the attorney; gathering records; locating, viewing and retrieving tangible evidence, personal property and other relevant items; photographing crime scenes and evidence; maintaining filing and information reference systems; writing comprehensive descriptive reports of work done; and testifying effectively in federal court proceedings. An Investigator must have the ability and willingness to accept responsibility, use initiative, ingenuity and resourcefulness. Knowledge of computer applications is required. Working knowledge of the criminal justice system is required. Regular, out-of-town, overnight travel throughout NM required. Applicants must have a high school degree or equivalent, and a minimum of six years (three years general plus three years specialized) investigative experience. Background check required. Spanish proficiency preferred. Position subject to the availability of funding. Submit resume and 3 references by March 30, 2007 to: Stephen P. McCue, Federal Public Defender, 111 Lomas Blvd. NW, Suite 501, Albuquerque, NM 87102.

**Full-Time Paralegal**

Full-time paralegal needed for small, busy firm. Must be detail-oriented. Prior experience with medical charts is helpful. Willing to train appropriate person with desire to learn. Salary DOE. Law Office of Leonard J. Piazza, P.A., P.O. Box 1567, Mesilla, New Mexico 88046, (505) 524-0443. Please fax resumes to: (505) 524-3505.

**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.

**Experienced Legal Secretary/Assistant**

Experienced legal secretary/assistant for uprown law firm dealing primarily in civil litigation, including personal injury, medical malpractice and products liability. Strong computer skills required and working knowledge of Word, Outlook, e-filings with court, calendaring of hearings, depositions, etc. Strong writing skills required. Fax resume to 822-8037.

**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**

NM Statures Anno. $225; Am Jur legal forms $95; Sm. conf. table (42” dia.) 3 chairs $250; Oak reception table 3 chairs $295; Exec. desk 2 chairs $125; 7’ x 30” bookcase $95; Oak cabinets, misc; 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 space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

**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.

**Downtown Albuquerque**

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

**Office for Lease**

Near Lomas & Tramway

1275 sq. ft. Office Suite with brand new carpet & paint. 3 offices plus conference room and separate work room with lots of build-ins. This space sparkles! Call Dan Hernandez at Berger Briggs 247-0444 or mobile 480-5700.
ACCOUNTING FOR LAWYERS

Wednesday, March 28, 2007
State Bar Center, Albuquerque
6.0 General CLE Credits
Presenter: Douglas R. Smith, CPA

Basic Analysis of Financial Statements
- Short-term liquidity
- Long-term solvency
- Return on investment
- Profitability and earnings
- Commonly used ratios
- Summary of Common Manipulative Practices you are likely to encounter
- Common techniques used to “manage” reported earnings
- How to avoid being misled by making the right inquiries

Basic Concepts Underlying Financial Reporting
(Generally and as they relate to law firm reports)
Generally Accepted Accounting Principles (GAAP) and non-GAAP reporting
- Levels of assurance provided by CPA-prepared financial statements
- Net income vs. cash flow
- Depreciable assets
- Capitalizing vs. expensing
- Inventory
- Other basic concepts

The Financial Statements
- Balance Sheet
- Income Statement
- Statement of Cash Flows
- Notes to the Financial Statements
- Accountants’ Report
- Sample professional firm financial statement
- Sample public company financial statement

Basic Analysis of Financial Statements
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- Common techniques used to “manage” reported earnings
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Special Reporting Issues
- Business combinations and goodwill
- Leases
- Contingent liabilities

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

Please Note: No auditors permitted
Hats Off
to Our
Volunteers

On behalf of the Young Lawyers Division and the University of New Mexico School of Law, we would like to thank the following attorneys for volunteering their time to participate in the UNM Law School Mock Interview Program:

Cindy Blackwell
John Blair
Hon. Michael Bustamante
Mo Chavez
Martha Chicoski
Beth Collard
Brian Colón
Darin Foster
Julie Gallardo
LaDonna Giron
Gina Manfredi
Nasha Martinez
Marcos Martinez
Kyle Nayback
Amelia Nelson
Art Nieto
Melanie Friztsche
Len Piazza
Allison Pieroni
Alison Rosner
Laura E. Sanchez
Joseph Sapien
Meghan Stanford
Briana Zamora

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