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Special Insert:

CLE At-A-Glance

www.nmbar.org
On behalf of the Young Lawyers Division and the University of New Mexico School of Law, we would like to thank the following individuals for volunteering their time to participate in the YLD/UNM Mentorship Program:

- Samantha Adams
- Henry Alaniz
- Jason R. Alcaraz
- Mikal M. Altomare
- Erika Anderson
- Amy Bailey
- Rosemary L. Bauman
- Catherine A. Begaye
- Ricardo Berry
- John Blair
- Daniel Buttram
- Roxanna Chacon
- Arlyn Crow
- Rosalie Fragoso
- Julie Gallardo
- William (Dooley) Gilchrist
- Patrick Griebel
- Justin Jackson
- Rebecca Jackson
- Lucrecia Jaramillo
- Rebecca Kenny
- Robert Kidd
- Julie A. Koschtial
- Cynthia A. Leos
- Nasha Y. Martinez
- Justin Miller
- Mekko M. Miller
- Brent Moore
- Olivia Neidheardt
- Michael Neill
- Carlos Pacheco
- Willow Parks
- Erika N. Poindexter
- Carolyn Ramos
- Valerie S. Reighard
- Cody Rogers
- Roman Romero
- Brenda Saiz
- Amanda Sanchez
- Brad Sims
- Mariposa Padilla Sivage
- Betsey Stephens
- Anita Tellez
- Jennifer Vega
- Spring V. Webb
- Dathan Weems
- Briana Zamora
The Young Lawyers Division will host a Law Day Call-In Program in Four cities on SATURDAY, APRIL 28th, to provide legal information to the public, and you do not have to be a young lawyer to participate in this program. We only ask that you be willing to volunteer your time!

Attorneys in all practice areas, including Spanish-speaking attorneys, are needed to handle calls.

**LOCATIONS**
(Check off the LOCATION you want to sign up for)
- Albuquerque 9:00 am to 1:00 pm
- Farmington 9:00 am to 1:00 pm
- Las Cruces 9:00 am to 1:00 pm
- Roswell 9:00 am to 1:00 pm

**AREAS OF LAW**
(Attorneys please indicate all areas of law you practice)
- Bankruptcy
- Contracts
- Estate Planning
- Medical/Medicaid
- Tax Law
- Business Law
- Criminal Law
- Family Law
- Personal Injury/Torts
- Workers’ Comp
- Civil (General)
- Elder Law
- Insurance Law
- Real Estate
- Civil Rights
- Employment/Labor Law
- Landlord/Tenant
- Social Security

**Volunteers Needed!**

Name: ____________________________________________
Phone: __________________________ Fax: __________________________
E-Mail: ____________________________________________

I have an attorney associate/friend/acquaintance that might be interested in participating.
Call: __________________________ (name) at: __________________________ (tel. #)

PLEASE RETURN THIS FORM AS SOON AS POSSIBLE TO:
Lizeth Cera-Cruz
Public and Legal Services/SBNM
PO Box 92860
Albuquerque, NM 87199

OR FAX TO: (505) 797.6074

Questions? Call: (505) 797-5047 or E-mail: lcera-cruz@nmbar.org
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

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

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Professionalism Tip
With respect to opposing parties and their counsel:
I will not make improper statements of fact or of law.

Meetings

April
25
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room

May
2
Employment and Labor Law Section Board of Directors, noon, State Bar Center
7
Attorney Support Group, 5:30 p.m., First United Methodist Church
8
Criminal Law Section Board of Directors, noon, State Bar Center
9
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
10
Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe
10
Business Law Section Board of Directors, 4 p.m., State Bar Center

State Bar Workshops

April
25
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque
26
Powers of Attorney and Adult Guardianship
1:15 p.m., Meadowlark Senior Center, Rio Rancho
26
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

May
1
Common Legal Issues Affecting Seniors
10:30 a.m., Deming-Luna County Senior Center, Deming
2
Common Legal Issues Affecting Seniors
11 a.m., Eula Mitchell Senior Center, Lordsburg
17
Common Legal Issues Affecting Seniors
10:30 a.m., Corrales Senior Center, Corrales

Cover Artist: Roderick Tenorio is an award-winning Native American artist from Santa Domingo, N.M. He is known for his unique symbolic interpretation and high degree of detail, which have earned him numerous esteemed jewelry awards. Tenorio expresses his spiritual belief through his work and, most importantly, a respect for the sky, nature and its gift of life. The jewelry depicted here is from his Gentle Rain Collection, designed exclusively for Relios, Inc., and produced in Albuquerque under strict quality standards.
**NOTICES**

**COURT NEWS**

**N.M. Supreme Court**

**Law Library**

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

**Bernalillo County**

**Metropolitan Court**

**Juror Appreciation Week**

The Bernalillo County Metropolitan Court will celebrate Juror Appreciation Week, April 30–May 4, by providing breakfast and afternoon snacks all week. State Bar Executive Director Joe Conte and State Bar President Dennis Jontz will visit the court to thank jurors.

**U.S. Bankruptcy Court**

**Brown-Bag Presentations**

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

**STATE BAR NEWS**

**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 who are interested in speaking to a specific topic or moderating a discussion, should 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., May 7, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

**Bankruptcy Law Section**

**Eighth Annual Golf Outing**

The State Bar Bankruptcy Law Section will host the eighth annual golf outing at 12:30 p.m., May 11, at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. The cost of $65 includes a round of golf, a golf cart and hors d’oeuvres. A cash bar will also be available.

Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m., also at the Four Hills Country Club. For more information or to register, contact Gerald Velarde, (505) 248-0500 or gvelarde@mac.com. Reservations must be made by May 7. Participants must provide their own golf clubs.

**Board of Bar Commissioners**

**Meeting Agenda**

The next Board of Bar Commissioners meeting will be held at noon, April 27, at the Supreme Court Building in Santa Fe.

1. Approval of February 16 meeting minutes  
2. Finance Committee report  
3. Acceptance of February financials  
4. Fee waiver requests  
5. Non-Partisan Judicial Elections report and discussion  
6. Section activities  
7. Bylaws/Policies Committee report  
8. Sections/committees selected to sunset  
9. Out-of-state member liaison report  
10. Personnel Committee report

**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.

<table>
<thead>
<tr>
<th>Judicial District</th>
<th>Date</th>
<th>Description</th>
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<tr>
<td>1st Judicial District (505) 827-4687</td>
<td>Exhibits for years 1970–1990</td>
<td>May be retrieved through April 27</td>
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<tr>
<td>1st Judicial District (505) 827-4689</td>
<td>Tapes in criminal, civil, children’s courts, domestic, incompetency/mental health, adoption and probate cases, 1974–1988</td>
<td>May be retrieved through May 23</td>
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<td>2nd Judicial District (505) 841-7596</td>
<td>Exhibits in civil cases, 1996</td>
<td>May be retrieved through July 29</td>
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<td>3rd Judicial District</td>
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<td>3rd Judicial District</td>
<td>Exhibits in criminal cases, 1996</td>
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11. Appointment to Access to Justice Commission
12. Appointments to DNA–People’s Legal Services, Inc., board
13. Fair Judicial Elections Committee report
14. State Plan for Providing Civil Legal Aid to Low Income New Mexicans
15. Pro Hac Vice reports
16. President’s report
17. Executive director’s report
18. 2008 Annual Meeting report
19. Division reports
20. Bar Commissioner district reports
22. New business

Casemaker Training and Technology Workshop Free Training Available
Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials as well as access to 25 other state libraries. Training on using Casemaker will be held from 3 to 4 p.m., April 23, at the State Bar Center. Seating is limited. Call (505) 797-6000 to register.

Committee on Diversity in the Legal Profession Reception and Third Study of Status of Minority Attorneys in New Mexico
The State Bar’s Committee on Diversity in the Legal Profession will host a reception from 5 to 6:30 p.m., June 22, at the State Bar Center to commemorate the work of the committee and celebrate the beginning of the third study of minorities in the profession. The study will be a comprehensive look over the past three decades at bar passage rates, disciplinary matters, State Bar leadership, judicial selection and more. All members are welcome and encouraged to attend this important event. R.S.V.P. to (505) 797-6000 by June 8.

Committee on Women and the Legal Profession Lunch Meeting Featuring April Land
The Committee on Women and the Legal Profession will host a lunch meeting from noon to 1:30 p.m., April 27, at Slate Street Café, 515 Slate NW, Albuquerque (one block north of Lomas between 5th and 6th streets). UNM Professor April Land will speak on Balancing the Profession of Law with Family. The meeting is open to everyone, and all are invited to attend. Lunch is ordered off the restaurant menu with payment made directly to Slate Street Café. Advance reservations are requested. To confirm attendance no later than April 25, R.S.V.P. to Elizabeth Garcia, (505) 222-9353 or e-mail egarcia@nmjsc.org.

Employment and Labor Law Section Board Meetings Open to Section Members
The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, May 2, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call S. Charles Archuleta, section chair, (505) 346-4646.

Public Law Section Public Lawyer Award
The State Bar Public Law Section will present its annual Public Lawyer of the Year Award to Chief Deputy Attorney General Stuart M. Bluestone at 4 p.m., May 1, at the State Capitol Rotunda in Santa Fe. A reception will follow. This award is given to recognize the accomplishments of an attorney in the public sector, including significant length of service in government, excellence as an attorney, acting as a role model for other public lawyers and serving charitable institutions or nonprofit entities connected with the practice of law. Additionally, a recipient’s character and dedication to public law and public service furthers the integrity and repute of the legal profession. New Mexico Supreme Court Chief Justice Edward L. Chávez, State Bar President Dennis E. Jontz and Attorney General Gary K. King will speak at the event.

Senior Lawyers Division Oral History Project and Annual Meeting
At its second quarterly meeting of the year held March 22, the Senior Lawyers Division board reaffirmed its commitment to move forward with its Oral History Project based upon the recommendations of the project subcommittee.

The board also authorized the presentation of awards to judges who have served on the bench for 25 years or more.

The board further approved a social event to be held at 5:30 p.m., July 13, at the Inn of the Mountain Gods during the State Bar’s annual meeting in coordination with the division’s annual meeting. Also during the State Bar’s annual meeting, the division plans to conduct several oral histories. Any member in attendance who would like to be interviewed should contact Terrence Revo, (505) 293-8888.

Taxation Section Annual Meeting and CLE
The Taxation Section will hold its annual meeting at 1:15 p.m., June 15, in conjunction with the 2007 Tax Symposium: Matters Affecting Federal and State Tax Practice. Agenda items should be sent to Chair Dean Cross at dc@claw-nm.com or call (505) 526-2101. The standard fee for the CLE program is $189. The price for State Bar Taxation Section members, government, legal services attorneys and paralegals is $179. Lunch and a post-CLE reception are included. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbarcl.org or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Young Lawyers Division Hispanic Bar Association Seeking Volunteers
The Young Lawyers Division and the Hispanic Bar Association are seeking volunteers to spend an hour with high school students on a new ABA/YLD program called Choose Law: A Profession for All. Choose Law encourages diversity in our profession and specifically, high school students of color to become attorneys. We are seeking attorney volunteers to spend one hour with a classroom of high school students to teach the importance of the legal profession and how law impacts many aspects of their lives. A video, written curriculum and Web site are available. Attorney volunteers will present the video and provide a meaningful discussion. For more information and to volunteer, contact Briana Zamora, bhzamora@btblaw.com, or Martha Chicoski, mchicoski@cabq.gov.
The Albuquerque Bar Association will sponsor the annual Law Day Luncheon at noon, May 1, at the Marriott Uptown, 2101 Louisiana Boulevard NE, Albuquerque.

The keynote speaker is Chief U.S. District Court Judge David F. Levi of the Eastern District of California.

A large turnout is expected so reservations should be made as soon as possible. Note that this is a pre-paid event. Tickets will not be sold at the door. Ticket prices are:

- Individual Tickets: $35
- Tables of 10: $350
- Sponsorships: $300

Recognition of sponsors and donations will appear in the program and announced at the luncheon.

Register by noon April 25 online at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

Nominations are being accepted for the 2007 Outstanding Civil Defense Lawyer. The award will be presented at the 2007 DLA Annual Meeting on Oct. 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.

New Mexico Christian Legal Aid announces a free information and training opportunity on May 4 for lawyers and law students who are either providing or are interested in providing help for the poor and homeless.

The training will be conducted from 11 a.m. to 5 p.m. at the State Bar Center. A free lunch will be provided at each session.

Reservations are required. These nationally approved free training programs are offered only once or twice annually. Contact Jim Roach, (505) 243-4419, or roachlawfirm@yahoo.com, for further information or to R.S.V.P.

A letter of nomination for each nominee should be sent to:
Joe Conte, Executive Director
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860; or
Fax to (505) 828-3765; or
E-mail sbnm@nmbar.org.

See the March 19 (Vol. 46, No. 9) Bar Bulletin for additional information.

Deadline for submissions is April 27.
Summer Law Clerk Program

The Summer Law Clerk Program was begun in 1992 with the goal of providing deserving students an opportunity to intern with a large law firm or a governmental law department. The State Bar recognizes that differences in the educational, economic, social, family or personal backgrounds of attorneys can create barriers, both real and perceived, to equal employment opportunities in the legal profession. This program offers students the unique opportunity to participate in training, evaluation and possible second-year clerk positions. Many students also receive the offer of employment as an associate, and all may identify participation in the program on their resumes. Although internships are nothing new to graduate students, the Summer Law Clerk Program is something most other law schools do not offer, especially to first-year students. The selection committee was interested in each applicant's employment history, interests, research and communication skills, community involvement and academic background, as well as whether and to what extent the student's background reflected an absence of equal opportunity that may limit his or her ability to compete effectively for future employment opportunities with large law firms in New Mexico.

Congratulations to the 2007 Summer Law Clerks

The following students were paired with the corresponding firm or agency.

Aaron Choneska  State Regulation & Licensing Division
Elizabeth Clapp  Freedman Boyd Daniels Hollander Goldberg
Bree Cole  Keleher & McLeod
Monica Ewing  Sutin Thayer & Browne
Jacob Gallegos  State Insurance Division
Kelley Grosso  State Gaming Control Board
Phyllis Jankowski  Butt, Thornton & Baehr
Lauren Koller  Montgomery & Andrews
Christopher Lopez  Comeau, Maldegen, Templeman & Indall
James Moffitt  City of Albuquerque
Katrina Richards  Robles, Rael & Anaya
Jennifer Rogers  Rodey, Dickason, Sloan, Akin & Robb
Patrick Schaeffer  State Bar of New Mexico
Sherrise Summers  State GSA Risk Management Division
Young Lawyers Division

Meet the Board

In the April 2007 issue of the YLD...In Brief newsletter (see the April 16, 2007, Vol 46, No. 16, issue of the Bar Bulletin) three board members were omitted. We are happy to publish their information here.

Roxanna M. Chacon, a native of Las Cruces, is a 1997 graduate of New Mexico State University and a 2001 graduate of the UNM School of Law. Chacon has practiced primarily in the area of civil litigation for law firms in Las Cruces and Albuquerque. She is currently a staff attorney for the 3rd Judicial District Court in Las Cruces. Chacon has served on the YLD board since 2002. She was chair of the YLD in 2005 and currently holds the position of director-at-large, position 4. During her term as chair, she served on the Board of Bar Commissioners. Chacon has been appointed by the chair of the American Bar Association Young Lawyers Division to serve on the ABA/YLD’s Affiliate Assistance Team for the past three years and is currently the team’s vice-director. In 2003, Chacon was named the State Bar’s Outstanding Young Lawyer of the Year.

Martha Chicoski is an assistant city attorney with the City of Albuquerque Legal Department, Public Safety Division. Her practice primarily focuses on civil rights defense as well as auto and identity theft. Previous experience includes Robles, Rael & Anaya, P.C. and Walz and Associates. In 2003, Chicoski moved from Boston, Massachusetts, to Roswell to work as an assistant public defender. She is the co-chair of the Junior Judges and UNM Law School/YLD Mock Interview Program. Chicoski received one of ten national scholarships provided by the American Bar Association Young Lawyers Division Minorities in the Profession Committee for 2006-07. This award enabled her to travel to the national ABA/YLD conferences and learn about other public service programs (such as Choose Law: A Profession for All) and assist in implementing them in New Mexico. Martha received her J.D. from Suffolk University Law School in 2002 and her B.A. in criminal justice from George Washington University in 1997. She is admitted to practice in New Mexico and Massachusetts as well as before the United States District Court for the District of New Mexico.

Nasha Y. Martinez is a native Northern New Mexican who currently lives in Albuquerque. She received her bachelor’s degree in business administration in 2000 from the Anderson Schools of Business and worked as an advocate for people with disabilities in San Diego at the non-profit law firm, Protection and Advocacy. She represented clients at administrative hearings, presented substantive legal trainings at national conferences, and worked heavily in the monolingual Spanish speaking and Native American communities. Martinez attended the UNM School of Law, graduating in 2006. She received the Dean’s Award for outstanding contributions to the law school community for her leadership work in establishing a minority mentorship program. Martinez now practices at the Rodey Law Firm in the litigation department, focusing on immigration, labor and employment law.
In the Supreme Court of the State of New Mexico

Proclamation
Law Day 2007

Law Day began 49 years ago with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

President Eisenhower noted that it was “fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law that our forefathers bequeathed to us.” Further, he said that it is “our moral and civic obligation as free [people] and as Americans to preserve and strengthen that great heritage.”

In celebrating Law Day this year, let us dedicate ourselves to the great values protected and preserved in our Constitution.

And, at the same time, let us recognize that democracy is not static, that we must always work to improve and perfect it. Let us seek to draw ever closer to the ideal cut in stone over the entrance to the United States Supreme Court: “Equal Justice Under Law.”

Let us resolve that Law Day be an opportunity for all of us, in government and the private sector, to examine our efforts to make equal justice a reality and to work together to reach that goal.

For more than 100 years, America’s charitable institutions and foundations, its lawyers and its courts, and countless others have worked to bring equal justice to as many people as possible.

Edward L. Chávez, Chief Justice
In the Supreme Court of the State of New Mexico

Proclamation

Juror Appreciation Week

April 30–May 4, 2007

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;
WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our
democracy as the right to vote;
WHEREAS, our courts depend upon citizens to serve as jurors;
WHEREAS, service by citizens as jurors is indispensable to the judicial system;
WHEREAS, all citizens are encouraged to respond when summoned for jury service;
WHEREAS, a continuing and imperative goal for the courts, the State Bar, and the broader
community is to ensure that jury selection and jury service are fair, effective, and not unduly
burdensome on anyone; and
WHEREAS, one of the most significant actions a court system can take is to show appreciation
for the jury system and for the tens of thousands of citizens who annually give their time and
talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:
• educating the public about jury duty and the importance of jury service;
• applauding the efforts of jurors who fulfill their civic duty;
• ensuring that the responsibility of jury service is shared fairly by supporting employees
who are called upon to serve as jurors;
• ensuring that the responsibility of jury service is shared fairly among all citizens and
that a fair cross section of the community is called for jury service including this state’s
non-English speaking population;
• ensuring that all jurors are treated with respect and that their service is not unduly
burdensome;
• providing jurors with tools that will assist their decision making; and
• continuing to improve the jury system by encouraging productive dialogue between
jurors and court officials.

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do
hereby recognize the week of April 30–May 4, 2007, as Juror Appreciation Week in New
Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 13th day of April, 2007.

Edward L. Chávez, Chief Justice
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Sponsor</th>
<th>Duration</th>
<th>Contact Information</th>
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<tr>
<td>23</td>
<td>Professionalism–Practicing Law Without Fear</td>
<td>TRT</td>
<td>1.0 E, 1.0 P</td>
<td>(800) 672-6253</td>
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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 April 23, 2007**

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NO. 30,272 State v. McClougherty (COA 24,409) 4/2/07
NO. 30,281 State v. Edwards (COA 25,675) 4/2/07
NO. 30,287 State v. Montoya (COA 26,483) 4/9/07
NO. 30,245 Garcia v. Lloyd’s of London (COA 25,985) 4/9/07
NO. 30,259 State v. Cummings (12-501) 4/10/07
NO. 30,289 State v. Contreras (COA 25,526) 4/16/07
NO. 30,263 State v. Downey (COA 25,068) 4/16/07

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

Petition for Writ of Certiorari Denied:

NO. 30,217 Jones v. Ulibarri (12-501) 4/9/07
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 Fé, NM 87504-2008 • (505) 827-4925

EFFECTIVE APRIL 13, 2007

PUBLISHED OPINIONS

Date Opinions Filed

No. 26351 11th Jud Dist San Juan CR-05-560, STATE v J WEIDNER (reverse and remand) 4/12/2007
No. 26687 11th Jud Dist San Juan CR-05-1132, STATE v J BOMBOY (affirm) 4/12/2007

UNPUBLISHED OPINIONS

4/12/2007

No. 26651 12th Jud Dist Otero CR-03-399, STATE v D CLAY (affirm) 4/10/2007
No. 26944 12th Jud Dist Otero CR-04-559, STATE v D MOTE (affirm) 4/10/2007
No. 27026 2nd Jud Dist Bernalillo CV-03-6496, G GRANBERRY v CITY OF ALBUQUERQUE (reverse) 4/10/2007
No. 27030 2nd Jud Dist Bernalillo CV-05-5038, K DZULA v J DZULA (affirm) 4/10/2007
No. 27167 1st Jud Dist Santa Fe CV-06-1541, R HENNELLY v P OLIVA (reverse) 4/10/2007
No. 27180 3rd Jud Dist Dona Ana CR-03-1026, STATE v J FLORES (reverse) 4/10/2007
No. 26862 2nd Jud Dist Bernalillo CR-05-1070, STATE v C KLATT (affirm) 4/12/2007
No. 27004 3rd Jud Dist Dona Ana DM-02-612, J ROCKWLL v N ROCKWELL (reverse) 4/12/2007
No. 27116 8th Jud Dist Colfax CV-05-158, EAGLE NEST VILLAGE v A GREER (affirm) 4/12/2007
No. 27134 11th Jud Dist San Juan CR-06-107, STATE v W WILLIAMS (affirm) 4/12/2007
No. 27152 5th Jud Dist Lea DM-01-150, V LOZOYA v R ARZATE (reverse) 4/12/2007
No. 27218 2nd Jud Dist Bernalillo CV-05-147, M SALAS v CAVCO INDUSTRIES (affirm) 4/12/2007
No. 27424 12th Jud Dist Lincoln CV-05-163, M MCPEEK v HUBBARD MUSEUM (dismiss) 4/12/2007

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

May
31 Immigration Section, Special Event

June
22 Animal Law

July
12-15 Annual Meeting, Mescalero

Register for Courses and LIVE WEBCASTS Online

- Go to www.nmbarcle.org
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- 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.

NOTE: Programs subject to change without notice.
New Mexico Collaborative Practice Symposium continued

E. The Orientation Meeting (First Four-Way Meeting)
   1. Ensuring and understanding of CFL
   2. Commitment to CFL process and to ‘Ground Rules’
   3. Providing clients with a ‘roadmap’ through the process
   4. Initial discussion of ‘values’
   5. Attention to critical temporary issues
F. Caucusing (Information Discussions Before or After Collaborative Conferences)

G. Collaborative Conferences
   1. Practical details
   2. Agenda
   3. Conduct of conference
   4. Dealing with impasse

INTERMEDIATE / ADVANCED SYMPOSIUM

11.5 General and 1.0 Ethics (optional) CLE Credits

❏ Standard Fee $309
❏ NMCPG Member $289

Presenters: Suzanne L. Brunsting, Esq., Donna M. Maier, CDFA,
David R. Murch, Esq., Association of Collaborative Family Law Attorneys, Rochester, NY

FRIDAY, MAY 4
9:00 a.m.-Noon
Lunch (provided at State Bar Center)
1:00-5:00 p.m. Energizing Your Collaborative Relationships

This workshop will give practical experience for questioning our assumptions and for staying collaborative and positive throughout the representation of our clients. Added to mutual respect and trust is the commitment by all of the professionals to work together in helping both clients reach a balanced and acceptable result.

* Explore the possibility of incorporating a neutral Facilitator in the process;
* Suspend judgment and question assumptions – the vital role of open inquiry;
* Reframe your thinking about relating to clients and to each other;
* Establish concrete action steps for immediate application to collaborative cases.

SATURDAY, MAY 5
9:00 a.m.-Noon
Lunch (provided at State Bar Center),
1:00-3:00 p.m. Session 1: Handling High Conflict Personalities In Collaborative Practice

A. Common Dynamics of High Conflict People in legal disputes
B. Four high conflict personalities (borderline, narcissistic, histrionic and antisocial)
C. Understanding their cognitive distortions and resistance to settlement
D. The hidden role of negative advocates (family, friends and professionals) in escalating conflict

Session 2: 10 Tips for Handling High Conflict People in Collaborative Practice

1. Lowering your expectations for change
2. Listening to highly-insistent emotions (without getting hooked)
3. Understanding their fear-based logic
4. Focusing them on tasks (not emotions)
5. Emphasizing their strengths
6. Reality testing
7. Using indirect confrontations
8. Educating them about consequences
9. Including a positive advocate
10. Recommendations

12:00 p.m. Lunch
1:00 p.m. Adjourn

INTERMEDIATE / ADVANCED SYMPOSIUM

11.5 General and 1.0 Ethics (optional) CLE Credits

Did you know …
Members of the State Bar can now purchase ABA publications through CLE at discounted prices?
When purchased by attendees at CLE Seminars, the discounts get even bigger!

State Bar of NEW MEXICO
2007 ANNUAL MEETING
Progress into Practice: Lawyers Lead the Way
Inn of the Mountain Gods Resort and Casino
Mescalero, NM • July 12 - 15, 2007

9 a.m.
Lawyer As Problem Solver: 2007 Professionalism
1.0 Professionalism CLE Credit $49

9 a.m.
Legislative Process in New Mexico
5.5 General, 1.0 Ethics CLE Credits $199

10:15 a.m.
New Challenges in Professional Liability Insurance
1.0 General CLE Credits $49

12:30 p.m.
Santa Clara Pueblo v. Martinez
2.7 General CLE Credits $109

May 1

May 15

8:30 a.m.
Lawyer As Problem Solver: 2007 Professionalism
1.0 Professionalism CLE Credit $49

9 a.m.
Legal and Tax Advantages of Limited Liability Companies
5.5 General and 1.0 Ethics CLE Credits $199

10:00 a.m.
Prevention, Reporting & Representing Victims of Identity Theft
2.7 General CLE Credit $109

12:30 p.m.
Road and Access Law
3.0 General CLE Credits $109
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.

15 Employee Overtime: Determining Who is “Exempt”
1.0 General CLE Credits
Whether an employee is entitled to overtime is a complicated 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.

22 Fundamentals of Trade Secrets in Business Law
Trade secrets—the know-how, methods, practices, and other confidential information that forms the basis of many business enterprises—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.

29 Fiduciary Income Taxation: The Basics
1.0 General CLE Credits
The use of trusts and the creation of other fiduciary relationships plunges 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.

5/6 Merging LLCs: Tax and Non-Tax Aspects Part 1 & 2
2.0 General CLE Credits
The tax and non-tax law and principles applicable to corporate mergers is well known. Less familiar are the principles applicable to the merger of two or more LLCs, or the merger of LLCs into corporations. This program will provide a practical instruction the tax and non-tax principles of merging LLCs and merging LLCs into corporations.

12/13 Business Planning with S Corps Part 1 & 2
1.0 General CLE Credits
With the growing popularity of LLCs as the pass-through entity of choice, the advantages of using S Corps is sometimes overlooked. Furthermore, many smaller and medium size businesses, particularly professional corporations, still operate as S Corps. This two part program will analyze the advantages and drawbacks of using S Corps, and analyze practical planning opportunities, including a discussion of capital gains issues and employment taxes.

19 Estate Planning for Retirement Benefits
1.0 General CLE Credits
Employer funded and individual retirement accounts, whether IRAs or 401(k)s, are a source of substantial financial wealth for many individuals. This program will provide a practical instruction the tax and non-tax principles applicable to the retirement accounts of an overall estate plan, including where a trust is the beneficiary and to satisfy charitable bequests.

SECTION 1031 TAX-DEFERRED EXCHANGES
Friday, May 18, 2007 • State Bar Center, Albuquerque
2.2 General CLE Credits
This seminar will introduce the basic concepts of 1031 exchanges, including the definitions of like-kind property, the relevant time periods, basis forward and reverse exchanges, and improvements exchanges. In addition, a CPA will discuss calculating capital gains and evaluating whether an exchange is appropriate from a financial and tax perspective. Over lunch, a real estate broker will also discuss some marketing and investment strategies when seeking to identify properties that will be part of a 1031 exchange. Learn about the legal and practical aspects of this beneficial tax strategy.
Thursday, June 7 and Friday, June 8, 2007 • State Bar Center, State Bar of New Mexico, Albuquerque
9.7 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Standard and Non-Attorney Fee $309
MREIL Section Member, Government, Legal Services Attorney, Paralegal $289

Co-Sponsors:
The Utton Transboundary Resources Center, UNM School of Law,
State Bar of New Mexico Natural Resources, Energy & Environmental Section

Friday, June 8
8:30 a.m. The Ethical Role of Politics in Compact Negotiations (1.0 P)
Do attorneys have an ethical obligation to avoid politicizing compact negotiations? Should demonstrated failure to negotiate in good faith on issues under approved compacts preclude litigation in the Supreme Court or justify imposing sanctions?
9:30 a.m. The Professionalism Role of Politics in Compact Negotiations (1.0 P)
Should there be a higher standard of professional behavior required of attorneys in compact negotiations and administration? The professionalism role of politics will be explored in the context of compact negotiations.

Discussion:
David R. Tuthill, Jr., Interim Director, Idaho Department of Water Resources, Boise, Idaho
Rachael Paschal Osborne, Columbia Institute for Water Policy, Washington, D.C.

Golden Colorado
10:00 a.m. Break
10:15 a.m. Legal and Practical Foundations for Key Provisions
Jerome C. Muys, Attorney-at-Law, Washington, D.C.
George William Sherk, Colorado School of Mines, Golden Colorado

Friday, June 8
3:45 p.m. Questions and Discussion

Matters Affecting Federal & State Tax Practice

Friday, June 15, 2007 • State Bar Center, Albuquerque
7.0 General CLE Credits

Standard Fee $119
Government, Legal Services Attorney, Paralegal $179

The Hague Convention on International Law created a multilateral treaty for the protection of children and families involved in international adoption. The United States became a signatory to the Hague Convention on March 31, 1994. On September 20, 2000, Congress enacted implementing legislation for the Convention – the Hague Adoption Act (the IAA). Since that time, the State Department has been creating regulations governing its implementation. These regulations will be completed in 2007, and the Convention will enter into force three months thereafter. More than 70 countries have ratified the Convention. These countries include many countries from which U.S. families have adopted children. Last year, nearly 60% of intercountry adoptions to the U.S. were from Convention countries. Even more are expected this year. The seminar will be designed to help districts, states, federal judges, adoption, family law, and immigration attorneys, adoption agencies, and other better understand how this treaty will change their responsibilities in international adoption.

4:15 p.m. Additional Ethical Issues in International Adoption and Immigration (1.0 E)
Lisa Olewine, MSW, Esq., and Irene Steffas, Esq.

5:00 p.m. Adjourn

2007 Tax Symposium:
Matters Affecting Federal & State Tax Practice

Friday, June 15, 2007 • State Bar Center, Albuquerque
6.0 Federal Income Tax, 2.0 State Income Tax, 1.0 General

Standard Fee $249
Government, Paralegal $209

The Effect of the Sarbanes-Oxley Act and FIN 48 on Taxpayer Compliance and Tax Audits
George F. Romkema, CPA, PhD, Chief Legal and Accounting Officer, Teledyne Corp.

3:30 p.m. Records Requirements and Penalties Applicable to Noncash Charitable Contribution Deductions
Alex Sadler, Partner, Crowell & Moring, LLP

3:45 p.m. Update on Initiatives Undertaken by the Department of Taxation and Revenue Speaker TBA

5:00 p.m. Adjourn and Reception

International Adoption

Friday, June 8, 2007 • State Bar Center, Albuquerque
4.2 General & 2.2 Ethics CLE Credits

Standard Fee $179
Government, Legal Services Attorney, Paralegal $169

The Hague Convention on International Law created a multilateral treaty for the protection of children and families involved in international adoption. The United States became a signatory to the Hague Convention on March 31, 1994. Since that time, the State Department has been creating regulations governing its implementation. These regulations will be completed in 2007, and the Convention will enter into force three months thereafter. More than 70 countries have ratified the Convention. These countries include many countries from which U.S. families have adopted children. Last year, nearly 60% of intercountry adoptions to the U.S. were from Convention countries. Even more are expected this year. The seminar will be designed to help districts, states, federal judges, adoption, family law, and immigration attorneys, adoption agencies, and others better understand how this treaty will change their responsibilities in international adoption.

3:00 p.m. Break
3:15 p.m. Benefits for Children (SIJS, VAWA, U visas) and Surrogacy Cases
Lisa Olewine, MSW, Esq., and Irene Steffas, Esq.

4:15 p.m. Additional Ethical Issues in International Adoption and Immigration (1.0 E)
Lisa Olewine, MSW, Esq., and Irene Steffas, Esq.

5:00 p.m. Adjourn

International Adoption
In this case, we determine whether an officer, based on his observation that Defendant’s vehicle had a dealer’s temporary demonstration plate and was traveling at 2 a.m., had reasonable suspicion to stop the vehicle. After our review of the record, we conclude that the officer did not have the requisite individualized and particularized suspicion to justify the stop of Defendant’s vehicle. We therefore reverse the district court’s judgment affirming the metropolitan court’s denial of Defendant’s motion to suppress. We remand to the district court with instructions to vacate the judgment and sentence.

I. BACKGROUND

The facts are undisputed and are based on the officer’s testimony as follows. While the officer was on patrol at approximately 2 a.m., he noticed Defendant’s moving vehicle because the vehicle did not appear to have a license plate. As the officer neared the vehicle, he saw a temporary dealer tag in the right rear window. The temporary tag was a paper dealer tag and not a drive-out tag for a newly purchased vehicle. The officer could not read the tag, but it appeared valid on its face. In the experience of the state police, a lot of temporary dealer tags are stolen and misused. The officer thought the possibility that a person would be demonstrating a vehicle at 2 a.m. was unreasonable; thus, the officer suspected that Defendant was misusing the temporary dealer tag. The officer stopped Defendant’s vehicle, asked Defendant to produce a driver’s license, and asked him why he was driving the vehicle. Prior to making the stop, the officer did not notice anything else unusual; he had no other reason for the stop.

The officer further testified to the following. State police patrolmen are ex officio agents of the State Taxation and Revenue Department (TRD), which regulates the use of dealer tags. The statutes give officers, as agents of TRD, the authority to investigate the use of a temporary dealer plate at any time of day in order to make sure that the vehicle is in the dealer’s inventory. Thus, the officer routinely stops vehicles with dealer tags at any time of the day in order to determine whether the tags are being properly used. A driver must be engaged in a proper use of the vehicle to avoid getting cited for a violation of the statute. In our case, the officer stopped the vehicle to determine whether use of the tag was proper, instead of calling the dealer, because the dealership was closed at 2 a.m. Upon further questioning by defense counsel, the officer also testified that he believed the tag was not properly displayed because the tag, which should have been attached to the rear of the vehicle, was displayed on the rear window.

After the officer’s testimony, Defendant moved to suppress any testimony regarding the officer’s investigation of Defendant after the stop, on the ground that the officer lacked reasonable suspicion for the stop. The metropolitan court denied Defendant’s motion. The court relied on these specific facts articulated by the officer: the officer observed Defendant’s vehicle traveling with temporary dealer tags at 2 a.m.; in the course of the officer’s duties as an agent of TRD, he routinely stops vehicles with these tags in order to investigate; and the officer knew of the state police department’s experience with the misuse of temporary dealer tags. Defendant then pleaded guilty to a first offense of driving while intoxicated (DWI) and reserved his right to appeal the denial of his motion to suppress.

Defendant appealed to the district court, pursuant to Rule 7-703(A) NMRA. In a written memorandum opinion, the district court affirmed the metropolitan court’s sentencing order, which was entered after the denial of Defendant’s motion. See generally NMSA 1978, § 34-8A-6(C) (1993) (providing that the metropolitan court is the court of record for criminal DWI cases); Rule 7-703(J) (observing that appeals involving DWI are exceptions to de novo appeals from the metropolitan court to the district court). The district court ruled that the following facts, as established by the officer’s testimony, were sufficient to give rise to a reasonable suspicion that the tag was being misused: (1) the vehicle was traveling at 2 a.m. with a temporary dealer tag; (2) the tag was the type used for demonstrating a vehicle, pursuant to NMSA 1978, § 66-3-6(F) (1998); (3) a tag issued pursuant to Section 66-3-6(F) is not for use on a vehicle loaned to a customer for the customer’s convenience; and (4) the dealership, under whose name the tag was issued, was closed. Defendant now appeals the district court’s judgment.

Celia Foy Castillo, Judge

[1] In this case, we determine whether an officer, based on his observation that Defendant’s vehicle had a dealer’s temporary demonstration plate and was traveling at 2 a.m., had reasonable suspicion to stop the vehicle. After our review of the record, we conclude that the officer did not have the requisite individualized and particularized suspicion to justify the stop of Defendant’s vehicle. We therefore reverse the district court’s judgment affirming the metropolitan court’s denial of Defendant’s motion to suppress. We remand to the metropolitan court with instructions to vacate the judgment and sentence.

I. BACKGROUND

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The officer further testified to the following. State police patrolmen are ex officio agents of the State Taxation and Revenue Department (TRD), which regulates the use of dealer tags. The statutes give officers, as agents of TRD, the authority to investigate the use of a temporary dealer plate at any time of day in order to make sure that the vehicle is in the dealer’s inventory. Thus, the officer routinely stops vehicles with dealer tags at any time of the day in order to determine whether the tags are being properly used. A driver must be engaged in a proper use of the vehicle to avoid getting cited for a violation of the statute. In our case, the officer stopped the vehicle to determine whether use of the tag was proper, instead of calling the dealer, because the dealership was closed at 2 a.m. Upon further questioning by defense counsel, the officer also testified that he believed the tag was not properly displayed because the tag, which should have been attached to the rear of the vehicle, was displayed on the rear window.

After the officer’s testimony, Defendant moved to suppress any testimony regarding the officer’s investigation of Defendant after the stop, on the ground that the officer lacked reasonable suspicion for the stop. The metropolitan court denied Defendant’s motion. The court relied on these specific facts articulated by the officer: the officer observed Defendant’s vehicle traveling with temporary dealer tags at 2 a.m.; in the course of the officer’s duties as an agent of TRD, he routinely stops vehicles with these tags in order to investigate; and the officer knew of the state police department’s experience with the misuse of temporary dealer tags. Defendant then pleaded guilty to a first offense of driving while intoxicated (DWI) and reserved his right to appeal the denial of his motion to suppress.

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II. STANDARD OF REVIEW

{6} On appellate review of the metro court’s denial of a motion to suppress, we must determine whether the law was correctly applied to the facts. See State v. Eli L., 1997-NMCA-109, ¶ 6, 124 N.M. 205, 947 P.2d 162. We give deference to the metro court’s determination of facts, together with all reasonable inferences arising from those facts, and view them in the light most favorable to the prevailing party. See State v. Lopez, 2005-NMSC-018, ¶ 9, 138 N.M. 9, 116 P.3d 80. “The ultimate determination of reasonable suspicion . . . however, is reviewed de novo.” Eli L., 1997-NMCA-109, ¶ 6 (emphasis, internal quotation marks, and citation omitted). We review all legal issues de novo. See State v. Krause, 1998-NMCA-013, ¶¶ 3-4, 124 N.M. 415, 951 P.2d 1076.

III. DISCUSSION

{7} The State asserts that the officer testified to specific, articulable facts constituting reasonable suspicion. The officer testified that he stopped the vehicle because, in his experience, temporary dealer tags were often stolen or misused and because Defendant’s vehicle was traveling with a temporary dealer tag at 2 a.m., a time at which dealerships are not open. From these facts, the State asserts that the officer could reasonably suspect that Defendant was misusing the temporary dealer tag. We disagree.

{8} An individual’s right to be free from unreasonable searches and seizures is protected by the Fourth Amendment to the United States Constitution. See State v. Patterson, 2006-NMCA-037, ¶ 14, 139 N.M. 322, 131 P.3d 1286. “The Fourth Amendment is violated when an officer detains an individual with no more than a generalized suspicion, or unarticulated hunch or suspicion, because the government’s interest in crime prevention will not outweigh the intrusion into the individual’s privacy.” Id. ¶ 16. Generalized suspicion or an unparticularized hunch that an individual is committing a crime is not enough to justify stopping a vehicle. See State v. Prince, 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332. “A . . . traffic stop must be justified at its inception[,]” State v. Ochoa, 2006-NMCA-131, ¶ 6, 140 N.M. 573, 144 P.3d 132 (emphasis, internal quotation marks, and citations omitted), cert. granted, 2006-NMCERT-010, 140 N.M. 675, 146 P.3d 810, and such a stop is justified when an officer has reasonable suspicion that a traffic law has been violated. Prince, 2004-NMCA-127, ¶ 9.

{9} To have reasonable suspicion in this type of case, a police officer must be aware of specific, articulable facts that, when judged objectively, would lead a reasonable person to believe a traffic offense has occurred or is occurring. Ochoa, 2006-NMCA-131, ¶ 6; State v. Galvan, 90 N.M. 129, 131, 560 P.2d 550, 552 (Ct. App. 1977) (“Would the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate?”). A reasonable suspicion must be a particularized suspicion, based on all the circumstances, that the specific individual detained has broken or is breaking the law. State v. Jason L., 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856; see also Patterson, 2006-NMCA-037, ¶ 24 (“[A] finding of individualized suspicion requires the articulation of the suspicion in a manner that is particularized with regard to the individual who is stopped.”); Eli L., 1997-NMCA-109, ¶ 8 (“An investigatory stop requires an assessment that yields a particularized suspicion, one that is based on the totality of the circumstances and that raises a suspicion that the particular individual being stopped is engaged in wrongdoing.”) (internal quotation marks and citation omitted).

{10} In our case, the officer testified that Defendant’s vehicle was traveling at 2 a.m. with temporary dealer plates that are for use only when demonstrating a vehicle. See § 66-3-6(F) (authorizing the issuance of “temporary demonstration plates to dealers”). The officer knew that these types of plates are often misused or stolen. Thus, the officer decided to “check it out” in order to determine whether the tag was being used properly. These facts are not sufficient to support the type of particularized reasonable suspicion, regarding the specific individual detained, that is required to justify a traffic stop. The State does not contend that the officer had knowledge regarding misuse of the specific plate on the vehicle or misuse of temporary plates generally by the specific dealer to which the plate was issued. The officer did not testify about any specific facts regarding the temporary plate, the vehicle, or the driver that would create reasonable suspicion about that particular plate, vehicle, or driver. When the officer testified, he admitted that the temporary plate was valid on its face and that he had no specific knowledge regarding Defendant’s use of the vehicle. The officer agreed that the only thing Defendant “did wrong” was to drive a vehicle with a temporary demonstration plate at 2 a.m. These facts alone do not support an inference that Defendant was engaged in misuse of the temporary demonstration plate. Section 66-3-6(F) provides no time limitations for the activities permissible with a temporary demonstration plate. Thus, the officer’s suspicion that Defendant had committed or was committing a violation of the law was not reasonable. Cf. Galvan, 90 N.M. at 132-33, 560 P.2d at 553-54 (concluding that one could not reasonably infer that the defendant saw the spotlight of the officer’s car and took evasive action from the facts—the defendant’s car turned off the county road onto an unmarked dead-end road at the same time the officers pulled off the road and turned off the patrol car’s lights—because these facts merely established “neutral conduct”). These circumstances amount to nothing more than a generalized suspicion that there was a possibility that Defendant might have been engaged in misuse of the temporary demonstration plate. See Patterson, 2006-NMCA-037, ¶ 16; cf. Prince, 2004-NMCA-127, ¶¶ 9, 12 (concluding that the officer did not articulate specific and particularized facts needed to expand the scope of the initial traffic stop when the officer knew that a police department suspected the defendant “might be involved with people . . . who might be manufacturing and trafficking” drugs and that the defendant, who might have drugs, was traveling a specific route in a specific vehicle with a specific license plate number). With these facts, the State’s interest in preventing the misuse of temporary demonstration plates does not outweigh the intrusion into Defendant’s privacy. See Ochoa, 2006-NMCA-131, ¶ 5 (“Whether a traffic stop is conducted in a reasonable manner is determined by balancing the public interest in the enforcement of traffic laws against an individual’s right to liberty, privacy, and freedom from arbitrary police interference.”) (internal quotation marks and citation omitted); Patterson, 2006-NMCA-037, ¶¶ 16, 25 (“Viewing the totality of the circumstances, the behavior of the defendant was not criminal and did not give rise to individualized suspicion.”).

{11} The State also contends that “the unlikely fact that there would be a demonstration of the vehicle at that time of night when no dealerships were open,” combined with the officer’s knowledge regarding the misuse of temporary dealer tags, is sufficient to create reasonable suspicion. Judging this fact objectively, we do not agree that the time of driving, combined with the officer’s knowledge of general
mishandling of temporary tags by other drivers, creates reasonable suspicion. See State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964 ("Police officers possess reasonable suspicion when they are aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring."). (internal quotation marks and citation omitted)).

Section 66-3-6(F) specifically provides that "temporary demonstration plates" are for "testing, demonstrating or preparing a vehicle for sale or lease." As previously noted, the statute does not provide any time-of-day limitation for the activities permitted with the use of a temporary demonstration plate. Accordingly, it is legal to allow an overnight test-drive of a vehicle, or even a few days' test driving. There is nothing unreasonable about such a practice. Thus, the facts relied upon by the officer were evidence of neutral conduct—conduct that is permissible under Section 66-3-6(F). Therefore we find that one cannot reasonably infer, from these facts, that Defendant was misusing the temporary dealer tag. See Galvan, 90 N.M. at 132, 560 P.2d at 553. The officer articulated no specific fact that would set Defendant apart from an innocent driver using a dealer demonstration plate at the same time of day. Cf. State v. Jones, 114 N.M. 147, 151, 835 P.2d 863, 867 (Ct. App. 1992) ("TheOfficers had no articulable facts that would set [the] Defendant apart from an innocent gang pedestrian in the same area."). Without more, the officer's suspicion is not reasonable.

The State relies on Vela v. State, 871 S.W.2d 815, 816-18 (Tex. Ct. App. 1994), to support the argument that the officer had reasonable suspicion to stop Defendant’s vehicle. In Vela, the court held that reasonable suspicion was supported by the following facts: (1) the defendant’s vehicle had a temporary dealer tag; (2) the vehicle was observed at about 8:20 p.m.; (3) the temporary tag was displayed in the rear license plate position; (4) in the officer’s experience, a temporary tag was ordinarily mounted in the rear window when a vehicle was being demonstrated; (5) the vehicle did not display a buyer’s temporary tag; (6) the vehicle was located at least fifteen miles, in another town, from the location of the dealership identified on the temporary tag; and (7) the officer was unaware of the possibility of running a computer check on the temporary tag numbers to determine whether the vehicle was stolen. Id. at 816-17. Vela is distinguishable from the case at hand.

Significantly, in our case, the officer presented no evidence regarding the location of the dealership or the vehicle’s distance from the dealership. Moreover, the officer did not testify and the State did not argue that the officer relied on his observation of the placement of the temporary tag to justify the stop. When questioned by defense counsel, the officer testified that the temporary demonstration plate was not properly displayed because it was in the rear window and not the rear of the vehicle. Compare NMSA 1978, § 66-3-18(A), (B) (1998) (providing that temporary demonstration plates shall be attached to the rear of the vehicle), with NMSA 1978, § 66-3-18(B) (2005) (providing that temporary demonstration plates shall be attached to the inside left rear window of the vehicle). However, it is unclear from the officer’s testimony whether his determination regarding improper display of the temporary demonstration plate was made prior to the inception of the stop. See Ochoa, 2006-NMCA-131, ¶ 6. Since neither the State nor the officer contends that the officer’s decision to stop the vehicle was based on his observation of the placement of the temporary plate prior to the inception of the stop, we cannot include this fact in the totality of the circumstances. See State v. Robbs, 2006-NMCA-061, ¶ 12, 139 N.M. 569, 136 P.3d 570 ("A police officer may make an investigatory stop if, under the totality of the circumstances, he has a reasonable and objective basis for suspecting a particular person has committed or is committing a crime."). We further note that the Vela court did not discuss whether the relevant statute contained any time limitations on permissible uses of the temporary demonstration plate—a consideration that we find pertinent to our analysis. Thus, we conclude that Vela is inapposite to the circumstances presented in our case.

Cases from other jurisdictions support our decision. While we recognize that the temporary plates in the out-of-state cases are temporary buyer plates, rather than temporary dealer plates, we believe that the reasoning of these cases is applicable to our case. Cf. § 66-3-6(E) (providing for the issuance of temporary retail-sale permits). In State v. Childs, 495 N.W.2d 475, 481 (Neb. 1993), the Nebraska Supreme Court observed that allowing an officer to stop a vehicle because it had a temporary decal would essentially replace the fundamental presumption of innocence with a presumption of criminal activity for every motorist driving a vehicle with a temporary decal. See id.; see also State v. Butler, 539 S.E.2d 414, 417 (S.C. Ct. App. 2000) ("[W]e refuse to create the suspect presumption in this state that every motorist traveling the highways with a temporary tag is guilty of driving an unregistered or uninsured car and is subject to detention until he or she can prove otherwise."). The court in Childs further stated, “Without a reasonable standard for stopping motorists to check the validity of In Transit decals, a distinct and perhaps substantial segment of the motoring public is left to random and roving stops by police in the unfettered discretion of officers in the field.” 495 N.W.2d at 481 (internal quotation marks and citation omitted). The court observed that less intrusive means were available to check the validity of temporary decals. See id. at 482.

Similarly, in Berry v. State, 547 S.E.2d 664, 668 (Ga. Ct. App. 2001), the court ruled that an officer’s stopping a vehicle with a “drive-out tag” in order to investigate whether the car was stolen was impermissible, despite the officer’s testimony that “we get a lot of stolen vehicles this way.” The court concluded that without more, the officer had a “mere inclination or hunch that any car with a drive-out tag might be stolen.” Id. at 668-69; see also Butler, 539 S.E.2d at 417 ("If we were to uphold the detention of [the] appellant . . . upon the generalized statement that temporary tags are sometimes used in criminal activity, we would be sanctioning, in effect, the detention of the driver of any vehicle bearing temporary tags."). (internal quotation marks and citation omitted). The court in Berry reasoned that if an officer could stop a car on this basis, this rationale would permit a stop of any or all motor vehicles on the interstate highway because drugs are often transported on interstate highways. 547 S.E.2d at 668. The court stated that a particularized and objective basis for suspicion of criminal activity by the specific driver was required to ensure that the stop was not arbitrary. Id. For all of these reasons, we conclude that the officer in our case did not have reasonable suspicion to stop Defendant under these circumstances.

Finally, we observe that our decision today does not impede investigations of specific incidents regarding temporary plates, which may have been reported stolen or misused, or investigations of vehicles reported stolen, which may display
temporary plates. Notably, the officer in this case had no information regarding theft of a vehicle, theft of specific temporary plates, or misuse of temporary dealer plates by a specific dealer or other individual.

IV. CONCLUSION

{18} We conclude that the specific facts articulated by the officer were not sufficiently individualized or particularized to create reasonable suspicion that Defendant had committed or was committing a traffic violation or other crime. Accordingly, we reverse the district court’s judgment. Because the only evidence in support of Defendant’s conviction was gained as a result of the illegal stop, we remand to the metro court with instructions to vacate the judgment and sentence entered below.

{19} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge

Certiorari Granted, No. 30,272, April 2, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-041

STATE OF NEW MEXICO, Plaintiff-Appellee,
versus
CHARLES ISAAC MCCLAUGHERTY, Defendant-Appellant.
No. 24,409 (filed: February 15, 2007)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NEIL C. CANDELARIA, District Judge

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for Appellant

We affirm the district court.

FACTS AND PROCEDURAL BACKGROUND
The Trial and Appeal to the Supreme Court

{3} Defendant was tried and convicted of a number of serious crimes, including the first-degree (deliberate and felony) murder of Ricky Solisz. The critical issue was whether Defendant “shot,” and the only direct evidence of it came from the State’s informant. McClaugherty, 2003-NMSC-006, ¶¶ 9-10. Defendant was the last witness to testify at trial and denied on direct examination that he was armed or fired a gun. Id. ¶ 10.

{4} In the cross-examination, the prosecutor, Kenny Montoya, questioned Defendant about his conversations with Sarah Tucker and Sherri Goen immediately after the shooting. When Defendant testified that he told them “I was there and I ran,” the prosecutor asked, “Is that all you told them?” At that point, the prosecutor asked Defendant, “You’re aware I’ve got statements?” and “[W]hy are they lying about you then?” The prosecutor then asked Defendant if he would be surprised that Tucker’s and Goen’s statements to the police indicated that Defendant admitted to them that he shot during the incident. This questioning continued through defense objections that the prosecutor was eliciting extrinsic evidence and hearsay.

{5} During re-direct examination, Defendant disagreed with the prosecutor’s version of those statements and testified that he had read the women’s statements and that they contained references to his denying any shooting. The prosecutor objected during the re-direct examination, arguing to the district court that defense counsel was eliciting a lie and stating, “[Defendant] said he shot. Do you want me to let that go? . . . They both admit that he said he shot at the guys.”

{6} Neither Tucker nor Goen was called to testify at trial, and the statements that they
made to the police were never admitted into evidence or presented to the district court. The State did not present rebuttal evidence, and the trial ended. The alleged “admissions” were not mentioned during closing arguments or at any other time during the trial.

{7} The Supreme Court reversed Defendant’s convictions and held that the prosecutor’s cross-examination constituted an impermissible use of hearsay that sufficiently prejudiced the course of the trial to an extent that required reversal. *Id.* ¶¶ 3, 16, 35. The Supreme Court remanded the case for a new trial. *Id.* ¶ 35.

**Motion to Bar Reprosecution and the State’s Appeal**

{8} Upon remand for trial from the Supreme Court, Defendant filed a motion to impose a double jeopardy bar to retrial, alleging that the prosecutor had committed misconduct sufficient to trigger Defendant’s rights to be free from double jeopardy under the New Mexico Constitution and *Breit*, 1996-NMSC-067, ¶ 32. Defendant alleged misconduct insofar as the prosecutor improperly used hearsay in the prosecutor’s cross-examination and grossly misrepresented the contents of the statements in his questions. The State denied that the prosecutor had acted in “willful disregard” of the consequences of his actions.

{9} At the May 6, 2003 hearing on Defendant’s motion to bar retrial, Defendant introduced the statements Tucker and Goen made to the police, which were admitted as evidence by the district court. The State did not present witnesses or evidence at this hearing. The State conceded that the trial questioning by the prosecutor based on the witness statements was improper, but argued that in the context of the entire trial, such misconduct was isolated, was based on a good faith interpretation of the statements, and consequently did not merit barring reprosecution of Defendant under *Breit*.

{10} The district court reviewed the police statements given by Tucker and Goen and the trial transcript. It found that their statements were that Defendant “did not shoot and was not the shooter” and that the prosecutor had “grossly misrepresented” the content of the statements to the district court during trial. The district court concluded that it had known of the extent of the State’s misconduct at the time, it would have granted a mistrial. The district court found that the prosecutor “was actually aware, or must be presumed to have been aware, that his misconduct had the potential to result in a mistrial or a reversal,” and that he had made a “conscious and purposeful decision to dismiss any concern” of such a result. The district court granted Defendant’s motion, barred reprosecution, and dismissed the indictment with prejudice. The State timely filed its notice appealing this order on May 12, 2003.

**The State’s Effort to Reopen the Evidence**

{11} On May 27, 2003, the State filed a motion to dismiss the appeal and a motion to reopen hearing as to barring of prosecution. It offered the testimony of the trial prosecutor that it stated “will be in direct contrast to the Court’s findings in its Order of Dismissal.”

**Remand by the Court of Appeals for Action on the State’s Motions**

{12} During this same period, Defendant applied to this Court for a dismissal of the State’s appeal because the State had not timely filed its docketing statement. See Rule 12-208(B) NMRA. We denied the motion to dismiss the appeal and remanded to the district court, directing that if the district court denied the pending motions, the State could file a docketing statement if it still desired to pursue its appeal. This Court did not comment on the effect, validity, or merits of the pending motions.

**The Reopened Hearing**

{13} On July 25, 2003, after the State filed its notice of appeal and subsequent motions, and following remand from this Court, the district court granted the State’s motions to dismiss the appeal and reopen the case, stating that it had discretion “to hear any additional matters that may not have been raised initially when the motion hearing was heard” on May 6. Defendant objected to this ruling, and the district court commenced to take evidence.

{14} The trial prosecutor testified that his questioning of Defendant was based on Goen’s statement of June 19, 1999, as well as a number of other unidentified statements. He agreed that his questioning of Defendant referred to “copies of statements” and that there was no statement by either Tucker or Goen other than the June 19 statements that was ever reduced to writing. He stated that his question—“So why are they lying about you then?”—referred to “all the statements I had in my hand,” including other witnesses than Tucker and Goen. He stated that he resumed his cross-examination after Defendant’s objection and a bench conference, asking Defendant, “[W]ould it surprise you to hear that [Tucker] gave a statement to the police 6/19/99” and later asking, “How about your roommate, Sherri Goen? Does it surprise you that she also made the same statement[?]” . . . That you admitted shooting? . . . Bragged about it?”

{15} The prosecutor testified that Tucker’s description of the night of the fight and its inconsistencies gave him his basis for his question about Tucker. He pointed out that Goen’s June 19 statement indicated that Defendant “said he shot them,” but conceded that Goen immediately stated to police, “[n]ot him but the guys that are with him,” and she then specifically denied that Defendant himself admitted shooting the victim. However, the prosecutor testified that he based his questions on the statement Goen gave in his office in which she said Defendant “bragged about it”

{16} The prosecutor recalled the defense objection and bench conference. He stated, “I think [Defendant’s trial attorney] was saying that I was eliciting hearsay and I said I wasn’t. I wasn’t going to admit the evidence. I just wanted—and [the district court] actually told me how to form it in a better way.” “I think it was very important that I knew when I brought those questions up that Sherri Goen was in my office, said that [Defendant] went up bragging that he killed him and it was him. He did the shooting.” The prosecutor testified that during re-direct examination of Defendant, his argument to the bench—“He said he shot. Do you want me to let that go? . . . They both admitted that he said he shot at the guys,”—was based on Tucker’s June 19 statement, Goen’s June 19 statement, and Goen’s pretrial interview in his office.

{17} The State offered an affidavit from Goen dated July 23, 2003, as an exhibit during its direct examination of the prosecutor, and the defense objected to it as hearsay. The State offered that the affidavit “goes also to Mr. Montoya’s reliance on Sherri Goen.” The district court admitted the affidavit. It then admitted, without objection, a February 2000 pretrial interview notice as evidence that the prosecutor met with Goen.

{18} The prosecutor testified that Goen had come to the district attorney’s office in 2000 and given a pretrial statement:

Myself, a defense attorney was there . . . I’m sure I either had a female in there or female coming in because Sherri was—a—I believe there’s somebody else. I couldn’t tell you who it is. Sherri Goen came in, broke down very quick,
started crying, saying “I’m very afraid, got to let you know what happened. He came up, he was bragging that he shot him.” He said “we did it.” It’s very short in her conversation with us because she was so definite that he admitted to not just shooting, but bragging about it. At that point, it stopped. I don’t have any notes to show you about it. There’s not a tape. I asked Erica Garcia, my old secretary, to look for a tape. The way I usually run things like that, the [defense] attorney was there, he’s taping it himself. I believe, it was Gustamante, the [defense] attorney and at that time, went out and we agreed on a plea because Ms. Goen was so definite . . . .

{19} The prosecutor stated that a police officer had to be sent to bring Goen in, and that “there were a number of people in that interview.” He recalled a defense attorney, Ed Gustamante; a “female;” and “a detective or our own investigator.” He testified that this interview lasted less than two minutes. As to the basis for his questions, the prosecutor said that “there was very solid evidence especially with [Tucker] and [Goen], I believe, saying it in front of me, ‘He admitted to shooting and he was bragging about we shot them.’”

{20} Defendant’s former attorney Ed Gustamante was called as a witness and testified that he represented Defendant in 2000, but did not recall ever being present at a pretrial interview with Montoya and Goen. He testified that it is his practice to record and preserve the recordings of such interviews. He recalled that Goen was “an important witness” and that her interview was “rescheduled a lot,” but he did not believe she was ever interviewed.

{21} Other evidence established that the State offered a plea to Defendant on April 27, 2000. Interviews had been scheduled for Goen for February 24, 2000 and August 29, 2000. Montoya sent Gustamante a list of witnesses, including Goen, for an interview he planned to hold on August 16, 2000. The State called attorney Sandra Barnhart y Chavez, who testified that she represented Goen and had been contacted by a faxed subpoena dated August 29, 2000. Barnhart y Chavez recalled that the prosecutor, Goen, and she were the only persons present. The meeting took place for not more than an hour and was conducted in the prosecutor’s personal office. Barnhart y Chavez did not recall the substance of Goen’s statement.

{22} Following these hearings, the district court stated that it had come to have doubts as to whether the Breit test had been satisfied. The district court remained convinced that if it had the transcripts of the two witness statements at trial, it would have granted a mistrial because it would have considered any curative instruction inadequate, thus meeting that element of the Breit test. The district court continued:

With respect to the third prong, it talks about the prosecutor’s acts must be in willful disregard, you know, and [Breit] defines what willful disregard means. In other words, I have to ask the question, was he actually aware of the potential consequences of his actions or even if he’s presumed to be aware of the potential consequences. And, again, I don’t think that it has risen to that level based upon the new information that I received. And certainly in the May hearing, if I’d have had all of this information before me, I think I probably would have been in a better position to make the decision.

. . . I don’t think that the last two prongs of [Breit] have been met. When it talks about the prosecutor in this fashion, it’s talking about a prosecutor who knowingly and willfully does something improper; that he or she knows the conduct is improper and knows that a mistrial could result and purposely does that to gain some sort of advantage somehow. And after listening to Mr. Montoya and the other evidence, I don’t think that it’s come that far.

{23} The district court entered its order on September 29, vacating the May 8 order of dismissal and denying Defendant’s motion to bar further prosecution and to dismiss. The district court also certified this case for interlocutory appeal pursuant to NMSA 1978, § 39-3-3(A)(3) (1972), directing the State to draft the appropriate order. Defendant filed his timely notice of appeal of the order.

THIS COURT’S JURISDICTION OF THIS APPEAL

{24} We initially address the State’s motion to dismiss this appeal for lack of jurisdiction. Defendant brings this appeal under State v. Apodaca, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478. Apodaca holds that a defendant has a right to directly appeal the denial of a motion to dismiss charges that the defendant claims violate constitutional double jeopardy protections. Id. ¶ 17. Under Breit, the double jeopardy clause of the New Mexico Constitution bars a retrial if the state has engaged in an extreme level of improper official conduct in the first trial. Breit, 1996-NMSC-067, ¶ 32.

{25} The State contends that Apodaca does not apply in this case because Defendant’s trial did not end in a mistrial as in Apodaca and that, therefore, Defendant’s appeal concerns only the district court’s ruling on a non-final motion involving prosecutor misconduct, a due process issue, not double jeopardy. We do not agree.

{26} Apodaca grants Defendant the right to directly appeal the district court’s order to this Court. See Apodaca, 1997-NMCA-051, ¶ 17; see also State v. McDonald, 2003-NMCA-123, ¶ 24, 134 N.M. 486, 79 P.3d 830 (holding that a denial of a motion to prevent retrial on double jeopardy grounds is “directly reviewable” under Apodaca, even when the trial ended with the jury deadlocked on the charges at issue instead of a mistrial), rev’d in part on other grounds, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667. Prosecutorial misconduct and double jeopardy principles are inextricably linked in this context. See Breit, 1996-NMSC-067, ¶ 15; “[W]hen a trial is severely prejudiced by prosecutorial misconduct, the double-jeopardy analysis is identical, whether the defendant requests a mistrial, a new trial, or, on appeal, a reversal.” Id.; see State v. Lynch, 2003-NMSC-020, ¶ 1, 134 N.M. 139, 74 P.3d 73 (reversing the denial of a double jeopardy claim against a new indictment on remand). Article VI, Section 2 of the New Mexico Constitution confers the right to appeal from the denial of a motion to bar re prosecution because the right to be free from double jeopardy is lost if a new trial takes place. See Apodaca, 1997-NMCA-051, ¶¶ 15-16.

{27} The Supreme Court reversed Defendant’s convictions in this case owing to the prosecutor’s improper use of hearsay statements in cross-examining Defendant. See McClaugherty, 2003-NMSC-006, ¶¶ 3, 16, 35. Defendant asserted in his motion that because the hearsay statements as represented at trial by the prosecutor were falsely stated, misleading, and prejudicial to Defendant’s rights, the misconduct was sufficient to raise a double jeopardy bar to retrial. The district court granted and then
denied Defendant’s motion. The denial of the motion below is all that is required by Apodaca to confer jurisdiction on this Court to hear an immediate direct appeal. See State v. Astorga, 2000-NMCA-098, ¶ 1, 129 N.M. 736, 13 P.3d 468. We have jurisdiction to hear the appeal, and the State’s motion to dismiss Defendant’s appeal is accordingly denied.

JURISDICTION OF THE DISTRICT COURT

{28} On May 8, 2003, the district court dismissed the indictment on double jeopardy grounds after its initial hearing on May 6, 2003. The State filed its notice of appeal on May 12, 2003. On May 27, 2003, the State filed two motions in the district court. It moved to voluntarily dismiss its appeal, and it moved to reopen the hearing on Defendant’s motion to bar further prosecution. This Court remanded the case to the district court for the limited purpose of ruling on the State’s pending motions on July 17, 2003. The district court granted the State’s motion to dismiss the appeal and motion to reopen the hearing on barring of repersecution on July 25, 2003. Subsequently, on September 29, 2003, after a hearing, it entered its order vacating its May 8, 2003 order of dismissal and denied Defendant’s motion to bar further prosecution.

{29} Defendant contends that the district court lacked jurisdiction to address the State’s motions to dismiss the appeal and to reopen the May 8, 2003 order based on the operation of Section 39-1-1. Section 39-1-1 reads in pertinent part:

Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof.

The State contends that Section 39-1-1 did not restrict the district court’s ability to act on the State’s motion because its notice of appeal divested the district court of jurisdiction to act on issues directed to the district court’s ruling on appeal as long as the appeal was pending. The State relies on a line of cases holding that the filing of a notice of appeal removes the case from the district court’s jurisdiction except to rule on motions directed to the judgment that are pending at the time of the filing of the notice of appeal, motions in connection with perfecting the appeal, or motions collateral to the judgment. See Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 241-43, 824 P.2d 1033, 1043-45 (1992).

{30} We therefore must resolve the tension between Section 39-1-1 and case law addressing the effect of the filing of a notice of appeal. We do so as a matter of statutory interpretation that we review de novo on appeal. State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).


{32} Substantially similar versions of Section 39-1-1 have been in effect for many years. See, e.g., Pugh v. Phelps, 37 N.M. 126, 127-28, 19 P.2d 315, 316-17 (1932) (citing the 1929 version of Section 39-1-1). The original thrust of Section 39-1-1 was to abrogate law that stated that a trial court lost jurisdiction of cases immediately upon filing its final judgment. See, e.g., Norment v. First Nat’l Bank of Santa Fe, 23 N.M. 198, 202-03, 167 P. 731, 732 (1917). Section 39-1-1 also reconciled such a rule with the common law rule that judgments were within the control of the court and could be modified until the end of the term of court in which they were issued. See State v. Neely, 117 N.M. 707, 708 n.1, 876 P.2d 222, 223 n.1 (1994). A long line of cases has described how the abolition of terms of court destroyed the control the district courts once had over their judgments. See, e.g., Pugh, 37 N.M. at 128, 19 P.2d at 317. Section 39-1-1 “restored to district courts, during the period of 30 days, the control which they formerly had over their judgments during term time.” Pugh, 37 N.M. at 128, 19 P.2d at 317 (internal quotation marks and citations omitted); see also King v. McElroy, 37 N.M. 238, 243, 21 P.2d 80, 83 (1933) (stating that the district court lost control of its judgments after they were rendered “except for the 30-day period of additional control specified” by Section 39-1-1) (internal quotation marks and citation omitted).

{33} Although Section 39-1-1 has been discussed in the context of jurisdiction, by its language and history, Section 39-1-1 does not grant jurisdiction to the district court, but, rather, limits the period of time that a district court may act on a case over which it has jurisdiction. It is the constitution that grants the district court its jurisdiction. N.M. Const. art. VI, § 13.

{34} Entirely separate from Section 39-1-1, our Supreme Court has clearly limited the ability of the district court to act in a case before it after a notice of appeal is filed. In Kelly Inn, 113 N.M. at 240-44, 824 P.2d at 1042-46, our Supreme Court addressed the authority of the district court to rule upon a motion for attorney fees after the filing of the notice of appeal. It stated the general rule that a district court “loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed to the judgment pending at the time.” Id. at 241, 824 P.2d at 1043 (internal quotation marks and citation omitted). It noted exceptions to the general rule when the district court acts on issues “collateral to or separate from the issues resolved in the judgment.” Id. at 244, 824 P.2d at 1046. It held that the attorney fee issue before it did not require the district court to alter or revise decisions contained in its judgment such that the district court did not lose its ability to rule on attorney fee issues after the filing of the notice of appeal or after the expiration of the thirty-day period of Section 39-1-1. Kelly Inn, 113 N.M. at 243-44, 824 P.2d at 1045-46. As a result of Kelly Inn, the district court cannot act on a motion filed after a notice of appeal except to perfect the appeal or rule on a matter collateral to the judgment or order on appeal. Id. at 244, 824 P.2d at 1046.

{35} In this case, the State filed its notice of appeal before it filed its motions to dismiss the appeal and to reopen the case. Its motion to reopen was directed to the district court’s order that was subject to the notice of appeal. The motion to reopen therefore was not collateral to the order subject to the appeal. See id. at 241-43, 824 P.2d at 1043-45. Our Supreme Court did not recognize any exception in Kelly Inn to the general rule that the filing of the notice of appeal divests the district court of its ability to rule on a motion directed to the judgment or order subject to the appeal that was filed after the notice of appeal. See id. at 241-44, 824 P.2d at 1043-46.
{36} Indeed, the lack of such an exception makes sense. Otherwise, a losing party may proceed to attack a judgment both in this Court and in district court, causing inefficiency in the process. This Court recognized such an inefficiency in this case when, after the filing of the notice of appeal and Defendant’s motion to dismiss the appeal, it remanded the case to the district court for the limited purpose of ruling on the State’s pending motions. At that point, this Court reinstated the district court’s control of the case with respect to those motions.

{37} Section 39-1-1 does not controvert this analysis. Although Section 39-1-1 limits a district court’s time to act on a post-judgment motion, it clearly allows the court to act on such motions. Yet, in the circumstances of this case, in which the State filed its notice of appeal before its motion to reopen, the district court no longer had any ability to act on the motion.

{38} We interpret a statute to achieve the result intended by the legislature, and we will not construe a statute in a way that renders its application “absurd, unreasonable, or unjust.” Rowell, 121 N.M. at 114, 908 P.2d at 1382 (internal quotation marks and citation omitted). New Mexico’s earliest cases recognize that jurisdiction of the appellate court attaches on appeal. See Canavan v. Canavan, 18 N.M. 468, 470, 138 P. 200, 201 (1914) (stating that jurisdiction of the Supreme Court attached “upon the allowance of the appeal or the issuance of the writ of error”); Abeytia v. Spiegelberg, 20 N.M. 614, 617, 151 P. 696, 697 (1915) (stating that the Supreme Court had jurisdiction of the cause upon the allowance of the appeal, the procedure at that time to bring an appeal); Pankey v. Hot Springs Nat’l Bank, 42 N.M. 674, 682, 84 P.2d 649, 654 (1938) (same). Our Supreme Court did not even originally recognize a district court’s ability to entertain a motion directed to a judgment pending when jurisdiction transferred to the Supreme Court on appeal. See State v. White, 71 N.M. 342, 346, 378 P.2d 379, 382 (1962) (stating the general rule that the district court lost jurisdiction except to perfect the appeal was modified to include the right “to pass upon a motion for new trial or modification of the judgment which was pending at the time the appeal was taken”). We do not believe that by enacting Section 39-1-1 or its predecessors the legislature ever intended the inefficiency of dual jurisdiction over the judgment or order on appeal that enables a losing party to file, and the district court to then entertain, motions directed to the judgment or order on appeal once the appellate court has jurisdiction of the case. We will not construe Section 39-1-1 to apply to such motions over which the district court has no ability to act.

{39} The cases upon which Defendant relies are not on point. They recognize that by virtue of Section 39-1-1 a motion can be deemed denied so as to affect the timeliness of an appeal or the record on appeal. See Wagner Land & Inv. Co. v. Halderman, 83 N.M. 628, 629-30, 495 P.2d 1075, 1076-77 (1972) (holding, among other holdings sufficient to resolve the appeal, including the lack of jurisdiction of the district court to act after the allowance of the appeal, that findings of fact and conclusions of law were not before the court on appeal because the district court had not acted on a motion to file them within thirty days as required by the predecessor statute to Section 39-1-1); Nat’l Am. Life Ins. Co. v. Baxter, 73 N.M. 94, 99-100, 385 P.2d 956, 960 (1963) (per curiam) (holding that the district court lacked the authority to act on a motion after the allowance of an appeal and noting that under the predecessor statute to Section 39-1-1 a motion set for hearing but not decided within thirty days would be denied by operation of law); Chavez-Rey v. Miller, 99 N.M. 377, 381, 658 P.2d 452, 456 (Ct. App. 1982) (holding that the notice of appeal was not timely filed because it was not filed within thirty days of the day the motion for a new trial was deemed denied under Section 39-1-1). But Defendant has not cited any case, and we have found none, in which Section 39-1-1 or its predecessors have been applied to a motion directed to the judgment or order on appeal filed after an appeal has been commenced. See Halderman, 83 N.M. at 629, 495 P.2d at 1076 (notice of appeal and motion at issue seeking relief from judgment, and, in the alternative, allowing filing of requested findings of fact and conclusions of law filed on same day); Baxter, 73 N.M. at 99, 385 P.2d at 960 (motion at issue filed prior to allowance of appeal); Miller, 99 N.M. at 381, 658 P.2d at 456 (motions at issue filed prior to notice of appeal). The district court simply does not have the ability to act on such a motion.

{40} Because the district court could not have acted on the State’s motion to reopen the hearing until the appeal was dismissed, it was not deemed denied under Section 39-1-1. The district court had authority to grant the motion on July 25, 2003.

MERITS OF MOTION TO REOPEN

{41} Although the dissent argues that the motion to reopen should not have been granted, we do not address the merits of that argument. Defendant did not raise it on appeal. See, e.g., State v. Rendleman, 2003-NMCA-150, ¶ 50, 134 N.M. 744, 82 P.3d 554 (stating that issues not raised in appellant’s brief-in-chief are deemed abandoned). Although we requested supplemental briefing on the merits of the motion to reopen, we prefer not to reach issues not initially raised by the parties. See State v. Ferguson, 111 N.M. 191, 196, 803 P.2d 676, 681 (Ct. App. 1990) (“Courts should not take it upon themselves to raise, argue, and decide legal issues overlooked by the lawyers.”).

MERITS OF MOTION TO BAR RETRAIL

{42} As set forth in Breit, under the New Mexico Constitution, we employ a three-part test to establish whether double jeopardy bars reprosecution as a result of prosecutorial misconduct: (1) the improper prosecutorial conduct must be “so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial;” (2) “the official knows that the conduct is improper and prejudicial;” and (3) “the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” Breit, 1996-NMSC-067, ¶ 32; see State v. Haynes, 2000-NMCA-060, ¶ 5, 129 N.M. 304, 6 P.3d 1026. On appellate review, the analysis presents a mixed question of law and fact. We defer to the district court when it has made findings of fact that are supported by substantial evidence and review de novo the district court’s application of the law to the facts. State v. Attaway, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994), modified on other grounds by State v. Lopez, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80; State v. Armijo, 118 N.M. 802, 811, 887 P.2d 1269, 1278 (Ct. App. 1994).

{43} Double jeopardy bars reprosecution in only the rare and exceptional occasion; it is an “exceedingly uncommon remedy.” Breit, 1996-NMSC-067, ¶ 35. It applies in only the cases of “the most severe prosecutorial transgressions.” State v. Gonzales, 2002-NMCA-071, ¶ 14, 132 N.M. 420, 49 P.3d 681. In most circumstances in which a defendant requests a mistrial or retrial based on evidentiary error, a new trial serves to rectify the error.

{44} The district court concluded that the first part of the Breit test was met in this
case, but that the second and third parts were not. If any of the three parts of the Breit test is not met, double jeopardy does not bar retrial. Because we do not believe that the third part has been met, we do not analyze the other parts in this case.

{45} The third part of the Breit test requires that the prosecutor “either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” Breit, 1996-NMSC-067, ¶ 32. Without an intent to provoke a mistrial, “the misconduct necessary to bar a retrial must be extraordinary.” State v. Foster, 1998-NMCA-163, ¶ 21, 126 N.M. 177, 967 P.2d 852. Defendant does not contend that the prosecutor intended to provoke a mistrial, but instead asserts that the prosecutor acted in willful disregard of the resulting mistrial, retrial, or reversal. According to Defendant, the prosecutor “must be presumed [under Breit] to have been aware that if he injected inadmissible hearsay into the trial and misrepresented out-of-court statements, manufacturing nonexistent confessions by the defendant, a mistrial or reversal could occur.” While we agree with Defendant that the prosecutor acted improperly as determined by our Supreme Court and that a prosecutor is presumed to be aware of the potential consequences of the prosecutor’s acts under Breit, 1996-NMSC-067, ¶ 34, we do not agree that the prosecutor’s actions in this case meet the extraordinary standard required to bar reprosecution based on double jeopardy concerns.

{46} The cases that hold that a prosecutor engaged in acts in willful disregard of the potential consequences of a mistrial or retrial serve as examples. In Breit, the prosecutor’s misconduct was pervasive throughout the trial. It began with unsupported allegations in opening statement, continued throughout the trial despite the district court’s direct admonitions, persisted in closing, and even included inappropriate post-trial conduct. Id. ¶¶ 41-44. The prosecutor’s misconduct involved statements and actions attacking the merits of the defense and defense counsel as well as verbal and non-verbal conduct that affected the atmosphere of the trial. Id. ¶¶ 42-44. Our Supreme Court examined the totality of the circumstances of the trial. Id. ¶ 40. It relied on the findings of the district court as corroborated by the record. Id. ¶ 37. It concluded that although separately the prosecutor’s actions would unlikely bar retrial, the conduct was “unrelenting and pervasive.” Id. ¶ 45. It therefore concluded that to avoid “an acquittal at any cost, it appears that among the costs the prosecution was willing to incur were a mistrial, a new trial, or a reversal on appeal.” Id. ¶ 48.

{47} In State v. Huff, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, this Court found that the prosecutor acted in willful disregard of a resulting mistrial, but it concluded that double jeopardy did not bar retrial because the first part of the Breit test was not met. Huff, 1998-NMCA-075, ¶¶ 22-24, 25. The conduct at issue in Huff was the continued questioning of a doctor in a criminal sexual contact case about the doctor’s post-traumatic-stress-disorder diagnosis of the victim. Id. ¶¶ 22-23. The prosecutor knew that the diagnosis was probably not based on sexual abuse involving the defendant and that the diagnosis “was based on incomplete information that did not include the incidents” charged. Id. ¶ 22. The district court repeatedly sustained defense objections, held bench conferences, and warned the prosecutor to limit her questions. Id. ¶¶ 22-23. Because the prosecutor nevertheless persisted with questioning, even though she modified it based on the court’s concerns, this Court presumed that the prosecutor was aware of the potential for a mistrial from her conduct. Id. ¶ 24.

{48} The questioning in this case does not extend to the level of conduct of Breit and Huff. Although the questioning was improper, it was isolated and was not reflected in other parts of the trial, including closing. See, e.g., Haynes, 2000-NMCA-060, ¶ 6. In addition, the district court concluded that the Breit test’s third prong was not satisfied. The district court heard the prosecutor testify about his interview with Goen in February 2000. He said that his cross-examination was based on all the statements he had before trial, including Goen’s statement at this interview. Defendant brought evidence that contradicted the prosecutor’s testimony. However, despite these contradictions and inconsistencies in the prosecutor’s testimony, the district court found the prosecutor to be a credible witness, stating specifically:

- The Court finds that Mr. Montoya did not know or can be presumed not to have known that the conduct was improper and prejudicial. The Court finds that Mr. Montoya had an honest belief that his questions were proper.

As to the third part of the Breit test, the district court stated:

- The Court finds that . . . Mr. Montoya did not act in willful disregard. That Mr. Montoya’s misconduct does not appear to be the result of a plan or scheme to inject unfair prejudice into the trial. Nor did Mr. Montoya seek a tactical advantage through his conduct or would the State would have gained [sic] a tactical advantage because of a mistrial.

{49} We must consider Defendant’s argument in the context of the trial as a whole. See Breit, 1996-NMSC-067, ¶¶ 40, 45. The district judge, of course, is in the best position to understand this context, having observed and presided over the trial. See, e.g., State v. Duffy, 1998-NMCA-014, ¶ 46, 126 N.M. 132, 967 P.2d 807 (“[T]he trial court is in the best position to evaluate the significance of any alleged prosecutorial errors.”). At least in part because of the district judge’s participation at trial, we follow established principles of appellate review with regard to factual findings, not substituting our judgment in place of findings of the district court, viewing the evidence in the light most favorable to the district court’s ruling, and disregarding evidence or inferences contrary to the district court’s ruling. State v. Rodriguez, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737; State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We therefore must accept the district court’s finding concerning the credibility of the prosecutor.

{50} Although the district court’s findings are laced with conclusions of law, we consider its observation that the prosecutor did not seek a tactical advantage and that the State would not have gained a tactical advantage by a mistrial to be significant. These factors were important to our analysis in State v. Lucero, 1999-NMCA-102, ¶ 28, 127 N.M. 672, 986 P.2d 468 (declining to bar reprosecution after discovery violation). In that case, in analyzing the type of evidence that would fall within the extraordinary circumstances barring reprosecution, we considered Justice Stevens’ concurring opinion in Oregon v. Kennedy, 456 U.S. 667, 689-90 (1982), explaining that, short of deliberate misconduct, a court would normally consider whether the prosecutor’s actions eliminated or reduced the probability of acquittal in a case that “was going badly” for the state. Lucero, 1999-NMCA-102, ¶ 29 (internal quotation marks and citation omitted). We therefore give considerable weight to the district court’s belief that the State would not have benefitted from a mistrial. Without
such a benefit, we do not conclude that the prosecutor acted in willful disregard of the constraints on his actions.

{51} Nor do we believe, as Defendant argues, that the timing of the prosecutor’s questions indicates the prosecutor’s willful disregard of the potential consequences of his actions. It is true that when improper questioning occurs late in a trial, it is more difficult to cure. Cf. Haynes, 2000-NMCA-060, ¶ 6 (“[D]ouble jeopardy will not bar retrial when the prosecutor’s misconduct occurs early in the trial and there is nothing in the record indicating that the prosecution would benefit from a further delay in the matter.”); State v. Pacheco, 1998-NMCA-164, ¶ 14, 126 N.M. 278, 968 P.2d 789 (noting that there would be no benefit to the prosecution because the misconduct “occurred at the very outset of the trial”). Defendant was the last witness to testify at trial, so his cross-examination would logically be at the end of the trial. However, we cannot infer a willful disregard for a mistrial on the part of the prosecutor from the timing of his questions during the trial, given the district court’s finding that the State would not have gained a tactical advantage from a mistrial in the case.

{52} Lastly, we note our concern about the State’s reasons for initially declining to present evidence opposing Defendant’s motion to bar reprosecution. In its motion to reopen, the State asserted that it “did not call Kenny Montoya at the first hearing because it did not believe the [c]ourt would rule in favor” of Defendant. It stated additionally that the prosecutor had recently been appointed to a statewide position. Defendant argued in response that the State should not be entitled to a second chance on the issue. The district court addressed the motion, and we have addressed the district court’s ruling on the merits. Nevertheless, we do not condone the State’s laxity in its approach. This case involves serious charges, and the State has the responsibility to act conscientiously. Cf. State v. Perkins, 529 A.2d 1056, 1059 (N.J. Super. Ct. Law Div. 1987) (noting that the prosecutor “is expected to prepare [serious charges] accordingly”): Rule 16-103 NMRA (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

CONCLUSION

{53} Section 39-1-1 did not deny the district court the ability to dismiss the State’s appeal and reopen the evidence in connection with Defendant’s motion to bar retrial for prosecutorial misconduct. The district court did not err in concluding that double jeopardy protections did not apply. We therefore affirm the ruling of the district court and remand for retrial.

{54} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

I CONCUR:

CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge (concurring in part and dissenting in part)

KENNEDY, Judge (concurring in part and dissenting in part).

{55} I fully concur that we have jurisdiction to hear this appeal, and that Section 39-1-1 does not apply to situations such as we have here. I respectfully dissent from the majority opinion because this uncommon and extraordinary case represents two independent aspects, either of which merit reversing the district court; either to leave its original and proper dismissal of the case intact, or to dismiss the indictment as violating double jeopardy for the prosecutorial misconduct that occurred at trial.

{56} How common is a murder case in which: (1) the prosecution represents at trial that it has two witnesses who heard the defendant confess to committing the crime; yet refuses to call either witness at trial; (2) the conviction is reversed for the prosecutor’s improper use of statements to the police purportedly given by those two witnesses in his cross-examination of the defendant; (3) at a subsequent hearing to bar reprosecution for prosecutorial misconduct, the State (represented by trial co-counsel) presents no evidence whatsoever, despite the lead trial prosecutor being available to testify at this hearing, but never having been contacted to do so. The district court discovers that the two “incriminating” statements cited by the prosecutor at trial reflect only the defendant’s denials of committing the crime, rather than any admissions; (4) as a result of being misled as to the contents of the statements, the district court dismisses the case as violating double jeopardy for prosecutorial misconduct, and the State thereafter requests to reopen the hearing in order to have the trial prosecutor testify. The State asserts as grounds that it put on no evidence because it did not “believe the Court would rule in favor in [sic] [D]efendant,” (5) on the day before the hearing to reopen, and three and a half years after the trial, the State has one of those witnesses swear an affidavit that she gave a statement to the lead prosecutor in a previously undisclosed interview with that trial prosecutor, in which she stated that the defendant had admitted that he did not just “shoot” at the incident, but actually “killed [the victim].” The trial prosecutor then testifies he did not contemporaneously record or take notes of this interview, never provided this statement to the defense, but moreover that he never had any intention to call that witness at trial, nor even mentioned the statement to his trial co-counsel until after the case had been dismissed when his original misrepresentation was discovered. While I concur that we have jurisdiction, I must respectfully dissent from the majority. The convergence of intentional action and generally inept practice in this case by the State results in circumstances justifying invoking double jeopardy to bar reprosecution.

I. REOPENING THE HEARING WAS AN ABUSE OF DISCRETION

{57} The law is well settled that a motion to reopen must cross a threshold of showing a good reason for the requesting party not presenting its case at the first hearing. See Sena v. N.M. State Police, 119 N.M. 471, 474, 892 P.2d 604, 607 (Ct. App. 1995). The district court’s granting the State’s motion to reopen was unsupported by the requisite showing by the State and an abuse of discretion meritting reversal resulted.

{58} The evidence presented to the district court on May 6, 2003, included the two statements given to the police by Tucker and Goen on June 19, 1999, and submitted by Defendant. The State did not request a continuance to procure any witnesses or obtain evidence for its case. Montoya was never contacted by the State prior to this hearing, although he was available to testify.

{59} The State’s argument at the May hearing conceded that the questioning by Montoya was improper, but asserted it was isolated misbehavior, based on a mistaken interpretation of the statements, and did not merit barring reprosecution of Defendant under Breit. The State did not dispute that the June 1999 Tucker and Goen statements in question contained no mention of Defendant admitting that he “shot,” nor does the State argue it now. The State offered no explanation of Montoya’s misrepresentation of the contents of the statements at trial. The “other” Goen statement, taken by Montoya himself and by then three years old, was never mentioned at the May hearing—Montoya had never told his trial co-counsel about it. There was no record in Montoya’s file of any interview
of Goen occurring other than the June 19, 1999, interview. Montoya stated that he had never mentioned this interview to anyone in the district attorney's office until either one or three weeks prior to the July 25, 2003, hearing.

[60] The State rested its case on May 6. See generally State v. Martin, 53 N.M. 413, 417, 209 P.2d 525, 528 (1949) (“Webster’s New International Dictionary, 2nd. Ed. p. 2124, defines ‘rest’ in law as follows: ‘In practice, to bring to an end voluntarily the introduction of evidence, the right to introduce fresh evidence, except in rebuttal, being thereafter lost.’” (emphasis added)).

[61] In May, the district court finally read the witness statements Montoya had declined to offer as evidence at trial. It found that Tucker and Goen’s statements were not that Defendant “shot,” but that Defendant “did not shoot and was not the shooter.” The district court found that it had been misled at trial by Montoya, and that given the witness statements, there was no assumption other than that Montoya should have known that his questioning was “totally improper and that [the questions’] impact on the jury was highly prejudicial.” The district court stated that it did not think “that any reasonable prosecutor would have asked those questions after reading those statements to the police.” It found that the prosecutor “was actually aware, or must be presumed to have been aware, that his misconduct had the potential to result in a mistrial or a reversal,” and that he had made a “conscious and purposeful decision to dismiss any concern” of such a result under Breit. The district court dismissed the indictment with prejudice. The district court entered its order on May 8, 2003, dismissing the case for Montoya’s misrepresentation of the witness statements and misleading the court.

[62] In moving for leave to reopen to present its entire case, the State never asserted that it wished to present any evidence it could not have presented on May 6. Instead, the State alleged that it had shirked its duty based on a belief that “the Court would [not] rule in favor in [sic] [D]efendant” and that Montoya had been appointed to the National Guard. The State knew this was sub-par justification; when the motion to reopen was heard, State’s counsel began by conceding the lack of a good excuse: “Judge, I don’t shy away from my responsibility in that I probably should have called Kenny Montoya. I didn’t expect the court to assume the worst of Mr. Montoya and I was wrong.” Montoya himself testified that after the hearing, in talking with the State’s counsel, he was told by his former co-counsel that the latter “didn’t believe that motion was going to go anywhere, kind of cake walk in and both surprised after that.”

[63] Defendant pointed out the State’s failure to either procure or present evidence. Defendant further objected that in seeking to reopen the case the State alleged no “legitimate reason for its failure to call Montoya at the May 6 hearing.”

[64] Granting of a motion to reopen a case to present evidence not previously offered is within the trial court’s discretion. See State v. Barragan, 2001-NMCA-086, ¶ 37, 131 N.M. 281, 34 P.3d 1157. The requests should be evaluated against the extent to which the State used due diligence in procuring the evidence and its probable value. Id.; State v. Padilla, 118 N.M. 189, 198, 879 P.2d 1208, 1217 (Ct. App. 1994) (evaluating motion to reopen against moving party’s failure to use due diligence and value of evidence). The standard applies whether the case before the court is there for trial or a motion hearing. State v. Silago, 2005-NMCA-100, ¶ 26, 138 N.M. 301, 119 P.3d 181.

[65] On July 25, the district court enunciated its exercise of discretion “to hear any additional matters that may not have been raised initially when the motion hearing was heard” (emphasis added) and granted the State’s motion to reopen. In this, the district court was wrong. There were no “additional matters” to be heard at all. No finding was made that the State was justified in its request. Reopening the hearing was an abuse of discretion.

The State Failed to Make a Requisite Threshold Showing to Justify Reopening the Case

[66] “A movant seeking permission to reopen its case must show some reasonable excuse.” Sena, 119 N.M. at 475, 892 P.2d at 607. It is a party’s primary responsibility to submit to the court “everything necessary for its decision.” State v. Perez, 95 N.M. 262, 265, 620 P.2d 1287, 1290 (1980). In Sena, we stated:

In considering a party’s motion to reopen its case to present additional evidence, the trial court should take into account all relevant factors, including the reason the party failed to initially offer such evidence; whether the opposing party will be surprised or unfairly prejudiced by the additional evidence; whether granting the motion would substantially delay the proceedings; the importance of the evidence to the movant’s case; and whether cogent reasons exist to deny the request.

119 N.M. at 475, 892 P.2d at 608; see also State v. Harrison, 2000-NMSC-022, ¶ 56, 129 N.M. 328, 7 P.3d 478 (holding that due diligence in obtaining testimony and its probable value are to be considered by appellate court in reviewing trial court’s actions); State v. Ortiz, 92 N.M. 166, 169, 584 P.2d 1306, 1309 (Ct. App. 1978) (holding that where parties failed to give adequate reason for such failure, denying motion to reopen case is not abuse of discretion).

[67] The State did not seek merely to reopen the case to present limited testimony on one issue as was allowed in Barragan, 2001-NMCA-086, ¶ 37, or to explain previous testimony. See State v. Crump, 97 N.M. 177, 178, 637 P.2d 1232, 1233 (1981) (holding that reopening proper for prosecution’s expert to explain technical terms used). This case involves no new “additional” or supplemental evidence, but the entirety of evidence the State failed to present on May 6, 2003. In Sena and Ortiz, as here, the party seeking reopening of evidence had waived arguments or failed to present its case despite opportunities to do so. Sena, 119 N.M. at 475, 892 P.2d at 608; Ortiz, 92 N.M. at 169, 584 P.2d at 1309. The clear lesson is that “[a] movant seeking permission to reopen its case must show some reasonable excuse.” Sena, 119 N.M. at 474, 892 P.2d at 607. No such excuse exists here. A trial court should rely on the party’s lack of diligence in denying a motion to reopen. People v. Monterroso, 101 P.3d 956, 982 (Cal. 2004) (noting that evidence sought to be presented was indisputably available during trial, and party offered no excuse for not asking for a ruling on its admission prior to the close of evidence). “It is elementary that due diligence requires an attempt to compel the witnesses’ attendance.” See State v. Case, 100 N.M. 714, 718, 676 P.2d 241, 245 (1984); See Perez, 95 N.M. at 264, 620 P.2d at 1289; see also State v. Fernandez, 56 N.M. 689, 693-94, 248 P.2d 679, 682-83 (1952); Waldo, Hall & Co. v. Beckwith, 1 N.M. 182, 182 (1857). “Without such a requirement of excuse, the rule generally limiting testimony to the evidence-taking stage of a trial would hardly be a rule at all.” United States v. Peterson, 233 F.3d 101, 107 (1st Cir. 2000).

[68] The prosecutor handling the May 6 hearing was co-counsel to Montoya at trial, yet did not talk with Montoya until
Montoya “initiated a call” to him on May 6 after hearing from a reporter that the case had been dismissed. At that time, the prosecutor told Montoya that he had expected a “cake walk.”

69 It is not the role of a court to supply a remedy for the State’s unexcused failure to adequately prepare its case. The State clearly apprised its duties under Breit from the start; it acknowledged at the beginning of the May 6 hearing that “what is before the Court right now is Mr. Montoya’s improper questioning.” The prosecutor stated his awareness that the court’s inquiry included “whether the prosecutor acted in willful disregard of the resulting mistrial, retrial, or reversal,” examining “the prosecutor’s conduct in light of the totality of the circumstances of the trial.” The State clearly understood the issues, but perhaps not the gravity of its situation.

70 The May 6 hearing was obviously no “cake walk.” City of Richmond v. Smith, 43 S.E. 345, 345-48 (Va. 1903) (holding city liable for negligence when it issued a permit to a “cake walk” gone bad). The State made its tactical decisions, lost everything, and then found that it could not deal with the consequences. See Ortiz, 92 N.M. at 170, 584 P.2d at 1310. The State all but conceded that it had no sufficient excuse to justify relief beyond the mercy of the court. Where there is no justification for reopening the evidence, it is an abuse of discretion for the district court to reopen the evidence.

II. WHEN A PROSECUTOR DELIBERATELY TRANSGRESSES PRECEPTS OF TRIAL PRACTICE AND FAIR PLAY THAT HE IS LEGALLY PRESUMED TO KNOW, HE ACTS IN WILLFUL DISREGARD OF THE CONSEQUENCES

71 The district court found in May 2003 that the prosecutor “was actually aware, or must be presumed to have been aware, that his misconduct had the potential to result in a mistrial or a reversal,” and that he had made a “conscious and purposeful decision to dismiss any concern” of such a result. I believe that this is the correct legal standard—that a prosecutor is presumed to be aware of proper conduct. Lucero, 1999-NMCA-102, ¶ 24. Therefore, when the district court reversed itself in September, finding that prosecutor Montoya was presumed “not to know” or appreciate the consequences of his actions, it erred by incorrectly applying a legal standard injecting prosecutorial good faith.

72 In this case, it is the prosecutor’s legally imputed knowledge that leads to the conclusion that he acted willfully. This is not a matter of weighing the evidence, but legal presumption. The law presumes a prosecutor knows the scope and import of the evidence, and knows the applicable rules of court, of evidence, and professional standards for his conduct. It is by this objective yardstick of his presumed knowledge that the prosecutor’s willful disregard of the consequences of his actions are most fairly judged. The district court, trying to establish its presumption that the prosecutor “did not know” things, attempted to ascribe his behavior to subjective attributes such as experience and negligence. Unfortunately, the evidence establishes the prosecutor’s extensive experience, and though his conduct fell below minimal levels, the district court’s later negative presumption cannot excuse his conduct in this context.

73 Breit is quite definite in excluding prosecutorial “good faith” as an unworkable standard, thereby rejecting the subjectivity allowed under Kennedy, 456 U.S. at 674-75, and instituting an objective standard in which good faith has little or no place. Montoya testified to his extensive experience and the scope of his intentional conduct. This exists together with legal presumptions that he knew what he was doing and acted in reckless disregard of the consequences. The district court’s legal errors by failing to apply established legal presumptions to the prosecutor’s actions make its ruling incorrect as a matter of law.

74 The one thing the State asserts in its defense—the “second” Goen statement—is the very thing that Montoya knowingly and purposefully suppressed and refused to present at trial, while attacking Defendant and his counsel as liars and misleading the court as to the nature of the “other statements” he “had in his hand.” In fact, the evidence supports the conclusion that he never intended to introduce any of the statements as evidence. I would hold that the requirements of Breit, 1996-NMSC-067, ¶ 32, have been met, and that re-prosecution of Defendant is barred by double jeopardy owing to prosecutorial misconduct at trial.

75 At the bench during his examination of Defendant, Montoya specifically4 abjured any intention of presenting the statements or their declarants, Tucker and Goen. As a result of Montoya’s later testimony, we know that he had no intention of presenting either witness to substantiate any of Defendant’s alleged “admissions.” At the end of trial, Montoya complained that that defense counsel had “elicited a lie” when Defendant testified that the June 19th statements contained no statements that he had admitted “shooting”:

Mr. Montoya: [Defendant] said he shot. Do you want me to let that go?

The Court: What does the statement say?

Mr. Montoya: They both admit that he said he shot at the guys.

[Defense Attorney]: The portion I have[,] he specifically asked her, “Did he tell you he shot?”

And she said no. If they want to bring her in and try and get the testimony out of her, I suppose that’s their decision, but this should have never come in in the first place. [sic]

The Court: Are you asking now to get into that statement? Is that what you’re wanting to do?

Mr. Montoya: I just want to show it to them, but I think it’s a past point.

The Court: All right. Hang on. You don’t have any other witnesses, right?

[Defense Attorney]: No, that’s it.

The Court: Do you have any rebuttal?

Mr. Montoya: No, your Honor.

The trial ended.

76 According to Montoya three years later, it was not the June 1999 statements, but the “statement [Goen] gave in the office” where she said Defendant “bragged about [the shooting]” upon which his questions were based. Montoya recalled, “I think Ms. Aragon [Defendant’s trial attorney] was saying that I was eliciting hearsay and I said I wasn’t. I wasn’t going to admit the evidence.” The Supreme Court made it clear that Montoya was dead wrong about whether he was using hearsay.

77 Montoya explained, “I think it was very important that I knew when I brought those questions up that Sherri Goen was in my office, said that he went up bragging that he killed him and it was him. He did the shooting.” The use of this totally undisclosed hearsay statement at trial would have been no less improper than Montoya’s use of the other hearsay statements that caused the reversal of defendant’s conviction by
the Supreme Court in *McClougherty*, 2003-NMSC-006, ¶ 30. No one but Goen and her attorney ever knew that Goen was “in [Montoya’s] office.” Montoya never mentioned this Goen statement from his office at trial until after the case was dismissed in May 2003, although acknowledging three years later that it was a “very important statement.”

{78} The prosecutor’s misconduct necessitated the reversal of Defendant’s conviction. The other two *Breit* requirements are that “the official knows that the conduct is improper and prejudicial”; and “the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.” *Breit*, 1996-NMSC-067, ¶ 32; *Haynes*, 2000-NMCA-060, ¶ 5. The majority ignores the second *Breit* requirement dealing with Montoya’s knowledge. Because established legal presumptions impute knowledge of proper conduct and procedure, this knowledge becomes an element of whether Montoya conducted himself in disregard of duties he is presumed to know and the consequences of that conduct, I consider some discussion of knowledge requisite to understand the magnitude of Montoya’s conduct in his pursuit of Defendant’s conviction.

{79} In ruling on the case in September, the district court stated from the bench:

The second prong where the—where the prosecutor states that he must know that his conduct is improper, and I really have some doubts about this particular prong. I mean, it—Mr Montoya came here and testified and said that he believed that what he was doing was proper; that he believed the information backed him up to ask those questions. It may amount to negligence. It may amount to poor lawyering, perhaps inexperience . . . being somewhat naive, but I got the impression that he honestly believed that what he was asking at trial was okay and was proper to do.

{80} The district court’s impression is irrelevant. First, our Supreme Court recognizes “gross negligence” as a type of prosecutorial misconduct that has resulted in double jeopardy barring reprosecution. *Breit*, 1996-NMSC-067, ¶ 17. Declining to call two witnesses who allegedly heard defendant admit to committing the crime, and having the case reversed because of improper use of those hearsay statements in cross-examination is extraordinarily negligent practice. Until 2003, no court knew the real contents of those statements. The added fact that the “statements of admission” referred to by the prosecutor actually denied that defendant admitted shooting, and the prosecutor failed to disclose another statement with an even more damning admission for another three years is even worse.

{81} The district court’s September final order found “that Mr. Montoya did not know or can be presumed not to have known that the conduct was improper and prejudicial,” and “that Mr. Montoya had an honest belief that his questions were proper.” (Emphasis added.) The State argues that the district court’s finding that Montoya was a credible witness whose “honest belief that his questions were proper” is based on substantial evidence and should end our consideration. That standard is incorrect; the district court erred in conflating Montoya’s subjective intent, which is irrelevant under *Breit*, against well established legal presumptions of Montoya’s knowledge, which are legally sufficient to satisfy the second *Breit* prong. Even if the prosecutor had a good faith basis for his questions, the statements “should not have been used on cross-examination.” *McClougherty*, 2003-NMSC-006, ¶ 24. Furthermore, the Supreme Court was specific in *Breit* as to its “doubt[s] that a claim of lack of experience could lift the bar [to reprosecution] of double jeopardy. Rare are the instances of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing.” *Breit*, 1996-NMSC-067, ¶ 33. “The law cannot reward ignorance.”] Id. (internal quotation marks and citation omitted).

{82} *Breit* is based on prosecutorial conduct, not prosecutorial intent. “Honest belief” and its sister “good faith” are subjective considerations that are not relevant when the law objectively presumes prosecutors to possess certain knowledge.

See, e.g., *McClougherty*, 2003-NMSC-006, ¶ 24. “Despite the heat of trial, prosecutors must fulfill their responsibility to act professionally.” *State v. Andrade*, 1998-NMCA-031, ¶ 29, 124 N.M. 690, 954 P.2d 755. “[E]xigencies of trial and purported judgment calls made under the stress and pressure of trial, cannot be a legal refuge from professional duties and obligations.” *State v. Maluia*, 108 P.3d 974, 982 n.2 (Haw. 2005) (Acoba, J., concurring) (internal quotation marks and citations omitted). Montoya testified that he was the lead prosecutor in this murder trial. He characterized himself as a prosecutor who had “entered every courtroom” in the Second Judicial District, and who, in the year around the time of Defendant’s prosecution, “did more murder trials than everybody else put together in the state.” He specifically testified to his knowledge of the case, and acknowledged that prosecutors “live[] by a higher standard,” and “don’t cross the line, we can’t. We have to protect too much.” An attorney with these qualifications may fairly be presumed to know what he is doing, and his conduct may fairly be judged against objective standards.

**What a Prosecutor May Legally Be Presumed to Know**

{83} The district court’s ascribing the prosecutor’s lack of knowledge to “negligence” or “poor lawyering, perhaps inexperience in handling those types of cases, being somewhat naive” is misplaced. “[T]here must be a point at which lawyers are conclusively presumed to know what is proper and what is not.” *Pool v. Superior Court*, 677 P.2d 261, 270 (Ariz. 1984) (en banc). Behavior falling short of intentional conduct may be sufficiently egregious to trigger double jeopardy protections. *State v. Lucero*, 1999-NMCA-102, ¶¶ 15-16. Reprosecution can be barred even when the prosecutor did not know the conduct was improper and prejudicial. *Id.*

{84} *Huff* provides little refuge to the State. In *Huff*, we held *Breit’s* knowledge test was satisfied by presuming knowledge on the part of a prosecutor who introduced “irrelevant, misleading, and prejudicial testimony.” *Huff*, 1998-NMCA-075, ¶ 21. We stated that prohibitions against proffering evidence without an adequate legal and factual foundation was “not a subtle point of law, and one we can presume any prosecuting attorney to know.” *Id.* “A prosecutor should know the rules of evidence. At the very least, a prosecutor should know a fundamental rule of evidence[.]” *Id.* ¶ 18. *Huff* let the prosecutor off the hook only because a mistrial was not required—the other two *Breit* requirements were met. The behavior in *Huff* is not much different in scope than the present case.

{85} The practice of injecting improper matters through cross-examination is so broadly prohibited that a presumption that prosecutors know to avoid the practice is warranted. “It is improper under the guise of ‘artful cross examination’ to tell the jury the substance of inadmissible evidence.” *United States v. Sanchez*, 176 F.3d 1214, 1222 (9th Cir. 1999). “The attempt to communicate impressions by innuendo
through questions which are answered in the negative. . . when the question has no evidence to support the innuendo, is an improper tactic which has often been condemned by the courts.” State v. Bartlett, 96 N.M. 415, 418, 631 P.2d 321, 324 (Ct. App. 1981) (internal quotation marks and citation omitted). “A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]” Rule 16-304(E) NMRA; State v. Vallejos, 86 N.M. 39, 43, 519 P.2d 135, 139 (Ct. App. 1974) (citing breach of this ethical standard).

{86} We consistently hold that counsel should not argue facts outside the record, looking to ABA Prosecution Standards and other accepted norms as benchmarks by which to gauge prosecutorial conduct. See State v. Martinez, 2001-NMCA-059, ¶ 32, 130 N.M. 744, 31 P.3d 1018; State v. Cooper, 2000-NMCA-041, ¶ 15, 129 N.M. 172, 3 P.3d 149; American Bar Association, ABA Standards for Criminal Justice: Prosecution Function and Defense Function § 3-5.6(b) (3d ed.1993) (“A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.”); 2 Michael H. Graham, Handbook of Federal Evidence § 611.21 (6th ed. 2006) (“Questions assuming a fact not in evidence on cross-examination often begin with such phrases as . . . ‘Would it surprise you if I told you?’”); State v. Marble, 901 P.2d 521, 525 (Kan. Ct. App. 1995); Bennett L. Gersham, Prosecutorial Misconduct § 10:30 (2d ed. 2006) (deliberately eliciting inadmissible and prejudicial evidence—backdoorin hearsay); Gersham, supra, ¶ 11:28 (false and misleading arguments—availability of unused evidence). The National District Attorneys Association, National Prosecution Standards § 77.4 (2d ed. 1991), states:

Prior recorded statements which are materially inconsistent with the testimony of a witness may be introduced as substantive evidence of the content of the prior statement if the person who elicited, witnessed, or recorded the statement is available for confrontation and cross-examination and after the witness has been given an opportunity, under oath, to explain or deny the prior statement.

(Emphasis added).

{87} “[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984). “The purpose of the rule is to protect against the danger that a statement of a declarant is unreliable because it is not given under oath by a witness who is present at trial and subject to cross-examination.” McClauherty, 2003-NMSC-006, ¶ 17; 5 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 802.02[3], at 802-9 (Joseph M. McLaughlin ed., 2d ed. 2006); Elmer v. State, 724 A.2d 625, 630-32 (Md. 1999) (holding that this “highly prejudicial” practice merited the conviction’s reversal).

{88} Our Supreme Court recently held that our 1990 decision in State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (Ct. App. 1990), imposed a strict prohibition against asking the defendant if another witness is mistaken or lying and established as standard that such behavior is “categorically improper.” State v. Duran, 2006-NMSC-035, ¶ 18, 140 N.M. 94, 140 P.3d 515. In Flanagan, we held that such questions about testifying witnesses might “constitute . . . a misleading argument to the jury that the only alternatives are that the defendant or the witnesses are liars.” 111 N.M. at 97, 801 P.2d at 679; Andrade, 1998-NMCA-031, ¶ 27 (holding it improper for prosecutor to ask defendant if the state’s witnesses are lying); State v. La Madrid, 1997-NMCA-057, ¶ 4, 123 N.M. 463, 943 P.2d 110 (noting that it is improper to impeach with extrinsic evidence of misconduct). Even though Montoya stated he was neither familiar with nor believed in the existence of such a rule, he should be presumed to know that eliciting inadmissible statements and asking the witness on the stand to comment on the veracity of witness statements that are not in evidence is improper, since the only evidence of the statements was the prosecutor’s own questioning.

{89} “A prosecutor who cross-examines in the form of leading questions, which he has a right to do, is the witness who testifies before the jury, not the defendant. The questions asked [in this case] were equivalent of testimony by the prosecutor[.]” Bartlett, 96 N.M. at 418, 631 P.2d at 324. Worse, during his testimony at the hearing on the motion to reopen, as he did at trial, the prosecutor continued to suggest that it was the defense’s duty to present the primary evidence. But see McClauherty, 2003-NMSC-006, ¶ 30 (“It was not Defendant’s burden to produce the hearsay declarants as witnesses. It was the State’s obligation to offer the statements.”). Holding a piece of paper purporting to contain a witness’s statement and then failing to call its declarant as a witness has been called “reprehensible” because it deprived the defendant the chance to present the true evidence. United States v. Steele, 91 F.3d 1046, 1051 (7th Cir. 1996); see also United States v. Beeks, 224 F.3d 741, 747-48 (8th Cir. 2000) (prosecutor’s act of inappropriate inquiry was basis for new trial).

{90} The prosecutor had no intention of presenting the statements, stating, “I wasn’t going to admit the evidence.” See McClauherty, 2003-NMSC-006, ¶ 30 (stating that in light of the lack of intent to call the witness, use of their statements was improper). Although he subpoenaed Goen and Tucker for trial, he did not call them, nor expect them to appear. The prosecutor never asked for a warrant for Goen’s arrest even though she was under subpoena; he testified that Sarah Tucker would not have been called because “some evidence isn’t needed.” Montoya specifically turned away from admitting the statements, insinuating that the defense could if it wanted. The fact that he presented their supposed substance anyway should have alerted the district court that allowing the examination was error. Id.

{91} “[N]either a prosecutor’s good faith belief that some basis for [his or] her question exists nor reassertances to appellate courts drawn from information never presented below will suffice.” United States v. Elizondo, 920 F.2d 1308, 1313 (7th Cir. 1990). Montoya testified that he made no mistake when he asked the questions. Even if the prosecutor had a good faith basis for his questions the statements “should not have been used on cross-examination.” McClauherty, 2003-NMSC-006, ¶ 24. “The statements made to the police were not used simply to challenge the credibility of a witness’s testimony, but to prove that Defendant actually admitted to shooting a gun on that night.” Id. ¶ 25. Defendant was deprived of the chance to confront the declartants of the statements, or effectively counter the implications arising from the prosecutor’s use of them. See id. ¶ 30. By July 2003, Montoya could have read our Supreme Court’s opinion in McClauherty and adjusted his testimony to accommodate its assessment of his misconduct. The fact that he testified he never had any intention of using these statements is conclusive on the point.
{92} Montoya is clearly presumed by law to know what is improper conduct, particularly as the precepts involved here are neither obscure nor complicated. The fact that he intentionally pursued this conduct, by intentionally refusing to present the true evidence in the case is misconduct that is sufficiently egregious and extraordinary as to justify barring re prosecution in this case. I cannot follow the majority to pass over the second Breit issue. The district court erred when it made findings as to Montoya’s “belief” that trumped well-established presumptions of his knowledge that are quite reasonable, given the level of experience Montoya said he possessed. These presumptions set the trigger for the third Breit prong that existed in Huff.

**Given the Prosecutor’s Intentional Conduct, He Acted in Disregard of its Consequences**

{93} “[W]hether the prosecutor’s conduct amounts to willful disregard of a resulting mistrial, retrial, or reversal, the appellate court will carefully examine the prosecutor’s conduct in light of the totality of the circumstances of the trial.” *State v. Pacheco*, 1998-NMCA-164, ¶ 14, 126 N.M. 278, 968 P.2d 789 (internal quotation marks and citation omitted); see also *Lucero*, 1999-NMCA-102, ¶ 26 (viewing prosecutor’s conduct in light of the totality of the circumstances). The State’s case at trial was not overwhelming, and the only direct evidence of Defendant’s firing a weapon came from the State’s informant, Nachima “Nick” Coriz. See *McClauherty*, 2003-NMSC-006, ¶ 10. This compelled the State to attempt to prove no more than that Defendant “shot” during the incident in which Ricky Solisz was killed. The prosecutor testified that his purpose in cross-examining Defendant was to elicit from him as much evidence on the elements of the offenses as he could. Defendant conceded that he was present at the scene, and that he had tampered with evidence. When the examination turned to whether Defendant had “shot,” however, the prosecutor found himself stymied when Defendant “wouldn’t say he shot, he wouldn’t say anybody shot”—to a point where he felt compelled to bring up what he felt were “admissions”—through statements Defendant did not make, or “prior inconsistent statements.”

The statements made by the prosecutor at trial bear this out.

{94} Montoya’s conduct in this regard was deliberate. His testimony showed that he was aware defense counsel “brought up the point to go and show the statement that said basically that no, you really don’t know because she never said that, and I felt so strong about it at the time I objected. . . . I felt so strongly about it, as I said, Ms. Aragon was trying to elicit untruths out of the defendant and let you know I did object in front of the jury.” Montoya was clearly attempting to characterize Defendant and his counsel as liars, and specifically refusing to present the statements despite any urging by the district court or the defense to do so. The heat of the moment carried him into foul territory.

{95} In Huff, the prosecutor was presumed to know that the foundation of the questions she put to a doctor was based on incomplete information. Huff, 1998-NMCA-075, ¶ 21-22. In Huff, the dispositive Breit prong was the first: other remedies than a mis trial existed, many involving action by the defense to counter a prosecutorial strategy they knew was in play. Huff, 1998-NMCA-075, ¶ 25. In this case, Montoya waited until the very end of trial to present the “evidence” of the statements, presumptively knowing that the 1999 statements were contrary to his representations, specifically refusing to offer the evidence itself when the court provided the opportunity, and improperly trying to shift to the burden of production to Defendant. The prejudicial effect of not only asserting an admission, but asserting that Defendant bragged about shooting, is extreme. Montoya is presumed to know the contents of the first statement, and has in effect by asserting matters as fact in the course of asking such leading questions made himself both a witness and representative of the State. Montoya chose his words, and tellingly did not assert any statement that Defendant admitted killing—just shooting. As a result, Defendant was deprived of the chance to confront the declarants of the statements, or effectively counter the implications arising from the prosecutor’s use of them. See *McClauherty*, 2003-NMSC-006, ¶ 30.

{96} In Lucero, “willful disregard” was held to mean “either that the prosecutor was actually aware, or can be presumed to have been aware, of the potential consequences of his act or omission.” 1999-NMCA-102, ¶ 26. It involves making a “conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal.” *Breit*, 1996-NMSC-067, ¶ 34. Prosecutors are presumed to know the rules of ethics, evidence and criminal procedure, as well as know the contents of their files; the conduct here transgressed basic principles of conduct.

{97} Montoya vividly described his frustration with Defendant when Defendant “wouldn’t say he shot, he wouldn’t say anybody shot”—to a point where he felt compelled to bring up what he felt were “admissions”—through statements the Defendant did not make, or “prior inconsistent statements.” See *McClauherty*, 2003-NMSC-006, ¶ 21 (holding that the statements at issue were not prior inconsistent statements). Montoya was quite specific that he wanted to elicit as much out of Defendant’s mouth on cross examination as he could. Montoya was attempting to back-door hearsay to insinuate defendant’s substantive guilt. See generally id. ¶ 18.

“The statements made to the police were not used simply to challenge the credibility of a witness’s testimony, but to prove that Defendant actually admitted to shooting a gun on that night.” Id. ¶ 25. Montoya acted with the express purpose to try to have Defendant admit that he shot during the incident when Ricky Solisz was killed, or leave that impression in the jury’s mind regardless of its admissibility or truth. The gravity of trying to insinuate Defendant’s guilt in this way creates a proportional degree of prejudice to Defendant’s right to a fair trial.

{98} The majority’s reliance on the district court’s finding that the State did not seek a “tactical advantage” at trial, nor would it have gained one by Montoya’s misconduct strains credibility. The Supreme Court pointed out that the evidence at trial as to Defendant’s “shooting” was not particularly strong. Id. ¶ 10. The June 19 statements were never before the district court or the Supreme Court. By lying about the content of the police statements, Montoya certainly tried to gain a tactical advantage. First, Montoya misrepresented statements that plainly stated that Defendant denied ever shooting, and intentionally created the impression that Defendant had admitted shooting. Second, his comments at trial and subsequent testimony overwhelmingly show that Tucker and Goen were witnesses whose statements he did not want to see the light of day, and whom he had no intention of ever calling to testify. Third, given what Montoya tells us was the content of Goen’s “secret” statement, that statement goes significantly farther than even Montoya’s misrepresentations at trial to establish not just “shooting,” but specifically shooting.
the victim. Montoya did not even mention Goen’s other statement prior, during or after trial—until his misconduct had been discovered three years later.

Montoya did not call these witnesses at trial in his case in chief, and the presumption that he knew the contents of their statements demonstrates why—it would have been disadvantageous to have their recounting Defendant’s contemporaneous denials of ever shooting. Instead, Montoya chose to sandbag Defendant at the very end of the trial in a manner that was calculated to gain an advantage and preserve it against discovery of the true nature of the evidence. The advantages gained—asserting Defendant’s admission, presentation of false evidence in the guise of statements by absent witnesses, using the prosecutor’s own credibility to assert the veracity of Defendant’s “admissions” by using improper cross examination—combine to form the final impression the jury had of the case before the end of the trial. The majority gives short shrift to the timing of this misconduct, but given the way Montoya played out his misconduct, the timing is essential to understand how willful the misconduct was, as well as the gravity of its effect on Defendant’s right to a fair trial.

The Timing of the Misconduct Weighs Against the State

Montoya testified that he made no mistake when he asked his questions. Montoya waited until the very end of trial to present improper hearsay through statements given by witnesses he had not called, had no intent to call, and with which he said he was familiar. Montoya’s intent was to imply that Defendant had at some time admitted his guilt to others. We presume his not calling any of the witnesses who might have testified to such strong admissions was a tactical decision. See, e.g., State v. Gutierrez, 2005-NMCA-015, ¶ 20, 136 N.M. 779, 105 P.3d 332 (“[W]e do not wish to guess at what . . . counsel was doing.”). The timing of the prosecutor’s actions served to call undue attention to both the substance of his questions—that Defendant had somehow admitted that he had “shot”—and the Defendant’s denials. The timing also served to deprive the Defendant of an opportunity to counter the prosecutor’s words and the inferences the prosecutor sought for the jury to draw from them. See Steele, 91 F.3d at 1051 (holding that it was proper but not prejudicial for a prosecutor to insinuate the existence of a witness statement contradicting the witness’s testimony by holding a piece of paper); Beeks, 224 F.3d at 748 (reversing conviction when prosecutor asked witness about denial of previous convictions on defendant’s employment application to improperly imply defendant’s untruthfulness and criminal past).

When misconduct occurs early in a trial, or with time and opportunity to cure the admission, dismissal will not be a suitable remedy. Cf. Haynes, 2000-NMCA-060, ¶ 6 (holding that where misconduct occurs early in trial double jeopardy should not generally bar retrial); Lucero, 1999-NMCA-102, ¶ 23 (holding that misconduct occurred early enough to allow cure short of mistrial); Foster, 1998-NMCA-163, ¶ 22 (holding that prosecutor’s improper opening statement curable because it may have been proper during closing statement and was not egregious enough to bar retrial); Pacheco, 1998-NMCA-164, ¶¶ 14-16 (holding prosecutor’s misconduct merited a mistrial, but since it occurred in opening statements and the prosecutor admitted his error, the conduct was not enough to bar reprosecution). Our Supreme Court commented in this trial, “Defendant had no chance to prove that he never made the statements to which the prosecutor referred during cross-examination. Without such an opportunity, the jury was left to assume that Defendant actually admitted that he shot a gun that night.” McClaugherly, 2003-NMSC-006, ¶ 33.

The interjection of these “admissions” left the impression that the prosecutor possessed information about such admissions, when there was no evidence to that effect before the jury. See, e.g., Gershman, supra, § 10:30. The central issue was whether defendant “shot.” No witness was called to the stand who heard Defendant admit to shooting. Instead, assertions that they had made “statements to police” concerning alleged “admissions” were thrown at the Defendant when he took the stand. We must presume the prosecutor knew the two June 1999 statements did not contain an admission by Defendant, and that their use was improper bootstrapping of hearsay. Even if the questioning had referred to the other Goen statement it would be no less a foul blow. That the conduct—asserting that Defendant had admitted shooting—happened at the very end of trial was certain to affix the impression of Defendant’s guilt in the jury’s mind more firmly.

The cases that guide us on what level of misconduct is necessary to merit a dismissal of a prosecution following mistrial or reversal continually use language such as “so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial.” State v. Fielder, 2005-NMCA-108, ¶ 20, 138 N.M. 244, 118 P.3d 752 (internal quotation marks and citation omitted), and constitute “severe prosecutorial transgressions.” Gonzales, 2002-NMCA-071, ¶ 14 (holding that dismissal of cases for misconduct requires egregious conduct that causes actual prejudice).

CONCLUSION

I emphasize that this case is truly unusual. The evidence at trial was not conclusive, as the Supreme Court pointed out, and only one witness, an informant, ever testified that Defendant “shot” during the incident in which Ricky Solisz was killed. The evidence is conclusive that the two statements that Montoya maintained at trial referred to Defendant’s admissions did nothing of the sort. The substance of Goen’s second statement is not in evidence, and its use would be no less an improper and unconstitutional use of hearsay than the testimonial statements given by her and Tucker on June 19, 1999.

The additional testimony taken from July through September 2003 served to show that our long-standing legal presumptions concerning prosecutorial knowledge of proper standards for conducting trials are well-founded. It is inconceivable to me that given these presumptions, a competent prosecutor with the experience possessed by Montoya would embark upon such a venture into impropriety without knowing the ultimate effect of his actions. The heat of the moment in a weak case is no excuse to strike the foul blow prosecutors are prohibited from striking. See Berger v. United States, 295 U.S. 78, 88 (1935). “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Id. The district court erred when it opened the hearing for more evidence, and erred again by abandoning its initial correct reliance on objective legal presumptions concerning the legal system’s expectations for prosecutorial conduct, looking to Montoya’s “good faith,” and ignoring the objective test enunciated in Brett.

For either or both of the grounds enunciated above, I would reverse the district court.

RODERICK T. KENNEDY, Judge
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**Position**

**Lawyer-O Positions**

The NM Human Services Dept., Office of General Counsel seeks to fill several Lawyer-O positions for child support enforcement legal services: three in Las Cruces (Job ID #5551), one in Roswell (Job ID #4829) and one in Farmington (Job ID #3526). All positions require a Juris Doctor and current licensure with the State Bar of New Mexico and 1 year of legal experience. Salary ranges from $18,356 to $32,634. To apply: Access the website for the NM State Personnel Office (SPO): http://www.state.nm.us/spo/ and select Search and Apply for Jobs Online. Upon completion of the PeopleSoft application process, please send a copy of your resume, bar card and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lilila Bird, Chief Counsel. Applications will be accepted until the positions are filled. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

**Associate**

Personal injury firm seeks associate with 0 to 2 years experience. Good people skills a must. Excellent pay and benefits including profit sharing. Please send resume and references to Hiring Partner, 4302 Carlisle NE, Albuquerque, NM 87107 or fax to (505) 883-5012. All replies kept confidential.

**Assistant Trial Attorney - Sandoval County**

The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Sandoval County Office, Bernalillo, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124, or via E-mail to: FGonzalez@da.state.nm.us. Deadline for submission of resumes: Immediate opening until filled.

**Full-Time/Part-Time Attorney**

Santa Fe law firm seeks full-time/part-time attorney with 2-5 year experience for general practice firm. Firm engages in practice including family law, guardianships, estate planning, criminal law and complex litigation. Additional licensure in California, Colorado, and Nevada desirable but not mandatory. Albuquerque resident may be able to split time between Albuquerque/Santa Fe. Health insurance and Simple IRA plan match. Send resume to bsutherland@jaygoodman.com, or fax to 505 989-3440.

**Family Law Paralegal**

Garcia Kelley & Kelley, P.C. - The Family Law Firm seeks experienced Divorce and Family Law Paralegal. Fax resume, letter of interest and salary requirements to (505) 245-7300, or email to services@familylawfirm.com.

**NM Center on Law and Poverty - Staff Attorney**

Public interest, non-profit law firm seeks attorney to engage in advocacy and litigation on poverty law issues. Looking for someone with a demonstrated commitment to addressing poverty and/or equal access to justice issues. Candidates should have extraordinary drive, research, writing and verbal skills. Spanish proficiency a plus. Non-profit salary offered with excellent benefits. Apply in confidence by sending letter of interest, resume, and writing sample to kim@nmpovertylaw.org. We are an equal employment opportunity employer.

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**Part Time Legal Secretary**

Small law firm seeks part-time legal secretary with strong civil litigation experience in insurance defense and/or plaintiff cases. Experience in WordPerfect, Time Slips. M.-Th., 4 to 5 hours/day, 16 to 20 hrs/wk. Please send resume and references to John P. Massey, Massey Law Office, LLC, 3616 Campus Boulevard, NE, Albuquerque, NM 87106; or fax to (505) 268-6629.

**Family Law Paralegal**

Garcia Kelley & Kelley, P.C. - The Family Law Firm seeks experienced Divorce and Family Law Paralegal. Fax resume, letter of interest and salary requirements to (505) 245-7300, or email to services@familylawfirm.com.

**Legal Support**

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

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**Great Opportunity for Spanish Speaker**

Crum & Associates, P.C. is seeking a Spanish Speaking attorney to handle domestic relations and criminal cases. Must be highly motivated and a great communicator. Excellent income potential. Fax a letter of interest and resume to Mary Cordova: 244-8731 or e-mail to Mary@NMlawyers.com

**Advertising Submission Deadlines**

All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication. The Bar Bulletin publishes every Monday. Advertising will be accepted for publication in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication requests. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact Marcia C. Ulibarri at (505) 797-6058, e-mail ads@nmbar.org or fax (505) 797-6075.
Full Time Secretary/Legal Assistant
Law Office of Elliot L. Weinreb. Santa Fe. We need an additional secretary/legal assistant. Competitive salary/benefits. Small, growing office. Attributes: pleasant personality, good computer and language skills, Organized, detail-oriented, likes to learn. We work as a team. Interest in doing a variety of tasks, such as wordprocessing, close document review, interviewing, photographing, learning computer programs, installing new software/hardware. Able to work small amounts of overtime when needed. No commutes. Fax to 505-982-6795.

Santa Fe PT Receptionist/Secretary
Seeking an individual to perform general reception/secretarial duties including but not limited to: greet clients; direct incoming phone calls; manage all document and litigation filing; assist in attorney calendars and schedules; manage office supply inventory; local travel for mail transfer and court filings; assist in providing general administrative and secretarial support to two attorneys and staff. Proficient in WindowsXP/Office 2003 and Excel. Omega exp. a plus. Law firm exp. preferred. 20-25 hours per week. Salary commensurate w/exp. Please contact Contessa Archuleta, Gallagher & Kennedy, P.A., 982-9523x106.

Case Administrator
United States District Court, Case Administrator. FT $34,972 to $56,870 DOQ. HS grad + 2 yrs gen exp, in legal clerical preferred. Position description available at www.nmcourt.fed.us/web/DCDOCS/dcindex.html. Cover letter + resume to: USDC, Attn: Sandi Sanchez, 333 Marquette, NW and for a limited time is leaseable 3rd office or Conf. Room/2yr Lease/ SU-2 Zoned Downtown Property $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

Litigation Assistant
FT litigation assistant needed for collection department of law firm. Must be detail oriented, self-motivated, an organized team player, possess strong computer and phone skills, with a strong work ethic. Excellent benefits. Salary DOE. If interested please fax or email resume and cover letter to (505) 898-7518 Cell (505) 247-2972.

Experienced Paralegal
Large law firm accepting resumes for a commercial/real estate paralegal with 5 years experience. College degree preferred. Candidates must possess excellent writing and proof-reading skills, legal terminology proficiency, organization skills, MS Word/Outlook, be self-motivated and able to work with minimal supervision in a fast-paced environment. Competitive salary, excellent benefits and positive work place. Fax resume to Administrator at (505) 243-4408.

Transcription Needs
For your tape, CD and digital transcription needs, call Legal Beagle @ 883-1960.

Personal Property Appraiser (Fine Arts)

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

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United States District Court, Case Administrator. FT $34,972 to $56,870 DOQ. HS grad + 2 yrs gen exp, in legal clerical preferred. Position description available at www.nmcourt.fed.us/web/DCDOCS/dcindex.html. Cover letter + resume to: USDC, Attn: Sandi Sanchez, 333 Marquette, NW and for a limited time is leaseable 3rd office or Conf. Room/2yr Lease/ SU-2 Zoned Downtown Property $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

Office Space
Awesome Space Below Market Value
Crum & Associates, P.C. is moving from 1005 Marquette, NW and for a limited time is leasing this space for below market value. Space is 2500 sq. ft, newly remodeled, hardwood floors, and completely wired. New furniture also available for use with lease. Short walk to all courthouses. Serious inquiries to David Crum: 385-9417 or David@nmlawyers.com

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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.

For Lease
Lovely historic building near downtown Flying Star, 2208 sq ft, $1385/mo. 286-1228.

Nob Hill Area Law Office
Comfortable, non-smoking environment, featuring off-street parking, hardwood floors, and easy access to Law School and Courthouses. Many of the finest restaurants are within walking distance. $600 monthly rent includes telephones, access to copy/fax machine and conference room. Contact Jim Ellis, 118 Wellesley Dr. S.E., 266-0800.

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

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Case Administrator

Litigation Assistant
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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 243-7170 for appointment.

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Near ABQ. Courthouse-1055sf/2 offices/De- tached 3rd office or Conf. Room/2yr Lease/ Available 6/1. $1200.00/mo. 505-604-9294 or 505-400-8588
This seminar will introduce the basic concepts of 1031 exchanges, including the definitions of like-kind property, the relevant time periods, basic forward and reverse exchanges, and improvements exchanges. In addition, a CPA will discuss calculating capital gains and evaluating whether an exchange is appropriate from a financial and tax perspective. Over lunch, a real estate broker will also discuss some marketing and investment strategies when seeking to identify properties that will be part of a 1031 exchange. Come learn about the legal and practical aspects of this beneficial tax strategy.

8:30 a.m.  Registration
9:00 a.m.  Sell of Property and Capital Gains
           James Owens, Esq., CPA
9:30 a.m.  Fundamentals of 1031 Exchanges
           Orlando Lucero, Esq.,
           Stewart Title of Albuquerque LLC
10:00 a.m. Break
10:15 a.m. Fundamentals (continued)
11:30 a.m. Adjourn and Lunch
           (provided at the State Bar Center)
           Lunch Presentation:
           Strategies for Finding Suitable Investment Properties
           April Ager, Associate Broker,
           Coldwell Banker Commercial

FIND OUT MORE

For more information, including registration details and speaker bios, please visit www.nmbarcel.org}

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

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