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Special Insert:

New Mexico Collaborative
Law Symposium CLE

www.nmbar.org
and
Sturges, Houston & Sexton, p.c.

Are Pleased to Announce
the Opening of the Albuquerque Office of
Montgomery & Andrews
Effective January 1, 2008

Paul E. Houston and Kevin M. Sexton have joined the Firm as shareholders.
Shannon A. Parden, Brian T. Judson, and Susan R. Johnson have joined as associates.
Joe A. Sturges will be Of Counsel to the Firm.
Jeffrey L. Martin, from the Santa Fe office, will join the Albuquerque office,
and will continue his practice in the area of Medical Malpractice.

The addition of the Albuquerque Office expands and enhances the Firm’s practice in the areas of:
Natural Resources Law
Professional Liability
Insurance Defense, Coverage and Regulation
Water Law
Legislative Services
Employment Law
Products Liability
Real Estate Law
Medical Malpractice
Administrative and Regulatory Practice
Environmental Law
Health Care Law

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Professional Association
Attorneys and Counselors at Law
Established 1937

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Albuquerque, NM 87110
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STATE BAR OF NEW MEXICO
NEW MEXICO STATE BAR FOUNDATION

FOUR WAYS TO REGISTER

State Bar Center, Albuquerque • Wednesday and Thursday, March 19-20, 2008
8.2 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits
Co-Sponsor: Law Office Management Committee and Solo & Small Firm Practitioners Section
Co-Moderators: Catherine Baker Stetson, Esq. & Donald D. Becker, MBA, JD, SBNM Law Office Management Committee
[ ] Standard Fee $309  [ ] Solo & Small Firm Practitioners Section Member $279  [ ] New Practitioners (0-3 years) $179
[ ] State Bar of New Mexico Student Member (No Charge)
[ ] Join Solo and Small Firm Practitioners Section $15

DAY ONE - Wednesday, March 19
8:30 a.m. Registration
9:00 a.m. Introductory Remarks
Donald D. Becker, MBA, JD
Co-Chair, SBNM Law Office Management Committee
9:05 a.m. Having A Plan (Understanding Mission, etc)
Donald D. Becker, MBA, JD

Where Accounting Budgets Meet Business Realities:
Understanding And Appreciating The Difference
Bruce Malott, CPA, CFP, CVA,
Managing Principal, Meyners + Company
Angela S. Anderson, CPA, CVA, Meyners + Company
10:15 a.m. Break
10:30 a.m. Where Accounting Budgets Meet Business Realities
Bruce Malott, CPA, CFP, CVA
Angela S. Anderson, CPA, CVA, Meyners + Company
11:15 a.m. Effective Strategy, Common Sense, and...
Donald D. Becker, MBA, JD
Rob Koonce, MA, MBA, Director, Center for Legal Education
Noon Lunch (provided at the State Bar Center)
12:45 p.m. What Clients Really Want: It’s Not About You
Catherine Baker Stetson, Esq., Stetson Law Offices
Co-Chair, SBNM Law Office Management Committee
1:45 p.m. Break
2:00 p.m. What Clients Really Want (continued)
Catherine Baker Stetson, Esq.
3:00 p.m. Break
3:15 p.m. “Keys to Work-Life Balance” (1.0 Professionalism)
Willow Misty Parks, Esq., Parks Law Office LLC
4:15 p.m. Adjourn

DAY TWO - Thursday, March 20
8:30 a.m. Registration
9:00 a.m. Topic TBA
Joseph Sapien, Esq., Sapien Law Firm
Chair, Solo & Small Firm Practitioners Section
10:00 a.m. Break
10:15 a.m. Technology: Don’t Leave Home Without It
Ian Bezpalko, Esq., The Bezpalko Law Firm
11:00 a.m. Personnel Issues: Hire, Train, Supervise, Fire
Chandra Manning, Firm Administrator, Miller Stratvert PA
Noon Lunch (provided at the State Bar Center)
1:00 p.m. Ethical Billing Practices and Trust Accounts (1.0 Ethics)
Donald D. Becker, MBA, JD
Legal Research: A Low Cost, High Results Toolbox
Robert Mead, Esq., NM Supreme Court Law Librarian
3:15 p.m. Adjourn

FOUR WAYS TO REGISTER

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CreditCard # _____________________________________________________________________________   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 other judges:
I will endeavor to work with other judges to foster a spirit of cooperation and collegiality.

Meetings

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

5
Employment and Labor Law Section
Board of Directors, noon, State Bar Center

6
Elder Law Section Board of Directors,
oon, State Bar Center

6
Health Law Section Board of Directors,
ono, State Bar Center

6
Appellate Practice Section Board of Directors, 1:30 p.m., Office of the State Engineer, Santa Fe

10
Taxation Section Board of Directors,
noon, via teleconference

State Bar Workshops

March
12
Lawyer Referral for the Elderly Workshop
10 a.m., Bloomfield Senior Center, Bloomfield

13
Lawyer Referral for the Elderly Workshop
10 a.m., Bonnie Dallas Senior Center, Farmington

26
Lawyer Referral for the Elderly Workshop
9 a.m., Estancia Senior Center, Estancia

26
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

27
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

Cover Artist: The media of Helen Gwinn's expressive images are acrylics on wooden panels and watermedia on paper with collage. She often embellishes with handmade paper packets — stuffed, folded, tied, painted and incorporated into each composition (www.HGWINN.com). Her works are also represented at The Artist Gallery and Old Pecos Gallery in Calabas. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
The Supreme Court Board Governing the Recording of Judicial Proceedings ensures that outstanding reporting/recording services are provided to members of the State Bar and to hearing agencies. If any user of recording services encounters a reporter/monitor problem, the Board requests counsel notify it with the following information: the date and type of hearing, the person or service that recorded the hearing and the nature of the problem. E-mail notifications to Board Administrator Linda McGee, ccr@ccrboard.com; mail to PO Box 92648 Albuquerque, NM 87199-2648; or call (505) 821-1440.

Board of Legal Specialization Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Attorneys and others are encouraged to comment upon any of the applicant’s qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Sandra E. Rotruck
Family Law

Center for Civic Values
IOLTA Grant Committee Attorney Appointment

The Supreme Court will make an attorney appointment to the Center for Civic Values IOLTA Grant Committee for a three-year term. The seven-member group meets annually to review grant proposals from New Mexico nonprofits that provide legal services for the poor, law-related education for the public or improvements in the administration of justice. To learn more about the organization, visit www.civicvalues.org.

Those interested in volunteering on this committee should send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. The deadline for letters/resumes is March 10.

Law Library

Open Monday–Friday, 8 a.m.–6 p.m. Closed Saturdays and Sundays

Phone: (505) 827-4850
Fax: (505) 827-4852
Website: www.supremecourtlawlibrary.com.

Proposed Revisions to the Rules of Appellate Procedure

The Appellate Rules Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court’s consideration.

To comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, send written comments to Kathleen J. Gibson, Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Comments must be received by the clerk on or before March 17, 2008, to be considered by the Court. For reference see the Feb. 25 (Vol. 47, No. 9) Bar Bulletin.

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts 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 (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit 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 not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic, probate cases</td>
<td>1977–1991</td>
<td>March 7</td>
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<tr>
<td>1st Judicial District Court</td>
<td>Unmarked Exhibits, oversized poster boards/maps and diagrams</td>
<td>1976–1992</td>
<td>April 25</td>
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<tr>
<td>(505) 476-0196</td>
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<td>May 9</td>
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<tr>
<td>1st Judicial District Court</td>
<td>Exhibits filed with the court, in criminal, civil, children’s court,</td>
<td>1976–1992</td>
<td>May 9</td>
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<tr>
<td>(505) 827-4735</td>
<td>domestic, incompetency/mental health, adoption and probate cases</td>
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<tr>
<td>2nd Judicial District Court</td>
<td>Unnumbered/unmarked exhibits, oversized poster boards and maps</td>
<td>1977–1989</td>
<td>March 21</td>
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<tr>
<td>(505) 841-7596/5452</td>
<td>Tapes in domestic relations cases</td>
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<td>2nd Judicial District Court</td>
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<td>(505) 841-6728</td>
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Uniform First Page for Orders of Protection Request for Comment

The New Mexico Tribal-State Judicial Consortium recently passed a resolution asking the New Mexico Supreme Court to consider adopting a new uniform first page to be used for all orders of protection issued in domestic violence cases. The Consortium’s request is part of a national effort to encourage the use of a recognizable first page for orders of protection that gathers common elements on a single page to enable law enforcement officers to effectively execute orders of protection issued by New Mexico state courts, tribal courts, and courts of other states. The Supreme Court has referred the Consortium’s request to the Domestic Relations Task Force for further review and a recommendation. To facilitate the work of the Task Force, interested parties are invited to submit comments on the proposed uniform first page. Send written comments to: Kathleen J. Gibson, Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848. Comments received by the clerk on or before March 10 will be forwarded to the Domestic Relations Task Force for consideration. For reference see the Feb. 18 (Vol. 47, No. 8) Bar Bulletin.

Second Judicial District Family Court Meeting

All family law practitioners are invited to attend the Family Court judges/attorneys meeting at noon, March 3, 3rd Floor Conference Room, Bernalillo County Courthouse, 400 Lomas NW, Albuquerque.

Judicial Appointment Right to Challenge

Governor Bill Richardson has announced his appointment of Robert M. Schwartz to fill the vacancy at the 2nd Judicial District Court, Division IX. Effective March 7, Judge Schwartz will be assigned criminal court cases previously assigned to Judge Mark A. Macaron. Parties who have not previously exercised their right to challenge or excuse will have 10 days from March 7 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Swearing-In Ceremony

Judge Robert M. Schwartz will be formally sworn in as a 2nd Judicial District Court judge, Division IX, at 4:30 p.m., March 7, in the Frank H. Allen Jr. Courtroom 338, Bernalillo County Courthouse, 400 Lomas Blvd., NW, Albuquerque. A reception will immediately follow at the Hyatt Regency Hotel, 330 Tijeras Avenue NW.

Retirement Reception

Judge Mark A. Macaron

The judges and employees of the 2nd Judicial District Court cordially invite members of the legal community to attend a retirement reception in honor of Judge Mark A. Macaron from 2 to 4 p.m., March 6, at the Bernalillo County Courthouse, Courtroom 406, 400 Lomas Blvd., NW, Albuquerque.

Thirteenth Judicial District Move to New Courthouse

The 13th Judicial District Court in Valencia County will close March 26–28 to move into the new courthouse located at 1835 Highway 314 S.W., Los Lunas. During the moving period, the Court will be closed and only emergency filings will be accepted. Telephone and mail service to the Court may also be disrupted to a certain degree during this period. The Court’s mailing address and telephone numbers will remain unchanged. The Court will reopen for business at 8 a.m., March 31. Direct questions to Court Administrator Gregory T. Ireland, (505) 865-4291, ext. 2104.

Call for Nominations

State Bar of New Mexico

2008 Annual Awards

The State Bar of New Mexico’s Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2007 or 2008. The awards will be presented at the 2008 Annual Meeting, July 17–18, Fairmont Scottsdale Princess, Scottsdale, Arizona.

Send a letter of nomination for each nominee to:
Joe Conte, Executive Director
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
Fax: (505) 828-3765
E-mail: jconte@nmbar.org

Deadline for nominations is April 25

See the Feb. 25 (Vol. 47, No. 9) Bar Bulletin for more information
If changes are necessary, click on Contact Us to submit changes online; mail changes to Address Changes, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3755.

Attorney Support Group
The Attorney Support Group offers two meeting opportunities:
- Afternoon meeting, 5:30 p.m., March 3 (meets regularly on the first Monday of the month)
- Morning meeting, 7:30 a.m., March 17 (meets regularly on the third Monday of the month)
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Employment and Labor Law Section
Board Meetings Open to Section Members
The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, March 5, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit www.nmbar.org; call Gregory P. Williams, section chair, (505) 889-4050; or e-mail gwilliams@dineslaw.com.

Paralegal Division
Monthly Brown-Bag CLE for Attorneys and Paralegals
The Paralegal Division invites members of the legal community to bring a lunch and attend Understanding Tribal Sovereignty, presented by Helen Padilla, Esq., director of the New Mexico Indian Law Center. The program will be held from noon to 1 p.m., March 10, at the State Bar Center and offers 1.0 general CLE credit (unless otherwise noted). Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff.
For more information, contact Cheryl Passalaqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

Software Tutorials
Free software tutorials for State Bar members and their support staff will be offered every Friday at the State Bar Center Computer Lab. Provided by the Law Office Management Committee, tutorials will be offered on Lotus 1-2-3, PowerPoint, Office Integration, Excel, Access, Quicken and QuickBooks. Only one space is available for each tutorial, but all seven will be available every Friday. Space will be reserved on a first-come first-served basis. Each tutorial is 3 1/2 to 4 hours in length and participants are encouraged to start by 9 a.m. to provide ample time to finish. Call (505) 797-6039 or e-mail vcordova@nmbar.org to reserve a spot. Leave your name, phone number, e-mail address, the date you wish to attend, and the title of the program you are interested in so confirmation can be sent.

Santa Fe Municipal Court Brown-Bag Lunch
Santa Fe Municipal Judge Ann Yalman invites all attorneys who practice in the Santa Fe Municipal Court to meet with her at Municipal Court at 11:30 a.m., March 12, for a discussion of the practices and procedures in the Municipal Court.

U.S. District Court for the District of New Mexico Courtroom Technology Training
The U.S. District Court for the District of New Mexico utilizes advanced courtroom technology in a number of locations within the district. In support of these technologies, the Court provides training on an annual basis. The 2008 Courtroom Technology Training will be held from 1:30 to 3:30 p.m., April 4, in the Rio Grande Courtroom, Pete V. Domenici Courthouse, Albuquerque. Call Scott Ferguson, (505) 348-2063, to reserve space. For details regarding courtrooms which are outfitted with advanced technology and what technologies are available, visit www.nmcourt.fed.us.

State Bar News
Address Changes for Bench & Bar Directory
State Bar staff is updating information for the 2008–09 Bench & Bar Directory. Address changes will be accepted through March 25. Information submitted beyond that date is not guaranteed to be in the new membership directory. To verify attorney information, go to www.nmbar.org, Find an Attorney, and search by name.

Young Lawyers Division
2008 Summer Fellowships
The Young Lawyers Division is currently accepting applications for its 2008 Summer Fellowships. Two fellowships will be awarded by the YLD to two law students who are interested in working in the public interest or government sector during the summer of 2008. The fellowship awards are intended to provide the opportunity for law students to work in positions that might not otherwise be possible because the positions are unpaid. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer.
In order to be eligible, applicants must be a current law student in good standing with their school. Applications for the fellowship must include: (1) a letter of interest that details the student's interest in public interest law or the government sector; (2) a resume; and (3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer of 2008. Submit applications to: J. Brent Moore, YLD Summer Fellowship Coordinator, Insurance Division, New Mexico Public Regulation Commission, PO Box 1269, Santa Fe, NM 87504-1269. Applications must be postmarked by March 31. Direct questions to J. Brent Moore at (505) 827-4645.

Junior Judges Community Service Program
The Young Lawyers Division is seeking attorney volunteers for its annual Junior Judges program. Volunteers will lead discussions with third, fourth, and fifth grade students about judging for themselves.
grade students about judging for themselves what the right choice may be in difficult peer situations and the potential consequences of bad behavior. Topics include stealing, bullying, cheating, alcohol and drugs, and gangs and weapons. The program (in approximately one-hour units) will take place in Albuquerque elementary schools April 25. A full curriculum and teaching video will be provided to assist volunteers with class discussions. For more information or to volunteer, contact Martha Chicoski, mchicoski@cabq.gov or (505) 768-4508, by April 4.

**OTHER BARS**

**Albuquerque Bar Association Luncheon and CLE**

The Albuquerque Bar Association’s Membership Luncheon will be held at noon, March 4, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The topic is *What Do Democrats and Republicans Offer Lawyers in the Upcoming Election?* Representatives from the two major parties will address each party’s slate of judicial and law-related candidates, major local and national legal initiatives anticipated to be important at the polls, and insight into the state and national convention processes.

The CLE program (1.0 general and 1.0 ethics CLE credits) will follow the luncheon from 1:30 to 2:30 p.m. Jeff Dahl of Keleher & McLeod will present the topic, *An Overview of Federal E-Discovery Rules*.

Lunch only: $25 members/$35 non-members with reservation, $5 additional at door; lunch and CLE: $45 members/$65 non-members with reservation, $5 additional at door; CLE only: 20 members/$30 non-members, $5 additional at door.

Register for lunch by noon Feb. 28. To register:
1. log on to www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. call (505) 842-1151 or (505) 243-2615; or
4. mail to PO Box 40 Albuquerque, NM 87103-0040

**N.M. Criminal Defense Lawyers Association CLE Opportunity**

The New Mexico Criminal Defense Lawyers Association will present *Negotiating Sentencing: Getting What You Need* (5.0 general and 1.0 ethics CLE credits) from 8:30 a.m. to 5 p.m., March 28, at the MCM Elegante Hotel, Albuquerque. Topics include changes in sentencing law, ethics of negotiation and negotiation skills and sentencing models and alternatives. Membership and registration information is available at www.nmcdla.org or call (505) 992-0050.

**N.M. Women’s Bar Association Networking Luncheon**

The New Mexico Women’s Bar Association’s networking luncheon will be from noon to 1:15 p.m., March 12, at One Up (formerly Carom Club), located on the corner of Third and Central, Albuquerque. Katie Thompson from Smith Barney will discuss financial planning.

Members and visitors are welcome. R.S.V.P. by 5 p.m., March 10, to Melanie Fritzschke, runner_mel@hotmail.com or (505) 238-2220.

**UNM School of Law Free Library Services for New Mexico Attorneys**

- Circulating books are available for checkout.
- Articles and available documents can be faxed, e-mailed, or mailed. Requests must include an exact citation.
- Materials from other law libraries are available on interlibrary loan. The UNM Law Library does not charge a fee for this service, but the attorney will be responsible for any fees assessed by the lending library.
- Westlaw-Pro, LexisNexis Academic, Loislaw, Shepard’s, RIA Checkpoint, and other research databases are accessible on-site. LexisNexis Academic and Loislaw are accessible on-site at the branch libraries at the Valencia County, Gallup, and Los Alamos campuses. Licenses are provided by the UNM Law Library.
- Advice is available concerning the licensing of low-cost on-line legal resources.

For more information about the UNM Law Library and any of these free services, visit http://lawlibrary.unm.edu, call (505) 277-0935, or e-mail librref@law.unm.edu.

**Spring Library Hours**

**Building and Circulation**

- Monday–Thursday 8 a.m.–11 p.m.
- Friday 8 a.m.–6 p.m.
- Saturday 9 a.m.–6 p.m.
- Sunday Noon–11 p.m.
- Reference
- Monday–Friday 9 a.m.–6 p.m.
- Saturday Closed
- Sunday Noon–4 p.m.
- March 17–21 Spring Break 8 a.m.–6 p.m.

**Other News**

**2008 Legal Fiction Writing Competition**

SEAK, Inc., is sponsoring its 7th Annual Legal Fiction Writing Competition for Lawyers. The purpose is to encourage lawyers to become more interested in and adept at writing legal fiction. Submit a short story or novel excerpt in the legal fiction genre, typed and not to exceed 2,500 words, by March 31. For additional information, e-mail stevenbabitsky@seak.com or visit www.seak.com.
Patricia A. Matthews has joined the Rodey Law Firm, practicing in the firm’s business department in the Santa Fe office. Matthews brings 20 years of experience to the firm. Her practice will focus in the areas of education law with an emphasis in charter schools as well as employment, mediation and administrative and local government issues.

Justin Horwitz has been elected to the Rodey Law Firm’s board of directors. Horwitz practices in the business department primarily in the area of public finance. He has experience in a variety of financing structures, including industrial revenue bonds, municipal bonds, and public improvement district bonds. Horwitz also advises clients in matters related to state and federal securities law and corporate governance. He received his law degree from the University of Arizona College of Law in 2001.

John (Jack) P. Burton has been appointed to the advisory board of the Institute for Energy Law. Burton is a director in the Santa Fe office of the Rodey Law Firm and is a member of the firm’s business department. He handles complex commercial disputes including class actions and nationwide discovery, arbitration and mediation as well as complex transactions involving business and property matters, mergers, acquisitions and financing. Through its educational programs, scholarly publications and membership activities, the Institute for Energy Law, a national organization, serves many thousands of energy lawyers and other professionals as an important educational forum in the energy industry.

Timothy J. Vidal of Santa Fe has been selected for inclusion in the 2008 edition of Best Lawyers in America in his specialty of trusts and estates. Vidal, of Canepa & Vidal PA, has been practicing law in New Mexico for more than thirty years and is the current president of the Santa Fe Estate Planning Council. He is a graduate of Stanford and the UNM School of Law.

Civerolo, Gralow, Hill & Curtis PA, is pleased to announce that Kallie D. Kuehl (formerly Kallie D. Woodward) has joined the firm as an associate. Kuehl is a 1997 graduate of Baylor University, a 2000 graduate of the University of Wyoming College of Law, and was with the Air Force JAG Corps. Kuehl practices in the areas of insurance defense, trucking defense, and general litigation.

Santa Fe attorney Mary Marlowe-Sommer has been selected for the position of domestic relations hearing officer at the 1st Judicial District Court. She worked at the Attorney General’s Office and then, with Daniel Marlowe, formed the Marlowe Law Firm where she was a shareholder and partner for 22 years.

The New Mexico Judicial Performance Evaluation Commission (JPEC) has appointed Retired Chief Justice Gene E. Franchini as vice chair. Franchini served as chief justice of the Supreme Court of New Mexico from 1997 to 1999 and was on the Supreme Court for 12 years.

“While on the Supreme Court, Justice Franchini recognized our state’s voters needed accurate, objective information about judges and justices standing for retention. He helped establish the JPEC, so we are extremely pleased to have him as a member of the commission,” said Felix Briones, Jr., chair of JPEC.

Prior to his retirement from the New Mexico Supreme Court in 2002, Franchini served on the bench for a total of 18 years, including serving as a district court judge in the 2nd Judicial District for six years. He was in private practice in Albuquerque for 24 years, was admitted to practice before the U.S. Supreme Court in 1973 and has been a member of the State Bar of New Mexico for 48 years. Franchini currently provides arbitration, mediation and counseling through his consulting firm, Dispute Resolutions PA.

A native of Albuquerque, he received his Bachelor of Business Administration degree from the University of New Mexico, his Juris Doctor degree from Georgetown University and his Master of Laws degree from the University of Virginia.

The Tinnin Law Firm PC has added attorney Glenn A. Beard to the practice. Beard, an Albuquerque native and graduate of Sandia High School, previously worked as a senior associate for a large east coast law firm headquartered in Philadelphia, where his practice focused exclusively on litigation and advice in all aspects of labor and employment law. After obtaining his undergraduate degree from Williams College and his law degree from Georgetown University, Beard worked as an associate for an Albuquerque law firm focusing on commercial and employment litigation prior to moving to Philadelphia.

In January 2008 the New Mexico Law Review published an article entitled “Correcting The Imbalance: The New Mexico Public Correcting The Imbalance The Public Employee Bargaining Act And The Statutory Rights Provided To Public Employees.” The New Mexico Law Review is written by S. Barry Paisner, a partner with Hinkle, Hensley, Shanor and Martin and Michelle R. Haubert-Barela, assistant staff attorney, New Mexico Court of Appeals Prehearing Division.

Editor’s Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send items to: Editor, PO Box 92860, Albuquerque, NM 87199-2860 or notices@nmbar.org.
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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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

EFFECTIVE MARCH 3, 2008

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

| NO. 30,954 | State v. Gonzales | Date Petition Filed | (COA 25,847) 2/20/08 |
| NO. 30,953 | State v. Santiago | Date Petition Filed | (COA 26,859) 2/20/08 |
| NO. 30,952 | State v. Calton | Date Petition Filed | (COA 28,098) 2/19/08 |
| NO. 30,951 | State v. Sepulveda | Date Petition Filed | (COA 28,058) 2/29/08 |
| NO. 30,949 | Silver City v. Shorts | Date Petition Filed | (COA 28,077) 2/19/08 |
| NO. 30,947 | State v. Diaz | Date Petition Filed | (COA 27,962) 2/18/08 |
| NO. 30,946 | State v. Wiggins | Date Petition Filed | (COA 27,210) 2/18/08 |
| NO. 30,944 | State v. Davis | Date Petition Filed | (COA 28,101) 2/15/08 |
| NO. 30,942 | Allen v. Schrader | Date Petition Filed | (COA 28,081) 2/14/08 |
| NO. 30,940 | State v. Martinez | Date Petition Filed | (COA 25,766) 2/13/08 |
| NO. 30,939 | Grygorwicz v. Trujillo | Date Petition Filed | (COA 27,752) 2/13/08 |
| NO. 30,938 | Niederstadt v. Town of Carrizozo | Date Petition Filed | (COA 26,838) 2/13/08 |
| NO. 30,937 | State v. Garcia | Date Petition Filed | (COA 27,091) 2/12/08 |
| NO. 30,935 | State v. Infante | Date Petition Filed | (COA 26,798) 2/11/08 |
| NO. 30,934 | State v. Miller | Date Petition Filed | (COA 27,886) 2/11/08 |
| NO. 30,933 | State v. Caldwell | Date Petition Filed | (COA 26,322) 2/11/08 |
| NO. 30,932 | State v. Almanza | Date Petition Filed | (COA 27,875) 2/11/08 |
| NO. 30,931 | State v. Benally | Date Petition Filed | (COA 27,904) 2/11/08 |
| NO. 30,930 | State v. Terrazas | Date Petition Filed | (COA 27,935) 2/11/08 |
| NO. 30,929 | State v. Bahe | Date Petition Filed | (COA 27,946) 2/8/08 |
| NO. 30,928 | State v. Silva | Date Petition Filed | (COA 27,901) 2/8/08 |
| NO. 30,927 | State v. Valencia | Date Petition Filed | (COA 27,917) 2/8/08 |
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| NO. 30,923 | Scott v. Ulibarri | Date Petition Filed | (COA 27,928) 2/7/08 |
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| NO. 30,915 | State v. Robinson | Date Petition Filed | (COA 27,495) 2/5/08 |
| NO. 30,920 | Hethcox v. Salaiz | Date Petition Filed | (COA 27,438) 2/5/08 |
| NO. 30,914 | State v. Castaneda | Date Petition Filed | (COA 27,013) 2/4/08 |
| NO. 30,916 | State v. Quick | Date Petition Filed | (COA 26,520) 2/4/08 |
| NO. 30,911 | State v. Hernandez | Date Petition Filed | (COA 26,609) 2/4/08 |
| NO. 30,910 | State v. O'Kelly | Date Petition Filed | (COA 26,116) 2/4/08 |
| NO. 30,909 | State v. Valentine | Date Petition Filed | (COA 27,510) 2/4/08 |
| NO. 30,906 | State v. Gonzales | Date Petition Filed | (COA 27,847) 2/1/08 |
| NO. 30,904 | State v. Chavez | Date Petition Filed | (COA 26,786) 2/1/08 |
| NO. 30,905 | State v. Jimenez | Date Petition Filed | (COA 27,852) 1/31/08 |
| NO. 30,903 | Schwettmann v. Schwettmann | Date Petition Filed | (COA 26,905) 1/31/08 |
| NO. 30,902 | State v. Dombos | Date Petition Filed | (COA 26,070) 1/31/08 |
| NO. 30,899 | Bishop v. Evangelical Society | Date Petition Filed | (COA 25,510) 1/30/08 |
| NO. 30,898 | State v. Valles | Date Petition Filed | (COA 26,260) 1/29/08 |
| NO. 30,895 | Leonard v. Payday Professional | Date Petition Filed | (COA 26,927) 1/28/08 |
| NO. 30,894 | State v. Soto | Date Petition Filed | (COA 26,861) 1/28/08 |
| NO. 30,844 | Citizen Action v. Sandia Corporation | Date Petition Filed | (COA 25,896) 12/31/08 |

CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

(Parties preparing briefs)

<p>| NO. 30,044 | State v. O’Kelly | Date Writ Issued | (COA 26,292) 11/13/06 |
| NO. 30,267 | State v. Ortiz | Date Writ Issued | (COA 27,113) 4/2/07 |
| NO. 30,318 | State v. Trujillo | Date Writ Issued | (COA 25,898) 4/20/07 |
| NO. 30,386 | Colony Insurance Company v. McLean | Date Writ Issued | (COA 27,321) 6/12/07 |
| NO. 30,349 | Franklin v. Coyote Canyon Rehabilitation Ctr. | Date Writ Issued | (COA 27,159) 6/5/07 |
| NO. 30,317 | Muniz v. Janecka | Date Writ Issued | (COA 25,519) 7/20/07 |
| NO. 30,463 | State v. Williams | Date Writ Issued | (COA 27,180) 7/20/07 |
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| NO. 30,520 | State v. Thompson | Date Writ Issued | (COA 27,051) 7/31/07 |
| NO. 30,346 | State v. Owens | Date Writ Issued | (COA 27,093) 8/1/07 |
| NO. 30,539 | State v. Dylan A. | Date Writ Issued | (COA 26,283) 8/8/07 |
| NO. 30,540 | State v. Sena | Date Writ Issued | (COA 24,156) 8/8/07 |
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| NO. 30,559 | State v. Rodriguez | Date Writ Issued | (COA 25,778) 9/17/07 |
| NO. 30,548 | State v. Leyba | Date Writ Issued | (COA 27,478) 9/17/07 |
| NO. 30,564 | State v. Ross | Date Writ Issued | (COA 26,239) 9/17/07 |
| NO. 30,536 | Cordova v. World Finance | Date Writ Issued | (COA 27,436) 9/24/07 |
| NO. 30,543 | Primetime v. City of Albq. | Date Writ Issued | (COA 25,616) 9/25/07 |
| NO. 30,620 | State v. Nozie | Date Writ Issued | (COA 25,481) 9/25/07 |</p>
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<td>NM Public Schools v. Gallagher</td>
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Slip Opinions for Published Opinions may be read on the Court’s Web site:  
14-4503. Driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more; essential elements.

For you to find the defendant guilty of driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;
2. Within three (3) hours of driving, the defendant had an alcohol concentration of eight one-hundredths (.08) grams or more in [one hundred milliliters of blood] or [two hundred ten liters of breath]; and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.

1. Insert count number if more than one count is charged.
2. For the definition of “motor vehicle, see NMSA 1978, § 66-8-1403.1 (H) (2007).
3. Use only the applicable alternative or alternatives.

Committee commentary.

This instruction pertains to NMSA 1978, § 66-8-102(C)(1) (2007), which makes it a criminal offense for “a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person’s blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.” It is commonly known as the “per se” violation. This instruction should be used for all driving under the influence of intoxicating liquor cases in which a per se violation is alleged to have been committed after April 1, 2007, to reflect amendments to § 66-8-102.

NMSA 1978, § 66-8-110(C)(1) (2007) provides, “The arresting officer shall charge the person tested with a violation of Section 66-8-102 NMSA 1978 when the blood or breath of the person contains an alcohol concentration of . . . eight one hundredths or more.” The determination of alcohol concentration shall be based on the grams of alcohol in one hundred milliliters of blood or the grams of alcohol in two hundred ten liters of breath.” NMSA 1978, § 66-8-110(F) (2007).

Therefore, §§ 66-8-102(C) and 66-8-110 create a per se standard. It is not necessary for the state to prove that the defendant was driving “while under the influence” in order for the jury to render a guilty verdict under § 66-8-102(C).

For a discussion of alternative charges under §§ 66-8-102(A) and 66-8-102(C), see Committee Commentary for UJI 14-4501.

For a discussion of the meaning of the phrase “to drive,” see Committee Commentary for UJI 14-4501.

14-4506. Aggravated driving with alcohol concentration of (.16) or more; essential elements.

For you to find the defendant guilty of aggravated driving while under the influence of intoxicating liquor [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;
2. Within three hours of driving, the defendant had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood] or [two hundred ten liters of breath]; and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.
3. This happened in New Mexico, on or about the _______ day of ____________, ________.

USE NOTE

1. If the evidence supports more than one theory of aggravated driving while intoxicated the applicable alternatives set forth in UJI 14-4509 are to be given. This instruction is to be used if the
only theory of aggravated driving in issue is aggravated driving with an alcohol concentration of (.16) or more.
2. Insert count number if more than one count is charged.
4. Use applicable alternative or alternatives.

Committee Commentary.
This instruction should be used for all aggravated driving under the influence of intoxicating liquor cases in which a per se violation is alleged to have been committed after April 1, 2007, to reflect amendments to § 66-8-102.

14-8001. Grand jury proceedings; explanation of proceedings.1
LADIES AND GENTLEMEN OF THE GRAND JURY:
Function of Grand Jury.
You have been summoned to serve as members of the grand jury for ______________ County to investigate ___________ day of ______________, __________, convened ___________.2 An order by the court filed on the ___________ day of ______________, __________, convened this grand jury. You have been qualified as members of such grand jury, and it is my duty as judge to instruct you as to your duties, authority and special responsibilities as members of the grand jury.
I will guide you to assure that your actions are within your legal authority. At any time, it is appropriate for any grand juror to seek advice and guidance from me as to the scope and propriety of the grand jury’s acts and investigations. The grand jury, however, is subject to no other supervision or control from any person, office or body.
Your purpose as grand jurors is to investigate the matter for which this grand jury was called and to determine from the evidence if there is probable cause to believe an offense has been committed.
Evidence.
The grand jury has the power to order the attendance of witnesses and to cause the production of public and private records or other evidence relative and relevant to its investigations. It has the authority of this court to subpoena witnesses and to obtain execution of subpoenas by any public officers charged with such duties. If you have reason to believe that evidence not presented to you is available that may excuse or disprove a charge or accusation or that would make an indictment unjustified, then you may order that evidence produced and presented to you.
In the course of your investigation and the presentation of charges by the prosecutor, you shall consider the evidence presented to you. Evidence means the oral testimony of witnesses under oath and any documentary or other physical evidence.
You must decide the case solely upon the evidence received during these proceedings. It is for you to decide whether that evidence is true or false. You may give the evidence whatever weight you believe it deserves. You must not consider anything you may have read or heard about the case except as a part of your inquiry as members of the grand jury. In the course of your investigation, it is your duty to protect citizens against unfounded accusations, whether they come from the government or others, and to prevent anyone from being indicted through malice, hatred or ill will.
Probable Cause.
For you to return an indictment, you must find probable cause. “Probable cause” means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.
Indictments will often contain more than one charge. You must decide whether there is probable cause for each charge separately. In finding probable cause on each charge, you must find that there is probable cause for every element of that crime.
Limits of Investigation.
The indiscriminate summoning of witnesses, on the mere chance that some crime may be discovered, is forbidden. The grand jury has no right to conduct an investigation into the personal affairs of citizens, nor the function, operation and housekeeping of any branch of government, except as may be necessary in the course of investigating criminal offenses.
Witnesses brought before the grand jury shall not be harassed nor subjected to unreasonable repeated appearances before the grand jury or the prosecuting attorney. This does not mean, however, that witnesses may not be brought before you on more than one occasion if either you or the prosecuting attorney shall so require.
Assistance for Grand Jury.
The court shall assign a clerk to you, as all testimony must be recorded. The court may also assign to you a bailiff, interpreter or others necessary to carry out your duties, but no one except members of the grand jury and court appointed interpreters may be present during your deliberations or upon your taking of a vote.
The district attorney’s office will assist you, examine witnesses, prepare indictments and reports at your request, and provide your foreperson with a form of oath to be administered by the foreperson to the witnesses who appear before you. The district attorney will advise you of the essential elements of any offense which is to be considered. The district attorney will answer, on the record, anything questions you may have, if allowed by law.
The statutes of New Mexico will be available to you, and the district attorney can, at your request, explain our criminal laws to you. You will have a copy of this and other instructions for your guidance and information.
You may call upon this court for assistance and advice [and you may request this court to call upon the attorney general of the state to aid you].3 If necessary, you may ask this court for legal or other assistance in your inquiry.
Secrecy of Grand Jury Proceedings.
If any person attempts to contact you with respect to any of your duties as a grand juror, advise that person that you cannot discuss any matter pertaining to your duties as a grand juror, obtain the person’s name and address, if possible, and report the matter to the court without delay.
The law requires that all that you hear, see, say or vote upon shall be kept secret and shall not be revealed to anyone outside of the grand jury room except in your official reports, indictments and no-bills.
No grand juror shall, except in the performance of official duty, disclose the fact that an indictment has been found against any person for any offense. You will not allow any unauthorized person into the grand jury room during your deliberations. You will not consult with anyone other than members of the grand jury as to how you should vote on any matter.
No one should have any advance information as to the activities of the grand jury or as to any activities which are planned by the grand jury.
As a grand juror, you may not be questioned about anything you say or any vote you cast relative to a matter legally pending.
before the grand jury except in prosecutions for violations of laws governing grand juries. You must strictly obey this requirement of secrecy in all matters before you. You will be asked to take an oath before serving as a grand juror. If you violate this oath, you may be prosecuted.

Although all proceedings in the grand jury room will be reported verbatim, your deliberations will not be reported.

If you learn of any violation of any rule governing these proceedings, you should report that violation to the court immediately. The court will address such violations appropriately.

**Foreperson of Grand Jury.**

The foreperson of the grand jury shall convene the grand jury during the regular hours of this court. The foreperson may appoint a clerk from among you to aid in keeping your records of votes during secret sessions when other persons are not able to be present. The foreperson shall sign all indictments and reports and shall swear all witnesses before you. The clerk must preserve the minutes of your deliberations but no record shall be kept of the votes of the individual members of the grand jury on an indictment or on any other matter voted upon by the grand jury. You will be guided by the orders of your foreperson, who shall preside over the sessions of the grand jury. The foreperson may recess the sessions of the grand jury and reconvene them. The foreperson, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary to continue the work of the grand jury.

**Instructions by the Court.**

It is your duty to follow the law described in these instructions and any other instructions you receive. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction and disregard others.

The clerk will now administer the oath and give you a copy of these opening instructions.

**USE NOTE**

1. This instruction may be used before the grand jury hears any testimony or is addressed by the prosecuting attorney. If it is used, the instruction may be sent into the grand jury room for its guidance. In *District Court v. McKenna*, 118 N.M. 402, 881 P.2d 1387 (1994), the Supreme Court set forth the procedures to be followed before convening a grand jury on a citizen’s petition.

2. Insert the reason for which the grand jury has been convened; e.g., offenses presented for consideration and indictment, special inquiry or investigation of a public officer regarding removal on a ground specified in NMSA 1978, § 10-4-2 (1909).

3. The bracketed phrase is not to be given if the attorney general has already been asked to assist the grand jury.

4. If used, UJI 14-8002 is to be given by the clerk of the court immediately after this instruction is given.

**STATE OF NEW MEXICO**

**COUNTY OF**

**IN THE DISTRICT COURT**

**IN THE MATTER OF THE CONVENING OF A GRAND JURY**

**ORDER**

The court, being advised in the premises and deeming it necessary, finds that a grand jury should be convened for the purpose of considering [criminal cases which may be presented to it] [the removal of _______________ (name of public officer) for ____________________________ (reason for removal of officer)].

IT IS THEREFORE ORDERED that a grand jury in __________ County, New Mexico, be convened to meet at __________ o’clock a.m. on ______________, the __________ day of __________, __________, to consider

IT IS FURTHER ORDERED that the names of __________________________ (state number) potential jurors be selected and from the lists of said persons, twelve grand jurors and __________________ alternates be chosen and qualified in open court prior to the convening of the grand jury on the __________ day of ______________, __________.

______________________________
District Judge

[As amended, effective ________________, 2005.]

**Committee Commentary.**

**Convening the grand jury.**

Article 2, Section 14 of the New Mexico Constitution provides that:

A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

Article 2, § 14 of the New Mexico Constitution prohibits holding a person to answer for a felony, capital or infamous crime, unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general.

The grand jury may present an accusation, in writing, for removal of any county, precinct, district, city, town or village officer elected by the people, and of any officer appointed to fill the unexpired term of any such officer, to the district court of the county in or for which the officer accused is elected for any of the following causes:

a. conviction of any felony or of any misdemeanor involving moral turpitude;

b. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

c. knowingly demanding or receiving illegal fees as such officer;

d. failure to account for money coming into his or her hands as such officer;

e. gross incompetency or gross negligence in discharging the duties of the office; or

f. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. NMSA 1978, §§ 10-4-1 to 10-4-4.

The grand jury may make a presentment for the removal of a local, elected officer, but if it does not do so, it shall not denigrate that person’s moral fitness to hold public office. NMSA 1978, § 31-6-10 (1979).
Territorial jurisdiction.
Selection of the grand jury.

NMSA 1978, § 38-5-3 (2005) describes the procedure used to compile the random jury list for the selection of grand jurors. The names of jurors summoned for grand jury duty are drawn from the random jury list. NMSA 1978, § 31-6-1 (1983). The district judge then qualifies a grand jury panel comprised of twelve regular jurors and a sufficient number of alternates to ensure the continuity of the inquiry and the taking of testimony. NMSA 1978, § 31-6-1 (1983).

Term of grand jury.

The grand jury is convened as provided for in N.M. Const., art. 2, § 14 and discharged at such time as the court determines the business of the grand jury is completed, but not later than three months after it was convened. NMSA 1978, § 31-6-1 (1983); State v. Raulie, 35 N.M. 135, 290 P. 789 (1930).

Function of the court.

“The district judge convening the grand jury shall charge it with its duties and direct it as to any special inquiry into violations of law that he wishes it to make.” NMSA 1978, § 31-6-9 (1993).

In District Court v. McKenna, 118 N.M. 402, 407–408, 881 P.2d 1387, 1393–94 (1994), the Supreme Court set forth the duties of the district court prior to convening a grand jury upon a citizen’s petition.

When appropriate, the district judge shall “call to the attention of grand jurors,” the provisions of NMSA 1978, §§ 23-1-5, 23-1-6 and 23-1-7 regarding the indebtedness of a state institution exceeding the appropriations for such institution. NMSA 1978, § 23-1-8 (1953).

Assistance for grand jury.

The court is required to assign court reporters, security officers, interpreters, clerks or other persons as needed to aid the grand jury in carrying out their duties. Security personnel may be present only by special leave of the court and only if they are not potential witnesses or interested parties. NMSA 1978, §§ 31-6-4(C) and 31-6-7 (A) (2003).

A prosecuting attorney attending a grand jury shall act fairly and impartially at all times during grand jury proceedings. NMSA 1978, § 31-6-7(A) (2003). The duty of the prosecuting attorney is to attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury. NMSA 1978, § 31-6-7(A) (2003). The prosecuting attorney shall also advise the grand jury, on the record, of the essential elements of any offense which is considered by the grand jury. State v. Ulibarri, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in State v. Ulibarri, 1999-NMCA-142, 128 N.M. 546). This shall be done by using Uniform Jury Instructions Criminal, where available, and the criminal statutes if no uniform instructions are available. The district attorney will answer, on the record, any questions which the grand jury may have. The prosecuting attorney will not, however, guide or otherwise influence the grand jury. If requested by the grand jury, the prosecuting attorney should also explain a statute to the grand jury.

Evidence.

Evidence before the grand jury is the oral testimony of witnesses and documentary or physical evidence, and the grand jury has the duty to order evidence produced if it believes that there is lawful, competent and relevant evidence available that may explain away or disprove a charge or accusation or that would make an indictment unjustified. NMSA 1978, § 31-6-11(A), (B) (2003). The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. NMSA 1978, § 31-6-12(A) (1979).

The sufficiency or competency of the evidence upon which an indictment is returned will not be subject to review absent a showing of bad faith on the part of the prosecutor assisting the grand jury. NMSA 1978, § 31-6-11 (2003); Buzbee v. Donnelly, supra; State v. Chance, 29 N.M. 34, 221 P. 183 (1923).


Relying on Costello v. United States, 350 U.S. 359 (1956), the New Mexico Supreme Court did not perceive a federal due process violation when the only misconduct asserted was a withholding of exculpatory evidence from the grand jury. In so doing, the court implicitly rejected the dictum in State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976), which assumed the prosecutor could violate due process in withholding some evidence from the grand jury.

Because the function of the grand jury is merely to find probable cause for bringing a defendant to trial, the court reasoned that a stricter test of materiality should be placed on evidence withheld from the grand jury. Before remedial action by a reviewing court is justified, the quantum and materiality should be great. The court held that NMSA 1978, § 31-6-11 requires a prosecutor to present direct exculpatory evidence, but does not require the prosecutor to present circumstantial exculpatory evidence. The court also reaffirmed its 1923 holding in State v. Chance, supra, that absent clear statutory authority the court will not review the legality or competency of evidence unless there is a violation of due process. The court did emphasize, however, that the prosecutor has a statutory duty, under Section 31-6-7 NMSA 1978, § 31-6-7 (2003) to conduct himself in a fair and impartial manner.

Finally, the court reaffirmed its holding in Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979): Prosecutors must not use inadmissible evidence when they seek an indictment. They should avoid perjury, deceit or malicious overreaching. A prosecutor’s conduct should not significantly impinge on the ability of the grand jury to exercise its independent judgment.

In 2003, the legislature amended NMSA 1978, § 31-6-11(B) (2003). The amended statute no longer requires the grand jury to consider “evidence that directly negates the guilt of the target. It now states:

It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

Interpreting the amended statute, the Court of Appeals held that § 31-6-11 does not authorize “judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith.” State v. Romero,
2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NM-CERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury.

The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. NMSA 1978, § 31-6-12 (1979).

**Targets**

In 2003, the legislature amended NMSA 1978, § 31-6-11 (2003), which now states:

A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation. Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:

1. that he is the target of an investigation;
2. the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations;
3. the target’s right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;
4. the target’s right to testify no earlier than ten days after receiving the target notice if he is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;
5. the target’s right to choose to remain silent; and
6. the target’s right to assistance of counsel during the grand jury investigation.

**USE NOTE**

1. This oath or affirmation or any other oath or affirmation which generally complies with NMSA 1978, 31-6-6 (1979) and Rule 11-603 NMRA must be administered prior to qualification of members of the grand jury.
2. Members of a grand jury may not serve for a period longer than three months. NMSA 1978, § 31-6-1 (1983).


**Committee commentary.**

NMSA 1978, 31-6-6 (1979) prescribes the oath to be administered by the district judge to the grand jurors and other participants in grand jury proceedings. Although the statute states in part: “the following oaths shall be administered by the district judge to jurors, officers of the court or others assigned to assist the grand jury,” the oath in UJI 14-8002, 14-8003, and 14-8004 does not follow the oath prescribed by the statute verbatim. No case has been found where a court considered the precise question of whether an oath, administered in court, was a matter of procedure or of substantive law. The committee is of the view that the actual oath given is a matter of procedure.

### 14-8005. Grand jury proceedings; sample instructions.¹

**Burglary; essential elements.**

For you to return an indictment against the accused for the crime of burglary, you must find that there is probable cause² to believe each of the following elements of the crime:

1. The accused entered ______________ (identify structure)³ without authorization or permission; [the least intrusion constitutes an entry];⁴
2. When the accused entered the ______________ (name of structure), intended to commit [a theft] [or] ______________ (name of felony)⁵ inside;
3. This happened in New Mexico on or about the ____________ day of __________________, __________.

**USE NOTE**

1. This instruction and any other applicable instruction shall be given. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).
2. UJI 14-8006, which defines probable cause, shall be given with the essential elements instruction(s). If the prosecutor does not follow the oath prescribed by the statute verbatim.
3. If the charge is burglary of a dwelling house, UJI 14-1631 shall be given with this instruction. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).
4. Use bracketed phrase if entry is an issue.
5. If this instruction is used, it is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony should be given with this instruction.
Committee commentary.

Applicable uniform jury instructions giving the essential elements of an offense shall be prepared and presented by the district attorney when the offense is being considered by the grand jury, *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546). Any other instructions, such as definitions, which are to be given with the essential elements instruction, shall also be prepared for the grand jury as required by law.

If no uniform essential elements instruction is available for an offense, the prosecutor shall instruct the grand jury based on the applicable statute and shall give a copy of the statute or a written instruction derived from the statute to the grand jury for their consideration.

As it is not necessary for the grand jury to find beyond a reasonable doubt the essential elements of the offense, but only that there is probable cause to believe each of the elements, it is necessary to modify the existing uniform jury instructions. UJI 14-8005 is a sample of such a modification.

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14-8020. Grand jury proceedings; findings.

I hereby certify that at least eight members of the grand jury have found that there is probable cause to accuse __________________ (person accused) of __________________ (name of offense) and to return an indictment against __________________ (person accused).1

Foreperson

USE NOTE
1. If this instruction is used, a separate findings form should be used for each offense charged. An indictment, a “true bill,” will then be returned by the grand jury for any offenses for which probable cause is found within twenty-four hours following the day upon which the indictment is voted. The indictment shall be filed with the district court clerk. If probable cause is found for one or more offenses, the district attorney will complete Rule 9-204 NMRA and present it to the grand jury for signing. If this instruction is used, it is not to be included in the district court file. It has been included as an aid to the district attorney in performing the duty of assisting the grand jury.


Committee commentary.

Eight grand jurors must concur in order to return an indictment. N.M. Const., art. 2, § 14; NMSA 1978, § 31-6-10 (1979).

The indictment must be signed by the foreperson of the grand jury. NMSA 1978, § 31-6-2 (1979).

In 2003, the legislature amended NMSA 1978, § 31-6-11 (2003), which governs evidence before the grand jury. Interpreting the amended statute, the Court of Appeals held that § 31-6-11 does not authorize “judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith.” *State v. Romero*, 2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NMCERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury. The Court held that § 31-6-11(A) “is directory and for the guidance of the grand jury,” and that “the Legislature has not authorized judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith.” *Romero*, 2006-NMCA-105, ¶ 5, 140 N.M. at 282.

Notwithstanding the lack of power of the court to review the evidence to support the indictment, the court has power to quash an indictment if the grand jury proceedings fail to comply with statutory requirements. *Davis v. Traub*, 90 N.M. 498 (1977). The court may also expunge unauthorized grand jury action.

The grand jury is prohibited from naming persons as unindicted coconspirators in indictments. NMSA 1978, § 31-6-5 (2003).

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14-8021. Grand jury proceedings; findings.

I hereby certify that the members of the grand jury have found that there is no probable cause to accuse __________________ of __________________.1

Foreperson

USE NOTE
1. If this instruction is used, a separate findings form should be used for each offense charged. For all offenses for which no indictment is returned, a “no-bill” shall be returned and filed under seal with the district court clerk. If this instruction is used, it is not to be included in the district court file.


Committee commentary.

See committee commentary under UJI 14-8002.

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14-8006. Grand jury proceedings; definition of probable cause.

“Probable cause” means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.

USE NOTE
1. This instruction shall be given with the essential elements instruction(s). If the prosecutor gives essential elements instructions for more than one offense, the prosecutor is not required to give the probable cause instruction more than once.
New Mexico Collaborative Law Symposium
Friday, May 2 and Saturday, May 3, 2008
State Bar Center, State Bar of New Mexico, Albuquerque

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Taking Destruction Out Of Divorce
FRIDAY, May 2
9:00 a.m.
I. Collaborative Family Law
   (CFL) Defined
   Jan Gilman-Tepper, Esq.
   Jerome Johnson, CPA
   Judy Lay, Ph.D.
   A. A brief overview of CFL
   B. The critical elements of CFL
   C. CFL distinguished from other options
      1. Pro Se
      2. Mediation
      3. Traditional litigation
      4. Collaborative Family Law
   II. Preparing to Practice Collaboratively
      A. The paradigm shift
      B. Skills development – Practice Group
      III. A Multidisciplinary Approach to
      Collaborative Family Law
      Jan Gilman-Tepper, Esq., David Walther, Esq.,
      Harry Tindall, Esq.
      A. The Multidisciplinary Model
      B. Role of the Collaborative Attorney
         1. Educating and counseling the client
         2. Managing conflict
         3. Guiding interest-based negotiations
         4. Assisting the parties in implementing agreements
      IV. For the First Meeting
      Max August, MA, Gretchen Walther, Esq.,
      Harry Tindall, Esq.
      A. The First Collaborative Meeting
      B. Initial discussion of ‘values’
      C. Developing a ‘roadmap’ through the process
      D. Initial discussion of ‘values’
      E. Attention to critical temporary issues
      F. Caususing (Information Discussions Before or After Collaborative Conferences)
   V. Collaborative Conferences
      A. Practical details
      B. Agenda
      10:15 a.m. Break
      10:30 a.m.
      ADVANCED TRACK
      SATURDAY, May 3
      9:00 a.m.
      I. Powerful Non-Defensive Communication:
         A Tool for Transformation with Families in Crisis
         Sharon Strand Ellison, Author of Taking the War Out of Our Words
      II. The Traditional ‘War Model’ for Communication
         A. The Traditional “War Model” for Communication
         B. The Powerful Non-Defensive Communication Model
         10:15 a.m.
         10:30 a.m.
         10:45 a.m. Break
         11:00 a.m.
         12:00 p.m. Lunch (provided at the State Bar Center)
      III. There is an “I” in Team
         carl Michael rossi, MA, JD, LPC
         A. “Who I am” is as important as “What I can do”
         B. Agenda
         C. Deliver your professional skills to other professionals
         D. Receive feedback from other professionals
         1:00 p.m.
         1:15 p.m.
         2:00 p.m.
         2:15 p.m.
         2:30 p.m.
         2:45 p.m.
         3:00 p.m.
         3:15 p.m.
         3:30 p.m.
         3:45 p.m.
         4:00 p.m.
         4:15 p.m.
         4:30 p.m.
         4:45 p.m.
         5:00 p.m.
         Adjourn

C. Conduct of conference
   D. Dealing with impasse
   E. Attention to critical temporary issues
   F. Caususing (Information Discussions Before or After Collaborative Conferences)
   G. Collaborative Conferences
      A. Practical details
      B. Agenda
We decide as a matter of first impression that the pursuit was an essential element of the crime of aggravated fleeing and reversed Defendant’s conviction for failure to instruct the jury on that issue. We reverse and reinstate Defendant’s conviction.

BACKGROUND

1. Defendant was convicted of the crime of aggravated fleeing a law enforcement officer which elevates to a felony certain willful and careless vehicular flight from a police officer conducting a pursuit “in accordance with the provisions of the Law Enforcement Safe Pursuit Act.” NMSA 1978, § 30-22-1.1 (2003). In this opinion, we decide as a matter of first impression whether the State has to prove, as an element of the crime, not only the unlawful conduct of the accused, but also the propriety of the police officer’s conduct during the pursuit. The Court of Appeals held that whether the State has to prove, as an element of the crime, that Defendant was in violation of registration statutes, NMSA 1978, § 66-3-18(C) (1998) and NMSA 1978, § 66-3-19 (1995). The officer activated his emergency lights, and in response, Defendant accelerated and ran a stop sign.

2. Defendant Felipe Padilla’s conviction arose from his flight from a police officer on the night of October 14, 2003. Around 2:00 a.m., a Portales police officer became suspicious of Defendant when he drove his Buick down an alley, parked, but did not get out of the car. The officer called in Defendant’s license plate number and determined that Defendant was in violation of registration statutes, NMSA 1978, § 66-3-18(C) (1998) and NMSA 1978, § 66-3-19 (1995). The officer activated his emergency lights, and in response, Defendant accelerated and ran a stop sign.

3. The officer turned on his siren and began pursuing Defendant. Defendant continued to flee the police officer at speeds up to eighty miles per hour running a total of ten stop signs. Eventually, Defendant entered a mobile home sales lot, got out of his car, and attempted to flee on foot. Defendant was arrested shortly thereafter.

4. The pursuing police officer testified that he was in uniform, wearing his badge, and was in a marked police vehicle. He also testified that, along with Defendant, there were two passengers in the car and that at times during the pursuit the passenger door would open four to six inches due to a broken latch. At one point during the pursuit another motorist was on the roadway in the vicinity of the speeding vehicles. Defendant crossed the center line four times while turning corners at high speed. Based on the way Defendant was driving, the officer charged Defendant with several misdemeanors and the felony of aggravated fleeing a law enforcement officer.

5. The text of the aggravated fleeing statute reads:

A. Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle in pursuit in accordance with the provisions of the Law Enforcement Safe Pursuit Act [29-20-1 NMSA 1978].

B. Whoever commits aggravated fleeing a law enforcement officer is guilty of a fourth degree felony.

6. The aggravated fleeing statute specifically refers to the Law Enforcement Safe Pursuit Act (“the LESPA” or “the Act”). NMSA 1978, §§ 29-20-1 to -4 (2003). Both statutes passed the 2003 Legislature as part of the same bill and became effective the same day, July 1, 2003. See 2003 N.M. Laws, ch. 260, §§ 1-6. The LESPA establishes police training regarding the “safe initiation and conduct of high speed pursuits,” § 29-20-3, and creates a mechanism to establish and enforce local high speed pursuit policies. See § 29-20-4(A) (“The chief law enforcement officer of every state, county and municipal law enforcement agency shall establish and enforce a written policy governing the conduct of law enforcement officers . . . .”).

STANDARD OF REVIEW

7. The outcome of this appeal hinges on the interpretation of the two statutes at issue. This Court reviews questions of statutory interpretation de novo. State v. Rivera, 2004-NMSC-001, ¶ 9, 134 N.M. 768, 82 P.3d 939. We first look to the plain language of the statute to determine if the
statute can be enforced as written. See State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (“Under the plain meaning rule statutes are to be given effect as written without room for construction . . .”). If the language of the statute is “doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity, or contradiction,” the court should reject the plain meaning rule in favor of construing the statute “according to its obvious spirit or reason.” Id. (citing State ex rel. Helman v. Gallegos, 117 N.M. 346, 347-48, 871 P.2d 1353-54 (1994)).

DISCUSSION

[8] The question raised by this appeal is whether the Legislature intended the phrase “in accordance with the provisions of the [LESPA]” found at the end of the aggravated fleeing statute to be an essential element of the crime of aggravated fleeing. If, as Defendant claims, the Legislature intended the phrase to be an essential element, then the jury should have been instructed to that effect, and a pursuit not “in accordance” with the LESP A would nullify an otherwise valid arrest and prosecution for aggravated fleeing. See Rule 5-608(A) NMRA (“The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury.”); State v. Rosaire, 1997-NMSC-034, ¶ 13, 123 N.M. 701, 945 P.2d 66.

[9] Our Court of Appeals concluded that “a reasonable reading of the phrase ‘in accordance with’ requires an evaluation of how police conduct the pursuit caused by a defendant.” State v. Padilla, 2006-NMCA-107, ¶ 17, 140 N.M. 333, 142 P.3d 921. In interpreting the aggravated fleeing statute, that Court did not rely solely on the plain meaning of the text, but also looked to the purpose of the statute and the relationship between the aggravated fleeing statute and the LESP A. Id. ¶¶ 13-21. The Court then determined that “the policy objectives of the Act and the aggravated fleeing statute,” were advanced by the plain language of the aggravated fleeing statute. Id. ¶ 14 (“This reading promotes the policy objectives of the Act and the aggravated fleeing statute by (1) more severely punishing a person who flees in a car in a dangerous manner, while at the same time (2) requiring that police obey the legislature’s rules relating to high speed pursuits.”). As a result, under the Court of Appeals’ interpretation, a defendant may not be convicted of aggravated fleeing, even if it is undisputed that the defendant’s conduct was exactly that which the Legislature sought to punish.

The prosecutor would also have to prove that local law enforcement agencies have established a high speed pursuit policy which complies with the requirements of the Act and with which the officer can be shown to have complied. Id. ¶ 20. [10] We are mindful that legislative intent is our touchstone when interpreting a statute. See State v. Smith, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (“Our ultimate goal in statutory construction ‘is to ascertain and give effect to the intent of the Legislature.’” (quoting State v. Cleve, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23)). “Not only must the legislative intent be given effect, but the court will not be bound by a literal interpretation of the words if such strict interpretation would defeat the intended object of the legislation.” State ex rel. Helman, 117 N.M. at 352, 871 P.2d at 1358 (quoting State v. Nance, 77 N.M. 39, 46, 419 P.2d 242, 247 (1966)). Accordingly, we now undertake our “judicial responsibility to search for and effectuate the legislative intent.” Id. at 353, 871 P.2d at 1359.

AGGRAVATED FLEEING A LAW ENFORCEMENT OFFICER

[11] We look first to general principles underlying criminal law to inform our analysis. Criminal liability is typically defined by the conduct of the accused, not the conduct of the police officer or the law enforcement agency tasked to enforce the criminal code. A criminal code has two primary functions. First, a criminal code “defines conduct which is deemed sufficiently injurious to the interests of the individual or community to warrant the protection of a criminal law.” 1 Charles E. Torcia, Wharton’s Criminal Law § 1, at 2 (15th ed. 1993). Second, a criminal code “provides a punishment for the criminal conduct, geared primarily to the gravity of the offense, yet broad enough in latitude to accommodate the characteristics of individual offenders.” Id. “The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.” 1 Wayne R. LaFave, Substantive Criminal Law § 1.2, at 11 (2d ed. 2003).

[12] Typically, criminal liability is premised upon a defendant’s culpable conduct, the actus reus, coupled with a defendant’s culpable mental state, the mens rea. 1 LaFave, supra, § 1.2(b), at 14 (“[T]he physical conduct and mental state must concur.”); 1 Torcia, supra, § 27, at 164 (“[A] crime is committed only if the evil doer harbored an evil mind.”). The focus of both requirements is on the accused. Id. § 27, at 168-71 (describing the various statutory definitions of mental states by focusing on the actor and his conduct); see also Black’s Law Dictionary 1373 (8th ed. 2004) (defining “scienter” as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment”).

[13] Similarly, a legislature may choose to differentiate between crimes based on aggravating conduct of the accused, and it may impose differing degrees of punishment based upon the severity of the crime. “It is for the legislative branch of a state or the federal government to determine, within state or federal constitutional limits, the kind of conduct which shall constitute a crime and the nature and extent of punishment which may be imposed therefor.” 1 Torcia, supra, § 10, at 37-38. A crime is “aggravated” when it is “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime.” Black’s Law Dictionary, supra, at 71. An “aggravating circumstance” is defined as “[a] fact or situation that increases the degree of liability or culpability for a criminal act.” Id. at 259. Again, it is the conduct of the accused that is relevant when considering aggravating circumstances.

[14] In the aggravated fleeing statute, the New Mexico Legislature has adhered to these general principles of criminal law. The text of the statute focuses on the accused’s conduct and the accused’s knowledge and intent when the accused chooses to engage a police officer in a high speed pursuit. The legislative decision to create the crime of aggravated fleeing suggests a hierarchy of criminal liability based on the aggravated nature of a defendant’s conduct. In the aggravated fleeing statute, the Legislature created a more severe punishment, a felony, when a person “willfully and carelessly driv[es] his vehicle in a manner that endangers the life of another.” Section 30-22-1.1(A). When a person resists, evades, or obstructs an officer by fleeing without willful and careless driving, that conduct is a mere misdemeanor. See NMSA 1978, § 30-22-1 (1981). Because fleeing is “made worse or more serious,” Black’s Law Dictionary, supra, at 71, when the person flees in a manner that endangers the lives of others, the Legislature chose
to make the crime a fourth degree felony, see § 30-22-1.1(B). Thus, the defendant’s conduct gives rise to the imposition of the heightened punishment. That heightened punishment, however, has no apparent relation to the propriety of the law enforcement agency’s pursuit policy. The manner in which the officer conducts a high speed pursuit is not logically a “fact or situation that increases the degree of liability or culpability for a criminal act.” Black’s Law Dictionary, supra, at 259.

{15} We acknowledge that some of the officer’s conduct, as it relates to a defendant’s knowledge, is relevant to criminal liability under the aggravated fleeing statute. The scienter requirement of aggravated fleeing is satisfied when the defendant flees a law enforcement officer with both: (a) the knowledge that the individual is a law enforcement officer, as designated by his uniform and marked vehicle, and (b) the knowledge that the law enforcement officer has signaled him to stop, either by use of a visual or audible signal. See § 30-22-1.1(A). Therefore, the requirements that the officer be in a marked vehicle, be in uniform, and instruct the driver to stop create the backdrop against which the defendant’s knowledge is evaluated.

{16} In this respect, the knowledge requirement for aggravated fleeing is similar to that for the crime of aggravated assault of a peace officer. Cf. NMSA 1978, § 30-22-22 (1971) (requiring a defendant’s knowledge as to identity of peace officer); see also Reese v. State, 106 N.M. 498, 499, 745 P.2d 1146, 1147 (1987) (holding that a defendant’s knowledge of the peace officer’s identity is a necessary element of the crime). In the crime of aggravated assault of a peace officer, the peace officer’s conduct in identifying himself is necessary to prove scienter. Reese, 106 N.M. at 499, 745 P.2d at 1147 (“Although [aggravated assault on a peace officer and battery of a peace officer] do not require knowledge of the victim’s identity as an element of the respective crimes, we nonetheless conclude that scienter is a necessary element of these crimes, and thus indispensable to the jury’s consideration of the case.”). Similarly, a police officer, before engaging a suspect in high speed pursuit, must identify himself as indicated in the statute, and proof of a defendant’s knowledge about the identity of the police officer becomes an essential element of the crime of aggravated fleeing. Cf. UJI 14-2216 NMRA Use Note 1 (“This instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement officer.”).

{17} In the instant case, all of these elements of the crime of aggravated fleeing were proven at trial, including scienter. The officer testified that he was in uniform, wearing his badge, and in a marked vehicle. He signaled Defendant to stop, using both visual and audible signals. In response to the officer’s signals to stop, Defendant drove in a willful and careless manner that endangered the lives of others—he ran ten stop signs, he exceeded the speed limit, there was at least one other motorist, apart from the officer, potentially placed at risk because of Defendant’s conduct, and the passengers in the car were placed at risk when Defendant careened around corners causing the door with the faulty lock to open. Defendant’s criminal liability arises from his knowledge that he was fleeing from a law enforcement officer, and his reckless conduct during the ensuing pursuit.

{18} Occasionally, the Legislature will link criminal liability not only to knowledge of an officer’s status but also, to a limited degree, to the manner in which the officer conducts himself. For example, portions of the misdemeanor resisting, evading or obstructing statute require the state to prove that the peace officer was acting in “the lawful discharge of his duties.” Section 30-22-1(D); see also UJI 14-2215 NMRA (describing essential elements of the crime of resisting, evading or obstructing an officer). Section 30-22-1(D), as well as Section 30-22-1(B), is an example of the Legislature enacting a statute criminalizing certain behavior so as to provide law enforcement officers with a necessary tool for their own protection and to aid them in the performance of their duties.

{19} In the case of aggravated assault on a peace officer, the Legislature enhanced the severity of the crime, as compared to aggravated assault on the general public, based upon the victim’s status as a peace officer in lawful discharge of his duties. See State v. Rhea, 93 N.M. 478, 480, 601 P.2d 448, 450 (Ct. App. 1979). The crime of aggravated assault on a peace officer requires the State to prove that the officer “was performing the duties of a peace officer.” UJI 14-2209 NMRA; see also Rhea, 93 N.M. at 480, 601 P.2d at 450 (“The requirement that the peace officer be performing his duties is an element of peace officer assault upon which the jury must be instructed.”). It is apparent that the Legislature intended to protect peace officers in the discharge of their duties by imposing a more serious consequence upon those who assault them.

{20} Significantly, instances in which the Legislature makes an officer’s conduct, as opposed to knowledge of his identity, an element of the crime are rare. To the best of our knowledge, the Legislature has chosen to diverge from the established norms of criminal liability discussed above generally only in those circumstances when the officer becomes a victim of the illegal conduct, or when the Legislature seeks to protect a law enforcement officer while he is discharging his duties. And even then, the State must only prove that the officer was performing official duties, not that the officer complied with every detail of local policy. Outside of these limited exceptions, the norm remains to gauge the severity of a crime by the conduct of the accused, not by the conduct of the officer tasked with arresting the accused.

{21} These rare exceptions to the general rule are of little help to Defendant. The aggravated fleeing statute does not focus upon the officer as a victim. The statute appears to be designed to protect the general public from the dangers of a high speed chase. In the case of aggravated assault, the officer’s performance of official duties is necessary to prove knowledge that the victim was in fact an officer in lawful discharge of his duties. In contrast, the manner in which the officer pursues a fleeing suspect, as opposed to his identity, is not logically an aggravating factor; it does not factor into the suspect’s knowledge that he is fleeing an officer nor affect his degree of culpability.

{22} Most of the time, a fleeing suspect simply would not know if the officer was pursuing him “in accordance with the provisions of the [Act].” Section 30-22-1.1(A). And, even assuming that a defendant did know that the officer was pursuing him in compliance with the Act, that knowledge in no way establishes his intent to flee a law enforcement officer. Instead, as mentioned above, the officer’s conduct, wearing his uniform, being in a marked car, and signaling the defendant to stop, establishes a defendant’s knowledge that he is fleeing a police officer. As such, it is a fair inference that the Legislature intended to make those parts of the officer’s conduct that establishes scienter, i.e., the accused’s knowledge that he is fleeing an officer, elements of the crime of aggravated fleeing. That same inference, however, seems too attenuated when applied to the propriety
of the police officer’s conduct during the chase, conduct of which the defendant would be unaware.

{23} Notwithstanding the foregoing analysis of criminal norms, Defendant argues, and our Court of Appeals agreed, that the officer’s conduct in pursing a suspect, and not just a defendant’s knowledge of an officer’s identity, is an element of the crime that must be proven by the State beyond a reasonable doubt. In so doing, the Court of Appeals attributes to the Legislature an intent to achieve a result that, at a minimum, is unorthodox and inconsistent with generally accepted norms of criminal law. Defendant’s construction of the statute would absolve the accused of careless and life-endangering conduct, based solely upon the details of a police agency’s pursuit plan and the actions of the officer in compliance with that plan. Following the logic of Defendant’s argument, we could easily anticipate that the status of a local police agency’s pursuit policy and the details of an officer’s compliance would become a trial within a trial, potentially consuming more time and resources than proof of the defendant’s aggravated flight. Without questioning the authority of our Legislature to enact such a law, we would be remiss in our duties of judicial review if we did not demand a high level of confidence before concluding that the Legislature intended such an unorthodox result. In seeking to resolve the ultimate question of legislative intent, we now turn to the second statute at issue, the LESPA.

**LAW ENFORCEMENT SAFE PURSUIT ACT**

{24} By establishing standards for the “safe initiation and conduct of high speed pursuits,” the LESPA protects the public from dangers that might arise when a suspect engages a law enforcement officer in a high speed chase. Section 29-20-3(A). The Act mandates a course of instruction for the New Mexico law enforcement academy, and requires that local law enforcement agencies create and enforce local pursuit policies. See §§ 29-20-3, -4. The Act defines a high speed pursuit, using terms similar to those used in the aggravated fleeing statute, but without any reference to the propriety of the chase. See § 29-20-2 (“[H]igh speed pursuit” means an attempt by a law enforcement officer in an authorized emergency vehicle to apprehend an occupant of a motor vehicle, the driver of which is actively attempting to avoid apprehension by exceeding the speed limit.”). The Legislature established a statutory scheme that enables law enforcement officers to make more knowledgeable decisions about how and when to pursue a suspect.

{25} Significantly, the Legislature included an enforcement mechanism within the text of the LESPA itself. The Act requires not only that the local chief law enforcement officer establish a local pursuit policy, but also that the local chief law enforcement officer enforce that policy. See § 29-20-4(A) (“The chief law enforcement officer of every state, county and municipal law enforcement agency shall establish and enforce a written policy governing the conduct of law enforcement officers employed by the agency who are involved in high speed pursuits.”). As this language demonstrates, the Legislature contemplated that the LESPA would be enforced locally and that the local pursuit policy would govern law enforcement officers’ conduct.

{26} The Court of Appeals determined that the Legislature included the phrase “in accordance with the provisions of the [LESPA]” as an external enforcement mechanism. Padilla, 2006-NMCA-107, ¶ 16. The Court of Appeals noted that the denial of a conviction acts as a penalty for failure to comply with the LESPA and that, like the exclusionary rule, such a penalty “is a time-honored way to motivate police compliance with the law.” Id (citing United States v. Brooks, 438 F.3d 1231, 1240 (10th Cir. 2006) (discussing the exclusionary rule)). Because of the unique nature of the exclusionary rule, we must hesitate before drawing an analogy between the exclusionary rule and the statutes at issue here.

{27} First, we are reluctant to extend the rationale behind the exclusionary rule to the aggravated fleeing statute because the exclusionary rule is a court-made doctrine fashioned out of necessity to protect principles articulated in the United States and New Mexico Constitutions. The aggravated fleeing statute, however, is not rooted in either Constitution. We are merely interpreting the intent of the Legislature in enforcing its own policy, not constitutional protections or the policies of this Court.

{28} Second, as we have said, the Legislature has affirmatively expressed its choice of an enforcement mechanism for the LESPA. This decision acknowledges the efficacy of internal mechanisms as a means of encouraging compliance with the LESPA. See Hudson v. Michigan, 126 S. Ct. 2159, 2168 (2006) “[I]t is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.” In addition to internal enforcement, private remedies, such as civil rights claims under 42 U.S.C. § 1983 (2000), may be available should the chief law enforcement officer not establish a local policy or police not adhere to it. See City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989) (holding that inadequate police training may form the basis for liability under § 1983 when “the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact”). For these reasons, the exclusionary rule provides little support for the inference of an additional enforcement mechanism that is neither stated nor implied in either of the two statutes at issue.

{29} Other provisions of the LESPA shed light on the Legislature’s intent behind the enactment of the aggravated fleeing statute and the reference to the LESPA contained within that statute. The Legislature mandated that local agencies must establish a local pursuit policy in Section 29-20-4(A) but chose not to set a date by when local agencies must establish such a policy. Compare § 29-20-4 (no date requirement) with § 29-20-3 (pursuit training to be in effect no later than December 31, 2004). The lack of a date by when a local agency must comply with the Act is significant; it gives the chief local law enforcement officer discretion over when to establish a pursuit policy for that agency. Under Defendant’s reading of the aggravated fleeing statute, the chief law enforcement officer’s discretion over when to establish a local pursuit policy in a specific jurisdiction would, in effect, give local law enforcement a veto over a legislatively created criminal statute. In our view, this conclusion is inconsistent with the Legislature’s intent.

{30} Significantly, the crime of aggravated fleeing became effective on July 1, 2003, and nothing in the aggravated fleeing statute suggests anything other than a legislative expectation that the crime would be enforced as of that date. Yet, because the LESPA also went into effect on July 1, 2003, it would be impossible for a local agency to establish a pursuit policy by July 1, 2003, the date the crime of aggravated fleeing went into effect. During that interim period the crime of aggravated fleeing would not have been enforceable anywhere in the entire State. And, because local agencies have discretion as to when to adopt their pursuit policy, enforcement of the crime of aggravated fleeing would only occur piecemeal.

{31} Furthermore, the Act, read as a whole, demonstrates that the Legislature
anticipated local variations in the content of specific pursuit policies. The Act permits a chief law enforcement officer to define the conditions under which an officer may engage or terminate a high speed pursuit, see § 29-20-4(B)(1), alternative measures to be utilized for apprehending a fleeing suspect, see § 29-20-4(B)(2), and the coordination of high speed pursuits with other agencies and officers, both within the jurisdiction and in other jurisdictions, see § 29-20-4(B)(3), (4). Because the Act does not specifically mandate the entire content of the local policy, but leaves significant portions of the policy to the discretion of the chief law enforcement officer, the Act creates the very real possibility that local pursuit policies will vary from locale to locale.

While the Act allows for variations in pursuit policies, Defendant’s interpretation would allow for variations in criminal liability among different locations of the State which seems inconsistent with the State’s duty to protect all citizens equally regardless of locale. It would be unprecedented for our Legislature to create and define a crime that appears to have statewide effect, only to leave it up to local agencies to decide when and where it will be enforced. Because the text of the LESPA allows for such variations within local policies, it seems unlikely that the Legislature intended compliance with the Act to be an essential element of the crime of aggravated fleeing.

Our conclusion that the Legislature did not intend the phrase to be an essential element of the crime does not render the phrase mere surplusage. See State v. Javier M., 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (“A statute must be construed so that no part of the statute is rendered surplusage or superfluous.”) (quoting Katz v. New Mexico Dep’t of Human Servs., 95 N.M. 530, 534, 624 P.2d 39, 43 (1981))). The Legislature did specify that pursuits should be “in accordance” with the LESPA, which lays out policy criteria for police officers to consider in deciding when and how to engage in high speed pursuit of suspects. Those policies are important and they will be enforced. The language of the LESPA reposes enforcement responsibility with law enforcement itself. Without diminishing the significance of those policies, we conclude only that the Legislature did not intend to make compliance with those policies an essential element of the crime of aggravated fleeing. The Legislature did not intend to create an additional enforcement mechanism for compliance with what amounts to a regulatory scheme, by conditioning criminal liability upon compliance with that policy. Instead, the legal obligation to comply with the LESPA is enforceable and mandatory as described in the Act itself.

CONCLUSION

We hold that the phrase “in accordance with the provisions of the [LESFA]” is not an essential element of the crime of aggravated fleeing. Because the phrase is not an essential element of the crime, the jury instructions were appropriate as given and Defendant’s conviction is reinstated. Accordingly, we reverse the Court of Appeals with respect to Defendant’s conviction for aggravated fleeing. We remand this case to the district court to vacate Defendant’s conviction for resisting, evading or obstructing in accordance with that part of the Court of Appeals opinion which is not the subject of review herein.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PATRICIO M. Serna, Justice

PETRA JIMÉNEZ MAES, Justice

EDWARD L. CHÁVEZ, Chief Justice (dissenting)

CHARLES W. DANIELS, Justice (dissenting)

CHÁVEZ, Chief Justice (dissenting).

The legislature decides what criminal laws to enact and the essential elements that define each crime. Crimes involving police officers, such as resisting arrest, battery on a police officer, and evading a police officer all have as an element that the police officer was in the lawful discharge of his or her duty. Rather than using the broad language “in the lawful discharge of his duties,” the legislature has more narrowly specified those duties when a defendant is charged with aggravated fleeing. Recognizing that both the suspect and the officers put the public at risk during a high speed pursuit, the legislature has specifically required officers in New Mexico to comply with the Law Enforcement Safe Pursuit Act, NMSA 1978, Sections 29-20-1 to -4 (2003) (the “Safe Pursuit Act” or “the Act”), before a defendant can be found guilty of aggravated fleeing. Because the majority has simply deleted this requirement from the statutory crime of aggravated fleeing, I respectfully dissent.

While on routine patrol, a police officer attempted to pull Defendant over for a registration violation. Defendant sped away with the officer in hot pursuit for what might have been nothing more than a registration violation. Ultimately, in addition to other charges, Defendant was charged with aggravated fleeing in violation of NMSA 1978, Section 30-22-1.1(A) (2003):

Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop . . . by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle in pursuit in accordance with the provisions of the Law Enforcement Safe Pursuit Act . . . .

(emphasis added). The Safe Pursuit Act and the offense of aggravated fleeing were enacted in the same bill. 2003 N.M. Laws, ch. 260, §§ 1-6. The Act establishes the conditions under which an officer is authorized to engage in a high speed pursuit. Section 29-20-4(B)(1) (requiring the local policy to specify “the conditions under which a law enforcement officer may engage in a high speed pursuit and the conditions when the officer shall terminate a high speed pursuit”) (emphasis added); § 29-20-4(C)(1)-(2) (requiring that the written policy include factors for when an officer “may initiate a high speed pursuit” and when an officer “shall not initiate or continue a high speed pursuit”) (emphasis added).

In other words, the Safe Pursuit Act limits the scope of the officer’s authority to engage in a high speed pursuit.

Significantly, the minimum requirements of the Safe Pursuit Act include a prohibition against an officer initiating a high speed pursuit unless the officer has reasonable grounds to believe that the suspect “poses a clear and immediate threat of death or serious injury to others or who the officer has probable cause to believe poses a clear and immediate threat to the safety of others that is ongoing and that existed prior to the high speed pursuit.”] Section 29-20-4(C)(1) (emphasis added). The seriousness of the offense that initiated the high speed pursuit is critical to the analysis. See § 29-20-4(C)(3)(a). If the officer did not act in accordance with the Act, then he did not have the authority to engage in a high speed pursuit.

The “pursuit in accordance” portion of aggravated fleeing is analogous to the requirement in other statutes that an officer
act “in the lawful discharge of his duties.” For example, resisting, evading, or obstructing an officer consists of “resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.” NMSA 1978, § 30-22-1(D) (1981) (emphasis added). Similarly, the crime of aggravated assault upon a peace officer requires, as an essential element, that the State prove that the officer was acting in the lawful discharge of his or her duties. See State v. Tapia, 2000-NMCA-054, ¶ 12, 129 N.M. 209, 4 P.3d 37 (citing NMSA 1978, § 30-22-22(A) (1971)). This element is sometimes a “severely disputed factual question.” State v. Kraul, 90 N.M. 314, 317, 563 P.2d 108, 111 (Ct. App. 1977) (battery upon a peace officer, NMSA 1953, § 40A-22-23).

{40} It is significant that the legislature chose not to use the phrase “in the lawful discharge of his duties”; it chose instead to use the phrase “in accordance with the . . . Safe Pursuit Act.” The more specific language, coupled with the creation of the two statutes in a single bill, indicates that the officer’s authority should be evaluated with respect to the Safe Pursuit Act. This also recognizes that it is not just the suspect, but also the officer, who puts the public in danger during a high speed pursuit. See § 29-20-3(B) (recognizing “the need to balance the known offense and risk posed by a fleeing suspect against the danger to law enforcement officers and other people by initiating a high speed pursuit”) (emphasis added). It is incongruous to believe that the legislature intended compliance with the Safe Pursuit Act to be irrelevant when elevating a misdemeanor evading an officer charge to a fourth-degree felony.

{41} The language of a statute determines the essential elements of an offense. State v. Rhea, 93 N.M. 478, 480, 601 P.2d 448, 450 (Ct. App. 1979). As a result, the well-reasoned opinion of the Court of Appeals is persuasive that, by using the phrase “in accordance with the provisions of the [Safe Pursuit Act],” the legislature intended compliance with the Act to be an essential element of aggravation of fleeing. State v. Padilla, 2006-NMCA-107, ¶ 13, 140 N.M. 333, 142 P.3d 921. When the statute’s language is clear and unambiguous, this Court is bound by the plain meaning rule. State ex rel. Helman v. Gallegos, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994). We may depart from the plain language “only under rare and exceptional circumstances.” Crooks v. Harrelson, 282 U.S. 55, 60 (1930). In this case, the Act clearly states that a pursuit must comply with the Safe Pursuit Act. Unless there is a clear intent otherwise, we must assume that the legislature chose its words advisedly. State v. Maestas, 2007-NMSC-001, ¶ 22, 140 N.M. 836, 149 P.3d 933 (citations omitted). We must do so even if we believe that the legislature did not consider all of the consequences that would result from its choice of words. Burch v. Foy, 62 N.M. 219, 223, 308 P.2d 199, 202 (1957).

{42} The majority renders meaningless and superfluous the language “in accordance with the provisions of the [Safe Pursuit Act.]” Section 30-22-1.1(A). This approach violates the rule of statutory construction that a court must construe statutes to avoid rendering a portion of the statute superfluous. State v. Javier M., 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1.

{43} Interpreting the aggravated fleeing statute to require compliance with the Safe Pursuit Act gives effect to the entire statutory scheme. As noted by the Court of Appeals, it seems reasonable that the legislature included the phrase “in pursuit in accordance with the provisions of the [Safe Pursuit Act]” to “motivate police to abide by the legislature’s promulgated rules regarding safe pursuits.” Padilla, 2006-NMCA-107, ¶ 13 (citations omitted). The Court of Appeals held that “[t]his reading promotes the policy objectives of the Act and the aggravated fleeing statute by (1) more severely punishing a person who flees in a car in a dangerous manner, while at the same time (2) requiring that police obey the legislature’s rules relating to high speed pursuits.” Id. ¶ 14. One important rule is not engaging in a high speed pursuit when the suspect does not pose a clear and immediate threat of death or serious injury to others.

{44} The majority’s concern that proof of compliance with the Safe Pursuit Act will be unorthodox and consume greater resources is misplaced. Majority Opinion ¶ 23. Just as a jury is instructed to consider whether an officer was acting in the lawful discharge of his or her duties when a defendant is charged with evading a police officer, a jury can be instructed to consider whether a police officer initiated a high speed pursuit when having reasonable grounds to believe that the suspect “poses a clear and immediate threat of death or serious injury to others or who the officer has probable cause to believe poses a clear and immediate threat to the safety of others that is ongoing and that existed prior to the high speed pursuit[.]” See § 29-20-4(C) (1). Such an analysis focuses squarely on the conduct of a defendant. A jury can also be instructed to weigh the factors enumerated in the Act and decide whether “the immediate danger to the officer and the public created by the high speed pursuit exceed[ed] the immediate danger to the public if the occupants of the motor vehicle being pursued remain[ed] at large.” See § 29-20-4(C)(2)-(3). Indeed, the majority has rewritten the crime of aggravated fleeing to require a greater showing for the misdemeanor crime of evading a police officer than what is required for the felony. To prove the misdemeanor, the prosecution must prove beyond a reasonable doubt that the officer was in the lawful discharge of his or her duties, but such a showing is not required under the majority construction of aggravated fleeing. This is inconsistent with the legislature’s intent.

{45} For the foregoing reasons, I respectfully dissent.

EDWARD L. CHÁVEZ,
Chief Justice

I CONCUR:
CHARLES W. DANIELS, Justice
Opinion Number: 2008-NMSC-007

Topic Index:
Criminal Law: Driving While Intoxicated (DWI)
Criminal Procedure: Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
JOHN C. DAY, III,
Defendant-Respondent.
No. 29,953 (filed: January 8, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
KAREN L. PARSONS, District Judge
GARY K. KING
Attorney General
STUART M. BLUESTONE
Chief Deputy Attorney General
MARGARET MCLEAN
Assistant Attorney General
Santa Fe, New Mexico
SCOT D. KEY
District Attorney
Alamogordo, New Mexico
for Petitioner

JOHN BIGELOW
Chief Public Defender
WILLIAM A. O’CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

KARI E. BRANDENBURG
GARY J. CADE
Albuquerque, New Mexico
for Amicus Curiae
Amicus Curiae
City of Albuquerque

ROBERT M. WHITE
PETER L. DINELLI
RICHARD J. MORAN
Albuquerque, New Mexico
for Amicus Curiae

DONNA M. BEVACQUA-YOUNG
Santa Fe, New Mexico
for Amicus Curiae
New Mexico District
Attorneys’ Association

JANICE STITZIEL BLOOM
Irving, Texas
for Amicus Curiae
Mothers Against Drunk Driving

Opinion

PATRICIO M. SERNA, JUSTICE

John C. Day, III, (Defendant) was convicted of driving with an alcohol concentration of eight one-hundredths (0.08) or more in his breath or blood (third offense), known as per se DWI, and consumption or possession of an open container of an alcoholic beverage. The Court of Appeals reversed Defendant’s conviction for per se DWI based on insufficient evidence because the State did not present scientific retrograde extrapolation evidence, which the Court of Appeals concluded was necessary to prove a nexus between Defendant’s breath alcohol concentration (“BAC”) test result of 0.08 taken one hour and six minutes after Defendant was arrested and Defendant’s BAC at the time of driving. State v. Day, 2006-NMCA-124, ¶ 2, 140 N.M. 544, 144 P.3d 103, cert. granted, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102. Our review of the evidence and pertinent case law compels our conclusion that Defendant’s conviction for per se DWI was supported by sufficient evidence. Accordingly, we reverse the Court of Appeals for the reasons that follow.

1. FACTS

On March 12, 2004, Defendant was charged by criminal complaint with (i) alternative counts of driving under the influence of intoxicating liquor (third offense), contrary to NMSA 1978, Sections 66-8-102(A) [hereinafter “the impairment charge”], 66-8-102(F)(2) (1953, as amended through 2003), or driving with an alcohol concentration of eight one-hundredths (0.08) or more in his breath or blood (third offense), contrary to NMSA 1978, Sections 66-8-102(C) [hereinafter, “per se DWI”], 66-8-102(F)(2) (1953, as amended through 2003), and (ii) consumption or possession of an open container of an alcoholic beverage, contrary to NMSA 1978, Section 66-8-138 (1989, as amended through 2001).

The charges arose from a November 20, 2003, stop by New Mexico State Police Officer Chad Casson (Officer Casson), who was stationed at U.S. 70 and Ruidoso Downs in Lincoln County, running stationary radar on passing cars. Defendant drove by, and Officer Casson noticed that the license plate lamp was not illuminated, as required by law. Thus, Officer Casson pulled Defendant over and advised him of the reason for the stop. As he was speaking to Defendant, Officer Casson noticed that the odor of an alcoholic beverage was emanating from inside the vehicle. Officer Casson asked Defendant to exit the vehicle, and thereupon observed that the odor was emanating from Defendant. In addition, Officer Casson noticed that Defendant had bloodshot, watery eyes and that “[h]is speech was a little slurred.” Defendant stated to Officer Casson that he had a few beers that evening, and Officer Casson recovered a half-full twelve-ounce can of Budweiser beer on the seat of the car which was still cool to the touch, “a freshly
opened can,” as Officer Casson described it. Officer Casson had not noticed any erratic driving, speeding, or traffic violations on the part of Defendant. The sole reason for the stop was Defendant’s unilluminated license plate.

[4] Officer Casson had Defendant perform two field sobriety tests, both of which he failed. First, during the one-leg stand, Defendant “swayed side to side to try to keep his balance instead of keeping his hands by his side and watching his toe and counting to 30 as instructed.” Then while performing the walk-and-turn test, Defendant “missed heel-to-toe and took ten steps instead of nine.” Based on these observations, Officer Casson placed Defendant under arrest for driving while intoxicated.

[5] After placing Defendant under arrest, Officer Casson read Defendant the New Mexico Implied Consent Act. See NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2003). BAC tests were administered on Defendant one hour and six minutes after he was arrested. The parties stipulated to the admission at trial of the logbook from the breathalyzer machine, on which Defendant’s BAC was measured, as well as the standards that indicate the machine was in proper working order and correctly calibrated. In addition, the parties stipulated to admission of Defendant’s breath test results, which were 0.08 on two different tests, as well as the time of the tests.

[6] After the State rested its case, defense counsel moved for a directed verdict with respect to the per se DWI charge. Defense counsel argued that, since Defendant’s BAC was measured an hour and six minutes after he was arrested, the State was required to produce retrograde extrapolation or other evidence to prove Defendant’s BAC at the time of driving. The trial court denied the motion, stating that “[i]n light of the fact that the breath test was taken within an hour I don’t think I need extrapolation evidence.” Defense counsel then moved for a directed verdict as to the impairment charge, which the trial court also denied.

[7] The defense presented two witnesses, Dr. Edward Reyes (Dr. Reyes) and Defendant. Dr. Reyes has a Ph.D. in pharmacology and is a semi-retired faculty member of the University of New Mexico School of Medicine’s Department of Pharmacology. He testified as an expert regarding the effects of alcohol on the body, including how it is absorbed, distributed, metabolized, and eliminated by the body. Dr. Reyes explained that a person’s BAC rises during the absorption period, which he stated “can take anywhere from 20 minutes to six hours,” depending on what else is in the stomach. A full stomach can slow down the process of absorption, according to Dr. Reyes. Dr. Reyes acknowledged that the average absorption period lasts three hours and that the absorption takes place during the length of time that the person is drinking. After the alcohol reaches a concentration point, the BAC peaks. Then, the BAC begins to decline during metabolism and elimination by the body. Dr. Reyes described this process as the “concentration time curve.”

[8] Dr. Reyes opined that Defendant was in the absorption phase at the time he was stopped. He based his opinion on the fact that there was a fresh, cold open container of beer in the car, from which he inferred that Defendant had been drinking recently before being stopped. Dr. Reyes, however, acknowledged that he did not know whom was drinking the beer, as both Defendant and a passenger were in the car. Dr. Reyes also acknowledged that he had no personal knowledge of what Defendant had eaten, how long Defendant had been drinking, his tolerance for alcohol, or his history of drinking. Dr. Reyes answered hypothetical questions, including the following:

Q: . . . Hypothetically, if somebody ate a dinner, drank a few beers, immediately got into their vehicle and got onto the roadway and got stopped by a police officer and was later taken to a police station and tested, at the time of driving would you expect that person to be in the absorption phase or the elimination phase?

A: In the absorption phase.

Q: And why would that be?

A: Because he’s got a full pot of food and alcohol in his stomach and he hasn’t had time to have that stomach empty into the small intestine and have it absorbed.

[9] Defendant then took the stand. He testified that on the night he was arrested, he prepared a pasta dinner for himself and his two roommates. During the preparation of dinner, which Defendant testified took about two hours, he consumed two twelve-ounce Budweiser beers. Then while eating dinner, Defendant consumed another twelve-ounce Budweiser beer. Right after dinner, Defendant and one of his roommates drove to get cigarettes. Defendant was pulled over about two hundred yards from his home. He estimated that seven to ten minutes had elapsed between the time he finished dinner and was pulled over.

[10] After resting, defense counsel again moved for a directed verdict with respect to the per se DWI charge, arguing that the State had presented no extrapolation evidence to relate Defendant’s 0.08 BAC test results back to the time of driving and that Dr. Reyes had testified that Defendant’s BAC was likely lower at the time of driving than at the time of testing. The trial court again denied the motion, reasoning in part that “[t]he case law that we’ve been through indicates that if we’re within two hours then I don’t have to have extrapolation evidence, at least that’s how I read it.” Defense counsel also renewed his motion for a directed

created a special per se DWI provision for drivers of commercial vehicles. The 2003 N.M. Laws, ch. 90, section 3, effective March 28, 2003, made changes to both paragraphs of subsection (C). The 2003 N.M. Laws, ch. 164, section 10, effective July 10, 2003, again rewrote subsection (C), deleting the provision regarding drivers of commercial vehicles and again consolidating the provision into a single subsection, to read in full, “It is unlawful for a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state.” The law was codified as such pursuant to NMSA 1978, Section 12-1-8(A) (1977), which provides that when the Legislature enacts two or more acts during the same session amending the same section of our statutes that “the last act signed by the governor shall be presumed to be the law and shall be compiled in the NMSA.” Accordingly, Section 66-8-102(C) (1953, as amended through 2003) is the provision which applies to Defendant and the provision to which we refer when discussing Defendant’s conviction.
was not supported by sufficient evidence, his conviction for per se DWI, claiming it of an open container. Defendant appealed his conviction for per se DWI, claiming it was not supported by sufficient evidence, particularly due to the lack of extrapolation evidence relating Defendant’s BAC results back to the time of driving. Defendant further argued that the trial court erred in denying his motion to dismiss based on alleged violations of the six-month rule and for alleged speedy trial right violations. Defendant did not appeal his conviction for consumption or possession of an open container.

{12} In a published opinion, the Court of Appeals reversed Defendant’s conviction for per se DWI based on insufficient evidence. Day, 2006-NMCA-124, ¶ 2. The Court held that absent scientific evidence of the alcohol absorption and elimination processes tied to the facts that must be considered in scientifically evaluating Defendant’s alcohol absorption rate, the jury could not have rationally inferred that Defendant had a .08 alcohol content at the time of driving based on a .08 breath test reading taken an hour and six minutes later.

Id. ¶ 2. The Court concluded that “the State failed to prove the required nexus between Defendant’s later-taken .08 breath test result and his alcohol level at the time he was driving.” Id. The Court went on to note that many traffic stop circumstances exist in which the State seeks to prove a breath alcohol content (BAC) of .08 or more at the time of driving based on the result of a later-taken test reading. In many of these cases the later reading may be at or not far above .08 BAC. And, from a review of literature on the subject, it is equally apparent that in these instances, a scientific retrograde extrapolation process is necessary in order to arrive at a rational inference of the BAC level at the time of driving.

Id. ¶ 3.

{13} However, the Court of Appeals also noted that scientific retrograde extrapolation evidence would not always be required. For example, in some cases, “common experience bearing on behavior of an intoxicated person might be sufficient, with a later-taken BAC reading, to prove a .08 or more BAC at the time of driving.” Id. ¶ 22 (citing State v. Baldwin, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394). Additionally, the Court did not foreclose the case in which a BAC test result “obtained immediately after a traffic stop” or an “extremely high test result” may provide sufficient evidence to support a per se DWI conviction. Id. ¶ 23. However, the Court pointed out that none of these scenarios reflected the facts of the instant case. Id.

{14} The State appealed. We granted certiorari to review whether sufficient evidence supported Defendant’s conviction for per se DWI and whether the Court of Appeals erred in requiring the State to present scientific retrograde extrapolation evidence in this case. Day, 2006-NM CERT-009.

II. STANDARD OF REVIEW

{15} We review Defendant’s conviction for per se DWI to determine whether it is supported by sufficient evidence. See State v. Sutphin, 107 N.M. 126, 130-31, 753 P.2d 1314, 1318-19 (1988). Our review requires us to examine the record to determine “whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” Id. at 131, 753 P.2d at 1319. We view the evidence in the light most favorable to the verdict, “resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict.” Id. Our role is not to weigh the evidence, nor do we “substitute [our] judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.” Id. In our assessment, we recognize that the fact finder is free to reject the defendant’s version of the events. Id. In sum, we will not disturb the jury’s verdict if we conclude it to be supported by substantial evidence. Id.

III. DEFENDANT’S CONVICTION FOR PER SE DWI IS SUPPORTED BY SUBSTANTIAL EVIDENCE

{16} At the time of Defendant’s arrest in 2003, the per se DWI statutory provision, read as follows, “It is unlawful for a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state.” Section 66-8-102(C) (1953, as amended through 2003). Section 66-8-102(C) is considered a per se statute because “violation is established by the BAC without any evidence of impairment.” Bierner v. State, Taxation and Revenue Dep’t, Motor Vehicle Div., 113 N.M. 696, 698, 831 P.2d 995, 997 (Ct. App. 1992). Our case law has consistently held that the per se DWI offense “relates to the time of driving.” State v. Christmas, 2002-NMCA-020, ¶ 20, 131 N.M. 591, 40 P.3d 1035. This requirement is reflected in the relevant uniform jury instruction for Section 66-8-102(C), UJI 14-4503 NMRA, which states that the defendant must have a BAC level of .08 or more “[a]t that time,” i.e., at the time the defendant was driving. See Christmas, 2002-NMCA-020, ¶ 20. Indeed, in State v. Baldwin, the Court of Appeals stated unequivocally that “[t]iming is an essential element of the crime” of per se DWI. 2001-NMCA-063, ¶ 8. Therefore, “[t]he State must prove a nexus between a BAC of .08 or more and the time ‘defendant operated a motor vehicle.’” Id. (quoting UJI 14-4503). This is so because “a BAC reading from a laboratory test is just a sterile number; by itself it tells us nothing about a driver’s condition hours earlier.” Id. ¶ 17.

{18} We find State v. Christmas, in which the Court of Appeals affirmed the defendant’s conviction for per se DWI, particularly instructive in our review of the instant case. 2002-NMCA-020, ¶ 2. Therein, the defendant was pulled over after a police officer noticed his license plate was not illuminated, and the officer observed the defendant’s vehicle crossing the center line. Id. ¶ 3. Upon pulling the defendant over, the officer noticed the odor of alcohol and asked the defendant if he had been drinking. Id. The defendant “acknowledged that he had consumed alcohol earlier, but said he had ‘slept some’ in the interim before driving.” Id. The officer then had the defendant perform three field sobriety tests, and the results were mixed, with the defendant failing one and performing marginally on another. Id. ¶¶ 3-5. In addition, the officer testified that the defendant “appeared ‘agitated,' displayed an ‘aggravated attitude,'
and seemed “a little bit nervous.”” Id. ¶ 5. The officer arrested the defendant and took him to the police station where a BAC test was administered “about an hour after [the] [d]efendant had stopped driving.” Id. ¶ 6. The defendant’s results were 0.09 and 0.08. Id.

19 The defendant challenged the sufficiency of the evidence to support his conviction for per se DWI, contending that the State failed to relate his BAC results to the time of driving, an hour earlier. Id. ¶ 19. The Court focused on the timing of the BAC test and framed the issue as “whether a lapse of only an hour [as opposed to the two hours and fifteen minutes in Baldwin] require[d] specific relation-back testimony or other corroborating evidence as in Baldwin.” Id. ¶ 20. The Court contrasted the case to cases in other jurisdictions, as well as New Mexico cases such as Baldwin, in which the courts “reversed DWI convictions based upon a lack of relation-back evidence . . . when there is a significant time lapse between the time of driving and the time of BAC testing, usually two hours or more.” Id. ¶¶ 21-22.

Since the defendant’s BAC was measured only one hour after driving, “it [is] less difficult to establish a relation-back nexus than if more time had elapsed.” Id. ¶ 22 (citing Baldwin, 2001-NMCA-063, ¶ 18). As the Legislature, at that time, had not prescribed a statutory relation-back time period “so that a jury could rely on a subsequent, timely BAC test result as a presumptive surrogate for what the BAC likely was at the time of driving,” the Court “look[ed] to legislative intent for guidance with regard to what the legislature envisioned when it presented a per se offense at the time of driving.” Id.

20 The Court enumerated the multiple events that must occur between the time of driving and BAC testing, thus evidencing the inevitability of “[s]ome reasonable delay” which the Legislature necessarily must have had in mind, e.g., “the time required to stop and question a suspect, conduct field sobriety testing, complete an arrest, transport the suspect to a testing site with a properly calibrated breathalyzer machine, and conduct the requisite twenty-minute observation period before breath testing.” Id. ¶ 23 (citing State v. Gardner, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465). As the Court put it, “[i]t would be foolhardy to think that the legislature contemplated that BAC readings could be obtained simultaneously with the act of driving.” Id. Thus, the Court concluded “that both the legislature and [this Court] contemplated tolerance of some reasonable and inevitable delay in testing, and intended that otherwise valid test results would be admitted into evidence notwithstanding such a delay.” Id.

21 In reviewing the sufficiency of the evidence, the Court considered “a sliding scale” of “the factors discussed in Baldwin,” namely the length of the delay; the extent to which the BAC test results exceed the statutory limit; and “the existence of other corroborating behavioral evidence.” Id. ¶ 24. With respect to the delay, the Court noted that it “did not exceed one hour,” and “[i]t is difficult to envision a reasonable delay of anything less than an hour from the time of driving to the time of testing, given all the events that must usually take place in the interim.” Id. ¶ 25. In addition, evidence was presented “from which the jury could have drawn a rational inference that [the] [d]efendant’s BAC at the time of driving was actually higher than the .08 and .09 readings obtained at the time of testing,” id., including the testimony of the same expert, Dr. Reyes, who testified in the instant case, id. ¶ 26.

22 As in the instant case, Dr. Reyes testified with respect to the absorption, peaking, and elimination phases of alcohol metabolism and how difficult it is to extrapolate back from a BAC test to the time of driving. Id. Although Dr. Reyes “warned against trying to use a subsequent BAC test score to calculate an individual’s BAC at the time of driving,” id. ¶ 26, the Court noted that the jury was not bound by Dr. Reyes’ conclusion, id. ¶ 27 (citing State v. Chamberlain, 112 N.M. 723, 732, 819 P.2d 673, 682 (1991)). Indeed, the jury could have rejected the defendant’s version of the facts, whilst being informed by Dr. Reyes’ explanation of the “alcohol time response curve.” Id. The Court explained as follows:

Based on [the] [d]efendant’s own admission that he had “slept some” after drinking but before taking the wheel, coupled with the additional hour that passed before BAC testing, and based on Dr. Reyes’ testimony, the jury could reasonably have inferred that [the] [d]efendant’s BAC had “peaked” earlier in the evening, and that he was well into the “elimination stage” at the time of BAC testing. If this was the case, then [the] [d]efendant’s BAC level at the time of driving would have been higher, not lower, than the BAC level recorded by the breathalyzer tests. This inference, fully supported by the evidence, would support a conclusion that [the] [d]efendant was driving with a BAC over the legal limit. [The] [d]efendant offered no specific evidence to support a theory that his blood-alcohol level may have “peaked” at some point after he actually operated his vehicle. In addition, the evidence was that [the] [d]efendant failed one field sobriety test, was given the benefit of the doubt on another on which his performance was marginal, was driving erratically, and responded in a nervous and agitated way when stopped.

Id. ¶ 28 (internal citation omitted). The Court concluded this to be sufficient evidence to support the defendant’s per se DWI conviction. Id. ¶ 29.

23 We now turn to an examination of the evidence in the instant case “to ascertain whether a rational jury could have drawn reasonable inferences regarding Defendant’s BAC at the time of driving.” State v. Martinez, 2002-NMCA-043, ¶ 13, 132 N.M. 101, 45 P.3d 41. The facts of the instant case are strikingly similar to those in Christmas and so shall be our conclusion. Officer Casson pulled Defendant over for an unilluminated license plate, although, unlike in Christmas, he reported no erratic driving. Officer Casson likewise smelled an odor of alcohol emanating from Defendant, and Defendant admitted that he had been drinking. Like the defendant in Christmas, Defendant performed poorly on his field sobriety tests, failing both of them. While Defendant did not display the agitated, nervous, or aggravated attitude of the defendant in Christmas, he displayed several indicia of intoxication, including bloodshot, watery eyes and slurred speech.

24 Furthermore, as in Christmas, the jury in the instant case was not bound by Dr. Reyes’ conclusion that Defendant was still in the absorption phase when he was driving. Rather, viewed in the light most favorable to the verdict, Dr. Reyes’ testimony regarding the “concentration time curve” (the “alcohol time response curve” in Christmas) could well have informed the jury’s verdict that Defendant’s BAC was 0.08 or higher at the time of driving.
Here, as in *Christmas*, the combination of Defendant’s own admission that he had been drinking for at least two hours while preparing and eating dinner before getting behind the wheel to buy cigarettes, coupled with the hour and six minutes that elapsed before Defendant’s BAC was tested, and based on Dr. Reyes’ testimony regarding the “concentration time curve,” the jury could reasonably have inferred, as it did in *Christmas*, that Defendant’s BAC had peaked earlier in the evening and that Defendant was already in the elimination and metabolism stage at the time his BAC was tested. Indeed, Dr. Reyes testified that the absorption phase can last anywhere from twenty minutes to six hours, with three hours being the average. Viewing the evidence in the light most favorable to the verdict, Defendant would have fallen into that time period, and the jury could reasonably have concluded that he was already in the elimination and metabolism stage. It would then follow that Defendant’s BAC level at the time of driving would have been higher, not lower, than the BAC level recorded following his arrest. Indulging this inference, which the evidence fully supports, the jury could reasonably have concluded that Defendant’s BAC at the time of driving was 0.08 or higher.

{25} Indeed, the only basis for Dr. Reyes’ opinion that Defendant was in the absorption phase was the fresh open container of beer in the car, i.e., Dr. Reyes inferred from the open container that Defendant was drinking up to the time he was pulled over. However, viewing the evidence in the light most favorable to the verdict, the jury could have inferred that the passenger, not Defendant, was drinking from the open container. Furthermore, other corroborating behavioral evidence was presented, namely that Defendant failed the two field sobriety tests and that he had bloodshot, watery eyes and slurred speech, which could have helped to guide the jury’s understanding of the concentration time curve and Defendant’s position on it at the time of driving.

{26} Normally, the State bears the burden of proving the defendant’s BAC at the time of driving. *Baldwin*, 2001-NMCA-063, ¶ 7; see also UJI 14-4503. Because the State did not present its own scientific retrograde extrapolation evidence, the State failed to meet its burden of proof at the close of its case. Had Defendant not presented any additional evidence, we would be unable to uphold his conviction. On review, however, we consider all of the evidence presented in the case. *State v. Clifford*, 117 N.M. 508, 512, 873 P.2d 254, 258 (1994). Defendant moved for a directed verdict at the close of the State’s case, which was denied. Defendant then proceeded to present his own evidence. In so doing, he waived any claim that this denial of the directed verdict was in error or that the evidence at the close of the State’s case was insufficient for submission to the jury. See *State v. Smith*, 51 N.M. 184, 189, 181 P.2d 800, 803 (1947). Based on the evidence presented and the testimony of Dr. Reyes, the jury had both the information and the tools necessary to reach the verdict it did. Therefore, we conclude that Defendant’s conviction for per se DWI was supported by substantial evidence.

{27} We also take this occasion to note a recent statutory amendment by our Legislature, which will foreclose cases such as the instant one in the future. Until the 2007 session, the Legislature had not specified an outer time limit for a BAC test taken after driving to prove a defendant’s BAC at the time of driving, as required by our per se DWI statute. Given the inevitability of delay between the time of driving and the time of BAC testing, *Christmas*, 2002-NMCA-020, ¶ 23, as well as our case law’s recognition of the difficulty of extrapolating backward in time, even for experts, *Baldwin*, 2001-NMCA-063, ¶ 17, the Court of Appeals had twice called on the Legislature “to create a statutory inference that a 0.08 BAC within a specified time, say two or three hours after driving, is prima facie evidence of a *per se* violation of Section 66-8-102(C), which a defendant could then try to rebut.” Id. ¶ 19; see also *Christmas*, 2002-NMCA-020, ¶ 22. In the 2007 session, the Legislature amended Section 66-8-102(C)(1) to read:

It is unlawful for a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person’s blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.

2007 N.M. Laws, ch. 322, § 1 (emphasis added); see also Section 66-8-102(C)(1) (1953, as amended through 2007).

{28} While Defendant’s BAC tests were taken within one hour and six minutes of driving and would easily fall within that three-hour time limit, the amendment to our per se DWI statute will not eliminate the need to show a nexus or to relate a BAC test result to the time of driving in all situations. Indeed, we foresee at least two situations in which scientific retrograde extrapolation evidence would be necessary for the State to meet its burden.

{29} In the first situation, the State can use scientific retrograde extrapolation evidence to prove that a BAC test taken after three hours and below 0.08 shows that the defendant had an actual BAC of 0.08 or higher within three hours of driving. Similarly, a defendant can use retrograde extrapolation evidence to show that a BAC test taken after three hours and above 0.08 shows that the defendant had an actual BAC of less than 0.08 within three hours of driving.

{30} In the second situation, the State can use scientific retrograde extrapolation evidence to prove that a BAC test taken within three hours but below 0.08 shows that the defendant had an actual BAC of 0.08 or higher within three hours. For example, a test taken two hours and forty-five minutes after driving might show a BAC of 0.07. If the defendant was in the elimination phase for some or all of the time before the test, then his or her BAC would have been higher before the test. Of course, aggravated DWI within the three-hour period will also be an issue.

{31} In either of these situations, the party seeking to prove a BAC at an earlier time must use scientific retrograde extrapolation evidence. A BAC test is a quantitative measurement of a physical property. See *Baldwin*, 2001-NMCA-063, ¶ 17. To extrapolate from the BAC at the time of testing to the BAC at an earlier time, one must know the rate at which the BAC changes over time. See *Christmas*, 2002-NMCA-020, ¶ 26. This rate is not constant, but varies over time, describing a curve rather than a straight line. See id. Determining the shape of the curve is a science. See Jim Frasier, Annotation, Admissibility and Sufficiency of Extrapolation Evidence in DUI Prosecutions, 119 A.L.R.5th 379 (2004). The exact shape of the curve depends on a number of factors, including inter alia the
type of alcohol consumed, the time period over which the alcohol was consumed, the time of the last drink, and when and what the defendant last ate. See Christmas, 2002-NMCA-020, ¶ 26. These factors can be quantified, although sometimes the supporting evidence may not be readily available. However, the burden of finding such evidence is appropriate for the State to bear when attempting to convict a person suspected of any crime, and should the State choose to pursue a per se DWI conviction, it must take the type of investigatory work required to prove a defendant’s guilt beyond a reasonable doubt.

{32} In addition, we must clarify the appropriate use of corroborating behavioral evidence. See Day, 2006-NMCA-124, ¶¶ 22, 26. Such evidence may be of limited relevance in the scientific retrograde extrapolation analysis. However, because behavioral evidence is qualitative, it should be used with care to support a quantitative analysis. Contrary to what the Court of Appeals stated below, see id., behavioral evidence by itself cannot be sufficient to show the required nexus between a BAC test and an earlier BAC. It may, however, have limited relevance when the factors that underlie the shape of the concentration time curve are subject to conflicting testimony. For example, there may be conflicting testimony over whether a defendant had just started drinking or had been drinking for some period of time. Watery eyes and slurred speech, as in the instant case, would support an inference that the defendant had not just started drinking. This inference would support the assumptions used to generate the concentration time curve. The evidence may not show the precise times when the defendant drank, but it might help narrow them down and thus make the concentration time curve more accurate.

IV. CONCLUSION

{33} For the reasons set forth above, we reverse the Court of Appeals and affirm Defendant’s conviction for per se DWI. Accordingly, the question of whether Defendant’s prosecution constituted a violation of the sixth-month rule must be answered. However, because the parties have not briefed the issue to this Court, we remand to the Court of Appeals for a determination of that issue.

{34} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice
RICHARD E. RANSOM (Pro Tem)

OPINION

PATRICIO M. SERNA, Justice

{1} On motions for rehearing, the opinion filed October 25, 2007, is withdrawn and the following opinion is substituted in its place. The City of Santa Fe’s motion for rehearing is otherwise denied. Maria Stennis’s motion for rehearing is likewise denied. The Court, after considering the parties’ supplemental briefing, decides, as a matter of law, that the Section 3-53-1.1(E) requirement of obtaining a “permit” from the municipality was duly satisfied by the municipality’s 1999 Ordinance, which provided an application process through which the applicant must obtain authorization from the city before drilling a well. Section 3-53-1.1 does not require a municipal ordinance to track its language.

{2} Maria Stennis (Stennis) submitted a domestic well application to the State Engineer (SE) in 2003. The SE approved Stennis’s application, which showed that her proposed well might be located within two hundred feet of a City of Santa Fe (the City) water distribution line. Under a local ordinance, the City prohibited all wells within two hundred feet of a water distribution line. Stennis filed a complaint in district court seeking a declaratory judg-

{33} We note that the Court of Appeals used “Office of the State Engineer” and “State Engineer” interchangeably throughout its opinion. See, e.g., Stennis, 2006-NMCA-125, ¶¶ 11, 12. For purposes
ment that the City did not have the authority to regulate domestic wells by municipal ordinance. On cross-petitions for summary judgment, the district court granted the City’s motion and denied Stennis’s motion, concluding that Stennis must obtain a City permit before using her domestic well. Stennis appealed to the Court of Appeals, which affirmed in a split decision. *Stennis v. City of Santa Fe*, 2006-NMCA-125, ¶¶ 5, 30, 140 N.M. 517, 143 P.3d 756. We granted certiorari to determine whether the City had the authority to enact a local ordinance governing domestic wells. 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102.

{3} The facts in this case are very similar to the facts in *Smith v. City of Santa Fe*, 2007-NMSC-055, __ N.M. __, 171 P.3d 300. In that case, we determined that the plaintiff could challenge the same ordinance at issue here through a declaratory judgment action, “provided that the declaratory judgment action is not used to circumvent established procedures for seeking judicial review of a municipality’s administrative decisions.” *Id.* ¶ 1. We also held that the City lawfully enacted this ordinance under its home rule authority. *Id.* ¶ 28 (citing *Smith v. City of Santa Fe*, 2006-NMCA-048, ¶¶ 6-25, 139 N.M. 410, 133 P.3d 866). The instant case differs because, prior to Stennis’s application for an SE permit, the Legislature explicitly gave municipalities the authority to regulate domestic wells, provided that municipalities adhere to certain procedures. See NMSA 1978, § 3-53-1.1 (2001). One such procedural requirement is that a municipality must file its ordinance with the SE. Section 3-53-1.1(D). We conclude that Section 3-53-1.1(D)’s filing requirement is determinative of Stennis’s case. We further conclude that a question of material fact exists in this case that must be decided by the district court: whether the City had its ordinance on file with the SE before Stennis applied to the SE for her domestic well permit. While the City could provide the

other procedural protections in Section 3-53-1.1 without explicitly including them in the ordinance’s language, the filing of its ordinance with the SE is mandatory.

{4} Therefore, we remand to the district court to determine whether the City had its ordinance on file with the SE before Stennis applied to the SE for a domestic well permit. If the City filed its ordinance before Stennis applied for her permit, Stennis must submit a domestic well application for the City’s authorization and the City must provide her a procedure in accordance with Section 3-53-1.1. If the City did not file its ordinance before Stennis applied for her permit, the City is without authority to regulate Stennis’s well and she is permitted to use it.

I. FACTS

{5} The City became a home rule charter municipality in 1998. In 1999, pursuant to its home rule authority, the City Council passed Ordinance No. 1999-3, Section 1, entitled “Regulation of New Domestic Wells,” codified at Santa Fe, N.M., Code chapter XXV, section 1.10 (1999) [hereinafter “1999 Ordinance”]. This ordinance provided that “[a]ll domestic well applications within the city’s municipal water service area” submitted to the SE “shall be denied if the applicant’s property boundary is within two hundred feet (200’) of a water distribution main.” *Id.* In practice, a person wanting to drill a domestic well within the City limits would apply to the SE for a permit, and the SE would hold these applications for review by City staff. The City would then inform the applicant that the applicant needed City authorization for the well and that the 1999 Ordinance prohibited the drilling of domestic wells if the property boundary was within two hundred feet of a City water distribution line.

{6} Thereafter, in 2001, the Legislature enacted Section 3-53-1.1, which reads, in pertinent part:

A. A municipality may, by ordinance, restrict the drilling of new domestic water wells, except for property zoned agricultural, if the property line of the applicant is within three hundred feet of the municipal water distribution lines and the property is located within the exterior boundaries of the municipality.

D. A municipality shall file with the state engineer its municipal ordinance restricting the drilling of new domestic water wells.

(Emphasis added.) The 1999 Ordinance remained in effect until March 31, 2004, when the City Council passed an ordinance that tracked the language of Section 3-53-1.1. Compare Santa Fe, N.M., Ordinance No. 2004-7, § 1, codified at Santa Fe, N.M., Code ch. XXV, § 1.10 (2004) with § 3-53-1.1.

{7} Pursuant to NMSA 1978, Sections 72-12-1 and 72-12-1.1 (2003), Stennis applied for a domestic well permit from the SE and, on September 24, 2003, she received a permit to drill a domestic well on her property. The SE notified the City of the permit and explained that the well might fall within the boundaries of the area covered by the 1999 Ordinance. In late September 2003, Stennis received notice from the City regarding the provisions of the 1999 Ordinance. The City informed her that she was required to obtain city authorization for the well because the boundary of Stennis’s property was located within the city limits.

{8} Stennis never requested authorization from the City, but, on March 3, 2004, over five months after receiving the City’s notice, she proceeded to drill her well. The City notified Stennis that drilling should stop, and Stennis applied for a restraining order. On March 5, 2004, the parties entered into a stipulated agreement, which allowed Stennis to complete drilling of the well but forbade her from pumping or using any

of this opinion, however, that distinction is one without a difference. Santa Fe, N.M., Code chapter XXV, section 1.10 (2004) and NMSA 1978, Section 3-53-1.1 (2001) both refer solely to the “State Engineer” and not to the “Office of the State Engineer.” Thus, for the sake of consistency, this opinion refers solely to “State Engineer,” which should be read to encompass not only the individual but also the Office of the State Engineer.

2New Mexico Constitution, article X, section 6(D) states: “A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.” Home rule municipalities need not look to the Legislature for a grant of power to act, but need only look for limitations on their power to act. *Apodaca v. Wilson*, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974).

3In 2003, Section 72-12-1 was amended. What was formerly contained in Section 72-12-1(A) (2001) was recodified as Section 72-12-1.1. The recodification did not change the language relating to domestic wells, and both parties cite to Section 72-12-1 for information actually set forth in Section 72-12-1.1.
water until the court rendered a decision on Stennis’s right to drill the well.

Even though the City informed Stennis that she needed its authorization to drill a well and that she was bound by the 1999 Ordinance, Stennis did not attempt to challenge this decision through any administrative proceeding. Instead, Stennis filed an amended complaint for declaratory relief, asking the district court to declare that the City had no authority to prohibit the drilling of a domestic well on her property. After a hearing on the parties’ cross-motions for summary judgment, the district court granted the City’s motion and denied Stennis’s motion.

Stennis appealed to the Court of Appeals, which affirmed in a split decision. Stennis v. Lomas Altos, Inc., 2006-NMCA-125, ¶ 1. The Court of Appeals held that, as a home rule municipality, the City had the authority to enact the 1999 Ordinance. Id. ¶ 11. Furthermore, the Court concluded that Section 3-53-1.1, governing municipal authority over domestic wells, did not preempt the 1999 Ordinance. Id. ¶ 24.

Stennis petitioned this Court for certiorari and asked us to determine whether the City was preempted from enacting the 1999 Ordinance regulating domestic wells and whether the City’s failure to adopt an ordinance pursuant to Section 3-53-1.1 until after she began drilling her well leaves the City without authority to regulate her well. Our decision in Smith informs the first question: the City had the authority to enact the 1999 Ordinance. 2007-NMSC-055, ¶ 27. Smith also informs our decision on the second issue. We conclude that the Legislature did not intend to negate the City’s valid authority to regulate domestic wells. Instead, Section 3-53-1.1 affirms this authority, but requires that the City follow a certain procedure, in particular, the filing of the municipal ordinance with the SE. Section 3-53-1.1(D). Because it is unclear whether the City filed the 1999 Ordinance with the SE, we remand this case for a determination of this fact by the district court. If the City filed the 1999 Ordinance before Stennis applied for her SE permit, she must apply for city authorization. On the other hand, if the City failed to file the 1999 Ordinance in accordance with Section 3-53-1.1(D)’s mandatory requirement, it is without authority to regulate Stennis’s well.

We recently explained the standard of review applied when reviewing a trial court’s decision to grant a motion for summary judgment:

An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment.


The instant case requires us to analyze the interaction between Section 3-53-1.1 and the 1999 Ordinance. Interpretation of municipal ordinances and statutes is a question of law that we review de novo. See Smith v. Bernalillo County, 2005-NMCA-012, ¶ 18, 137 N.M. 280, 110 P.3d 496; State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

The City claims that Stennis lacks standing to bring the underlying declaratory judgment action because she failed to exhaust administrative remedies. The City made an identical argument in Smith, 2007-NMSC-055, ¶ 11. Therein, we concluded that a declaratory judgment action is an appropriate method for “challenging the constitutionality or validity of local laws or ordinances” when it does not require fact-finding by the administrative agency. Id. ¶¶ 14-16. Stennis, like the plaintiffs in Smith, “simply asked the district court to determine whether the City’s attempt to regulate the permitting of domestic wells within the City’s municipal limits was appropriate in light of existing state statutes concerning the regulation of wells.” Id. ¶ 18. Furthermore, since Stennis never sought a permit from the City, this declaratory judgment action is not an attempt to circumvent administrative appellate procedures. See id. ¶ 25. Because Smith falls under the rule announced in Smith, we conclude that she has standing to bring this declaratory judgment action challenging the City’s authority to enact the 1999 Ordinance and proceed to address the merits of her claim.

IV. THE 1999 ORDINANCE WAS A VALID EXERCISE OF THE CITY’S HOME RULE AUTHORITY

Stennis claims that the City did not have the authority to enact the 1999 Ordinance. Our holding in Smith is dispositive of the issue and, for that reason, we do not repeat the Smith analysis here. See Smith, 2007-NMSC-055, ¶¶ 28-29. Instead, we reiterate that “the City has[s] the authority to prohibit the drilling of domestic wells” for “the reasons contained in [Smith, 2006-NMCA-048, ¶¶ 6-25].” Id. ¶ 28.

V. SECTION 3-53-1.1 DID NOT NEGATE THE 1999 ORDINANCE, SO LONG AS THE CITY FILED THE ORDINANCE WITH THE STATE ENGINEER

Stennis contends that Section 3-53-1.1 invalidates the 1999 Ordinance because the ordinance did not track the statute’s language regarding procedural protections. The City counters that Section 3-53-1.1 requires only that it enact an ordinance, which in this case was the 1999 Ordinance, and that the other Section 3-53-1.1 requirements were provided for in its domestic well application procedure. We agree with the City, but conclude that Section 3-53-1.1(D) also specifically required the 1999 Ordinance to be filed with the SE to be effective. Therefore, we remand to the district court to determine this factual issue.

Section 3-53-1.1 and the 1999 Ordinance are distinct provisions. Section 3-53-1.1(A) restricts proposed wells within the municipality’s exterior boundaries and within three hundred feet of the distribution line, while the 1999 Ordinance provides for automatic denial of well permit applications within the City’s water service area and within two hundred feet of a water distribution line. Section 3-53-1.1(D) required the City to file the 1999 Ordinance with the SE.

In support of Stennis’s argument that the 1999 Ordinance should track the lan-

4Other Section 3-53-1.1 subsections are not pertinent to this case because they deal with procedures applicable after a landowner has applied for municipal authorization, which Stennis has never done. See, e.g., §§ 3-53-1.1(B), (C), (F), (G).
guage of Section 3-53-1.1, Stennis brings City of Hobbs v. Biswell to our attention. 81 N.M. 778, 473 P.2d 917 (Ct. App. 1970). Therein, the defendant challenged a municipal ordinance regulating pawnbrokers, arguing, in part, that the ordinance was invalid because it did not contain a general welfare clause recital. Id. at 779, 781, 473 P.2d at 918, 920. While the Court of Appeals ultimately held that the ordinance did not require such a recital, it observed that “the direction of definite and certain method of procedure in the grant of power to the municipality excludes all other methods by implication of law.” Id. at 782, 473 P.2d at 921 (quoting City of Clovis v. Crain, 68 N.M. 10, 13, 357 P.2d 667, 669 (1960)).

Stennis suggests that Section 3-53-1.1 sets forth the specific procedure that the City must follow in processing domestic well applications. While Section 3-53-1.1 does set forth the procedure the City must follow in reviewing domestic well applications, we agree with the Court of Appeals that nothing in the statute requires the City ordinance’s language to track the statute’s language. See Stennis, 2006-NMCA-125, ¶ 20 (“Plaintiff . . . argues that the 1999 Ordinance is invalid because it does not include all of [Section 3-53-1.1’s] statutory protections and limitations. . . . [W]e disagree.”).

(19) Section 3-53-1.1(A) does not require a municipal ordinance to track its language. Instead, it allows a municipality to enact an ordinance that will “restrict the drilling of new domestic water wells . . . if the property line of the applicant is within three hundred feet of the municipal water distribution lines.” The plain language of Section 3-53-1.1 accommodates the creation of municipal ordinances related to the regulation domestic wells; it does not require that those ordinances track its language, and we will not read such an additional requirement into the statute. See Cobb v. N.M. State Canvassing Bd., 2006-NMSC-034, ¶ 34, 140 N.M. 77, 140 P.3d 498 (“[W]e will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.”) (quoting Regents of Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236). As the Court of Appeals concluded, Section 3-53-1.1 did not invalidate the 1999 Ordinance because Section 3-53-1.1 “allows adoption of an ordinance to ‘restrict the drilling of new domestic water wells.’ The City had an ordinance, albeit a very basic one, which restricted the drilling of domestic wells.” Stennis, 2006-NMCA-125, ¶ 21 (quoting § 3-53-1.1(A)).

(20) Stennis makes much of the fact that the City acknowledged that it needed to incorporate the Section 3-53-1.1 restrictions into its ordinance and that it did so in 2004. Regardless of what the City believed that it needed to do, the plain language of Section 3-53-1.1 does not require municipal ordinances to track its language. Stennis further argues that the passage of Section 3-53-1.1 suggests no municipality had the authority to prohibit domestic wells before its enactment. The language of Section 3-53-1.1 suggests otherwise.

(21) Under New Mexico law, “a municipality may adopt ordinances or resolutions not inconsistent with” state law. NMSA 1978, § 3-17-1 (1965, as amended through 1993). A municipal ordinance does not conflict with state law unless “the ordinance permits an act the general law prohibits, or vice versa.” Bd. of Comm’rs of Rio Arriba County v. Greacen, 2000-NMSC-016, ¶ 16, 129 N.M. 177, 3 P.3d 672 (quoting State ex rel. Coffin v. McCall, 58 N.M. 534, 537, 273 P.2d 642, 644 (1954)). Our Court of Appeals has further explained that “an ordinance will conflict with state law when state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy.” New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43, 138 N.M. 785, 126 P.3d 1149. We presume that the Legislature was aware of this legal principle and did not intend to invalidate the 1999 Ordinance when it passed Section 3-53-1.1. See Benavidez v. Sierra Blanca Motors, 122 N.M. 209, 213, 922 P.2d 1205, 1209 (1996) (“When interpreting a statute . . . [w]e presume that the Legislature is well informed regarding existing statutory and common law and does not intend to enact a nullity.”).

(22) The 1999 Ordinance is neither inconsistent with nor antagonistic to Section 3-53-1.1 because it restricts the same activities as Section 3-53-1.1 but does so in a less restrictive manner. See McCall, 58 N.M. at 538, 273 P.2d at 644 (concluding that an ordinance, which was less restrictive than the corresponding state statute, “merely complement[ed] the statute and [was] nowhere antagonistic therewith”). The Legislature likely had the 1999 Ordinance in mind when it enacted Section 3-53-1.1 because Section 3-53-1.1 is more restrictive than the 1999 Ordinance: the 1999 Ordinance prohibited drilling within two hundred feet of a water distribution line, while Section 3-53-1.1 prohibits domestic wells within three hundred feet. Because the 1999 Ordinance was less restrictive than Section 3-53-1.1 and was not in conflict with it, we hold that the 1999 Ordinance was still effective after the enactment of Section 3-53-1.1.

(23) Our determination that Section 3-53-1.1 did not require the 1999 Ordinance to track the statute’s language does not end our inquiry into whether the City could enforce its ordinance against Stennis. Section 3-53-1.1(D) clearly mandates that the City file the 1999 Ordinance with the SE. On this issue, there appears to be a question of material fact as to whether the City actually did so. Stennis presented evidence from her fiancé that he went to the SE, obtained a copy of a letter and attached form prepared by the City and filed with the SE, and was told by an SE employee that she had not filed any ordinance with the SE. The City, on the other hand, presented evidence that the SE helped draft a procedure to aid in the City’s regulation of domestic wells and referred all domestic well applications within the 1999 Ordinance to the City.

(24) Stennis never availed herself of the City’s domestic well application procedure, and, under this record, we cannot determine whether the City filed the 1999 Ordinance with the SE. The Court of Appeals, nonetheless, proceeded to analyze whether the City had failed to comply with the requirements of the statute. See Stennis, 2006-NMCA-125, ¶ 22. We conclude, however, that the more appropriate result is for the district court to determine on remand whether the City filed the 1999 Ordinance with the SE. If the City filed the 1999 Ordinance with the SE before Stennis applied for her domestic well permit, Stennis must file for city authorization and the City must provide her the procedural protections required by Section 3-53-1.1. If the City did not file the 1999 Ordinance with the SE before Stennis applied for her domestic well permit, then the City failed to comply with the Section 3-53-1.1(D) requirement and cannot validly regulate Stennis’s well.

(25) Based on our holding, we decline to address whether Stennis is subject to water use surcharges. If the district court determines that the City can lawfully prohibit Stennis’s well, then she will remain a customer of the water utility and utility surcharges will apply to her. If the district
court decides that the City did not have a valid ordinance and Stennis is no longer served by the city water utility, the sur-
charges will not apply.

VI. CONCLUSION

{26} Stennis had standing to bring the underlying declaratory judgment action against the City because she did not attempt to circumvent established procedures for seeking judicial review of the City’s ad-
ministrative decisions. The 1999 Ordinance was a valid exercise of the City’s home rule authority and remained effective after Section 3-53-1.1 entered into force because (1) Section 3-53-1.1 does not require an ordinance to track its language and (2) the 1999 Ordinance could be applied to follow the procedural requirements of Section 3-53-1.1. So holding does not dispose of this case, and thus we remand to the district court to decide the following issue of material fact: whether the City filed the 1999 Ordinance as required by Section 3-53-1.1(D). Upon such determination, the
district court shall issue an order consistent with this opinion.

{27} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PETRA JIMÉNEZ MAES, Justice

JAMES J. WECHSLER, Judge

(sitting by designation)

From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-009

Topic Index:

ADMINISTRATIVE LAW AND PROCEDURE: Scope of Review; and Sufficiency of Evidence

APPEAL AND ERROR: Notice of Appeal; and Timeliness of Appeal

ATTORNEYS: Disciplinary Action; Fees, General; Misconduct; and Professional Responsibility

IN THE MATTER OF KENT E. YALKUT, ESQUIRE

An Attorney Admitted to Practice
Before the Courts of the State of New Mexico
No. 29,396 (filed: January 23, 2008)

DISCIPLINARY PROCEEDING

JOEL L. WIDMAN
Disciplinary Counsel
Albuquerque, New Mexico
for Petitioner

THOMAS A. SANDENAW, JR.
SANDENAW & ANDERSON, P.C.
Las Cruces, New Mexico
for Respondent

OPINION

PER CURIAM

{1} The focus of this disciplinary proceeding is whether the evidence demonstrated that attorney Kent E. Yalkut (Respondent) misappropriated client funds and, as a result, should be disbarred. There is no dispute that Respondent accepted a flat fee from a client and did not deposit it in a trust account as required by the Rules of Professional Conduct. Instead, the flat fee was commingled with other funds in a personal account belonging to Respondent and from which Respondent made several withdrawals. While it is clear from the evidence that Respondent misused his cli-
ent’s funds, we are not persuaded that the evidence demonstrates the required intent to prove misappropriation. In addition to our previously filed order, we write both to clarify what the evidence must demonstrate to prove misappropriation and to emphasize that flat fees must be placed in trust ac-
counts until they have been earned.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Formal disciplinary proceedings were initiated against Respondent based on his conduct in professional relationships with three separate clients. The Disciplinary Board appointed a hearing committee to hold an evidentiary hearing and issue findings of fact, conclusions of law, and a recommendation for discipline.

{3} The hearing committee found that Respondent had been a partner in the law firm of Yalkut, Hill & Associates, P.C. (YHA) since June 2001. It was the policy of the YHA’s members to direct all funds received from clients to Respondent’s part-
ner to deposit in the firm’s trust or business accounts. In February 2003, A-Affordable Bail Bonds, through its agent, Joe Ruiz, retained Respondent to file an appeal from a $50,000.00 judgment, giving Respondent a check for $5,325.00.

{4} While Respondent was out of town in March 2003, Joe Ruiz called the law firm to inquire about the appeal. Respondent’s partner did not know about the appeal and could not find a check in the firm’s ac-
counts, but subsequently traced the check to a personal bank account belonging to Respondent. Respondent’s personal bank account also contained deposits from other clients. The findings do not state which funds in the personal bank account were Respondent’s personal funds, but the hearing committee found that “personal monies” were commingled with “those received from clients.” The hearing com-
mittee also found that Respondent “spent the commingled money in his personal ac-
counts on a multitude of various personal expenses” and that he had not earned “the entirety of the fee of $5,325.00 before spending it.” The hearing committee then determined that Respondent had commit-
ted misappropriation and conversion by depositing the fee into his personal account and spending it.

{5} On March 31, 2003, when Respondent returned to the office, his partner confront-
ed him about the check, and Respondent indicated the deposit was a mistake, stat-
ing, “I made a deposit. I generally don’t do that. I just spaced out and did it. I’ve got the money and it hasn’t been touched.” Respondent then filed the appeal for A-Affordable Bail Bonds on the same day, but it was subsequently dismissed by the Court of Appeals as untimely. Respondent told his client that he would return the $5,325.00 he had received to pursue the
appeal, but by the time of the committee hearing, Respondent had not done so.

[6] At some time between that day and the next—March 31 and April 1, 2003—Respondent removed the contents of his office, including files and equipment, from the office he shared with his partner. Respondent testified that he had been looking for new office space as he was going to be leaving the firm, but the committee made no finding reflecting this testimony. Instead, the findings state that the staff at the law firm were not aware that Respondent was leaving; his partner denied that he and Respondent had any discussions about terminating the partnership; and office records indicated that Respondent had numerous appointments scheduled into the second week of April. Respondent did not establish a new trust account for his clients until May 19, 2003.

[7] Based on these findings, the hearing committee concluded that Respondent had violated the following Rules of Professional Conduct: Rule 16-115(A) NMRA (by failing to hold Client 1’s property separate from his own property and by failing to hold unearned client funds in trust until earned); Rule 16-401(A) NMRA (by making a false statement of material fact or law to a third person); Rule 16-801(A) NMRA (by knowingly making a false statement of fact to disciplinary counsel by stating he had intended to leave his law firm); Rule 16-804(C) NMRA (by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 16-804(D) (by engaging in conduct that is prejudicial to the administration of justice); and Rule 16-804(H) (by engaging in conduct that adversely reflects on his fitness to practice law).

[8] The hearing committee also made findings addressing Respondent’s relationships with two other clients: Stuart Guttman, who had a civil case, and Sylvia Verdugo, who had a criminal case. In the civil case, Respondent was contacted by the client to file a complaint in a lawsuit, and the complaint was filed in May 2001. Although an associate in Respondent’s law firm did some work on this case, Respondent signed the complaint, and the associate left the law firm in February 2002. The file for the case remained in Respondent’s law firm, and Respondent did not withdraw from the case. The case was subsequently dismissed for lack of prosecution in October 2002, and in November 2002, the client fired Respondent.

[9] Based on these findings, the hearing committee concluded that Respondent violated the following rules: Rule 16-101 NMRA (by failing to competently represent a client by abandoning the client and his case); Rule 16-103 NMRA (by failing to act with reasonable diligence and promptness in representing a client); Rule 16-302 NMRA (by failing to make reasonable efforts to expedite litigation consistent with the interests of his client); Rule 16-104(A) NMRA (by failing to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information); Rule 16-804(D) (by engaging in conduct that is prejudicial to the administration of justice); and Rule 16-804(H) (by engaging in conduct that adversely reflects on his fitness to practice law).

[10] The hearing committee found that in connection with the criminal case, Respondent represented his client in trial on criminal matters, and the client was convicted. Respondent failed to file a notice of appeal, docketing statement, and motion for appointment of appellate counsel as required by the Rules of Appellate Procedure. The client contacted the Appellate Defender about her desire to appeal her conviction and Respondent’s failure to file the necessary documents. Both the Appellate Defender and disciplinary counsel contacted Respondent, reminding him of his duty to file the documents or obtain his client’s waiver of her right to appeal. Respondent did not obtain a written waiver showing that his client had waived her constitutional right to appeal. The hearing committee also found that as a result of Respondent’s conduct, the client’s conviction was affirmed, and she was not represented on appeal.

[11] Based on these findings, the hearing committee concluded that Respondent had violated the following rules: Rule 16-101 (by failing to competently represent a client by abandoning the client and her case); Rule 16-103 (by failing to act with reasonable diligence and promptness in representing a client); Rule 16-302 (by failing to make reasonable efforts to expedite litigation consistent with the interests of his client); and Rule 16-804(D) (by engaging in conduct that is prejudicial to the administration of justice).

[12] The hearing committee also found the following aggravating factors: a selfish or dishonest motive, a pattern of misconduct, multiple offenses, making false statements, failing to acknowledge the wrongful nature of his conduct, having substantial experience in the practice of law, and indifference to making restitution. The hearing committee then recommended that Respondent be disbarred and not permitted to seek reinstatement under Rules 17-206(A)(1) and 17-214(A) NMRA until he made full restitution, with interest, to his client; pay the costs, with interest, of the investigation and prosecution; take and pass the New Mexico Bar Examination and the Multi-State Professional Responsibility Examination (MPRE); and then reapply for admission to the Bar, pursuant to Rule 15-502(B) NMRA.

[13] The decision of the hearing committee was subsequently reviewed by a hearing panel of the Disciplinary Board. The hearing panel unanimously recommended to this Court that the findings, conclusions, and factors in aggravation be adopted. However, the hearing panel amended the hearing committee’s recommendations for discipline on the ground that disbarment was not an appropriate sanction. The hearing panel recommended, instead, that Respondent be suspended for a definite period of time and not be reinstated until he complied with all conditions that may be imposed by this Court, and that he then be placed on one year’s supervised probation. The conditions for reinstatement recommended by the hearing panel included that Respondent pass the MPRE, make full restitution, with interest, to his client, pay all costs of the investigation and prosecution of the disciplinary proceeding, and exercise the right to seek termination of his suspension under Rule 17-214(B)(2).

[14] The hearing panel did not recommend requiring Respondent to retake the New Mexico Bar Examination, but did recommend that Respondent be placed on probationary status for at least one year following reinstatement and be monitored and supervised by an experienced attorney approved by the Disciplinary Board.

[15] Both disciplinary counsel and Respondent petitioned this Court to review the panel’s decision. Disciplinary counsel raises two specific issues for review: (1) whether disbarment was, indeed, appropriate under the facts found by the hearing committee, and (2) whether Respondent can be required to comply with conditions for reinstatement when he has been suspended for a definite, rather than an indefinite, period of time. Respondent raised the following two issues: (1) whether the hearing panel failed to evaluate whether the hearing committee’s findings were supported by substantial evidence, and (2) whether the hearing panel’s recommendation against
II. DISCUSSION

{16} In reviewing the hearing committee’s actions, both the hearing panel and this Court defer to the committee on factual matters, but review legal conclusions and recommendations for discipline de novo. See In re Bristol, 2006-NMSC-041, ¶¶ 16-24, 140 N.M. 317, 142 P.3d 905 (per curiam). Because Respondent raises the issue of whether the hearing committee’s findings were supported by substantial evidence, we first address the findings before reviewing the legal issues of whether disbarment was appropriate, as the hearing committee recommended, or whether a period of definite suspension, recommended by the hearing panel, is appropriate and practical in this case.

A. WHETHER THE COMMITTEE’S FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

{17} Respondent argued generally to both the hearing panel and to this Court that the hearing committee’s findings were not supported by substantial evidence. In briefs to the hearing panel, Respondent argued that the hearing committee erred by not adopting findings addressing two situations: (1) findings establishing that he did not misappropriate funds; and (2) findings concerning his representation of Guttman and Verdugo.

{18} Our review of the hearing committee’s factual findings is deferential to the hearing committee, “viewing the evidence in the light most favorable to the hearing committee’s decision and resolving all conflicts and reasonable inferences in favor of the decision reached by the hearing committee.” In re Bristol, 2006-NMSC-041, ¶ 16. Moreover, when “findings of fact are supported by substantial evidence... refusal to make contrary findings is not error,” Griffin v. Guadalupe Med. Ctr., Inc., 1997-NMCA-012, ¶ 22, 123 N.M. 60, 933 P.2d 859. Indeed, failure to make a finding of fact is regarded as a finding against the party seeking to establish the affirmative. Landskroner v. McClure, 107 N.M. 773, 775, 765 P.2d 189, 191 (1988). In reviewing findings, we determine whether the fact-finder’s “decision is supported by substantial evidence, not whether the [fact-finder] could have reached a different conclusion.” In re Ernesto M., Jr., 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318.

{19} Relying on In re Bristol, 2006-NMSC-041, ¶ 17, Respondent argued to the hearing panel that the panel could make additional findings on issues not considered by the hearing committee. Respondent sought to persuade the panel that it could and should make additional findings on the following issues: that Respondent followed accepted local billing practices when he deposited a flat fee in his operating account; that such a deposit was proper because flat fees were treated as earned when received; that he had earned the flat fee; and that he had earned the other client fees that were deposited in the account. In addition, Respondent argued that the panel should make additional findings regarding YHA’s business practices and his representation of Guttman and Verdugo. Respondent’s reliance on In re Bristol is misplaced. Evidence regarding the issues on which Respondent sought additional findings was considered by the hearing committee; the committee simply chose not to accept Respondent’s proposed findings concerning that evidence. See Landskroner, 107 N.M. at 775, 765 P.2d at 191 (stating that failure to make a finding is regarded as a rejection of that finding).

{20} Accordingly, we review only the findings that Respondent argues are not supported by substantial evidence. At oral argument before the hearing panel and before this Court, Respondent challenged whether findings under Counts I and II, numbered 9-15 and which address the handling of the flat fee paid by A-Affordable Bail Bonds, were supported by substantial evidence. The challenged findings state that Respondent deposited a check for $5,325.00 from his client, along with other checks, into a personal bank account. By engaging in this conduct, the findings state, Respondent commingled personal funds with those received from clients and spent the commingled funds on various personal expenses. The findings also state that Respondent did not earn the entirety of his $5,325.00 fee before spending it. The committee determined that these actions constituted misappropriation and conversion.

{21} As Respondent correctly points out, statements that Respondent misappropriated and converted funds are legal conclusions, which we will review de novo. The other findings, however, were supported by the following evidence. Joe Ruiz testified that a check for $5,325.00 (which was introduced into evidence) was delivered to Respondent to pursue an appeal. Respondent testified that he deposited the check into a personal account of his that had previously been used for a political campaign, but which had been dormant for some time. Respondent’s bank statement showed that on February 28, 2003, the balance in the account was $262.29. The check for $5,325.00 was deposited into the account on February 28, 2003, and other checks and cash were subsequently deposited in March 2003. The bank statement also shows that Respondent wrote multiple checks on the account between March 10, 2003, and May 10, 2003. Indeed, Respondent testified that he believed that when he received flat fees from clients, he had earned the money when it was paid to him.

{22} This was sufficient evidence to support the findings that Respondent deposited his client’s funds into a personal account and commingled those funds with his own money. Respondent contends, however, that because he had completed a substantial amount of work on the client’s appeal, there was insufficient evidence to support a finding that he had not earned the entirety of his fee before spending it. In addition, Respondent argues, to conclude that Respondent misappropriated and converted client funds would require additional findings.

{23} We first address whether there was sufficient evidence to support a finding that Respondent had not earned the entirety of his fee before spending it. Respondent argued at oral argument before this Court that he testified before the hearing committee that he had earned the fee by reviewing the case, discussing the case history and procedure with his client, and by preparing everything needed to go forward with his client’s appeal. It is clear from the record, however, that the Court of Appeals dismissed the appeal because Respondent did not file a notice of appeal from the judgment in a timely manner under Rule 12-201(A)(2) NMRA.

{24} The timely filing of a notice of appeal is a mandatory precondition to the Court of Appeals’ jurisdiction, which will only be overlooked in unusual circumstances, such as judicial error. See Trujillo v. Serrano, 117 N.M. 273, 277-78, 871 P.2d 369, 373-74 (1994). Consequently, Respondent’s failure to timely file the notice of appeal rendered all work done on the appeal irrelevant because the appeal was foreclosed. Under these circumstances, Respondent cannot claim to have earned any of his client’s fee. Therefore, the hearing committee’s finding, that Respondent had not earned the entirety of his client’s fee before spending it, is supported by substantial evidence, even if
that finding is, in fact, an understatement of what occurred.

[25] Whether these findings, taken together, support the conclusion that Respondent misappropriated or converted client funds, is a separate issue. As this Court explained in In re Cannain, 1997-NMSC-001, 122 N.M. 710, 712, 930 P.2d 1162, 1164 (1997) (citations omitted), misappropriation “necessarily involves a dishonest motive and an intent to deprive the client of his or her funds and will almost inevitably result in disbarment.” Similarly, “[c]onversion is the unlawful exercise of dominion and control over property belonging to another in defiance of the owner’s rights, or acts constituting an unauthorized and injurious use of another’s property, or a wrongful detention after demand has been made.” Sec. Pac. Fin. Servs. v. Signfilled Corp., 1998-NMCA-046, ¶ 15, 125 N.M. 38, 956 P.2d 837. Thus, both misappropriation and conversion require intentional wrongdoing. Misuse of client funds, on the other hand, “occurs when a lawyer withdraws client funds for an improper purpose, but does so in error, without an intent to deprive the client of the funds.” In re Cannain, 122 N.M. at 711-12, 930 P.2d at 1163-64. In this case, the hearing committee made no finding that Respondent had a dishonest motive when he withdrew client funds before he had earned them. Indeed, the evidence suggests that Respondent erroneously believed he was entitled to withdraw the flat fee he had deposited into his personal account. That Respondent was incorrect does not necessarily make him dishonest, and here the hearing committee did not find dishonesty on Respondent’s part. That too is supported by substantial evidence, whether or not this Court would have found similarly if we were acting in a fact-finding capacity.

[26] We take this opportunity to emphasize that in New Mexico, “[a] lawyer’s fee shall be reasonable.” Rule 16-105(A) NMRA. In this context, we have previously held that non-refundable unearned fees are unreasonable. See In re Dawson, 2000-NMSC-024, ¶ 11, 129 N.M. 369, 8 P.3d 856. Thus, it follows that a flat fee for future legal services cannot be considered as earned when paid and must be held in trust until earned. As we wrote in In re Dawson,

[i]n order for lawyers and their clients to know what portion of a flat fee or retainer may properly be withdrawn from trust, lawyers must inform their new clients of the basis upon which they will compute the amount of fee earned . . . and maintain records that will enable them to determine the ongoing status of the fee, even when the fee arrangement is for a flat fee[.]

Id. ¶ 12 (citations omitted). In this case, the fee was not placed in trust and, as we stated earlier, was never earned because Respondent failed to file a timely appeal on his client’s behalf.

[27] Here, the evidence was sufficient to support findings that Respondent commingled his client’s funds with his own and withdrew funds that he had not yet earned. The evidence may have supported a finding of wrongful intent necessary to conclude that Respondent misappropriated or converted his client’s funds, but neither the hearing committee nor the hearing panel made any such finding. We defer to the hearing committee when it comes to fact-finding. Without such a finding of wrongful intent, the only conclusion that can be drawn is that Respondent misused or commingled his client’s funds, but did not convert them, and should be punished accordingly.

[28] We do not address Respondent’s second issue, regarding whether the hearing panel concluded that Respondent’s conduct was not intentional.

B. WHETHER DISBARMENT IS REQUIRED

[29] Disciplinary counsel asked this Court to review whether, under the facts found and conclusions drawn by the hearing committee, Respondent should be disbarred. In light of the conclusion that Respondent commingled by error rather than misappropriated with dishonest intent his client’s funds, we consider only what discipline is appropriate in that circumstance. We note that although the charges filed by disciplinary counsel also alleged that Respondent’s conduct was dishonest because he made false statements to disciplinary counsel about his intentions to leave YHA before his departure between March 31 and April 1, 2003, the hearing committee made no findings concerning Respondent’s communications with disciplinary counsel, and disciplinary counsel has not argued that this alleged conduct be considered in determining intent to misappropriate funds.

[30] “‘[T]he level of discipline to impose is a matter that this Court . . . considers independently under a de novo standard of review.’” In re Bristol, 2006-NMSC-041, ¶ 30. In imposing discipline pursuant to Rule 17-206, this Court looks to the ABA Standards for Imposing Lawyer Sanc-

ations (1991) for guidance. See In re Key, 2005-NMSC-014, ¶ 5, 137 N.M. 517, 113 P.3d 340 (per curiam). These standards “serve as a model which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.” Preface to ABA Standards. The ABA Standards state:

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;
(b) the lawyer’s mental state;
and
(c) the actual or potential injury caused by the lawyer’s misconduct;
and
(d) the existence of aggravating or mitigating factors.

ABA Standards III(C)(3).0.

[31] Section 4.1 of the ABA Standards, which addresses a lawyer’s failure to preserve a client’s property, states that if a lawyer’s conduct is intentional, that is, if the lawyer “knowingly converts client property and causes injury or potential injury to a client,” “[d]isbarment is generally appropriate.” ABA Standards 4.11. If, however, the lawyer’s conduct is negligent, that is, if the lawyer “knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client,” “[s]uspension is generally appropriate.” ABA Standards 4.12.

[32] Although we have determined that there was insufficient evidence to show Respondent’s conduct was intentional, Respondent should have known that Rule 16-115(A) requires an attorney to keep client funds in a separate trust account. In addition, he should have known that if he did not file a timely notice of appeal in the matter for which he was hired, he would not have earned those funds. Under the ABA Standards, therefore, we agree with the hearing panel that suspension is the appropriate sanction.

[33] This is consistent with how we have previously sanctioned attorneys who have commingled and misused client funds, but who lacked the intent to misappropriate funds. See In re Cannain, 122 N.M. at 711-12, 930 P.2d at 1163-64 (stating that misuse of client funds without the intent to deprive the client of those funds constituted misuse and warranted suspension); In re Martin, 1999-NMSC-022, ¶¶ 18-20, 127 N.M. 321, 980 P.2d 646 (per curiam) (determining that suspension
was the appropriate sanction for failing to maintain a trust account, commingling, and unintentionally misusing client funds). Accordingly, we hold that under the evidence before the hearing committee in this case, suspension and not disbarment is the appropriate sanction.

C. DEFINITE SUSPENSION

{34} The other issue raised by disciplinary counsel is whether conditions for reinstatement can attach to a definite suspension. Counsel argues that it seems inconsistent to require Respondent to comply with certain conditions for reinstatement, but not to make the length of his suspension contingent upon his completion of those requirements. Counsel observes that Rule 17-206(A)(2), which lists definite suspension as a form of discipline, does not include a reference to Rule 17-214(B), which permits disciplinary counsel to file objections to reinstatement. Disciplinary counsel emphasizes that, by contrast, Rule 17-206(A)(3), which lists indefinite suspension as a form of discipline, specifically refers to the rule permitting disciplinary counsel to file objections to reinstatement.

{35} We are not persuaded that conditions for reinstatement can only be attached to indefinite suspensions, nor do we read Rules 17-206 and 17-214 as contradictory, particularly in light of the recent amendments to Rule 17-214, which were proposed by the Disciplinary Board. As amended, and as disciplinary counsel acknowledges, Rule 17-214(B)(1) now specifically provides for an exception to automatic reinstatement if disciplinary counsel timely files objections with this Court “prior to the expiration of such term.” See Rule 17-214(B). Rule 17-206(A)(2)’s silence on the filing of objections to reinstatement does not contradict the provisions of Rule 17-214(B) that specifically provide for such objections. See N.M. Dep’t of Health v. Ulibarri, 115 N.M. 413, 416, 852 P.2d 686, 689 (Ct. App. 1993) (stating that appellate courts construe rules in the same way they interpret statutes); High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating that when several sections of a statute are involved, they must be read together so that all parts are given effect).

{36} In our view, the rules provide that when circumstances warrant only an indefinite suspension, an attorney may petition this Court for reinstatement as soon as he or she has satisfied the conditions for reinstatement. See Rule 17-214(B)(2). However, when circumstances warrant the more serious discipline of a period of definite suspension, the attorney remains suspended for that period, regardless of whether or not any conditions for reinstatement have been satisfied. See Rule 17-214(B)(1). If the attorney has not satisfied the conditions imposed by this Court when the period of definite suspension expires, disciplinary counsel is permitted to file objections to the attorney’s reinstatement. Id. In our view, therefore, there is no inconsistency in suspending an attorney for a definite period and also requiring the attorney to comply with specific conditions before being reinstated.

III. CONCLUSION

{37} Accordingly, in our October 15, 2007 order consistent with the hearing panel recommendation, we suspended Respondent for one year. We also ordered that before reinstatement Respondent must file an affidavit stating that he has complied with the terms and conditions of the order by making restitution with interest through the Office of Disciplinary Counsel to this client; by taking and passing the Multistate Professional Responsibility Examination; and by paying the costs of this disciplinary proceeding. Finally, we ordered that upon reinstatement Respondent would be placed on a year’s supervised probation, subject to the terms and conditions set forth in our order.

{38} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

PATRICIO M. SERNA, Justice

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State Bar of New Mexico
In Memory of

THOMAS DAVID HAINES, JR.

October 30, 1956 – January 8, 2008
Tom was laid to rest January 12, 2008, at Gruver Cemetery, Gruver, Texas.

Tom was born in Dallas to Tomas David Haines, Sr. and Carol Mullins Haines. They survive him in Oklahoma City, Oklahoma.

Tom married Nanette Cluck in Gruver, Texas on March 1, 1986. She survives him at the family home.

Tom is also survived by his daughters, Bennett and Maison Haines of Roswell; his sister, Beth Haines, of Denver, CO.; his nephew, Samuel and niece, Maddie Cluck, of Amarillo, TX; his brother-in-law, Barbara Cluck, of Gruver; his brother-in-law, Brad and wife Mary Cluck, of Amarillo, TX; his aunt Linda Frihart of Pittsburgh, KS. He was preceded in death by his father-in-law, Del Cluck.

Tom graduated from Del City High School. He was a boys state delegate, serving as insurance commissioner and the assistant drum major in the DCHS band. He received his Bachelor of Science degree in political science from Oklahoma State University in 1979 and was a member of the OSU marching band (playing the baritone). He received his Juris Doctor degree from the University of Oklahoma Law School in 1982, then joined Hinkle, Hensley, Shanor and Martin, L.L.P. as an associate. He became a partner in 1988.

Tom loved his colleagues and his work. His love for the firm was evident in his gregarious presence, easy laugh, and caring personality. His colleagues will greatly miss the infectious joy and enthusiasm he brought to the firm. They will miss the fun of seeing Tom wearing a Santa suit joking with all as he handed out Christmas gifts at the firm's annual Christmas party, or wearing a clown wig as he read funny poems that he wrote as tributes to people in the firm for various reasons. Tom's enthusiasm, commitment to his clients, his eye for detail, careful research and preparation and thoughtful approach to his cases will be sorely missed.

The legal community of New Mexico has lost a great friend and an excellent attorney.

Tom was admitted to practice before the US Court of Appeals for the Tenth Circuit. The USDC for the District of NM, the NM Supreme Court and the Oklahoma Supreme Court. Tom was a member of the following: Chavez County, NM and Oklahoma Bar Associations; NMDLA, DRI, George L. Reese Jr. American Inn of Court, CLE committee of the YLD of NM. He served the following: Local Rules Committee for CCBA, NM Bar Foundation High School mock trial judge, Med. Legal Panel of NM, CCBA Law Day Committee, chairman of the Admin. Council, Trustee of the Stewardship Committee and Youth Advisor at the First Methodist Church of Roswell.


Donations can be made in Tom's name to the Cowboy Bell Scholarship Fund or the Music Ministry Fund at the First United Methodist Church or to the charity of your choice.
CONGRATULATES

Jon A. Feder

Elected Chair of Family Law Section,
STATE BAR OF NEW MEXICO