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Dear Members of the State Bar of New Mexico:

In this my second message to members of the State Bar since becoming your president in January, I want to give you an update on my first three months in office. Amazingly, the time has passed faster than I ever thought possible.

The Board of Bar Commissioners has had only one meeting so far this year and that was substantial. The balance of my time has been focused on the work of the State Bar, in particular meeting with many of our members and related groups and planning for the year.

A few items of note from the first Board meeting of the year. With the appointment of Commissioner Alan Malott to the district court bench, the Board was charged to fill a vacancy until the next regular election. To the surprise of most of us, 14 talented and qualified candidates submitted their names for consideration. Wow, what an amazing field from which to select only one new representative for the 1st Bar Commissioner District, Albuquerque! It was a very long and difficult process, but after deliberations, the Board selected Raynard Struck to represent Albuquerque lawyers. I want to again extend my thanks and appreciation to all who took the time to apply and attend the Board meeting. I hope you will all remain active and interested in your State Bar.

You may be following the discussion regarding public disclosure of malpractice insurance. If not, there is a proposed rule out for comment that would require members to have their clients sign an affidavit acknowledging that they are aware their attorney has no liability coverage.

This rule has been controversial, of course, and to produce the best outcome possible, representatives from the Disciplinary Board, the Code of Professional Conduct Committee, the Client Protection Fund Commission, the Lawyers Professional Liability Committee, and the Ethics Advisory Committee will meet in early April to discuss the proposed amendments and provide comments to the Court. If you have views you would like to share, please comment directly at the Supreme Court’s Web site, www.nmcourts.gov.

I have had the opportunity to visit with local members of the Taos County Bar and the Colfax-Union County Bar and was the featured speaker at the Taos County Rotary Club in April. I enjoy and look forward to meeting with members and civic groups all over the state this year. We are in the process of setting up more local bar and community visits, which will be announced in the Bar Bulletin and through e-mail. I hope to meet as many of our members as possible at these informal gatherings. If there is a specific meeting you would like me to attend, please contact me and I will do my best to be there.

Also, please remember the State Bar Annual Meeting in July at the newly opened Buffalo Thunder Resort in Pojoaque July 9–12. A special insert appeared in the April 6 Bar Bulletin.

Finally, let me just comment on how fast this year is moving. It is amazing that the first quarter has passed and with so much more planned for the year, I am certain it will move quickly. In the meantime, please let me know if I can be of service to you.

Sincerely,

Henry A. Alaniz, President
State Bar of New Mexico
In Celebration of Law Day

DIALOGUE IN THE SCHOOLS
Engage students in a meaningful discussion of this year’s Law Day theme, “A Legacy of Liberty—Celebrating Lincoln’s Bicentennial.” American Bar Association materials will be provided. Attorneys and judges are needed to visit schools on a selection of days April 27 through May 8.

“ASK-A-LAWYER” CALL IN
Assist callers with legal questions by offering information and referrals from 9 a.m. to 1 p.m., Saturday, May 2. Attorneys are needed in:
- Albuquerque
- Las Cruces
- Farmington
- Roswell

Pro bono credit for both events.
Contact Marilyn Kelley
mkelley@nmbar.org or (505) 797-6048,
or fax the form below to (505) 797-6074.

In Celebration of... that this nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people, shall not perish from the earth.”
Abraham Lincoln, November 19, 1863, Gettysburg Address

I would like to assist with:
- Dialogue in the Schools
- “Ask-a-Lawyer” Call in

Contact information:

Name

Bar ID

Address

City

State

Zip

Phone

Fax

E-mail

State Bar of New Mexico
IMPROVING THE HR PROFESSIONAL/ATTORNEY RELATIONSHIP (2009)

Friday, April 24, 2009 • State Bar Center, Albuquerque
5.0 General CLE Credits

- Standard Fee $179  - Employment and Labor Law Section Member, Government, Legal Services Attorney, Paralegal $149

Co-Sponsors: SBNM Employment & Labor Law Section and Human Resource Management Association of New Mexico

8:30 a.m.  Registration
9:00 a.m.

The Top 7 Things You Need to Know About Workplace Harassment
Allison West, Esq., SPHR, Employment Practices Specialists LLC
- What harassment is…and is not
- Manager’s responsibilities
- Employee’s obligations
- How to effectively handle complaints
- Managing the workplace during an investigation
- Avoiding retaliation claims
- Accountability and prevention
- What harassment is…and is not

10:15 a.m.  Break
10:30 a.m.

Beyond Discrimination Claims: What Else Can You Be Sued For?
Allison West, Esq.
Noon  Lunch (provided at the State Bar Center)
1:00 p.m.

The High Cost of Getting Even: Preventing Retaliation Claims
Allison West, Esq.
2:15 p.m.  Break
2:30 p.m.

2009 Federal and State Legislative Update
Whitney Warner, Esq., Moody & Warner PC
3:30 p.m.  Adjourn

FOUR WAYS TO REGISTER

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

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

Name ____________________________  NM Bar # ____________________________
Street ________________________________________________________________
City/State/Zip ________________________________________________________
Phone ____________________________  Fax ________________________________
E-mail ______________________________

☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ____________________________  Exp. Date ________  CVV# ______________

Authorized Signature ____________________________________________________
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5-801, and 5-802 NMRA of the Rules of Criminal Procedure for the District Courts ... 19
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From the New Mexico Court of Appeals

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*Professionalism Tip*

In all matters: “My Word is My Bond!”

## Meetings

**April**

**21**
Solo and Small Firm Practitioners
Section Board Meeting, 11:30 a.m., Section meeting, Noon, State Bar Center

**22**
Criminal Law Section Board of Directors, noon, State Bar Center

**23**
Technology Committee, 4 p.m., State Bar Center

**24**
Family Law Section Board of Directors, 9 a.m., via teleconference

**25**
International and Immigration Law Section Board of Directors, noon, State Bar Center

**26**
Real Property, Trust and Estate Section Board of Directors, noon, via teleconference

## State Bar Workshops

**April**

**22**
Lawyer Referral for the Elderly Workshop
10 a.m., Presentation/1–3:30 p.m., Clinics
Agnes Kastner Head Senior Center, Hobbs

**22**
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

**23**
Lawyer Referral for the Elderly Workshop
10 a.m., Presentation/1–4 p.m., Clinics
Roswell Joy Center, Roswell

**23**
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

**May**

**12**
Lawyer Referral for the Elderly Workshop
9:30 a.m., Presentation/1:30–3 p.m., Clinics
Betty Ethar Senior Center, Los Alamos

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**Cover Art:** Susan Weeks is an inactive attorney-turned-watercolorist. Originally from Tennessee, she came to New Mexico to work as a librarian at the UNM School of Library. Her watercolors, painted in a hyper-realistic style, are of subjects that often come from her travels. Her work can be seen at the Weems Artfest in November, at the summer New Mexico Arts & Crafts Fair, and on her Web site, www.susanweeks.com. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
Court News

N.M. Supreme Court
Compilation Commission Meeting

The New Mexico Compilation Commission will meet at 9 a.m., May 5, in the Supreme Court Building, Room 208. The commission director will present a status report on commission activities and the chair of the Advisory Committee will present recommendations pursuant to NMSA 1978, Section 12-1-3.


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

Submit comments electronically through the Supreme Court's Web site at http://nmsupremecourt.nmcourts.gov/ or send written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848

Comments must be received on or before May 4 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s Web site for public viewing. For reference, see the April 13 (Vol. 48, No. 15) Bar Bulletin.

First Judicial District Court
Judicial Appointment

Governor Bill Richardson has appointed Sheri Raphaelson to fill the vacancy in Division V (Tierra Amarilla) of the 1st Judicial District Court effective March 23. Judge Raphaelson will be assigned all case types previously assigned to Judge Tim Garcia. Parties who have not previously exercised their right to challenge or excuse will have ten days from April 27 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Second Judicial District Court
Family Court Meeting

All family law practitioners are invited to attend the Family Court judges'/attorneys' meeting at noon, May 4, at the Bernalillo County Courthouse, 3rd Floor Conference Room, 400 Lomas NW, Albuquerque.

Proposed Revisions to the Rules of Appellate Procedure for the District Courts

The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court's consideration. Submit comments electronically through the Supreme Court's Web site at http://nmsupremecourt.nmcourts.gov/ or send written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848

Comments must be received on or before May 4 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court's Web site for public viewing. For reference, see the April 13 (Vol. 48, No. 15) Bar Bulletin.

U.S. Bankruptcy Court
Brown-Bag Seminar

The U.S. Trustee will conduct a brown-bag seminar on mortgage fraud issues and how to make means testing a win-win situation. The seminar will be held at noon, April 30, at 500 Gold Avenue SW, Room 12411, Albuquerque.

Invitation to Comment on Proposed Revised Local Rules

The United States Bankruptcy Court for the District of New Mexico proposes to revise the local rules in their entirety. In accordance with 28 U.S.C. §2071(b), the court invites public comment. A copy of the proposed revised local rules (and related forms) is available at the Clerk's Office or on the court's Web site at http://www.nmcourt.fed.us/usbc/local-rules-proposed where comments can be made. The court prefers to receive comments via the online survey. For those unable to use the survey, e-mail comments to usbcproposedrules@nmcourt.fed.us, or mail written comments to Norman H. Meyer, Jr., Clerk, United States Bankruptcy Court, District of New Mexico, PO Box 546, Albuquerque NM 87103.

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, and Domestic Cases</td>
<td>1977–1992</td>
<td>June 19</td>
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6 Bar Bulletin - April 20, 2009 - Volume 48, No. 16
Retirement Ceremony
A retirement ceremony for Chief Bankruptcy Judge Mark B. McFeeley will be held at 4 p.m., May 1, in the Ceremonial Courtroom, 6th Floor, Federal Building and United States Courthouse, 421 Gold Avenue SW, Albuquerque. A reception will follow at the Albuquerque Country Club, 601 Laguna Boulevard SW.

Equal Access to Justice Auction Items Needed
Equal Access to Justice will host its famous silent auction at the State Bar’s annual meeting in July 2009 to raise money for civil legal services for needy New Mexicans. Auction items are needed (gift certificates, handmade crafts, jewelry, art, vacation home rentals, hotel packages, air tickets, vintage wine or creative gift packages, etc.). Contact Kate Mulqueen, (505) 797-6064 or kmulqueen@nmbar.org, by June 1.

New Mexico Needs You
New Mexico legal aid providers are facing a dire situation. Demand for civil legal services is increasing while funding for those services, from all sources, is stagnant or decreasing. The New Mexico legislative appropriation for civil legal services is down by $600,000. Federal interest on IOLTA accounts is minimal at best—.005 percent. Equal Access to Justice is down by $40,000 compared to this time in 2008. So how can you help? This is your community. Help your neighbors access civil legal services for needy New Mexicans. If you have not donated yet, go to www.eaj-nm.org and do your part. If you have already donated this year, please make another small donation.

Solo and Small Firm Section
War Stories from Kabul
The Solo and Small Firm Section is happy to present Assistant U.S. Attorney Tara Neda at their noon meeting, April 21, at the State Bar Center. Neda will detail her experiences as a Department of Justice senior legal advisor at the U.S. Embassy in Kabul, Afghanistan. She was part of the internationally created Criminal Justice Task Force which investigates and prosecutes higher-level drug traffickers in Afghanistan.
The work was extraordinarily challenging due to the danger, lack of resources, language and culture barriers, and the newness of the concept of the rule of law. Neda traveled to many provinces (via old Russian helicopters) to meet and train provincial judges, prosecutors and investigators. She learned the language, wore a gun and flak jacket, drove an armored SUV through some tight situations, and experienced a lifetime in the one-and-one-half years she was in country. Neda will discuss the people, the war, and her work introducing the rule of law of Afghanistan. Lunch will be provided to section members who R.S.V.P. by April 20 to Tony Horvat, thorvat@nmbar.org or 797-6033.

**Young Lawyers Division**

**Law Day Ask-a-Lawyer Call-In**

The Young Lawyers Division is seeking attorney volunteers to answer phones for the annual Ask-a-Lawyer Call-In Program from 9 a.m. to 1 p.m., May 2, at sites around the state. The program provides legal information and referrals to callers with various legal issues. Contact the following for more information or to volunteer:

- Albuquerque: Martha Chicoski, mary.martha.chicoski@farmers.com
- Farmington: Reagyn Germer, germerlaw@yahoo.com
- Las Cruces: David Lutz, dplutz@osogrande.com
- Roswell: Dustin Hunter, dhunter@kraftandhunter.com

**CALL FOR NOMINATIONS**

**STATE BAR OF NEW MEXICO 2009 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 2008 or 2009.

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 or E-mail: jconte@nmbar.org

**DEADLINE FOR NOMINATIONS IS MAY 15**

**2009 ANNUAL MEETING AND BENCH AND BAR CONFERENCE**

July 9-12, 2009 • Buffalo Thunder Resort in Santa Fe

10.2 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits
**OTHER BARS**

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

The following is the federal bar association’s 2009 projected total expenditures:
- WiFi at Domenici and Campos courthouses $4,400
- WiFi at 500 Gold for Bankruptcy Court $1,200
- Campos Courthouse Attorney Lounge copier/printer/fax annual maintenance/supplies $700
- Domenici Courthouse Attorney Lounge copier/printer/fax annual maintenance/supplies $5,000
- Las Cruces Attorney Lounge copier/printer/fax annual maintenance/supplies $850
- CJA attorney seminars $5,000
- Court ceremonies (new magistrate judge and others) $8,000
- G.2.b(iii) reimbursements $200
- Albuquerque Bar Law Day $1,500
- Federal Bar seminars $40,000
- PDF training for attorneys and paralegals $24,000
- Two Federal Bar receptions for attorneys to meet informally with judges $8,000

To access this report and other information, see the Federal Bar Association page on the Court’s Web site at http://www.nmcourt.fed.us.

**N.M. Defense Lawyers Association**

**Basic Skills Seminar**

The New Mexico Defense Lawyers Association presents Defense Practice Academy: Basic Skills (9.0 general CLE credits) April 24–25 at the State Bar Center. Designed for attorneys with zero to three years of experience, the seminar will feature a faculty of experienced attorneys from local firms providing insight into opening a file, pleadings and motions, discovery, depositions, medical records/experts, and evidence/trial preparation. Attendance is limited so register early. For more information, e-mail DLA at nmdefense@nmdla.org.

**Women Litigators Seminar**

The New Mexico Defense Lawyers Association presents Women in the Courtroom II: Sharing Success (4.0 general and 1.0 professionalism CLE credits) May 8 at the Jewish Community Center, 5520 Wyoming Blvd., Albuquerque. Part II of Power Lessons for the Female Litigator is a unique seminar designed for New Mexico trial lawyers. This seminar is designed for women litigators who want to refine their trial skills and gain practical, diverse perspectives on balance, ambition and success. Law firm managers and other attorneys who want to recruit and retain talented female attorneys are also encouraged to attend. For more information, e-mail DLA at nmdefense@nmdla.org.

**UNM School of Law**

**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.

**OTHER NEWS**

**N.M. Christian Legal Aid Volunteers Needed**

New Mexico Christian Legal Aid is hosting a new volunteer training session from 11 to 5 p.m., May 1, at the State Bar Center. Lunch will be provided. CLE credit has been requested and the training will likely offer 2.5–3.0 CLE credits. Contact Jim Roach, (505) 243-4419 or nmcla.coordinator@yahoo.com, for more information.

**ALBUQUERQUE BAR ASSOCIATION**

**Law Day Luncheon:**

**“A Legacy of Liberty”**

May 5

Hotel Albuquerque, Old Town

Pre-paid event.

Tickets will not be sold at the door.

Individual tickets $35

Tables of 10 $350

Sponsorships $300

Call (505) 842-1151 or e-mail abqbar@abqbar.com.

See the April 6 (Vol. 48, No. 14) Bar Bulletin for more information.
In the Supreme Court of the State of New Mexico

Proclamation
Law Day Recognition
May 1, 2009

Law Day began 50 years ago with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

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

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

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

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

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

Law Day 2009 is an opportune time to recognize the work of those who try to make courts accessible and justice equal:

- Legal aid offices that provide legal services to those unable to afford them;
- Pro Bono Publico programs under which private lawyers accept worthy cases at no fee;
- Lawyer referral programs that help people find appropriate legal services;
- Court programs that are designed to inform the public about laws and legal procedures, provide interpreters for those who need them, and generally make courts accessible.

We salute these efforts, but let us offer greater support to those who work daily to provide legal services to those who most need them. Let us dedicate ourselves to improving our courts and our justice system, so that we will truly have “justice for all.”

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do hereby recognize Thursday, May 1, 2009, as Law Day. I urge the legal professionals of New Mexico to recognize the designated day and to participate in the observance of that date.

DONE in Santa Fe, New Mexico, this 6th day of April, 2009.

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

Proclamation

Juror Appreciation Week
April 27–May 1, 2009

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;

WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our democracy as the right to vote;

WHEREAS, our courts depend upon citizens to serve as jurors;

WHEREAS, service by citizens as jurors is indispensable to the judicial system;

WHEREAS, all citizens are encouraged to respond when summoned for jury service;

WHEREAS, a continuing and imperative goal for the courts, the bar, and the broader community is to ensure that jury selection and jury service are fair, effective, and not unduly burdensome on anyone; and

WHEREAS, one of the most significant actions a court system can take is to show appreciation for the jury system and for the tens of thousands of citizens who annually give their time and talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:

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

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do hereby recognize the week of April 27–May 1, 2009, as Juror Appreciation Week in New Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 6th day of April, 2009.

Edward L. Chávez, Chief Justice
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Title</th>
<th>Details</th>
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<tbody>
<tr>
<td>21</td>
<td>2008 Civil Procedures Update</td>
<td>VR–State Bar Center Center for Legal Education of NMSBF 6.7 G (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>21</td>
<td>Estate Planning for Retirement Benefits</td>
<td>Teleseminar Center for Legal Education of NMSBF 1.0 G (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>21</td>
<td>Avoiding Oops! Uh-Oh! and Yikes</td>
<td>VR–State Bar Center Center for Legal Education of NMSBF 1.0 E (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
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<td>21</td>
<td>Judge May I Borrow Your Gavel?</td>
<td>VR–State Bar Center Center for Legal Education of NMSBF 2.0 G (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>21</td>
<td>Special Planning Concerns for Younger Clients</td>
<td>Teleconference Cannon Financial Institute 1.5 G (706) 353-3346</td>
</tr>
<tr>
<td>23</td>
<td>Asset-Backed Financing in a Tight Credit Environment</td>
<td>Teleseminar Center for Legal Education of NMSBF 1.0 G (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>23</td>
<td>Joint Conference for Criminal Defense Attorneys and Prosecutors</td>
<td>VR–State Bar Center Center for Legal Education of NMSBF 4.2 G, 1.0 E (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>23</td>
<td>Trust Accounting: It’s Not an Oxymoron</td>
<td>VR–State Bar Center Center for Legal Education of NMSBF 1.5 E, 1.0 P (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<tr>
<td>24</td>
<td>28th Annual Update on New Mexico Tort Law</td>
<td>Albuquerque New Mexico Trial Lawyers 6.2 G, 1.0 E (505) 243-6003 <a href="http://www.nmtla.org">www.nmtla.org</a></td>
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<tr>
<td>24–25</td>
<td>Defense Practice Academy: Basic Skills</td>
<td>State Bar Center New Mexico Defense Lawyers Association 9.0 G (505) 797-6021 <a href="mailto:nmdefense@nmtla.org">nmdefense@nmtla.org</a></td>
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<tr>
<td>24</td>
<td>Improving the HR Professional/Attorney Relationship (2009)</td>
<td>State Bar Center Center for Legal Education of NMSBF 5.0 G (505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>24</td>
<td>Legal Ethics of Representing Unpopular Causes and Clients</td>
<td>Teleconference TRT, Inc. 2.0 E 1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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WRITS OF CERTIORARI

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective April 20, 2009

Petitions for Writ of Certiorari Filed and Pending:

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**Petition for Writ of Certiorari Denied:**

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**Published Opinions**

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**Unpublished Opinions**

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

Clerk’s Certificate Dated March 24, 2009

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Greetings from the Chair/Chair Elect

As the Acting Chair and Chair-Elect of the Young Lawyers Division (YLD), I am honored to address our YLD members, as well as the other members of the State Bar. I find myself writing this article a year sooner than expected due to Briana Zamora’s appointment to a judgeship in the Metropolitan Court Criminal Division. During her five years on the YLD Board, Judge Zamora headed many projects and events for YLD, and her dedication and leadership will be missed. On behalf of the YLD Board, I would like to wish Judge Zamora the best of luck with her new endeavor.

In the upcoming year, YLD will continue to provide services and outreach to its members, support and encourage public service. In doing so, we try to help bridge the gap between law school and the practice of law for our members, while encouraging them to get involved with and give back to their communities.

In the upcoming year, YLD will continue many of its longstanding and successful service projects. These include: Mock Interview program; Call-In program for Law Day; Junior Judges; Summer Fellowship; Wills-for-Heroes; Homeless Legal Aid Clinics in Las Cruces, Santa Fe and Albuquerque; and YLD/UNM Law Mentorship Program. On March 27th, a Wills-for-Heroes event held in Albuquerque generated almost fifty free wills for qualified emergency first responders! Other events around the state are being planned, so be sure to keep an eye out for volunteer opportunities. Finally, YLD will once again co-sponsor the Justice for All Ball with Equal Access to Justice, which is scheduled to be held in the fall.

Additionally, we are excited to begin two new service projects in 2009. The Children’s Court mentorship program pairs volunteer attorneys with young adults who are successfully completing probation within Children’s Court special programs. Mentors will participate in activities designed to encourage professionalism and interpersonal skills. The program is scheduled to kick off on April 5th with dinner at Saggios, followed by a performance of Luma at Popejoy Hall (both of which were generously donated). We also hope to launch Voices Against Violence, the 2009 ABA/YLD public service project. Voices Against Violence is “a call to action for young lawyers around the country to join forces to end domestic violence.” The program was created to educate young lawyers to the epidemic of domestic violence and to engage them in efforts to respond to and prevent domestic violence in their communities. For more information on any program, please feel free to contact any YLD Board member.

Finally, I would like to welcome Emilio Chavez, William Gilchrist, Mateo Page, and Alex Russell to the YLD Board. I look forward to their energy, leadership, and contributions during the upcoming year. YLD is a fun and exciting division of the State Bar. I encourage all YLD members to get involved with our projects. Please feel free to contact me if you have any questions or would like more information about YLD events.

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Director-At-Large, Position 2, Mateo Page
Director-At-Large, Position 3, Ernestina Cruz
Director-At-Large, Position 4, Alexander Russell
Director-At-Large, Position 5, Clara Moran
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Region 4 Director, David Lutz
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Elder Law - Sara Traub
Employment & Labor Law - Erin Langenwalter
Family Law - Reagyn Germer
Health Law - Valerie Reighard
Indian Law - Vincent Knight
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Farmingdon: Reagyn Germer
Roswell: Dustin Hunter
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Samantha Jarrett and Martha Chicoski
Homeless Legal Clinic -
Albuquerque: Laurel Nesbitt
Las Cruces: Steven Almanza
Santa Fe: Donna Lynch
In Brief - Brent Moore
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and Martha Chicoski
Las Cruces: Roxanna Chacon
7th Judicial District: Matt Page
YLD/UNM Law Mock Interview Program -
Nashia Torres and Martha Chicoski
Summer Fellowship Program - Brent Moore
YLD/UNM Law Mentor Program -
Erika Poindexter and Sarita Nair
Wills for Heroes -
Albuquerque: Clara Moran and Martha Chicoski
Farmingdon: Reagyn Germer

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Meet the Board

Emilio Chavez

Emilio Chavez represents Region 2 of the YLD. Mr. Chavez is currently a Senior Trial Attorney for the Eighth Judicial District Attorney’s Office. His duties include the prosecution of various homicides, drug trafficking, criminal sexual penetration, and other serious violent felony cases. Prior to his foray into the criminal world, Mr. Chavez worked as an energy associate with a prominent law firm in Washington D.C. Mr. Chavez obtained his B.A. degree in economics from Grinnell College in 2001 and J.D. from University of New Mexico in 2004. He is licensed in New Mexico and Washington D.C.

Martha Chicoski

Martha Chicoski represents Region 5 of the YLD. She chairs Junior Judges, co-chairs the YLD/UNM Law Mock Interview program and Wills for Heroes, and most recently co-chaired the inaugural Justice for All Ball, which was co-sponsored by Equal Access to Justice. In 2007, Ms. Chicoski received one of ten national scholarships given by the Minorities in the Profession Committee of the ABA/YLD. She currently works as a trial attorney with the Law Offices of Craig A. Orraj as staff counsel for Farmers Insurance Exchange and Affiliates. Previously, she has worked for the Public Safety Division of the Albuquerque City Attorney’s Office, Robles, Rael & Anaya, P.C., and Wälz and Associates. Ms. Chicoski received a J.D. from Suffolk University Law School and a B.A. from The George Washington University. She is admitted to practice in New Mexico and Massachusetts, as well as before the United States District Court for the District of New Mexico.

Tina Cruz

Ms. Cruz is a shareholder at the Narvaez Law Firm in Albuquerque and has practiced in the area of civil litigation for seven years. She has concentrated her law practice in the areas of employment law, civil rights, education law and insurance defense. She represents public entities and private employers in New Mexico federal and state courts. Ms. Cruz also represents employers at the administrative level before the New Mexico Human Rights Division, the Equal Employment Opportunity Commission and the City of Albuquerque’s Human Rights Office and has handled appeals before the New Mexico Court of Appeals and Tenth Circuit Court of Appeals. She was appointed to the Young Lawyers Division Board in January 2008. She has volunteered on various YLD related projects, including Wills for Heroes, Junior Judges, the Mock Interview Program, UNM/YLD Law Student Mentor Program, and the Bar Exam Orientation.

William G. “Dooley” Gilchrist

William G. “Dooley” Gilchrist was born in Jackson, Mississippi. He earned his Bachelor of Arts degree in Economics and Political Science from the University of New Mexico and his Juris Doctor, cum laude, from the Boston University School of Law. His practice focuses on employment law and general commercial litigation matters. Mr. Gilchrist has represented employers in proceedings before the New Mexico Department of Labor, the New Mexico Human Rights Division, the Equal Employment Opportunity Commission, and state and federal courts in New Mexico as well as in other states. Mr. Gilchrist is admitted to practice in New Mexico and Arizona, the United States District Courts for the District of New Mexico and Arizona, and the Ninth and Tenth Circuit Court of Appeals. Prior to joining the firm, Mr. Gilchrist practiced with Rodey, Dickason, Sloan, Akin & Robb, P.A. in Albuquerque. While in law school, Dooley served as an editor for his law school’s legislative drafting clinic and served as a staff member on the Boston University International Law Journal and as an intern at the Massachusetts Office for Refugees and Immigrants.

Dustin K. Hunter

Dustin K. Hunter is a partner in the Roswell, New Mexico firm of Kraft & Hunter, LLP. He practices in a wide range of civil and corporate matters, including family law, business litigation, insurance coverage and litigation, contracts and personal injury. Mr. Hunter attended undergraduate at Cameron University and graduated magna cum laude with a B.A. in political science. While at Cameron, he was elected and served as the Student Body President. Mr. Hunter obtained his Juris Doctorate from Texas Tech University School of Law, graduating magna cum laude. Mr. Hunter was a member of the Texas Tech Law Review and was named to the Order of the Coif. Mr. Hunter also serves as a member of the Board of Directors of the Family Law Section of the State Bar of New Mexico. On a national level, Mr. Hunter has served on the ABA YLD Affiliate Newsletter as an Associate Editor. He is a proud 2006 graduate of the Roswell Chamber of Commerce ‘Leadership Roswell’ program and a 2008 graduate of the State Bar of New Mexico’s Lawyers Leadership Training Institute. Mr. Hunter also volunteers and provides pro bono services to elderly individuals through the Lawyer Referral for the Elderly Program and is a member of the Chaves County Pro Bono Committee. He has been married for sixteen years to his best friend, Jennifer, and has two children, Lauren and Ethan.

Brent Moore

Brent Moore is the General Counsel for the Insurance Division of the New Mexico Public Regulation Commission. In 2008, he served as the Chair of the Young Lawyers Division, and he continues to serve as the fellowship coordinator for the YLD Summer Fellowship program. Prior to being appointed General Counsel, Mr. Moore served as the Deputy Superintendent for the Insurance Division. He is a 1994 graduate of Texas Christian University and a 1998 graduate of the University of New Mexico School of Law. After graduating from law school, Mr. Moore participated in the Legal Honors Program for the U.S. Department of Housing and Urban Development in Washington, D.C. Upon completing the program, he served as agency counsel for the Navajo Nation Environmental Protection Agency and Assistant General Counsel for the New Mexico Environment Department. He lives in Santa Fe with his wife, Mary Ann, and two daughters, Caroline and Virginia.
Meet the Board

Clara Moran
Clara Moran is currently an Assistant Trial Attorney with the Bernalillo County District Attorney’s office in Albuquerque. She is a 2005 graduate of UNM’s Law School. Ms. Moran currently works within the DWI Felony/Vehicular Homicide Division and previously worked as the sole prosecutor within the Domestic Violence Pilot Project, which is a program of pooled resources between the Bernalillo County District Attorney’s office and Governor Richardson’s office. Ms. Moran has taught and participated in several seminars, trainings, and CLE’s on the prosecution of domestic violence cases. She has worked on the Division’s Wills for Heroes program, the 2008 Access for Justice Pamela Minzner Justice for All Ball, and arranged a forum linking the judges of the 2nd Judicial District with YLD members. Ms. Moran lives in Albuquerque with her husband, Richard, and daughter, Molly.

Mateo “Matt” S. Page
Mateo “Matt” S. Page is an assistant district attorney for the 7th Judicial District where he prosecutes primarily DWI, domestic violence, and juvenile cases. He received his B.A. in political science from University of New Mexico in 2000 where he was a Presidential Scholar, and his J.D. from the University of Washington School of Law in Seattle in 2004. Upon graduating from law school and becoming a member of the Washington state bar, he and his family returned home to New Mexico where he practiced Indian law and environmental law with a civil firm in Corrales. Mr. Page has previously worked as an assistant district attorney for the 12th Judicial District and 2nd Judicial District where he was assigned to the metropolitan court division for two and half years. Currently, Mr. Page lives in Moriarty with Heather, his wife of eight and half years, and his three sons, Royal, Lincoln, and Cotton.

Alex Russell
Alex Russell is Chair-Elect of the Criminal Law Section of the State Bar, Member of the Board of Directors of the Trial Practice Section, and Member of the H. Vearle Payne American Inn of Court. Mr. Russell is an experienced trial attorney with a concentration in criminal law. He received his law degree from St. Mary’s University School of Law and is a graduate of Bucknell University. Mr. Russell is admitted to practice in New Mexico and the District of Columbia, as well as the United States District Court for the District of New Mexico.

Reagyn Germer
Reagyn Germer was born and raised in Colorado. She graduated from University of Chicago, A.B., in 1999 and received her law degree from University of Colorado School of Law in 2003. Her practice consists of general civil matters in the courts of the Navajo Nation, New Mexico, Arizona, and the Hopi Tribe, and working with DNA-People’s Legal Services. She also serves as a Shiprock Bar Commissioner with the Navajo Nation Bar Association. Ms. Germer was previously with the Native American Disability Law Center (formerly known as the Native American Protection and Advocacy Project) for approximately three years focusing on providing legal services to the members of the Navajo Nation and Hopi Tribe.

David Lutz
David Lutz was born in Las Cruces, New Mexico and graduated from Onate High School in 1993. He attended Claremont McKenna College and graduated with a Bachelor of Arts, summa cum laude, in History in 1997. David attended Cornell Law School and graduated with a J.D., with Specialization in International Legal Affairs in 2000. He worked as an associate at Baker Botts, LLP in Dallas from 2000 until 2003. David returned to New Mexico in 2004. Mr. Lutz is currently a partner at Martin, Lutz, Roggow, & Eubanks, P.C. in Las Cruces.

The Board of the Young Lawyers Division would like to congratulate one of our own on her recent appointment to the bench of the Metropolitan Court.

Thank you for all of your hard work and contributions to the Board.
We wish you the best of luck as you begin your judicial career!

The Hon. Briana Zamora
YLD Community Service Programs – Volunteers’ Perspectives

Martha Chicoski

The continued success of the Young Lawyers Division’s community service programs is due in large part to the dedication and commitment of the many attorneys and judges who generously give their time to these programs. While many of the same volunteers sign up for these community service opportunities, YLD is fortunate to attract new volunteers, too. These days, it is often difficult to balance professional and personal obligations, let alone have time to give back to the community. We asked some “perennial” volunteers and some newcomers why they do it. Some of their responses are below. YLD thanks all of the wonderful people who have volunteered over the years!

“Junior Judges 2008 at my neighborhood elementary school provided an opportunity to speak to inquisitive students about our justice system and to address some interesting and thoughtful questions posed by the young people. The Junior Judges experience provided an avenue to encourage, motivate and validate our future leaders. I am looking forward to being a part of Junior Judges 2009.”

– Judge John Romero, District Judge, Children’s Court Division

“Although time is a commodity that few of us have, I believe my time volunteering and participating with the YLD has been time well-spent. My volunteer experiences have always been rewarding and I walk away from them with new insight and a different perspective. These experiences have helped me grow as an individual. I hope, along the way, I have been a positive influence to others.”

– Amanda Sanchez, Associate, Rodey Law Firm

“I volunteer for the Mock Interview Program because I believe that it is a valuable tool to help law students, especially those with no prior work experience and no ties to the legal community (my status when I was in law school) learn the skills needed to participate in a productive job interview. I also enjoy giving back to the law school because it is my alma mater.”

– Sean Garrett, Associate, Butt Thorton & Baehr PC

“Helping out people with a bit of my time is one way I like to help New Mexico. The YLD along with the State Bar make it easy for me to give back a little.”

– Scott Jaworski, Associate, Miller Stratvert PA

“As a person who entered the legal profession because of my desire to work for social justice and social change, it is inspiring to see so many attorneys willing to volunteer their (often very limited) free time to pursue activities related to helping individuals who may be facing significant injustices… YLD’s commitment to public service work is really inspiring to me because it shows that there is a real commitment on the part of everyone involved to creating a more just society.”

– Grace Spulak, Staff Attorney/ Skadden Fellow, Pegasus Legal Services for Children

The Young Lawyers Division volunteered their time and expertise on March 27 at the 2nd Judicial District Courthouse to write wills and family estate planning documents for Albuquerque’s first responders’ police officers and firefighters who put themselves in harm’s way every day. The attorneys helped firefighters and police officers who otherwise might not have sought the costly legal services. The Wills for Heroes program provides essential legal documents free of charge to first responders, including wills, living wills, and powers of attorney. By inviting first responders to plan now, the volunteer attorneys are helping to ensure that important legal affairs are in order before a tragedy hits. At the event, organized by Chair Martha Chicoski and Clara Moran, 22 volunteer attorneys worked one-on-one with 48 first responders and their families. In addition, ten paralegal volunteers provided notary services and served as witnesses.
NO. 09-8300-005

IN THE MATTER OF THE AMENDMENTS OF FORM 4-803 NMRA OF THE RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Rules of Civil Procedure Committee to amend Form 4-803 NMRA of the Rules of Civil Procedure, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Form 4-803 NMRA of the Rules of Civil Procedure for District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Form 4-803 NMRA of the Rules of Civil Procedure shall be effective May 6, 2009;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Form 4-803 NMRA by publishing the same on the Judiciary’s web site (www.nmcourts.gov) and in the Bar Bulletin and NMRA.

IT IS SO ORDERED.

WITNESS, Honororable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of March, 2009.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

4-803
[For use with district, magistrate and metropolitan court rules of civil procedure 1-065.1, 2-801, 3-801, 4-803]
STATE OF NEW MEXICO
COUNTY OF ______________ JUDICIAL DISTRICT COURT

_______________________________________

v. ____________________________________
Defendant

CLAIM OF EXEMPTIONS ON EXECUTION
A JUDGMENT HAS BEEN ENTERED AGAINST YOU. ALL OF THE PROPERTY YOU POSSESS MAY BE SEIZED AND SOLD TO PAY THIS JUDGMENT. YOU MUST COMPLETE AND RETURN THIS FORM WITHIN TEN (10) DAYS TO CLAIM ANY STATUTORY EXEMPTION FROM THIS SEIZURE AND SALE.

Part I. Homestead exemption
(This part is for use only in the district court)

[ ] Judgment debtor owns, leases or is purchasing a dwelling house which judgment debtor occupies and is entitled to hold exempt a homestead in the amount of sixty thousand dollars ($60,000) under Section 42-10-9 NMSA 1978.

Part II. Exemption in lieu of homestead exemption
(Parts II and III are for use in the district court, magistrate court and metropolitan court)

[ ] Judgment debtor is a resident of this state who does not claim a homestead exemption, but claims an exemption of real or personal property in the amount of five thousand dollars ($5,000) under Section 42-10-10 NMSA 1978. The property claimed to be exempt is as follows:

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<th>LIST PROPERTY</th>
<th>STATED VALUE</th>
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(Attach additional page if necessary)

Part III. Personal property exemptions
Unless the judgment debtor files a written waiver of exemption, the sheriff may not seize the judgment debtor’s personal clothing, furniture or books.

In addition to the property claimed or listed as exempt above, the judgment debtor hereby claims the following exemptions:

(attach only applicable boxes)

[ ] personal property worth up to $500

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<th>LIST ITEMS</th>
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[ ] tools of the trade worth up to $1,500.

Occupation of judgment debtor: ____________________________

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[ ] one motor vehicle worth up to $4,000 or that amount of equity in a more valuable vehicle

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<th>MAKE, MODEL AND YEAR OF VEHICLE</th>
<th>FAIR MARKET VALUE</th>
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[ ] jewelry worth up to $2,500

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(Attach additional page if necessary)

[ ] medical-health equipment being used for the health of the claimant or a member of the household of the claimant and not in a profession; (attach separate sheet setting forth items claimed and the name of the household member and the medical condition of the member)

[ ] pensions or retirement funds;

[ ] not more than $5,000 in benefits from a benevolent association of which the judgment debtor is a member;

[ ] building materials not financed by the judgment creditor in this action as provided by Section 48-2-15 NMSA 1978;

[ ] a partner’s interest in specific partnership property subject to the limitations of Section 54-1-25 NMSA 1978;

[ ] worker’s compensation benefits subject to the limitations of Section 52-1-52;

[ ] occupational health benefits as provided by Section 52-3-37 NMSA 1978;

[ ] unemployment compensation benefits subject to the limitations of Section 51-1-37 NMSA 1978 for necessities furnished while the debtor was unemployed and child support;
IN THE MATTER OF THE AMENDMENTS OF RULES 5-121, 5-207, 5-614, 5-801, AND 5-802 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure Committee to amend Rules 5-121, 5-207, 5-614, 5-801, and 5-802 NMRA of the Rules of Criminal Procedure for District Courts, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 5-121, 5-207, 5-614, 5-801, and 5-802 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 5-121, 5-207, 5-614, 5-801, and 5-802 NMRA of the Rules of Criminal Procedure for District Courts shall be effective May 6, 2009; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the above-referenced amendments by publishing the same on the Judiciary’s web site (www.nmcourts.gov) and in the Bar Bulletin and NMRA.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of March, 2009.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

5-121. Orders; preparation and entry.

A. Preparation of orders. Upon announcement of the court’s decision in any matter the court shall:

1. allow counsel a reasonable time, fixed by the court, within which to submit the requested form of order or judgment;
2. designate the counsel who shall be responsible for preparation of the order or judgment and fix the time within which it is to be submitted; or
3. prepare its own form of order or judgment.

B. Trial without a jury. In a case tried without a jury the court shall make a general finding and may in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

C. Time limit. Notwithstanding Section 39-1-1 NMSA 1978, if no satisfactory form of order or judgment has been submitted within the time fixed by the court, the court shall take such steps as it may deem proper to have an appropriate form of order or judgment entered promptly.

D. Examination by counsel. In all events, before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.
E. Entry by court. The court must enter the judgment and order within a reasonable time after submission.

F. Filing. Upon the signing of any order or judgment it shall be filed promptly in the clerk’s office and such filing constitutes entry thereof.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

Committee comment for 2009 amendments - The 2009 amendment to Paragraph E of this rule supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. The 2009 amendment to Rule 5-121 NMRA and the corresponding amendments to Paragraph C of Rule 5-614, Paragraph B of Rule 5-801 and Paragraph H of Rule 5-802 NMRA are intended to make clear that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases subject to the Rules of Criminal Procedure for the District Courts. See 2006 Committee Commentary to Rule 1-054.1 NMRA discussing the similar elimination of deemed denied provisions from the Rules of Civil Procedure for the District Courts. As a result of these changes, all post-conviction motions are subject to the same requirement that the court shall enter judgments or orders promptly in accordance with Paragraph E of this rule.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

[Withdrawn by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

[Withdrawn by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

5-614. Motion for new trial.

A. Motion. When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.

B. Evidence on motion. When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.

C. Time for making motion for new trial. A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.

D. Procedure; hearing. When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.

E. Waiver. Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

5-801. Modification of sentence.

A. Correction of sentence. The court may correct an illegal sentence at any time pursuant to Rule 5-802 NMRA and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of sentence.

B. Modification of sentence. A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed, or within ninety (90) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ninety (90) days after entry of any order or judgment of the appellate court denying review of, or having the effect of upholding, a judgment of conviction. A motion to reduce a sentence may also be filed upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.

C. Mandatory sentence. Paragraph B of this rule does not apply to the death penalty or a mandatory sentence.

[As amended, effective March 1, 1986; August 1, 1989; August 1, 1992; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

5-802. Habeas corpus.

A. Scope of rule. This rule governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

B. Petition. A writ of habeas corpus will be issued only upon filing with the clerk of the court a petition on behalf of the party seeking the writ. If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, the petition is deemed to be filed with the clerk of the court on the day the petition is deposited in the institution’s internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution’s internal mail system. The petition shall contain the following:

1. the respondent’s name and title. The respondent shall be the petitioner’s immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted;

2. a statement naming the place where the person is confined or restrained;

3. a statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency or institutional grievance committee from which relief was sought and the result of each judicial or administrative proceeding;

4. a statement of whether an appeal or prior petitions for habeas corpus or other relief have been filed, including a statement of the case name, the docket number of the case, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding and, if appropriate, a statement of why the claim now being raised was not raised in such prior proceedings or how the claim now being raised differs from a claim raised in those proceedings;

5. if the claim has been raised in prior proceedings, a statement explaining why the ends of justice require consideration of the petition;

6. a statement as to whether:

(a) the petition seeks to vacate, set aside or correct the sentence or order of confinement; or

(b) the petition challenges confinement or matters other than Subparagraph (a) of this subparagraph;
(7) a concise statement of the facts and law upon which the application is based; and
(8) a concise statement of the relief sought.

C. Papers attached to petition. The following shall be attached to the petition:
   (1) any opinion, order, transcript or other written material indicating any court’s, agency’s or institutional grievance committee’s position or ruling on the petitioner’s custody or restraint;
   (2) if the petitioner is indigent, an affidavit attesting to the petitioner’s indigency and containing a statement of the petitioner’s available assets and a motion for permission to proceed in forma pauperis, provided that a petitioner who is incarcerated at the time of filing the petition need not file a motion for permission to proceed in forma pauperis and may file the petition without payment of the applicable filing fee; and
   (3) a certificate of service showing service on the respondent and the district attorney in the district in which the application is filed.

D. Venue. If the petition:
   (1) seeks to vacate, set aside or correct the sentence or order of confinement, correct the Department of Corrections’ interpretation or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county in which the matter was adjudicated, or, if the matter has not been adjudicated, in the county of the court that ordered the contested confinement; or
   (2) challenges confinement or matters other than those set forth in Subparagraph (1) of this paragraph, it shall be filed in the county where the petitioner is confined or restrained.

E. Procedure in non-death penalty cases. If a sentence of death has not been imposed, upon presentation of the petition the court shall:
   (1) promptly examine the petition together with all attachments. If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief as a matter of law, the court shall order a summary dismissal of the petition;
   (2) if the court does not order a summary dismissal, unless the petitioner has filed a waiver of counsel or has retained counsel, the court shall appoint counsel to represent the petitioner. Within ninety (90) days after appointment, counsel for the petitioner may file an amended petition or if no amended petition is filed, the petition originally filed by the petitioner is deemed accepted. Within thirty (30) days after acceptance of the petition or the filing of an amended petition, the court shall order the respondent to file a response to the petition or shall dismiss the petition pursuant to Subparagraph (1) of this paragraph. If a response is ordered, a copy of the petition and a copy of the order to prepare a response to the petition shall be served on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1 or 5-103.2 NMRA. Within ninety (90) days after service of the petition and order, the respondent shall file a response to the petition;
   (3) if the court directs the respondent to file a response, after the response is filed, the court shall determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court shall dispose of the petition without a hearing, but may ask for briefs and oral arguments;
   (4) if an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

F. Death penalty cases. If a sentence of death has been imposed:
   (1) upon issuance of the mandate of the Supreme Court affirming the sentence of death, the district court shall promptly appoint counsel to represent the defendant;
   (2) following the issuance of the mandate the execution shall be stayed pending further proceedings under this paragraph;
   (3) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after appointment, the defendant shall file a petition for writ of habeas corpus;
   (4) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after service of a petition for writ of habeas corpus, the respondent shall file a response to the petition;
   (5) within thirty (30) days after service of the response, the court shall schedule a hearing on the petition. In considering the petition, the court may hear evidence, require briefs or schedule arguments;
   (6) within thirty (30) days after the filing of the district court’s order on the petition:
      (a) if the writ is granted, the state may appeal; or
      (b) if the writ is denied, the petitioner may appeal;
   (7) the Rules of Appellate Procedure shall govern the appeal to the Supreme Court.

G. Procedure on petition remanded by the Supreme Court. A petition originally filed in the Supreme Court may be remanded by the Supreme Court to the district court. If the petition is remanded by the Supreme Court, the district court shall proceed as if the petition had been filed in the district court in the first instance.

H. Appeal; non-death penalty proceedings. Within thirty (30) days after the district court’s decision:
   (1) if the writ is granted, the state may appeal as of right pursuant to the Rules of Appellate Procedure;
   (2) if the writ is denied, a petition for certiorari may be filed with the Supreme Court.

[As amended, effective March 1, 1986: March 16, 1998; June 1, 2002; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

Committee commentary for 2009 amendments - The 2009 amendments to this rule make five changes to the procedures governing petitions for writs of habeas corpus. First, Paragraph B is amended to provide that a petition filed by an unrepresented inmate is deemed to be filed on the date that the petition is deposited in the institution’s internal mail system. The amendment further provides that the inmate must state in the petition, under penalty of perjury, the date on which the petition was deposited for mailing. A corresponding amendment to Form 9-701 NMRA includes this statement.

The purpose of the amendment to Paragraph B is to eliminate uncertainty regarding the date when the petition is filed in the district court. Although there is no time limit for filing a state petition for a writ of habeas corpus, the date of filing can have an impact on the deadline for filing a petition for a writ of habeas corpus in federal court. Currently, defendants convicted in state court have one (1) year to file a petition for a writ of habeas corpus in federal court, and the one (1) year period begins to run from the date of the final judgment on a guilty plea, or one (1) year from a final decision of the highest state court ruling on a direct appeal after trial. However, under federal law, the filing of a state habeas petition tolls the one (1) year limitations period for filing a habeas petition in federal court.

While a state petition can toll the federal limitations period, disputes often arise concerning when the state petition was actually filed in state court. In some instances, unforeseen mailing delays beyond the control of the inmate prevent the receipt of a state habeas petition.

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petition to toll the one (1) year federal limitations period before it expires. Moreover, the practices among the various state judicial districts for processing state habeas petitions can vary greatly and, as a result, impact the application of the federal tolling provision. For example, some districts apparently refer habeas petitions to a district court judge for fairly swift review before actually filing, with filing by the clerk soon thereafter. In other districts, however, clerks sometimes hold petitions for sixty (60) days or more before they are reviewed by a judge and officially filed with the court. But in virtually none of these districts are the petitions actually file-stamped on the date of receipt by the clerk.

The uncertainties inherent in mailing documents from prison, and the existing inconsistent filing procedures in the district courts, have the potential to drastically affect an inmate’s right to toll the federal limitations period while state post-conviction remedies are exhausted. See Adams v. LeMaster, 223 F.3d 1177 (10th Cir. 2000) (holding that New Mexico inmate’s federal habeas petition was not timely filed because the one (1) year limitation period expired before state petition was file-stamped by state district court clerk). The amendments to Paragraph B are intended to eliminate confusion and avoid the unfair application of federal tolling provisions that may result from inconsistent filing practices in state district courts or unforeseen mailing delays beyond the control of an incarcerated petitioner.

Because there are no filing deadlines for filing state habeas petitions by unrepresented inmates in New Mexico, the changes to Paragraph B will not affect the substantive or procedural rights of the parties to a state post-conviction proceeding. State district courts, however, may want to revise their procedures so that the date file-stamped on a petition reflects the date of mailing set forth in the petition. If the State has reason to believe that the mailing date set forth in the petition is not accurate, the State may file a motion with the district court asking for a correction to the filing date.

The amendments to Paragraph C are intended to eliminate the inordinate amount of paperwork necessary to prepare and process requests for free process in post-conviction proceedings, which seems particularly unnecessary given the undeniable right of access to the courts by persons, indigent or not, who seek to correct an unlawful confinement. Moreover, the processing of this paperwork appears to lead to many of the delays in the actual filing of habeas petitions discussed above. The amendment to Paragraph C therefore seeks to eliminate these problems by allowing an incarcerated petitioner to file a petition without payment of a filing fee.

The amendments to Paragraph D are intended to clarify the place of filing for habeas petitions. The first change to Subparagraph (1) of Paragraph D provides that petitions challenging the Department of Corrections’ interpretation of a sentence should be filed with the court that imposed the sentence. As Rule 5-802.D(1) is currently written, the Department’s interpretation and application of a sentence fall within “matters other than [those set forth in] Subparagraph (1),” thereby requiring the petition to be filed in the judicial district where the petitioner is confined or restrained. The rationale for the proposed amendment is that, much like petitions that seek to correct a sentence, the court that sentenced the inmate is better qualified to interpret its own sentence than a court of the judicial district in which the institution is located. The second change to Subparagraph (1) of Paragraph D also clarifies that the petition should be filed with the court that adjudicated the petitioner’s confinement rather than focusing on the county where the offense was committed.

The amendments to Subparagraph (2) of Paragraph E expands the filing deadlines for amended petitions and responses ordered by the district court. Currently, if counsel is appointed to represent a petitioner, the attorney has thirty (30) days to file an amended petition. In situations where counsel is appointed, the issues involved and the need for further investigation by counsel often make the 30-day filing deadline for an amended petition unrealistic. As a result, motions to extend the filing deadline are routinely made and granted. The amendment to the filing deadline seeks to recognize this reality and eliminate unnecessary motion practice by expanding the filing deadline to ninety (90) days. As a matter of fairness and consistency, the amendments also increase the filing deadline to ninety (90) days in those instances when the State is ordered to file a response to the amended petition.

Finally, the amendment to Paragraph H eliminates the deemed denied provision that previously governed the Supreme Court’s review of the denial of habeas corpus petitions under Rule 12-501 NMRA. With this amendment, an express order by the Supreme Court is required to deny a petition for review filed under Rule 12-501 regardless of the length of time the petition for review is pending in the Supreme Court. The amendment is intended to conform to similar amendments to Rules 5-614, 5-801, and 5-121 NMRA eliminating the application of other deemed denied provisions during other stages of a criminal proceeding.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

ORDER


NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 1-016, 1-026, 1-033, 1-034, 1-037, and 1-045 of the Rules of Civil Procedure for District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 1-016, 1-026, 1-033, 1-034, 1-037, and 1-045 of the Rules of Civil Procedure for District Courts shall be effective May 15, 2009;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced amendments by publishing the same on the Judiciary’s web site (www.nmcourts.gov) in the Bar Bulletin and NMRA.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 30th day of March, 2009.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

1-016. Pretrial conferences; scheduling; management.

A. Pretrial conferences; objectives. In any action the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation; and
(5) facilitating the settlement of the case.

B. Scheduling and planning. Except in categories of actions exempted by local district court rule as inappropriate, the judge may, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(1) to join other parties and to amend the pleadings;
(2) to file and hear motions; and
(3) to complete discovery.

The scheduling order shall also include:

(4) provisions for disclosure or discovery of electronically stored information;
(5) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;
(6) the date or dates for conferences before trial and a final pretrial conference;
(7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and
(8) any other matters appropriate in the circumstances of the case.

The pretrial scheduling order shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint. A scheduling order shall not be modified except by order of the court upon a showing of good cause.

If a pretrial scheduling order is not entered, the court shall set the case for trial in a timely manner, but no later than eighteen (18) months after the filing of the complaint.

For good cause shown, the court may extend the time for commencement for trial beyond the time standards set forth in this paragraph or may modify the scheduling order.

C. Subjects to be discussed at pretrial conferences. The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
(2) the necessity or desirability of amendments to the pleadings;
(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; stipulations regarding the authenticity of documents and advance rulings from the court on the admissibility of evidence;
(4) the avoidance of unnecessary proof and of cumulative evidence;
(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs and the date or dates for further conferences and for trial;
(6) the advisability of referring matters to a master;
(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
(8) the form and substance of the pretrial order;
(9) the disposition of pending motions;
(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems;
(11) the limitation of the number of expert witnesses; and
(12) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants reasonably anticipate may be discussed.

D. Final pretrial conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.
E. **Pretrial orders.** After any pretrial conference is held pursuant to this rule, an order shall be entered reciting any action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

F. **Sanctions.** If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the court’s own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Subparagraphs (b), (c) or (d) of Subparagraph (2), of Paragraph B of Rule 1-037. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney’s fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[As amended, effective January 1, 1990; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

**Committee Commentary for 2009 Amendments.**

See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

**1-026. General provisions governing discovery.**

A. **Discovery methods.** Parties may obtain discovery by any of the following methods: depositions; interrogatories; requests for production or to enter land; physical and mental examinations and requests for admission.

B. **Scope of discovery.** Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

1. In general. Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party responding to discovery requests shall provide all nonprivileged responsive information then known to the party, subject to the limitations in these rules or as ordered by the court.

2. Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:
   - (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
   - (b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
   - (c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.

3. Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness’s expected testimony and the substance of the witness’s testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.

4. Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. For purposes of this paragraph, an application for insurance is not part of an insurance agreement.

5. Trial preparation materials. Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party’s representative (including the party’s attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement that the party made concerning the action or its subject matter. Upon request, a person not a party may obtain without the required showing a statement that the person made concerning the action or its subject matter. If the request is refused, the person may move for a court order compelling production of the statement. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement is:

(a) a written statement signed, adopted or approved by the person making it, or

(b) a contemporaneous, substantially verbatim recital of an oral statement by a person.


(a) A party may through interrogatories and requests for production discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, a party may discover the qualifications of the expert, including a copy of or the name and address of the custodian of any reports prepared by the expert regarding the pending action, a list of all publications authored by the witness within the preceding ten (10) years, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(b) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(c) A party may discover facts known or opinions held by an expert that another party has retained or specially employed in anticipation of litigation or preparation for trial and who is not
expected to be called as a witness at trial, only as provided in Rule 1-035 NMRA or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(d) Unless manifest injustice would result, the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under this subparagraph

(7) Claims of privilege or protection of trial preparation materials.

(a) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection pursuant to Subparagraph (5) of this paragraph as trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. Protective orders. Upon motion by any party or interested person for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(1) prohibiting the disclosure or discovery;
(2) limiting the terms or conditions of the disclosure or discovery;
(3) designating the time or place of the disclosure or discovery;
(4) directing the method of discovery including a method different than the party seeking discovery selected;
(5) barring or limiting inquiry into certain matters;
(6) directing that discovery be conducted with no one present except persons designated by the court;
(7) sealing disclosures, responses or deposition transcripts;
(8) authorizing, prohibiting or limiting the discovery of a trade secret or other confidential research, development or commercial information; and
(9) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may order that any party or person provide or permit discovery. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

A motion filed pursuant to Paragraph C of this rule shall set forth or attach a copy of the discovery request at issue.

D. Sequence and timing of discovery. Unless the court for good cause orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party’s discovery. A party responding to discovery requests may not refuse to provide responsive information on grounds that discovery is continuing or that future scheduling deadlines exist such as those for exchange of trial witness and exhibits lists.

E. Supplementation of responses. A duty to supplement responses may be imposed by order of the court, agreement of the parties or at any time prior to trial through new requests for supplementation of prior responses. In addition, a party has a duty to seasonably supplement or amend a prior response to an interrogatory, request for production, or request for admission if a party learns that the response is materially incomplete or incorrect and if additional or corrective information has not otherwise been made known to the parties during the discovery process or in writing.

F. Discovery conference. At any time the court may direct the attorneys for the parties to appear for a discovery conference. The court shall also conduct a discovery conference upon motion by any party, unless the court determines that good cause exists not to conduct such a conference.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Upon request of a party or when good cause otherwise exists, the court shall establish deadlines for identifying expert witnesses and conducting discovery related to expert testimony. An order may be altered or amended for good cause or by stipulation of the parties with court approval.

The court may combine the discovery conference with a pretrial conference authorized by Rule 1-016 NMRA.

[As amended, effective October 15, 1986; August 1, 1989; January 1, 1998; May 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments.

The 2009 amendments to Rule 1-026 NMRA consist of numerous changes as described below.

Stylistic and Grammatical Changes

The stylistic and grammatical changes to Rule 1-026 are numerous. Unless otherwise noted below, these changes were not intended to impact the substantive provisions of Rule 1-026.

Discovery Methods. The new language in Rule 1-026(A) is more concise. The provisions for requests for production or to enter land apply to both Rule 1-034, which has to do with such discovery requests made upon parties, as well as Rule 1-045, which has to do with such discovery via a subpoena to non-parties.

Scope of Discovery. The amendments consolidate the prior language in Rule 1-026(B)(1) to express the well-established standard for liberal pretrial discovery. E.g., Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982). The parties may obtain discovery of any information not privileged which is relevant to the subject matter involved in the pending litigation. The amendment retains the provision that the information sought need not be admissible at trial if the information appears to be reasonably calculated to lead to the discovery of admissible evidence. The rule further explains that parties responding to discovery requests seeking such information must provide responsive information then known to the party and may not delay discovery of such information simply
because discovery is not complete or future pretrial deadlines may exist.

**Witnesses and Exhibits.** This paragraph explicitly provides for discovery related to witnesses, documents, electronically stored information, and tangible things. One of the principal purposes of these provisions is to facilitate early discovery of necessary pretrial information to focus later discovery. Early identification of potential witnesses and exhibits should expedite the litigation process.

**Insurance Information.** Although Rule 1-026(B)(4) does not include an insurance application as part of an insurance agreement, such applications may be discoverable when reasonably calculated to lead to the discovery of admissible evidence. The revisions to Rule 1-026(B)(4) are not intended to change existing law governing the admissibility of information concerning insurance agreements. The Rules of Evidence continue to control the admissibility of insurance information.

**Expert Discovery.** Rule 1-026(B)(4) concerns discovery of experts. The previous rule required a court order for taking a deposition of an expert, a procedure not uniformly followed. The rule now provides for requests for production and interrogatories as well as depositions of experts without court order.

**Privilege Issues.** These revisions consist mostly of stylistic changes. It is desirable that a party comply with the provisions of Rule 1-026(B)(7)(a) by producing a privilege log of any information being withheld from discovery on the grounds of privilege. The provisions in Rule 1-026(B)(7)(b) are new. They modeled after amendments to the Federal Rules of Civil Procedure adopted with provisions for the discovery of electronically stored information as explained in more detail below.

**Protective Orders.** The amendments consist essentially of stylistic changes with one notable exception. The rule previously provided that a party or other person could seek a protective order from the court in which the action is pending or, alternatively, on matters relating to a deposition, from a court in the district where the deposition is to be taken. The provision applicable to the district where the deposition is to be taken is a vestige from the adoption of portions of the federal rule, which envisions discovery outside the federal district of the pending action. The federal rule has a nationwide application. New Mexico has a much smaller geographic area, and consequently, the committee felt that the burdens imposed by requiring parties or non-parties to seek a protective order in the district court where the action is filed did not outweigh the judicial economy and consistency of having that particular court decide the issue.

**Supplementation.** The amendments to Paragraph E concern a party’s duty to supplement and amend discovery responses. The rule does not require supplementation or amendment if the additional or corrective information has otherwise been made known to the parties during the discovery process or in writing. The amendment does not otherwise significantly change the substantive requirements of the existing rule; it is intended to restate those requirements more concisely.

**Discovery Conferences.** The revisions streamline the procedures applicable to discovery conferences and eliminate provisions that litigants were not typically following in routine practice. The rule provides parties the opportunity to have the court enter scheduling deadlines related to expert witnesses.

**Discovery of Electronically Stored Information.** In September, 2005, the Committee on Rules of Practice and Procedure proposed amendments to the Federal Rules of Civil Procedure. The committee found that discovery of electronically stored information “raises markedly different issues from conventional discovery of paper records” and that existing discovery rules “provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases.” September 2005 Report of the Committee on Rules of Practice and Procedure. The advisory committee submitted proposed amendments to Federal Rules 16, 26, 33, 34, 37, 45 and Form 35 to address these problems. The proposals were adopted and went into effect in the federal courts in December, 2006.

The New Mexico Rules of Civil Procedure for the District Courts Committee reviewed these new federal rules and the advisory committee’s accompanying commentary. With three substantive changes and additional minor editing changes, the committee recommended that New Mexico amend Rules 1-016, 1-026, 1-033, 1-034, 1-037 and 1-045 of the New Mexico Rules of Civil Procedure for the District Courts to incorporate the new federal rules concerning discovery of electronically stored information.

One recommended change occurs in Rule 1-026(B)(7)(b) NMRA, which deals with the assertion of privilege or other protection for information already produced by a party. Both Federal Rule 26(b)(5)(B) and Rule 1-026(B)(7)(b) provide that the party who is notified that the party has received information subject to the claim of privilege or protection must sequester it and not use it until the claim is resolved. Federal Rule 26(b)(5)(B) provides that the party in possession of the disputed information “may promptly present the information to the court under seal for a determination of the claim.” Because New Mexico law provides that documents are sealed only after a motion to seal has been made and granted, see, e.g., Thomas v. Thomas, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7 (Ct. App. 1999) (noting that a party sought a protective order to seal the district court record of the proceedings); LR2-111 NMRA (“... a court may seal a file or other record upon a party’s written motion or the court’s own motion, and showing of good cause.”), New Mexico Rule 1-026(B)(7)(b) provides instead: “By motion, a receiving party may promptly present the information to the court for in camera review and determination of the claim.” The committee does not intend that the adoption of Rule 1-026(B)(7) will otherwise affect the burdens of production and persuasion that apply when claims of privilege are made. See Rule Rule 1-026(B)(7(a)); also Pina v. Espinoza, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062.

The second change is the omission from the amendments to New Mexico Rule 1-037 of that portion of the 2006 amendment that added Rule 37(f) to the Federal Rule. Federal Rule 37(f) provides:

**(f) Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules.

The third change is the omission of a provision in Federal Rule 26(b)(2)(B), which provides:

**(B) Specific Limitations on Electronically Stored Information.** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden
or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The committee is of the view that the discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

1-033. Interrogatories to parties.

A. Number. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding fifty (50) in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Subparagraph (2) of Paragraph B(2) of Rule 1-026 NMRA.

B. Service. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. In cases involving multiple parties, the party serving interrogatories shall serve notice upon all parties who have appeared in the action that interrogatories have been served. A party propounding the interrogatories shall, upon request of any party, furnish to such party a copy of the interrogatories, answers and objections, if any.

C. Answers and objections.
(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.
(2) The answers are to be signed by the person making them and the objections signed by the attorney making them.
(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or agreed to in writing by the parties subject to Rule 1-029 NMRA.
(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party’s failure to object is excused by the court for good cause shown.
(5) The party submitting the interrogatories may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to answer an interrogatory.

D. Scope; use at trial. Interrogatories may relate to any matters which may be inquired into under Paragraph B of Rule 1-026 NMRA, and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

E. Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records, including the electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[As amended, effective January 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments.

See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

1-034. Production of documents and things and entry upon land for inspection and other purposes.

A. Scope. Any party may serve on any other party a request:
(1) to produce and permit the party making the request, or someone acting on the requestor’s behalf, to inspect, copy, test or sample any designated documents, electronically stored information any tangible things which constitute or contain matters within the scope of Rule 1-026 NMRA and which are in the possession, custody or control of the party upon whom the request is served; or
(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 1-026 NMRA.

B. Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that
inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

C. Persons not parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 1-045 NMRA.

As amended, effective January 1, 1998; as amended by Supreme Court Order No. 99-5400-001, effective May 15, 2009.

Committee Commentary for 2009 Amendments. See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.

1-037. Failure to make discovery; sanctions.

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state, whether of a party or a nonparty, this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 1-030 NMRA or Rule 1-031 NMRA, or a corporation or other entity fails to make a designation under Rule 1-030 NMRA or Rule 1-031 NMRA, or a party fails to answer an interrogatory submitted under Rule 1-033 NMRA, or if a party, in response to a request for inspection submitted under Rule 1-034 NMRA, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 1-026 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery. A motion filed pursuant to this paragraph shall set forth or have attached the interrogatory or the request for production or admission, and any response thereto.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney’s fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule or Rule 1-035 NMRA, or if a party fails to obey an order under Rule 1-026 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(c) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) where a party has failed to comply with an order under Rule 1-035 NMRA requiring that party to produce another for examination, such orders as are listed in Subparagraphs (a), (b) and (c) of Subparagraph (2) of this paragraph, unless the party failing to comply shows that that party is unable to produce such person for examination.
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 1-036 NMRA, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees. The court shall make the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 1-036 NMRA;
(2) the admission sought was of no substantial importance;
(3) the party failing to admit had reasonable grounds to believe that the party might prevail on the matter; or
(4) there was another good reason for the failure to admit.

D. Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.
If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails:

(1) to appear before the officer who is to take the deposition, after being served with a proper notice;
(2) to serve answers or objections to interrogatories submitted under Rule 1-033 NMRA, after proper service of the interrogatories; or
(3) to serve a written response to a request for inspection submitted under Rule 1-034 NMRA, after proper service of the request, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this paragraph may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1-026 NMRA.

As amended, effective October 15, 1986; August 1, 1988; August 1, 1989; January 1, 1998; [as amended by Supreme Court Order 09-8300-007, effective May 15, 2009.]

Committee Commentary for 2009 Amendments.
A number of amendments to the Rules of Civil Procedure for the District Courts were approved in 2009 to incorporate provisions from the Federal Rules of Civil Procedure addressing the discovery of electronically stored information. See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information. However, one difference between the New Mexico and federal rules pertaining to electronic discovery is the omission of that portion of Federal Rule 37(f) commonly referred to as the “safe harbor” provision, which provides:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of the discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules. But even without inclusion of the federal “safe harbor” provision, the committee is of the view that New Mexico’s civil discovery rules should not treat the routine, good-faith purging of electronic files any differently than the good-faith, routine destruction of paper files according to an established records retention schedule. The destruction of electronic information pursuant to the routine, good-faith operation of an electronic information system is, of course, something the district court can take into account when considering a request for discovery sanctions. However, regardless of the form of information sought within the context of discovery, a bad faith approach to discovery warrants the imposition of sanctions. See United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 241, 629 P.2d 231, 317 (1980)(“When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants.”). Indeed, even under the federal safe harbor provision, one may be sanctioned for the bad faith destruction of electronically stored information.

[Adopted by Supreme Court Order 09-8300-007, effective May 15, 2009.]

1-045. Subpoena.
A. Form; issuance.
(1) Every subpoena shall:
(a) state the name of the court from which it is issued;
(b) state the title of the action and its civil action number;
(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing or sampling of designated documents, electronically stored information or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection, copying, testing or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. Service; place of examination.
(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a
party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person’s attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2) of this rule:

(i) a person commanded to produce and permit inspection, copying, testing or sampling of designated electronically stored information, documents or tangible things; or

(ii) a person commanded to attend a board or committee meeting and the mileage provided by Rule 1-005 NMRA.

(3) A person may be required to attend a deposition within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued for taking of a deposition within this state in an action pending outside the state pursuant to Section 38-8-1 NMSA 1978 upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. Protection of persons subject to subpoenas.

(1) In general. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.

(2) Subpoena of materials or inspection of premises.

(a) A person commanded to produce and permit inspection, copying, testing or sampling of designated electronically stored information, documents or tangible things, or inspection of premises:

(i) need not appear in person at the place of production, inspection, copying, testing or sampling unless commanded to appear for deposition, hearing or trial; (ii) absent a court order, shall not respond to the subpoena prior to the expiration of fourteen (14) days after the date of service of the subpoena;

(iii) if a written objection is served or a motion to quash the subpoena is filed, shall not respond to the subpoena until ordered by the court;

(iv) may condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying.

(b) Subject to Subparagraph (2) of Paragraph D of this rule:

(i) a person commanded to produce and permit inspection, copying, testing or sampling or a person who has a legal interest in or the legal right to possession of the designated material or premises may file a written objection or a motion to quash the subpoena;

(ii) any party may, within fourteen (14) days after service of the subpoena serve upon all parties written objection to or a motion to quash inspection, copying, testing or sampling of any or all of the designated materials or inspection of the premises.

(iii) If objection is served on the party serving the subpoena or a motion to quash is filed with the court and served on the parties, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. The court may award costs and attorney fees against a party or person for serving written objections or filing a motion to quash which lacks substantial merit.

(3) (a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(b) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.
D. Duties in responding to subpoena.

(1)  
(a) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of Subparagraph (2) of Paragraph B of Rule 1-026 NMRA. The court may specify the conditions for the discovery.

(2)  
(a) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

E. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

F. Duties to make copies available. A party receiving documents under subpoena shall make them available for copying by other parties.

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1998; November 1, 2002; as amended by Supreme Court Order No. 09-0800-007, effective May 15, 2009.]

Committee Commentary.

2002 Amendment to Rule 1-045

Formerly, pre-trial production of documents or tangible items in the possession or control of a nonparty could only be obtained by a subpoena issued in conjunction with a notice of deposition of the person in possession of the documents.

In 1991, the federal rule was amended to allow pretrial subpoenas of documents or tangible items without the necessity of noticing and scheduling a simultaneous deposition. In 1997, the New Mexico Supreme Court similarly amended Rule 1-045 NMRA.

As amended in 1991, the federal rule required that “[p]rior notice” of any commanded production shall be served on each party, F.R. Civ. P. 45(b)(1). “The purpose of the notice provision is to afford other parties an opportunity to object to the production.


The 1997 amendment of Rule 1-045 NMRA provided for notice to all parties “[p]rior to or at the same time” as service of the subpoena. Rule 1-045(B)(2)(b) NMRA. As demonstrated in Wallis v. Smith, 2001-NMCA-017, 130 N.M. 214, 22 P.2d 682, cert. denied 23 P.3d 929, the New Mexico rule could be construed to permit a party to hand deliver a subpoena for documents and simultaneously mail notice to other parties with the possible result that the nonparty might comply with the subpoena before other parties received notice of its contents and had an opportunity to object to its contents pursuant to Rule 1-045(C)(2)(b) NMRA.

The 2002 amendment to Rule 1-045(C)(2) NMRA solves this problem by providing a fourteen (14) day period before responding to assure that “a person who has a legal interest in or the legal right to possession of the designated material or premises” or any party will have an opportunity to object to the subpoena before the witness responds.

The federal rule, requiring “[p]rior notice” is ambiguous, though it has been construed to require “reasonable notice” prior to service of the subpoena. Biocore Medical Technologies, Inc. v. Khosrowshahi, 181 F.R.D. 660, 667 (D. Kan. 1998). The committee considered but rejected this construction, preferring to set a specific time that will assure prior notice, while also recognizing the possibility that a court might reduce the time under appropriate circumstances.

1997 Amendment of Rule 1-045

1. Introduction

The New Mexico District Court Rules were based upon the Federal Rules of Civil Procedure. Although the New Mexico rules diverge from the Federal Rules when appropriate, the committee regularly reviews New Mexico’s District Court Rules of Civil Procedure when the Federal Rules are modified. Federal Rule 45 - Subpoenas - underwent significant change as a result of amendments that went into effect in December, 1991 and was further modified by amendments effective in December, 1995. The Rules Committee’s reevaluation of Rule 1-045 in light of the changes in the federal rule prompted amendments to Rule 1-045 and the adoption of Rule 1-045 in its current form.

2. Overview

Rule 1-045 formerly contained different provisions for subpoenas for attendance at trial or hearing and for attendance at a deposition. The existing rule follows the model of the current federal rule which generally eliminates that distinction. Rule 1-045 formerly had the effect of barring parties from obtaining items such as documents or inspecting premises except in conjunction with a subpoena setting a deposition of a witness. The existing rule follows the current federal rule which allows subpoenas for production of items or inspection of premises from non-parties without the necessity of scheduling and conducting a deposition at the same time. The rule provides procedural protections to as-
Subpoenas

The rule provides for statewide service of both trial and hearing subpoenas and deposition and production subpoenas. Rule 1-045(B)(1). Formerly, Rule 1-045 placed significant geographic limitations upon the place that depositions might be conducted in the absence of a court order. Some of those limitations depended upon the place of service of the subpoena. The rule eliminates the significance of the place of service of the subpoena as a factor in setting the place of deposition and modifies but does not eliminate other limitations in the former rule.

Rule 1-045 formerly authorized only the district court clerk to issue subpoenas. The existing rule follows the current federal rule which allows any person’s attorney to issue subpoenas in the name of the court.

3. Who may issue subpoenas

Formerly, Rule 1-045 required that the clerk issue and sign all subpoenas. Following the model of the current federal rule, Rule 1-045 now authorizes an attorney for a party to issue and sign subpoenas in the attorney’s capacity as an officer of the court. Any attorney authorized to practice law in New Mexico who is serving as attorney to a party may issue trial and hearing subpoenas as well as deposition and production and inspection subpoenas.

The clerk continues to have power to issue subpoenas. A clerk’s subpoena will be of particular use to a party who is not represented by counsel. The clerk of the court for the district in which the matter is pending is the appropriate person to issue subpoenas for service anywhere in the state.

4. Form and content of subpoenas

A subpoena may: 1) command a person to attend at trial or attend a hearing; 2) command a person to appear for a deposition; 3) command a person to permit inspection of premises; 4) command a person to produce items at trial or a hearing; or 5) command a person to produce items for discovery or inspection prior to trial. A subpoena to produce items or permit inspection may, but need not, also command the person to attend a trial, hearing or deposition. Thus, Rule 1-045 now permits a party to subpoena items or obtain inspection without simultaneously scheduling a deposition.

Following the model of the current federal rule, subpoenas no longer need to contain the seal of the court. They must, however, now contain the civil action number of the case for which the subpoena is issued. Rule 1-045(A)(1)(d) now provides that subpoenas shall be substantially in the form approved by the Supreme Court and the Court has approved forms consistent with the requirements of Rule 1-045. See Civil Form 4-505 NMRA.

5. Service of subpoenas

Rule 1-045 now explicitly authorizes service of process anywhere in the state. When a person is beyond the subpoena power of the New Mexico District Court, Rule 1-045 provides that the party to the New Mexico proceeding who seeks to subpoena items, conduct inspection, or conduct a deposition in another state shall do so in the manner provided by law or rule of the other state. See, e.g., Mass. Gen. Laws Ann. 123A Sec. 11 (West 1985) (“Discovery Within Commonwealth for Proceedings Outside Commonwealth”).

As in former Rule 1-045, service of the subpoena normally must be accompanied by the tender of designated per diem expenses and mileage except in situations provided for in Rule 1-045(B)(2)(a) and when subpoenas are issued in behalf of the state, a state officer or a state agency. The rule now specifically requires that the full per diem be tendered even if the party believes that the required attendance will not take an entire day. Where attendance is required for more than one day, the full per diem for each additional day must be paid prior to the commencement of proceedings each day.

Rule 1-045(B)(2) formerly provided that the failure to tender required per diem expense and mileage fees did not invalidate the subpoena but merely justified the imposition of appropriate sanctions. That provision has been omitted from Rule 1-045. The committee intends that henceforth the failure to tender required expense and mileage fees shall invalidate the subpoena and justify non-compliance with the subpoena’s command. The burden of compliance rests upon the person on whose behalf the subpoena is served.

Because Rule 1-045 already provided for service by anyone not a party who is at least eighteen years old, specific references to the authority of sheriffs and deputies to serve subpoenas was superfluous and has been omitted in this rule. This modification follows the model of the current federal rule.

6. Notice of service of subpoena

Whenever a party schedules a deposition (whether or not a subpoena is issued compelling attendance at the deposition), Rule 1-030(B)(1) requires that notice of the deposition be sent to each party. When a subpoena for production or inspection is served in conjunction with the notice of deposition, the party seeking production at the deposition must also send notice of the issuance of the subpoena to each party along with the notice of the deposition. Id.

Because Rule 1-045 formerly required that subpoenas for pre-trial production or inspection could only be issued in conjunction with the taking of a deposition, the notice requirement of Rule 1-030(B)(1) effectively assured that all parties would receive notice of every pre-trial attempt by a party to compel production and inspection against a non-party. Rule 1-045 now authorizes issuance of a subpoena for pre-trial production without the necessity of a simultaneous deposition, Rule 1-045(A)(1)(d), with the result that the notice requirement in Rule 1-030(B)(1) no longer assures that all parties will receive notice of pre-trial production and subpoenas. To fill this notice gap, Rule 1-045(B)(2) now requires that prior to or simultaneously with the service of pre-trial inspection or production subpoenas the party on whose behalf the subpoena is served must give notice to all parties in the lawsuit in the manner required by Rule 1-005. This provision follows the model of the current federal rule.

7. Place of attendance or production

Service of a subpoena may be made anywhere in the state. Rule 1-045(B)(1). As was the case under former Rule 1-045, if the subpoena commands attendance at a trial or a hearing, the person served with the subpoena must appear as commanded anywhere in the state. Rule 1-045(B)(4).

Rule 1-045 modifies the former rule concerning the place in which a deposition of a subpoenaed witness may be scheduled. The rule formerly contained separate provisions for the place of depositions, depending upon whether the person subpoenaed was a resident of the judicial district in which the deposition was to be taken. In the case of nonresidents of the judicial district, the former rule focused on the place of service, and required that the deposition be held within forty miles of the place of service of the subpoena unless the court ordered otherwise.

Rule 1-045 eliminates the distinction between residents and nonresidents of the judicial district and does not take into account the place of service in setting the proper place for the deposition.

Instead, Rule 1-045 provides that all persons may be required to
attend a deposition only within 100 miles of the place of their residence, their place of employment or where they transact business unless another place is fixed by order of the court. Rule 1-045(B)(3).

If a person declines to honor a subpoena that is inconsistent with the geographical limitations of this rule, the person cannot be held in contempt for failure to attend the deposition unless the court entered an order compelling attendance at that place. Rule 1-045(E).

8. Proof of service of subpoena

The Supreme Court has approved a form for proof of service of a subpoena. See civil form 4-505 NMRA. When proof of service of the subpoena must be filed pursuant to Rule 1-005(D) NMRA, Rule 1-045(B)(5) requires that the form of the proof of service be in substantial compliance with the approved form.

9. Duty to avoid misuse of subpoena authority

For the first time, Rule 1-045 imposes an explicit duty on parties and attorneys responsible for subpoenas to take reasonable steps to avoid undue burden or expense on persons subject to the subpoenas. Rule 1-045(C)(1). The court may sanction parties or attorneys who violate this rule with appropriate sanctions including imposition of an order to pay the witness lost earnings and attorney’s fees. Id.

10. Subpoenas for production or inspection

Subpoenas for the production of tangible items or inspection of premises now may issue without the necessity for setting a deposition at the same time. Rule 1-045(A)(1)(d). When such a subpoena is issued, the party responsible for the issuance of the subpoena must provide timely notice to all parties of the issuance of the subpoena. Rule 1-045(B)(2).

The rule formerly provided only that the subpoenaed person “produce” the items. The rule now requires that the person “produce and permit inspection and copying” of the books, documents or tangible items. Rule 1-045(A)(1)(d).

The rule formerly provided that the subpoena must identify the items subject to the subpoena with reasonable particularity. The committee has eliminated this explicit requirement in deference to its preference to model Rule 1-045 after the federal rule, but believes that the requirement that the items be “designated”, Rule 1-045(A)(1)(c), incorporates the former requirement of reasonable particularity in the description of the items sought. The former rule also explicitly limited the scope of subpoenaed items to those within the scope of discovery permitted by Rule 1-026(B). The committee has eliminated this explicit limitation also in deference to its preference to model Rule 1-045 after the federal rule, but assumes that specific references to protection for trade secrets, expert opinions and the like, now found in Rule 1-045(C)(3)(b), which are rooted in Rule 1-026, suffice to indicate that the subpoena of items continues to be subject to the limitations of discovery in Rule 1-026.

The person who receives a subpoena to produce items or permit inspection of premises need not appear in person at the designated time and place unless that person is also commanded in the subpoena to appear for a deposition, trial or hearing. Rule 1-045(C)(2).

The person who receives a subpoena to produce items or permit inspection of premises must do so unless the person serves timely objections on all parties. This modifies the federal rule by requiring service on all parties.

If no objections are served, the person responding shall produce the documents either as they are kept in the ordinary course of business or labeled and organized to correspond with the categories of the demand. Rule 1-045(D)(1).

If timely objections are served, the subpoenaed person need not comply with the subpoena unless and until the person seeking the subpoenaed items obtains a court order compelling the production. Rule 1-045(C)(2)(b). Alternatively, the person who opposes compliance with the subpoena and serves timely notice of objections may file a timely motion seeking to quash or modify the subpoena. Rule 1-045(C)(3)(a).

Rule 1-045 now lists grounds for seeking an order of protection from a subpoena, Rule 1-045(C)(3), and provides guidelines for the court to use in ruling on such motions. Id. These new provisions follow the current federal rule.

11. Taking a deposition in New Mexico for an action pending outside New Mexico

A New Mexico statute authorizes New Mexico courts to order the deposition of persons found in this state for use in conjunction with legal proceedings outside New Mexico. Sections 38-8-1 to 38-8-3 NMSA 1978. Rule 1-045(B)(6) makes reference to the statute as a guide to practitioners.

Committee Commentary for 2009 Amendments.

See the 2009 Committee Commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]
Certiorari Denied, No. 31,524, February 17, 2009

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-031

Topic Index:

Appeal and Error: Fundamental Error; and Harmless Error
Criminal Law: Criminal Sexual Penetration; and Sexual Offenses
Criminal Procedure: Affidavit for Search Warrant; Children as Witnesses;
Grand Jury; Indictment; Motion to Suppress; Prejudice; Probable Cause;
Right to Confrontation; Search and Seizure; Search Warrant;
and Substantial or Sufficient Evidence
Evidence: Character Evidence; Children as Witnesses; Hearsay Evidence;
Photographs; Physical Evidence; Prejudicial Evidence;
Prior Acts or Statements; Probative Value vs. Prejudicial Effect;
and Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
TOM DIETRICH,
Defendant-Appellant.
No. 25,220 (filed: January 8, 2009)

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
KENNETH G. BROWN, District Judge

GARY K. KING
Attorney General
CHRIS CONLEE
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

HUGH W. DANGLER
Chief Public Defender
SUSAN ROTH
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

RODERICK T. KENNEDY, Judge

[1] Defendant Tom Dietrich was convicted of criminal sexual contact of a minor (CSCM) and two counts of contributing to the delinquency of a minor (CDM) following a jury trial. The victims that testified in the jury trial were R.P. and C.L. Another victim, J.O., did not show up for trial, and ten criminal counts relating to him were dropped. Defendant was also convicted of two counts of sexual exploitation of children following a bench trial. On appeal, Defendant contests convictions arising from both trials, raising nine points of error. We affirm, addressing each of Defendant’s points of error in turn.

FACTS AND PROCEDURAL HISTORY

[2] This case began in May 2002, when Defendant reported that his house had been burglarized. Detective James Harris began an investigation into the reported burglary and interviewed Defendant’s neighbors. Defendant had listed one of the alleged victims in this case, J.O., as a suspect in the burglary. Detective Harris went to the scene of the burglary and spoke with neighbors who reportedly had been seen with J.O. The detective related that Defendant listed two other people as potential suspects in the burglary and claimed that all three people had access to Defendant’s residence. Detective Harris discovered that all three suspects had “free rein in and out of the residence” and were living with Defendant on and off.

[3] Detective Harris first made contact with J.O. on May 30, 2002. At first, J.O. concealed his identity. He later made an allegation that Defendant tried to rape him. The investigation of the burglary thereafter developed into an investigation about sexual misconduct on the part of Defendant. Detective Harris subsequently obtained search warrants for Defendant’s residence that resulted in evidence inculpatory to Defendant’s being seized. Defendant was indicted on July 25, 2002, and his jury trial commenced on November 3, 2003. We discuss pertinent facts as they relate to each issue below.

DISCUSSION

1. Affidavit

[4] Defendant argues that the affidavit for the search warrants was insufficient because it was based on unreliable information, violating his right against unreasonable searches and seizures under the Fourth Amendment and the New Mexico Constitution. Defendant’s brief refers to “the affidavit” for the first of three search warrants that Detective Harris obtained. At trial, Defendant objected to evidence obtained under all warrants. We note that the factual information in the affidavit for the first search warrant formed a common basis for all warrants, and we address the sufficiency of the one affidavit as it affects the three warrants executed on Defendant’s premises. Before trial, Defendant sought to have evidence against him suppressed based on deficiencies in the warrants. The district court denied Defendant’s motion to suppress.

Standard of Review

[5] The district court applies “a de novo standard of review to a magistrate’s determination that an affidavit for a search warrant alleges facts sufficient to constitute probable cause.” State v. Nyce, 2006-NMSC-026, ¶ 8, 139 N.M. 647, 137 P.3d 587. This Court conducts the same review as the district court. State v. Gonzalez, 2003-NMCA-008, ¶ 13, 133 N.M. 158, 61 P.3d 867. We limit our review to the contents of the affidavit and apply a common-sense reading, considering the document as a whole “to determine whether the issuing judge made an . . . independent determination of probable cause based on sufficient facts.” Nyce, 2006-NMSC-026, ¶ 8 (alteration in original) (internal quotation marks and citation omitted); see State v.
The Investigation

(7) The following facts were contained in the affidavit submitted to the magistrate in this case. Detective Harris was a full-time, salaried, and certified law enforcement officer investigating a burglary that Defendant reported at his house. After Detective Harris began the investigation of the burglary, he received the name of one suspect, J.O., and made contact with him. J.O. responded to Detective Harris’s questioning about his relationship with Defendant by stating: “That mother f**ker [sic] tried to rape me.” J.O. stated that he had spent time living with Defendant from the time he was thirteen until as recently as May of 2002. He also alleged that Defendant repeatedly made sexual advances toward him, had sodomized him before he reached the age of eighteen, and had taken “nude or sexually explicit pictures of him . . . without his consent,” pictures that could be found on Defendant’s computer. J.O. told Detective Harris to contact J.B., an inmate at the juvenile detention center in Albuquerque, ostensibly to corroborate J.O.’s statements.

(8) When Detective Harris questioned J.B. at the juvenile detention center, J.B. declined to make any statements. Detective Harris spoke to an employee of this detention center, unnamed in the affidavit, who told the detective that there had been other similar allegations made against Defendant. This employee also told Detective Harris about an incident in which Defendant had delivered a cupcake to J.B. with a note stating “I am your daddy.”

(9) Detective Harris spoke with J.O.’s girlfriend Darlene Gonzales, who told the detective that after she had an altercation with J.O., Defendant told her that he was going to drug J.O. “to the point of incapacitation and then have sex with him.”

(10) Detective Harris further spoke with a person referred to in the affidavit as the supervisor in charge of adult probation and parole in Valencia County. Harris was told that although Defendant had worked there, he had been discharged for “misconduct” involving clients. The detective also spoke with unnamed persons at the sheriff’s office in Valencia County. One sheriff’s deputy who had responded to reports of parties at Defendant’s home found “numerous young juvenile males” present. Another unnamed sheriff’s deputy reported to the detective that he had dealt with Defendant, that Defendant had “three or four young [male] juveniles” with him on that occasion, and that he believed that there was alcohol present. The deputy also believed those juveniles to have been clients within the juvenile probation system. Additionally, when Detective Harris contacted the game and fish department of Sierra County, he discovered that Defendant had been arrested for contributing to the delinquency of a minor during an incident near Elephant Butte Lake.

(11) J.O. also made allegations that Defendant was reporting burglaries in order to defraud his insurance company and that Defendant had previously reported that his home was burglarized. Detective Harris checked three reports filed by Defendant and noted several inconsistencies among them, including the possible listing of duplicate items. Detective Harris requested a search warrant based on all of these facts, and the magistrate judge authorized it.

Hearsay, Named and Unnamed Informers

(12) “[I]t is necessary that the affidavit provide a factual basis for the informant’s personal knowledge,” such as dealings with or observations of the defendant. State v. Baca, 97 N.M. 379, 381, 640 P.2d 485, 487 (1982). When facts provided by an informant are independently corroborated, we accord greater weight to the informant’s credibility. See Steinzig, 1999-NMCA-107, ¶ 21. Identifying an “informant” by name is a significant factor in determining the veracity or reliability of the information. See id. ¶ 19. “[A] named informant has greater incentive to provide truthful information because he or she is subject to unfavorable consequences for providing false or inaccurate information to a greater degree than an unnamed or anonymous individual.” Id.

(13) Defendant argues that the affidavit in this case was constitutionally inadequate because it did not “satisfy the basis of knowledge or the credibility prong of the Aguilar-Spinelli test.” See generally Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). This Court noted in Steinzig that the strictures of Aguilar-Spinelli “were aimed primarily at unnamed police informers.” Steinzig, 1999-NMCA-107, ¶ 19 (internal quotation marks and citation omitted). “If the affidavit rests on hearsay—an informant’s report—what is necessary under Aguilar is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it[.]” Spinelli, 393 U.S. at 425 (White, J., concurring).

(14) J.O. was a citizen-informant named in an affidavit. All persons to whom Detective Harris spoke were identified in the affidavit by name or position. The information obtained by Detective Harris in further investigations and interviews with several other informants following the allegations made by J.O. does not require the same scrutiny required by Aguilar-Spinelli because that information merely corroborated J.O.’s story of Defendant’s predilections and did not form the basis for the allegations leading to probable cause to issue a warrant. The affidavit in this case rests on first-hand accounts of Defendant’s crimes by citizen-informer J.O. Corroboration obtained by Detective Harris in further investigation bolsters the reliability of J.O.’s allegations.

J.O.’s Motivations

(15) Defendant makes much of the fact that Detective Harris’s investigation began based on a report of a burglary committed in Defendant’s home and quickly transformed into an investigation of Defendant himself based on allegations made by J.O. Defendant’s argument insinuates that J.O. made allegations against Defendant in order to turn the detective’s
attention from himself and onto Defendant. This implies that J.O. had a motive to lie and thus maintains that his information cannot be reliable. While any or all of J.O.’s statements might have been true, the issue is the extent to which Harris acquired and used sufficiently reliable information to continue his investigation of all matters on which he acted. The fundamental inquiry in cases such as this one is whether the underlying circumstances show that the informant’s information is reliable.

Courts have looked at an informant’s motivation for telling the truth to investigating officers when the informant is aware that if his information is false, he could be held accountable for filing a false report. See People v. Rodriguez, 420 N.E.2d 946, 950 (N.Y. 1981) (noting that it would behoove a criminal defendant to tell the truth about criminal activities of another because “[h]e must . . . have known that sending the police on a fruitless errand would avail him of little[.]”); State v. Thomas, 673 N.W.2d 897, 908-09 (Neb. 2004) (“[B]y identifying himself or herself by name, the informant is put in the position to be held accountable for providing a false report, which makes the informant more reliable.”). The New York Court of Appeals noted in Rodriguez that the defendant’s situation of being in custody was “not necessarily an indicator of his unreliability.” 420 N.E.2d at 950. Instead, the Court noted, the defendant could have made his statement revealing the criminal activities of another because “[h]e must . . . have known that sending the police on a fruitless errand would avail him of little[.]”

We recognize that the employee at this detention center who had a personal relationship with J.O. and Darlene Gonzales that Defendant was engaged in inappropriate conduct with juvenile males. See State v. Turkal, 93 N.M. 248, 250, 599 P.2d 1045, 1047 (1979) (noting that an affidavit contained probable cause when personal information provided by the informant was corroborated by other sources).

Detective Harris went to the juvenile detention center in Albuquerque to speak with J.B., and although J.B. declined to provide a statement, an employee there related the incident involving the cupcake. We recognize that the employee at this detention center was unnamed in the affidavit, but we do not find that particularly troubling. The person is identified as an employee of a particular detention center who had a face-to-face conversation with Detective Harris and gave detailed, specific information. This was no anonymous or confidential informant but rather a government employee talking about information within his official knowledge. See Knight, 2000-NMCA-016, ¶ 20 (recognizing that information provided by a citizen-informant, independently corroborated by police investigation and the naming of the informant, along with independent corroboration considered with the facts and circumstances of the case “all may import sufficient veracity or reliability in a particular instance”).

Detective Harris also received confirmation that Defendant had been employed by Valencia County in adult probation and parole and had been terminated due to “misconduct” with clients. In addition, Detective Harris heard several allegations about Defendant’s association with young juvenile males, and that several of those instances included alcohol. The magistrate was entitled to consider reasonable inferences from Defendant’s activities and the allegations made against him, despite the potentially suspicious circumstances under which J.O. furnished his information. Nyce, 2006-NMSC-026, ¶ 9. We conclude that there was enough independent corroborating evidence of their credibility and reliability be shown. One practical way of making such a showing is to point to accurate information which they have supplied in the past.

State v. Paszek, 184 N.W.2d 836, 842 (Wis. 1971).

Further, even if it appears that the informant is seeking revenge, it does not necessarily indicate a motive to falsify allegations. See People v. Isenberg, 367 N.E.2d 364, 366 (Ill. App. Ct. 1977) (rejecting the defendant’s contention that the informant could not be reliable because he was seeking revenge on the defendant based on the informant’s brother’s hospitalization and holding that the informant could be considered an ordinary citizen); State v. Olson, 2003 MT 61, ¶ 27, 66 P.3d 297 (noting that even if a citizen-informant has mixed motives, his information can still be reliable). While the fact that J.O. made allegations against Defendant while being investigated for a burglary perpetrated on Defendant’s property casts doubt on J.O.’s truthfulness, we cannot ignore that he remained a named informant and that Detective Harris further investigated and received corroborating information.

Indeed, in State v. Knight, 2000-NMCA-016, ¶ 21, 128 N.M. 591, 995 P.2d 1033, this Court considered the cooperation of a criminal defendant in providing information to law enforcement officers when that information was later used in an affidavit. We stated that the agreement, “when viewed together with the informant’s efforts at cooperation, adds [to] rather than detracts from his reliability, thereby reducing the risk of fabrication.” Id.

J.O. was the citizen-informer in this case, providing information to Detective Harris that was soon confirmed by Darlene Gonzales. Detective Harris also obtained information from J.O. suggesting that Defendant had other inappropriate contact with juvenile males. That information was also later confirmed by a staff member at the juvenile detention center in Albuquerque and by persons at the sheriff’s office in Valencia County and the game and fish department in Sierra County. From J.O.’s statements that Defendant took unauthorized nude photographs of him and attempted to rape him, the magistrate could reasonably infer that Defendant’s house could contain evidence of those illegal activities. See Gonzales, 2003-NMCA-008, ¶s 12, 14 (“[W]e give deference to the magistrate’s reasonable factual inferences underlying the probable cause determination.”). The magistrate could also reasonably infer that there was evidence of drugs at Defendant’s house based on the statement of Darlene Gonzales that Defendant intended to use drugs to facilitate a sexual encounter with J.O.

In this case, we have numerous cooperating informants; and most do not share J.O.’s motivations regarding Defendant. Rather, the majority were employees of state agencies and were forthcoming with information about Defendant despite having nothing to gain. The information provided by the informants corroborated accounts by J.O. and Darlene Gonzales that Defendant was engaged in inappropriate conduct with juvenile males. See State v. Turkal, 93 N.M. 248, 250, 599 P.2d 1045, 1047 (1979) (noting that an affidavit contained probable cause when personal information provided by the informant was corroborated by other sources).

Detective Harris also confirmed that Defendant had been employed by Valencia County in adult probation and parole and had been terminated due to “misconduct” with clients. In addition, Detective Harris heard several allegations about Defendant’s association with young juvenile males, and that several of those instances included alcohol. The magistrate was entitled to consider reasonable inferences from Defendant’s activities and the allegations made against him, despite the potentially suspicious circumstances under which J.O. furnished his information. Nyce, 2006-NMSC-026, ¶ 9. We conclude that there was enough independent corroborating
information, apart from J.O.’s allegations, for the magistrate to determine that probable cause existed to search Defendant’s house for the items the detective had been told he would find there. Id. ¶ 14 (“[O]rdinary, innocent facts alleged in an affidavit may be sufficient if, when viewed together with all the facts and circumstances, they make it reasonably probable that a crime is occurring in the place to be searched.”).

[23] We hold that the affidavit was supported by probable cause and therefore that the district court did not err in denying the motion to suppress.

2. Filing Returns of Warrants With the Court After Execution

[24] Defendant argues that because the search warrants were not returned, filed in court, or signed by a judge or clerk, the warrants are invalid and the evidence obtained as a result of the warrants should be suppressed. Defendant relies on State v. Montoya, 86 N.M. 119, 120, 520 P.2d 275, 276 (Ct. App. 1974), for his argument that the failure to return a search warrant renders the warrant void.

[25] First, Montoya is of little precedential value in this case as this Court adopted its partial dissent in State v. Malloy, 2001-NMCA-067, ¶ 15, 131 N.M. 222, 34 P.3d 611. Montoya held that the search warrant “had no direction on its face that it be returned to the issuing judge and no such return was ever made,” rendering the warrant invalid. 86 N.M. at 120, 520 P.2d at 276. However, in Malloy, this Court noted that the purpose of the warrant requirement was “to provide the property owner assurance and notice during the search” and that two levels of error apply to executing a search warrant: fundamental error and merely technical error. 2001-NMCA-067, ¶ 11.

[26] Second, Defendant did not raise this argument in the district court; he raises it here for the first time. Because he did not preserve the issue in the district court, we review it only for fundamental error. State v. Cunningham, 2000-NMSC-009, ¶ 8, 128 N.M. 711, 998 P.2d 176. Fundamental error may be found upon one or more of the following bases: “there has been a miscarriage of justice,” the question of the defendant’s guilt “is so doubtful that it would shock the conscience” to allow his conviction to stand, or “substantial justice has not been done.” State v. Orosco, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). We may also hold that a fundamental error has been committed where we determine that there was an “error . . . of such magnitude that it affected the trial outcome.” State v. Jacobs, 2000-NMSC-026, ¶ 58, 129 N.M. 448, 10 P.3d 127. As our Supreme Court stated in Cunningham, 2000-NMSC-009, ¶ 13, fundamental error applies only in those cases where a criminal defendant’s innocence is in dispute or where allowing his conviction to stand “would shock the conscience.” Id. (internal quotation marks and citation omitted).

[27] Defendant in this case received notice of the search warrants and signed the inventories. He was aware of what was seized and had a copy of the warrants. He does not assert a substantive problem with the execution of the warrants or the evidence seized thereunder. Perea, 85 N.M. at 509, 513 P.2d at 1291 (holding that, without a showing of prejudice, “an otherwise valid search warrant” will not be set aside “because of defects in the return of the warrant”); Malloy, 2001-NMCA-067, ¶ 11 (“Technical violations require suppression only if the defendant can show prejudice or if there was a deliberate disregard of the rule by the police.”); see State v. Wise, 90 N.M. 659, 662, 567 P.2d 970, 973 (Ct. App. 1977); State v. Baca, 87 N.M. 12, 15, 528 P.2d 656, 659 (Ct. App. 1974); Perea, 85 N.M. at 509-10, 513 P.2d at 1291-92 (holding that matters involving defects in the return of a warrant are “ministerial acts which, even if defective or erroneous, do not require a search warrant to be held invalid unless prejudice is shown”). The actions taken in this case comport with the purpose of the rule, which was to provide Defendant with notice and assurance during the search. Malloy, 2001-NMCA-067, ¶ 11.

[28] This is a longstanding view. In Rose v. United States, 274 F. 245, 250 (6th Cir. 1921), the Sixth Circuit stated that “[t]he failure of the officer to whom a search warrant is directed to make a return thereof cannot invalidate the search or seizure made by authority of such warrant.” The Sixth Circuit articulated that a return could be made at any time after the warrant was executed, and thus, the defect could be cured. Furthermore, such a defect “does not bear consequences of constitutional dimension.” Malloy, 2001-NMCA-067, ¶ 21. Defendant did not object to this technical defect below nor give the State an opportunity to cure it. Defendant’s contention at this late juncture is without merit.

3. Evidence of an Uncharged Act: Rule 11-404(B) NMRA

[29] Defendant argues both fundamental error and abuse of discretion on the part of the district court in allowing hearsay evidence of bad acts into evidence at the jury trial. Defendant argues that the district court erred by allowing as evidence nude photographs of R.P. and C.L. and a bag containing sex toys. Defendant also complains of testimony from O.L. concerning experiences with Defendant, including a feeling by O.L. of having been drugged, and testimony from Detective Harris concerning conversations that he had in the course of his investigations into sexual allegations against Defendant.

Detective Harris’s Testimony

[30] Defendant concedes that he did not object at trial to the evidence of which he now complains. Again, he seeks our review under the doctrine of fundamental error and argues “that the admission of the bad act testimony deprived him of a fair trial.” As we stated above, a fundamental error cannot be adjudged where a miscarriage of justice has occurred, the result shocks the conscience, or substantial justice has been denied. Orosco, 113 N.M. at 784, 833 P.2d at 1150. So sufficient for us to hold that a fundamental error has been committed is the determination of an “error . . . of such magnitude that it affected the trial outcome.” Jacobs, 2000-NMSC-026, ¶ 58. Absent “error [that] goes to the foundation . . . of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive,” we will not reverse the district court. Cunningham, 2000-NMSC-009, ¶ 13.

[31] Detective Harris’s testimony of which Defendant now complains was as follows:

[State] From the investigation that was provided to you, what did you do next? [Harris] [J.O.] also advised that I needed to go and make contact with an individual at the juvenile detention center at Camino Nuevo. He identified the subject as an inmate there by the name of [J.B.]. I went over to the Camino Nuevo and made contact with [J.B.]. . . .

[Harris] And he – I spoke with the adult probation – or I’m sorry – the superintendent of Camino Nuevo and told him that I needed to speak with this individual, [J.B.], that it was in reference to some allegations that were made against Defendant. That individual stated that he had also received some allegations and that at one point there was a note left –

At this point, the prosecutor interrupted the answer and did not inquire further into what the detective heard.

[32] On appeal, Defendant argues that this
testimony about allegations against Defendant that surfaced at the juvenile detention center at Camino Nuevo while Detective Harris was investigating there was so “prejudicial” that it rose to the level of fundamental error. We disagree. Defendant fails to point out how this testimony resulted in any fundamental error other than to say “[i]t is hard to imagine evidence that is more prejudicial.” This statement, without more, is merely conclusory.

For instance, Defendant relies upon the holdings of both State v. Barber, 2004-NMSC-019, ¶¶ 16-17, 135 N.M. 621, 92 P.3d 633, and Cunningham, 2000-NMSC-009, ¶ 13, for the proposition that fundamental error occurs whenever a defendant is denied a fair trial, irrespective of the defendant’s apparent guilt or innocence. These citations, as statements of law, are flawless, but such statements of law are as far as Defendant goes. He makes no argument as to how, exactly, the inclusion of this evidence resulted in fundamental unfairness, choosing instead to assert that the evidence was “prejudicial.” Without a proper application of the law to the facts, we must reject Defendant’s argument.

O.L.'s Testimony

Defendant also argues that fundamental error occurred when O.L. was allowed to testify about his experiences with Defendant, even though O.L. was not an alleged victim at Defendant’s trial. O.L. testified about meeting Defendant at the juvenile detention center, going to “hang out” at Defendant’s house, and going with Defendant to Elephant Butte and getting arrested there while they were drinking. The State contends that O.L.’s testimony was relevant to establish Defendant’s relationship with C.L., O.L.’s brother, and the relationship among all three people.

Defendant’s objection to the inclusion of O.L.’s testimony intertwines with his objection to the testimony of Detective Harris. Just as he challenges Detective Harris’s testimony, he likewise asserts the “prejudicial” effect of O.L.’s testimony. As we stated, this Court will reverse a conviction for fundamental error only where the defendant demonstrates a miscarriage of justice, a conviction that shocks the conscience, a denial of substantial justice, or an error of such magnitude that it affects the outcome of the trial. Orosco, 113 N.M. at 784, 833 P.2d at 1150; Jacobs, 2000-NMSC-026, ¶ 58. Defendant makes no such showing, choosing instead to rely on the conclusory statement that the inclusion of this evidence was “prejudicial.”

Physical Evidence: Photographs and Sex Toys

Before trial, Defendant moved to sever the sexual exploitation charges from the charges of CSCM and CDM. Included in the motion were references to photographs of the two victims who testified at trial, R.P. and C.L. In its response, the State argued that the photographs were relevant and necessary to prove the charges against Defendant and showed intent, motive, plan, preparation, and/or absence of mistake. The district court severed the charges but ruled that the photographs of R.P. and C.L. could be admitted during the trial, citing “compelling legal and factual reasons” to allow the evidence.

At trial, Defendant made an objection to the admission into evidence of items seized under the warrants, noting that it was a continuing objection from the issues raised during the pre-trial suppression hearing. Defendant also initially objected to the admission into evidence of a bag containing sex toys that was taken from Defendant’s home but later stipulated to the fact of its existence. However, Defendant argued that the jury should not be able to see the contents of the bag. The court admitted this evidence but postponed showing it to the jury. Defendant does not argue that the jury ever saw the contents of the bag or that the bag’s contents were ever described to the jury.

Defendant merges his argument regarding both the photographs and the bag of sex toys. Defendant argues that those pieces of evidence were prohibited propensity and character evidence and that the district court failed to perform a balancing test to determine whether the probative value of the evidence outweighed its prejudicial effect as required by Rule 11-403 NMRA. Defendant argues that the State was using the evidence “to show that [Defendant] acted in conformity with the sort of person who would commit CSCM and CDM.” The State counters that the photographs were relevant and admissible because they showed Defendant’s relationship with the victims and went towards proving the element of “unlawfulness” in the CSCM charge.

We review the admission of physical evidence of bad acts under an abuse of discretion standard. See State v. Allen, 91 N.M. 759, 761, 581 P.2d 22, 24 (Ct. App. 1978) (noting that admission of such evidence was within the discretion of the trial court); State v. Romero, 2006-NMCA-045, ¶ 73, 139 N.M. 386, 133 P.3d 842, aff’d, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 11-404(B). We consider two paramount factors in deciding whether the district court abused its discretion in admitting the evidence: “whether the State made a sufficient showing that the evidence would serve a legitimate purpose other than to show character . . . and whether the probative value was substantially outweighed by the danger of unfair prejudice or other factors.” State v. Jordan, 116 N.M. 76, 80, 860 P.2d 206, 210 (Ct. App. 1993).

“A requisite element of the charged crime of CSCM is that the defendant’s touch was ‘unlawful.’” State v. Kerby, 2007-NMSC-014, ¶ 26, 141 N.M. 413, 156 P.3d 704. “Unlawfulness may be proven by showing that defendant’s behavior was done . . . to arouse or gratify sexual desire.” Id. (alteration in original) (internal quotation marks and citation omitted). In State v. Jones, 120 N.M. 185, 188, 899 P.2d 1139, 1142 (Ct. App. 1995), this Court held that “evidence of other bad acts might be admissible if a specific type of intent were at issue and the other bad acts bore on that intent in a way that did not merely show propensity.” We went on to demonstrate an example of when other bad act evidence might be admissible: “if the defendant were accused of assault with intent to commit [criminal sexual penetration] and evidence of other sexual assaults were offered to establish the defendant’s intent when grabbing the victim.” Id. On the other hand, “[a] state of mind that continues over time and governs otherwise unconnected acts is generally called a person’s character trait or propensity.” State v. Aguayo, 114 N.M. 124, 129, 835 P.2d 840, 845 (Ct. App. 1992) (internal quotation marks and citation omitted). “Admission of character traits to prove that the defendant acted in accordance with those traits is, of course, exactly what Rule 404(B) is designed to prohibit.” Id.

On appeal, Defendant argues that “[t]he prejudice of having the jury see (and hear about) nude photographs of [R.P. and C.L.], when the photos were not an element of the CSCM and CDM charges, is unquestionable.” However, “[e]vidence of prior acts with the complaining witness can directly bolster the complaining witness’s testimony by providing significant corroboration.” State v. Landers, 115 N.M. 514, 519, 853 P.2d 1270, 1275 (Ct. App. 1992). When used for such a purpose, this evidence is admissible and not considered propensity evidence. Id. The State argued that the photographs would corroborate the victims’ testimony and demonstrate the overall nature of the victims’ relationships with Defendant.
Defendant now objects to statements that came in through Detective Harris. Detective Harris testified about what J.O. had alleged, including the rape allegations and that J.O. had lived with Defendant on and off since he was thirteen. Defendant did not object to this hearsay testimony at trial.

Defendant argues that the statements amounted to fundamental error at trial because Defendant was never able to cross-examine J.O. Because Defendant never objected to the admission of the statements below, we review the statements and determine whether their admission created fundamental error. Cunningham, 2000-NMSC-009, ¶ 8; see State v. Martinez, 2007-NMSC-025, ¶ 25, 141 N.M. 713, 160 P.3d 894 (reviewing a defendant’s Confrontation Clause claim for fundamental error even though the issue was not preserved). “In a fundamental error analysis, where the defendant has waived all error by failing to object, the Court’s goal is to search for injustice.” State v. Benally, 2001-NMSC-033, ¶ 33, 131 N.M. 258, 34 P.3d 1134. (Baca, J., dissenting).

Detective Harris testified at trial that when he contacted him, J.O. made serious allegations against Defendant.

[Harris] . . . . I asked [J.O.] if – I told him I needed to talk to [him] in reference to a burglary [and] that I was a detective with the Los Lunas Police Department. And that I was investigating a burglary that had occurred at the house of [Defendant] and I needed to speak to [J.O.] in reference to that. And I really needed to talk to him because I felt that there might have been more to the – to the incident that was reported.

[State] And what did this individual inform you of next?

[Harris] At that time he opened the door. He asked he [sic] who I – or he asked me what I meant by that statement. I asked him if he was [J.O.], he state [sic] that had [sic] he was. I asked him to tell me what he could tell me about the situation at [Defendant’s] home and he made a statement to the effect that [Defendant] tried to rape him.

[State] What did he mention to you about [Defendant]?

[Harris] He stated that – he stated that there was – you know, that he had been with [Defendant] on and off since he was 13 years old, that he had met [Defendant] at the juvenile detention center when [Defendant] was employed at the juvenile detention center. He stated that he – that on at least one occasion he had been drugged, that [Defendant] was constantly trying to get him to do sexual favors for him.

At this point, the district court asked the State and defense counsel to approach the bench. The district court judge remarked that he was “hearing a lot of hearsay” and expressed concern that defense counsel was not objecting. Nevertheless, the testimony continued.

Later in his testimony, Detective Harris revisited his conversation with J.O. [Harris] During my initial conversation with [J.O.], he also advised that [Defendant] had taken nude and sexually explicit photographs of him as well as other people and that he had placed them on his computer using a digital camera.

. . . . [Harris] . . . . I also spoke – I spoke with other people during my investigation that lead [sic] me to believe that there may have been some form of sexual misconduct going on.

The Confrontation Clause of the Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” The United States Supreme Court further clarified the Confrontation Clause in Crawford v. Washington, 541 U.S. 36, 68 (2004), providing that in order for a testimonial hearsay statement to be admitted at trial, the witness must be unavailable at trial and the defendant must have had a prior opportunity to cross-examine the witness. While the Court did not provide a definition for “testimonial,” it spelled out that the term “applies at a minimum to prior testimony at trial and the defendant must have had a prior opportunity to cross-examine the witness.” Id. The Court noted that “testimonial” could be defined as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact” and that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. at 51 (internal quotation marks and citation omitted). Crawford does not apply, however,
where the testimonial statement is not offered to prove the truth of the matter asserted. S. 39 n.9.

[51] We note that Defendant failed to preserve this confrontation issue in the district court. We therefore analyze it only for fundamental error. Compare Romero, 2006-NMCA-045, ¶ 15, 70 (indicating that preserved Crawford issues are analyzed under a harmless error standard), with Martinez, 2007-NMSC-025, ¶ 25 (indicating that unpreserved Crawford issues are reviewed for fundamental error only).

[52] We repeat the standard for fundamental error. A fundamental error occurs where there has been a miscarriage of justice, the conviction shocks the conscience, or substantial justice has been denied. Orosco, 113 N.M. at 784, 833 P.2d at 1150. We may also conclude that a fundamental error has been committed upon a determination that a trial court’s “error was of such magnitude that it affected the trial outcome.” Jacobs, 2000-NMSC-026, ¶ 58. We hold that Defendant’s convictions were just and that the district court’s admission of the statements in this case was neither an error nor an influence on the trial outcome.

[53] The admission of Detective Harris’s statement regarding J.O. does not violate Crawford. In order for a statement to be testimonial under Crawford, it must be offered for the truth of the matter asserted—or in other words, it must be hearsay. Wilson v. Sirmons, 536 F.3d 1064, 1111 (10th Cir. 2008). In Wilson, a police officer (Officer Huff) testified and was questioned about his motivation for effecting the traffic stop of the defendant Wilson. Id. Officer Huff testified that another officer (Officer Meek) informed him that Wilson was driving an automobile that matched the description of a vehicle previously used in a homicide. Id. On the basis of this information, Officer Huff stopped Wilson, who was later arrested and charged with homicide. Id. Wilson objected to the Officer Huff’s testimony on the basis that it violated his rights under Crawford. Id. But the Tenth Circuit rejected Wilson’s argument, holding that Officer Huff’s testimony was offered only to demonstrate his motivation for stopping Wilson, not to prove that the car Wilson drove was used in a homicide. Id. The facts before us require a similar analysis. Like the Tenth Circuit in Wilson, we have little difficulty concluding that Detective Harris’s statements were not offered to prove the truth of the matter asserted. Detective Harris appeared at J.O.’s home in order to investigate a burglary reported by Defendant. Upon being questioned, J.O. stated, among other things, that Defendant tried to rape him and took nude photographs of him. Defendant did not object to this testimony. And when asked about the nature of this line of questioning, the State said it was attempting to establish the reason why its investigation proceeded from burglary to sexual misconduct. Although the court surmised that this testimony was “hearsay,” it never made a ruling on the issue.

[54] Despite this speculation by the district court, we harbor little doubt that the evidence was not hearsay; simply, it was not offered to prove the truth of the matter asserted. The statements of J.O. were not offered to prove that he was the victim of an attempted rape or that Defendant photographed him. Instead, they were offered to demonstrate how the investigation proceeded from one of burglary to one of sexual misconduct. Defendant’s dismissed charges only lend further support to our holding that Defendant’s convictions were safely obtained. Defendant was charged with and convicted of CSCM and CDM based on the testimony of the two victims of those crimes, R.P. and C.L. Statements attributed to J.O. pertained to other charges that were dismissed after the court determined that J.O. would not testify. Thus, J.O.’s statements were not used to prove the elements of the offenses for which Defendant was convicted.

[55] The admission of Detective Harris’s statements regarding J.O. does not constitute fundamental error. Such a result should be clear from our analysis above, which concludes that the admission of Detective Harris’s statements does not constitute any error. Further, given the testimony of R.P. and C.L., Defendant’s conviction for crimes of which they were the victims does not shock our conscience. See Orosco, 113 N.M. at 784, 833 P.2d at 1150. Indeed, because the convictions comport with well-settled constitutional protections, there is neither a miscarriage of justice nor denial of substantial justice. Id. Little probability exists that Defendant’s case would have turned out differently had the testimony of Detective Harris been excluded. Jacobs, 2000-NMSC-026, ¶ 58. We therefore affirm.

5. Sufficiency of the Evidence for CSCM and CDM involving R.P.

[56] Defendant argues that there was insufficient evidence to convict him of CSCM and CDM involving R.P. Specifically, Defendant contends that R.P.’s testimony “never pinned down the dates that [Defendant] allegedly touched his genital area,” thereby making the evidence of CSCM “inherently improbable.” Defendant also argues that R.P.’s testimony disavows that Defendant engaged in CDM because R.P. never testified that Defendant encouraged him to do drugs or drink.

[57] We take a two-step approach in determining the sufficiency of the evidence. State v. Apodaca, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). We begin by reviewing the evidence in the light most favorable to the jury verdict and then make a “legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” Id. (internal quotation marks and citation omitted). The evidence may be of either a direct or circumstantial nature. State v. Ungarten, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993). “This Court does not consider the merit of evidence that may have supported a verdict to the contrary.” State v. Montoya, 2005-NMCA-078, ¶ 3, 137 N.M. 713, 114 P.3d 393 (internal quotation marks and citation omitted).

[58] To convict Defendant of the charge of CSCM in which R.P. was the victim, the State had to prove beyond a reasonable doubt that

1. [Defendant] touched or applied force to the penis of [R.P.];
2. [Defendant] was a person by reason of his relationship to [R.P.] was able to exercise undue influence over [R.P.] and used this authority to coerce him to submit to sexual contact;
3. [R.P.] was at least 13 but less than 18 years old;
4. This happened in New Mexico on or between the 1st day of January 2000 and the 30th day of April 2000.

To convict Defendant of the charge of CDM in which R.P. was the victim, the State had to prove beyond a reasonable doubt that

1. [Defendant] caused [R.P.] to engage in sexual contact and/or undergo drinking/drug use;
2. This caused [R.P.] to conduct himself in a manner injurious to the morals, health or welfare of [R.P.];
3. [R.P.] was under the age of 18;
4. This happened in New Mexico on or between the 1st day of January 2000 and the 30th day of April 2000.

[59] R.P. was born on May 8, 1982. During R.P.’s direct examination, the prosecutor
elicited testimony about salient events in R.P.’s life in order to determine dates for events that occurred with Defendant. The prosecutor relied on where Defendant was living during certain time periods and when R.P. was released from the Bernalillo County youth detention facility. The testimony reflected that R.P. was released to Defendant on February 10, 2000. R.P. testified that during his stay with Defendant, he consumed alcohol, smoked marijuana, and used mushrooms. He further testified that Defendant purchased the alcohol for him, and he remembered one occasion when Defendant purchased marijuana. R.P. testified that while living with Defendant he awoke on several occasions to find himself unclothed and Defendant touching his penis. This occurred between February of 2000 and March of 2000.

[60] R.P. testified that he was again released to Defendant on March 29, 2000. R.P.’s testimony indicated that he began drinking and smoking marijuana again. R.P. testified that Defendant purchased alcohol and marijuana for R.P.’s use and that Defendant made sexual advances towards him, similar to the advances that Defendant had previously made. These events were established as having occurred before April 10, 2000, when R.P. was again placed in a detention facility.

[61] It is enough that the State provided the jury with approximate dates in which the events described could have occurred. See State v. Altigilbers, 109 N.M. 453, 471, 786 P.2d 680, 698 (Ct. App. 1989) (“No juror need have a precise day in his or her own mind in order to vote for conviction.”). The dates that were provided as an approximate time line for the dates of the incidents with Defendant are well within the charged time frame. As to the CDM charge, R.P.’s testimony that Defendant provided and purchased drugs and alcohol for him satisfies the element of “caused [R.P.] to engage in . . . under age drinking/drug use” whether or not Defendant “encouraged” such use. R.P. testified that he was a heroin user during the time that he spent with Defendant. Providing R.P. with more drugs and alcohol is sufficient evidence that Defendant’s acts “caused [R.P.] to conduct himself in a manner injurious to [his] morals, health or welfare.”

6. Impermissible Vouching

[62] Before trial, defense counsel argued that Sarah Kerrigan, a Ph.D. toxicology specialist, should not have been allowed to testify. Defense counsel did not object to Kerrigan’s qualifications as an expert witness but maintained a continued objection to her testimony in general. On appeal, Defendant cites only to State v. Alberico, 116 N.M. 156, 169, 861 P.2d 192, 205 (1993), to support his argument but uses this authority solely to point out that the admission of expert testimony lies within the district court’s discretion. Defendant does not provide any particular objection or any case law for his contentions that Kerrigan’s testimony was “pure vouching” and “prejudicial.” Thus, we decline to address Defendant’s argument. State v. Rivera, 115 N.M. 424, 427, 853 P.2d 126, 129 (Ct. App. 1993) (noting that because the defendant did not cite any authority supporting his contention, this Court need not consider it).

7. Addition of “New” Charge

[63] Defendant argues that he was never charged with the crime of sexual exploitation by possession of child pornography, yet he was still convicted of two counts of that crime. Defendant was indicted on five counts of possession of child pornography with intent to distribute. Before the trial, the State unsuccessfully attempted to amend this grand jury indictment to a charge of mere possession of child pornography, a crime that made such possession a fourth degree felony if the child was under eighteen years of age.

[64] At the bench trial, the district court dismissed three of the sexual exploitation charges, noting that there was no evidence of distribution (as was required by the statute in effect when those crimes allegedly occurred). However, the district court found Defendant guilty of two counts of sexual exploitation by possession, noting that the time frames for the corresponding criminal acts fell under the newer 2001 law, which only required possession of pornography for conviction. Defendant argues that the district court’s actions were improper and violated his due process rights.

Rule 5-204(A) NMRA states in part:

The court may at any time prior to a verdict cause the complaint, indictment, or information to be amended in respect to any . . . defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Thus, we are faced with a two-part test of the propriety of the district court’s actions that determines: (1) whether an additional or different offense was charged and (2) if any substantial rights of Defendant were prejudiced. See id.

[65] The original indictment charged Defendant with five counts of sexual exploitation of children in violation of NMSA 1978, Section 30-6A-3(A) (1993). The indictment alleged in the first count, and similarly in the others, that Defendant did intentionally distribute or possess with intent to distribute a visual or print medium depicting a prohibited sexual act or simulation of such an act where one of the participants in that act was a child under the age of eighteen years knowing or having reason to know that the medium depicted a prohibited sexual act or simulation of such an act.

The current version of Section 30-6A-3(A) states that

[it] is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age.

§ 30-6A-3(A) (2001) (amended 2007). Pursuant to the 2001 amendment, Subsection (A) required the State to prove only that Defendant possessed the photographs. Under the previous version reflected in the original indictment, the State was not only required to prove that Defendant possessed the photographs but also that he intentionally distributed or intended to distribute the photographs. Essentially, the State had one less element to prove as a result of the change in the statute.

[66] Defendant argues that in effect an entirely new charge was added to his indictment, in violation of Rule 5-204(A). Defendant cites State v. Roman, 1998-NMCA-132, ¶ 9, 125 N.M. 688, 964 P.2d 852, to support his argument. Defendant contends that he was prejudiced by the district court’s actions, because his intention was to “attack the possession with intent to distribute and distribution element charged in the grand jury indictment.”

[67] “[I]t is permissible to amend an information to conform to evidence introduced in support of the charge made in the information.” Id. ¶ 11. Amendment of an information “to include lesser included offenses” is also permissible. Id. We consider the district court’s actions as an amendment of the information because the otherwise adequate
information in the indictment was supplemented by the new version of the statute. Id. ¶ 12. The amendment did not add any additional elements to the charge and did not bring in matters that were not directly at issue on any of the charges. Id. ¶ 13; see State v. Armijo, 90 N.M. 614, 618, 566 P.2d 1152, 1156 (Ct. App. 1977) (excluding matters that “went beyond the issues in the case”). It did not substantially alter the nature of the case before the court. See In re Garrison P., 2002-NMCA-094, ¶ 9, 132 N.M. 626, 52 P.3d 998.

[68] “An ‘included offense’ is one which has some, but not all, of the elements of the greater offense and does not have any elements not included in the greater offense, so that it is impossible to commit the greater offense without necessarily also committing the included offense.” State v. Hamilton, 107 N.M. 186, 188, 754 P.2d 857, 859 (Ct. App. 1988). It is clear that the new statute included all of the elements of the old statute except the element of intent to distribute. Therefore, we hold that the amendment did not charge an “additional or different offense.” See Rule 5-204(A).

[69] We now turn to whether the amendment of the indictment information prejudiced Defendant’s substantial rights. Defendant argues that he was on notice that he would be defending against the old statute, which included the element of intent to distribute, and that his defense was to attack that element. “A variance between the crime charged and the offense for which defendant was convicted will not be deemed to be fatal unless the defendant could not reasonably have anticipated from the indictment or information, the nature of the charges and proof against him.” Hamilton, 107 N.M. at 189, 754 P.2d at 860. It is clear that Defendant knew that he was indicted for possessing photographs of nude boys on his computer.

[70] The amended indictment information from August 21, 2002, included five counts charging “[s]exual [e]xploitation of [c]hildren,” abbreviated as “[p]ossession” in the indictment. Each count described the crime of sexual exploitation of a child as intentional distribution or possession with the intent to distribute “visual or print media depicting a prohibited sexual act or simulation of such an act where one of the participants in that act was a child under the age of eighteen [or sixteen] years.” Each charge also referred to the statute as “[Section] 30-6A-3(A).” The State divided the charges into five groups based on the year in which the photographs were allegedly downloaded onto Defendant’s computer. Each charge represented that Defendant engaged in the prohibited act over the course of a year, for the calendar years of 1997, 1999, 2000, and 2001, through June 6, 2002.

[71] During the May 6, 2004, bench trial on the five counts of sexual exploitation of a child, the district court dismissed the charges relating to 1997, 1999, and 2000. The charges that remained for 2001 and 2002 fell under the 2001 amendment of the sexual exploitation statute that made mere possession a crime. Defendant knew what the State was prepared to offer as evidence against him, and because the amended information filed in 2002 cited the correct statute, we fail to see how Defendant could not have reasonably known what he would be defending against.

[72] On March 30, 2004, more than five weeks before the bench trial at which Defendant was convicted of two counts of sexual exploitation of a child, the State filed a motion to amend the grand jury indictment to reflect the changes in the statute that became effective on July 1, 2001, giving Defendant further notice. The amended indictment confirmed the statutes and the previously admitted evidence on which the State would base its case. We therefore hold that Defendant was not charged with an “additional or different” offense and that his “substantial rights” were not prejudiced. See Rule 5-204(A).

8. Amended Criminal Information

[73] Defendant argues that Counts 16, 19, and 22 in the first grand jury indictment, three CDM counts relating to C.L., were withdrawn by the prosecutor and later “improperly resurrected.” Defendant argues that the counts were withdrawn because the grand jury did not find probable cause to support them but that those same counts reappeared in the amended grand jury indictment as Counts 14, 15 and 16. At the hearing on a motion to dismiss those counts, the prosecutor told the district court that he “misspoke as to [the grand jury] not finding probable cause” and that the grand jury properly indicted on all of the CDM counts. The prosecutor asked the district court to look at the transcript from the grand jury as a whole in determining whether to drop the charges. Later in the hearing the prosecutor dropped two of the three counts of CDM relating to C.L., noting that those counts occurred in a different county, but kept one count, noting that there was a dispute as to which county it occurred in. Defendant was convicted of that charge of CDM.

[74] Defendant’s argument focuses on Stirone v. United States, 361 U.S. 212, 216-17 (1960), and on State v. Trivitt, 89 N.M. 162, 169, 548 P.2d 442, 449 (1976), for the proposition that a defendant cannot be tried on charges that were not included in the indictment against him. Neither case Defendant relies on addresses the situation before us: whether the grand jury can return an indictment for counts that have been withdrawn by the prosecution. It is clear that the original indictment and the amended indictment included the charge of CDM related to C.L. upon which Defendant was convicted.

[75] The State concedes that during the grand jury proceedings, the prosecutor initially withdrew the three CDM charges. The State argues that despite this withdrawal, it “later gave the grand jurors the option to consider any of those charges,” which resulted in their finding probable cause for all three counts. Therefore, the State contends, the grand jury returned indictments for those charges. At the hearing, the State argued that its compliance with State v. Ulibarri, 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, rendered the indictments valid.

[76] In Ulibarri, this Court held that one of the most basic functions of the grand jury was “to investigate the matter for which it is called and to determine from the evidence if there is probable cause to believe an offense has been committed.” Id. ¶ 10 (alteration omitted) (internal quotations marks and citation omitted). “While the grand jury should not be the tool of the prosecuting authority to manipulate at will, neither should it be subject to undue interference with its deliberative and decisional process.” Id. (internal quotation marks and citation omitted). The grand jury is a separate and distinct body from the executive and judicial departments of government. Id. ¶ 11. It is empowered to “order that evidence be produced over and above that initially presented by the State.” Id.

[77] Defendant’s argument challenges the grand jury process and the manner in which Defendant’s indictments arose. See id. ¶ 13. Unlike Ulibarri, we are not convinced in this case that the prosecutor’s action of keeping the CDM charges in the amended indictment (despite having indicated that he would be withdrawing them) went to the heart of the grand jury’s function and responsibility. Cf. id. ¶ 15. The grand jury was appropriately guided, despite returning an indictment that was contrary to the State’s belief in the necessity to withdraw the CDM counts. Defendant received his notice that he was subject to charges of CDM in both the first indictment and the amended indictment, and we disagree with Defendant’s claim that he
was prejudiced by the grand jury’s return on the charges. See, e.g., id. ¶ 18.
{78} We are guided by NMSA 1978, Section 31-6-10 (1979), which states in pertinent part:

Before the grand jury may vote an indictment charging an offense against the laws of the state, it must be satisfied from the lawful evidence before it that an offense against the laws has been committed and that there is probable cause to accuse by indictment the person named, of the commission of the offense so that he may be brought to trial therefor.

It is clear that the purpose of the grand jury proceedings is to determine whether there is probable cause to indict the person named. The prosecutor’s role in the grand jury proceedings is to assist the process. See UJI 14-8001 NMRA. “The district attorney will not, however, guide or otherwise influence the grand jury.” Id., Committee commentary (Assistance for grand jury.). It is ultimately up to the grand jury to decide whether probable cause existed for the various counts. Because the grand jury determined that probable cause existed for the CDM counts relating to C.L., it was within the discretion of the prosecutor to keep those counts alive for the amended criminal indictment. The counts were properly included in the indictment against Defendant, and therefore we affirm his conviction for CDM.

9. **Ineffective Assistance of Counsel**

{79} Defendant contends that he received ineffective assistance of counsel, citing multiple incidents from the trial. In determining whether a defendant has received ineffective assistance of counsel, we apply the test of whether “defense counsel exercised the skill of a reasonably competent attorney.” State v. Talley, 103 N.M. 33, 36, 702 P.2d 353, 356 (Ct. App. 1985). Additionally, the defendant must show that incompetent representation prejudiced his case. State v. Crain, 1997-NMCA-101, ¶ 24, 124 N.M. 84, 946 P.2d 1095. Without a showing demonstrating both incompetence and prejudice, defense counsel is presumed competent. Talley, 103 N.M. at 36, 702 P.2d at 356; Jacobs, 2000-NMSC-026, ¶ 48 (“Counsel is presumed competent unless a defendant succeeds in showing both the incompetence of his attorney and the prejudice resulting from the incompetence.”). We consider the record as a whole when determining whether a defendant has received ineffective assistance of counsel. State v. Lewis, 104 N.M. 677, 680, 726 P.2d 354, 357 (Ct. App. 1986).

In considering a claim of ineffective assistance, the duties of counsel are considered. These duties include loyalty, avoiding a conflict of interest, consulting with defendant on important decisions, keeping defendant informed of important developments, and using skill and knowledge to render the trial a reliable adversarial testing process. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Talley, 103 N.M. at 36, 702 P.2d at 356 (internal quotation marks and citation omitted).

{80} Defendant complains about his defense counsel’s failure to move for a mistrial when it was discovered that J.O. would not be testifying, failure to object to bad act evidence, stipulation to testimony about the photographs found on Defendant’s computer, and failure to call the notary of an affidavit signed by R.P. when R.P. testified contrary to the affidavit. Defendant argues that the instances he recites “call for a presumption of ineffective assistance of counsel.” Defendant further argues that his defense counsel’s ineffectiveness led to Defendant’s convictions.

{81} “A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel’s conduct.” Jacobs, 2000-NMSC-026, ¶ 49. “A reviewing court will not attempt to second guess that [conduct]. An attorney’s decision to object to testimony or other evidence is a matter of trial tactics.” Id. (citation omitted).

{82} Defendant’s first contention, that defense counsel should have moved for a mistrial once it was discovered the J.O. would not be testifying, is without merit. The charges relating to J.O. were dropped upon learning that J.O. would not be testifying. See, e.g., State v. Newman, 109 N.M. 268, 784 P.2d 1006, 1011 (Ct. App. 1989) (holding that it was not ineffective assistance of counsel where defense counsel requested an admonition instead of a mistrial). Defense counsel did not object to the hearsay testimony relating to J.O. when it came in through Detective Harris, even after an obvious attempt by the district court to bring the testimony to defense counsel’s attention as hearsay. This suggests that defense counsel was aware that hearsay testimony had come in but saw no merit in requesting a mistrial because the hearsay testimony related to the nonappearing victim of the dropped charges. At the beginning of Detective Harris’s cross-examination, defense counsel brought out J.O.’s allegations again, ostensibly to impeach J.O. through Detective Harris. Furthermore, defense counsel did not “entirely fail[] to subject the prosecution’s case to meaningful adversarial testing.” Bell v. Cone, 535 U.S. 685, 697 (2002) (emphasis omitted) (internal quotation marks and citation omitted). To impeach J.O. through Detective Harris and to discover the tenor of Detective Harris’s investigation is exactly what defense counsel attempted to do.

{83} As to Defendant’s other contentions, we note that defense counsel was an active participant at the trial, attempting to impeach the credibility of the witnesses, filing pretrial motions addressing numerous counts of the indictment, filing a motion to suppress, and participating in hearings arising from his motions. See, e.g., Newman, 109 N.M. at 268, 784 P.2d at 1011 (finding the defendant’s claim of ineffective assistance of counsel unpersuasive when defense counsel acted “vigorously” on the defendant’s behalf). We will not further “review the record to see how many objections were raised by defense counsel or how clever was the cross-examination of the state’s witnesses. To be effective, counsel need not be a wizard. Some cases are simply hard to defend.” State v. Brazeal, 109 N.M. 752, 757, 790 P.2d 1033, 1038 (Ct. App. 1990).

{84} “[E]ven if counsel’s performance was constitutionally defective, the defendant must still affirmatively prove prejudice.” Id. Defendant has failed to show that his counsel was ineffective in representing him or that his case was prejudiced by his counsel’s representation.

**CONCLUSION**

{85} We affirm Defendant’s convictions.

{86} **IT IS SO ORDERED.**

RODERICK T. KENNEDY
Judge

WE CONCUR:
JONATHAN B. SUTIN, Chief Judge
MICHAEL D. BUSTAMANTE, Judge
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NOTE: The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico Court may impose civil penalties, including but not limited to court costs, for any violation. AOC may also impose civil penalties against any firm, including attorney fees and costs, in the amount as specified in the AOC's Revised Administrative Order AD-14-2009.

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The contractor will be paid a fixed rate each month for services rendered. The contractor will be paid a fixed rate each month for services rendered. The contractor will be paid a fixed rate each month for services rendered.

Attorney Fees Log in order to be paid. Each applicant will be evaluated on his or her experience as a trial attorney with a focus on family law and domestic violence.

The contractor shall represent children who are either the subject of abuse or neglect proceedings or the subject of Family in Need of Court Ordered Services (FINCOS) proceedings, including proceedings for the termination of parental rights, adoption proceedings, matters under the Uniform Parentage Act, or other abuse/neglect or FINC proceedings as designated by the Court. The Contractor shall also represent indigent parties in guardianship matters where a person is alleged to be incapacitated under the Probate Code, and proceedings in which a person is alleged to be incapacitated pursuant to the Adult Protective Service Act.

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One party in not represented by counsel, as directed by the Court. The contractor will be paid a fixed rate each month for services rendered. Each applicant will be evaluated on their experience as a trial attorney with a focus on family law and domestic violence. The contractor shall represent children who are either the subject of abuse or neglect proceedings or the subject of Family in Need of Court Ordered Services (FINCOS) proceedings, including proceedings for the termination of parental rights, adoption proceedings, matters under the Uniform Parentage Act, or other abuse/neglect or FINC proceedings as designated by the Court. The Contractor shall also represent indigent parties in guardianship matters where a person is alleged to be incapacitated under the Probate Code, and proceedings in which a person is alleged to be incapacitated pursuant to the Adult Protective Service Act.

The contractor will be paid a fixed rate each month for services rendered.
Tenth Judicial District Court Request For Proposals

The Tenth Judicial District Court is requesting proposals for one-year contracts that, pursuant to NMSA 1978, §3-1-150. The term of the initial contract will be from July 1, 2009, to June 30, 2010. Only attorneys licensed to practice law in New Mexico will be considered for the following contract: Respondent, Guardian ad Litem and Youth: Respondent, Guardian ad Litem and Youth, for Quay, DeBaca & Harding Counties. Attorneys may rotate either as Respondent Attorney or GAL and maybe subject to changes based on the case. Hearings in this District at present are held every other Monday, (twice per month). On average there are 10 - 15 new cases per year and approximately 25-30 pending cases. The Contractor shall represent children/respondent or youths who are either the subject of abuse or neglect proceedings or the subject of Family in Need of Court Ordered Services (FINS) proceedings, including proceedings for the termination of parental rights, adoption proceedings, matters under the Uniform Parentage Act, or other abuse/neglect or FINS proceedings as designated by the Court. The Contractor shall also represent indigent respondents concerning: mental health and development disability commitments, alcoholism commitments, guardianship matters where a person is allegedly incompetent under the Probate Code, and proceedings in which a person is allegedly incapacitated pursuant to the Adult Protective Service Act. Time and Place for Submitting a Proposal: All interested attorneys should submit both a proposal not later than 5:00 p.m. on May 7, 2009, to: Diane Ulbrich, Court Administrator, Tenth Judicial District Court, PO Box 1067, Tucumcari NM 88401. If you have questions concerning this Request for Proposals you may contact: Diane Ulbrich, Court Administrator, Tenth Judicial District Court, PO Box 1067, Tucumcari NM 88401. Phone 575-461-2764

Associate Trial Attorney/Assistant Trial Attorney or Senior Trial Attorney

The Eighth Judicial District Attorney's Office is accepting applications for entry level Associate Trial Attorney, Assistant Trial Attorney or Senior Trial Attorney in the Raton Office. This position will be responsible for a felony and misdemeanor caseload plus administrative duties. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Daniel L. Romero, Chief Deputy District Attorney, 920 Salazar Road-Suite A, Taos, New Mexico 87571. Position open until filled.

Re-Advertised - City Attorney City of Espanola, Espanola, NM

Appointed by the City Mayor and under the general direction of the City Manager, the successful applicant must be an attorney licensed to practice law in Federal and State Court in the State of New Mexico. A background in municipal law is preferred, with an emphasis in employment law. The city attorney serves as Chief Prosecutor in enforcing all ordinances, including municipal criminal and municipal code ordinances. Provides advice in legal and administrative proceedings and on personnel matters to the Mayor, City Council, and City Manager. Commonly advises on issues regarding municipal planning and zoning, resolutions, ordinances, leases, contracts, policies, procedures, annexations, sale and purchase agreements and memorandums of understanding and agreement relevant to municipal government. Salary range $65,000 - $85,000 excellent benefit package. Open until filled. Please submit letter of interest, Resume, and three (3) references to: Human Resources Department, 405 N. Paseo De Onate, Espanola, NM 87532.

Associate Attorney

Busy insurance defense firm is interested in hiring an attorney to assist with all aspects of insurance defense practice. Salary commensurate with experience and qualifications – excellent benefits, collegial environment. Please send, fax or e-mail resume to 6000 Indian School NE, Suite 200, Albuquerque, NM 87110. Fax 883-3232. e-mail: msandoval@obrienlawoffice.com

Assistant District Attorney

The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Carlsbad and Roswell, New Mexico. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney ($41,685.00 to $72,575.00) dependent upon experience. Please send resume to Janetta B. Hicks, District Attorney, 400 N. Virginia Ave., Suite G-2, Roswell, NM 88201-6222 or e-mail to jhicks@da.state.nm.us.

Assistant District Attorney

The Twelfth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Alamogordo, New Mexico. Salary and job assignments will be based upon experience and the District Attorney’s Personnel and Compensation Plan. Please send resume to Diana A. Martwick, District Attorney, 1000 New York Avenue, Room 301, Alamogordo, NM 88310 or e-mail to: dmartwick@da.state.nm.us.

Associate Attorney

Silva, Saucedo & Gonzales, P.C., an AV rated litigation firm, seeks an attorney with two to five years experience, interested in working in a congenial atmosphere on complex civil, employment, personal injury, white collar and wrongful death cases. Strong academic credentials and excellent research and legal writing skills required. All inquiries confidential. Excellent salary and benefits. Please mail resume to Tamara Silva at PO Box 100, Albuquerque, New Mexico 87103-0100; fax 246-0707 or emailtsilva@silvalaw.org. Position available immediately.

Request For Proposals Bond Counsel Services

San Juan County will accept sealed proposals for PROPOSAL NO. 08-09-45, BOND COUNSEL SERVICES, until 5:00 p.m. (MDT), May 15, 2009, at the Central Purchasing Office, 213 South Oliver Drive, Aztec, NM 87410. Proposal documents may be obtained by accessing the San Juan County web page, www.sjcounty.net (under “Most Requested Information”, select “Bids/Proposals Listing”). Proposal documents may also be obtained by calling (505) 334-4551.

Services

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Contract paralegal with 20+ years experience in civil litigation available for trial preparation and all paralegal tasks. Excellent references. (505) 899-2918.

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**Law Office for Sale in the Heart of Nob Hill:**
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**Downtown Offices Available:**
Ocho Building, 423 6th St. (6th & Roma). Under new management. 2 offices and 1 two office suite available on 2nd Floor. Starting at $500.00. Rent Includes general receptionist, use of conference room, high-speed Internet, phone system, parking, Cable TV, use of copy/fax machine. Also Available up to 4000 sq-ft of office space on lower level, will remodel to suit. Leave Message for Charles Lill, 505-247-3900, ocholimited@comcast.net

**Premiere Lensic Block Offices:**
Sizes from 500-2,500 square feet available including premier penthouse office. Located in the historic Lensic Theater Block in downtown Santa Fe, ideal for legal, financial or real estate office use. Features multiple office configurations, custom built-in furnishings, conference rooms, secure entry, elevator, alarm systems, refrigerated air, some with kitchens and appliances, etc. close proximity to City and County offices. Contact Michael Maremont at 986-2947

**Heirs Of Francisco Aragon**
Seeking any information concerning the identities and whereabouts of heirs of Francisco Aragon, presumed to be a member of the Navajo Nation as of 1918. Please call Stephen D. Ingram, Esq., at 505/243-5400.

**North Albuquerque Acres**
1 Acre, North of Elena, East of Eubank. Borders Sandia Pueblo, fantastic views Walled, gated, private cul-de-sac, all utilities in. Price reduced $50K to $450K. Call Scott Clark, Owner/Broker, (505) 933-1300.

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**Holiday Schedule**

All advertising for the June 1, 2009
*Bar Bulletin* must be submitted by 5 p.m. on Monday, May 18

**SUBMISSION DEADLINES**

All advertising must be submitted by e-mail by 5 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Monday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication.**

For more advertising information, contact:
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