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www.nmbar.org
It is more important than ever to understand your 401(k) fees.

401(k) fees can be assessed as explicit out-of-pocket expenses or charged as a percentage of assets. These expenses can be charged to either the sponsoring law firm or the plan’s participants. Often they are assessed both ways, in some combination to the firm and its participants.

HOW IS THE ABA RETIREMENT FUNDS PROGRAM DIFFERENT FROM OTHER PROVIDERS? TWO REASONS:

1. The ABA Retirement Funds program was created by a not-for-profit organization within the ABA to provide a member benefit, not generate revenue for the ABA.

2. The ABA Retirement Funds program achieves the necessary economies of scale with over $3 billion invested to eliminate all explicit fees for firms, and provide investments for participants with low asset based fees.

Let the ABA Retirement Funds program provide you with a cost comparison so you can better understand your direct 401(k) fees, and see how we can help you to provide an affordable 401(k), without sacrificing service, to your firm.

For more details contact us by phone (877) 945-2272, by email abaretirement@us.ing.com or on the web at www.abaretirement.com

You should consider the investment objectives, risks, charges and expenses of the investment options carefully before investing. Please refer to the most recent Program prospectus for such information. For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call 1-877-945-2272, or visit www.abaretirement.com or write ABA Retirement Funds P.O. Box 5142, Boston, MA 02206-5142 - abaretirement@us.ing.com. Please read the information carefully before investing. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program. 04/09
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• Professionalism Tip •
With respect to my clients:
I will be courteous to and considerate of my client at all times.

Meetings

July
1 Employment and Labor Law Section
    Board of Directors, noon, State Bar Center
6 Attorney Support Group,
    5:30 p.m., First United Methodist Church
8 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
8 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
9 Board of Editors,
    8:30 a.m., State Bar Center

State Bar Workshops

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

August
12 Estate Planning/Probate Workshop
    6 p.m., State Bar Center, Albuquerque
26 Consumer Debt/Bankruptcy Workshop
    6 p.m., State Bar Center, Albuquerque

September
23 Consumer Debt/Bankruptcy Workshop
    6 p.m., State Bar Center, Albuquerque
NOTICES

COURT NEWS
N.M. Supreme Court
Board of Legal Specialization
Comments Solicited

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

Eric L. Burton
Estate Planning, Trusts and Probate Law
Grace B. Duran
Family Law

STATE BAR NEWS
Annual Meeting
Resolutions and Motions

The 2009 Annual Meeting of the State Bar of New Mexico will be held at 8:30 a.m., July 10, at the Buffalo Thunder Resort in Pojoaque, New Mexico. Resolutions or motions to be presented for consideration must be submitted in writing by June 6 to:

Joe Conte, Executive Director
PO Box 92860
Albuquerque, NM 87199

Submissions may also be sent by fax, (505) 828-3765; or e-mail, jconte@nmbar.org.

Attorney Support Group
• Afternoon groups meet regularly on the first Monday of the month: July 6, 5:30 p.m.
• Morning groups meet regularly on the third Monday of the month: July 20, 7:30 a.m.

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Employment and Labor Law Section
Board Meeting

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, July 1, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar Web site, www.nmbar.org, or call Danny Jarrett, section chair, (505) 878-0515 or jarrettld@jacksonlewis.com.

Indian Law Section
Summer Mixer

Join the Indian Law Section for a summer mixer from 6 to 8:30 p.m., July 3, at St. Clair Winery & Bistro, 901 Rio Grande Blvd. NW, Albuquerque. Light appetizers and a cash bar will be available. This social event will provide an opportunity for new and existing members of the section to gather in an informal setting to relax, get acquainted, and catch up with other attorneys who are interested in Indian law. Section members and new bar members are free. Non-section members can join the section for $20. All other guests can join the fun for $20. All mixer attendees will be eligible for door prizes to be given away at the event. For further information, contact Georgene Louis, georgenelouis@yahoo.com.

Paralegal Division
Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend Legal Research presented by Michelle Rigual, Esq. The program will be held from noon to 1 p.m., June 10, at the State Bar Center and offers 1.0 general CLE credit. The registration fee is $16 for attorneys, $10 for members of the Paralegal Division, and $15 for non-members. Registration begins at the door at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 247-0411.

Senior Lawyers Division
Annual Meeting

The Senior Lawyers Division will hold its annual meeting at 12:30 p.m., July 10, during the State Bar’s annual meeting at the Buffalo Thunder Resort in Santa Fe. The discussion will focus on determining senior lawyer programs using technology that should be provided to members. Members should send issues that they would like addressed along with any other agenda items to Chair Tom Dawe, tdawe@lrlaw.com or (505) 764-5427. Lunch will be provided to members who R.S.V.P. by July 3 to Tony Horvat, thorvat@nmbar.org or (505) 797-6033.

Young Lawyers Division
Annual Meeting

The Young Lawyers Division will hold its annual meeting from 10 a.m. to noon, July 1 and $15 for non-members. Registration

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.

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<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</td>
<td>Exhibits in Criminal, Civil, and Domestic</td>
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<td>Court</td>
<td>Relations, Children’s Court, and Probate Cases</td>
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The New Mexico Secretary of State has announced a new Web site redesign for the partnership page to be released later this summer. The page will have a fresh new look. Interested parties will be able to continue to view official images of certificates of registration, amendments, cancellations, mergers and conversions. The capability of ordering certified copies and certificates of existence will remain. Research for name availability for a partnership may also be conducted on-line. Visit www.sos.state.nm.us for more information.

Seminar on Changes to Guardianship Laws

Understanding guardianship and conservatorship issues can be important in both one’s professional career and personal life. Guardian Angels Foundation is conducting a seminar featuring a master guardian and lawyers practicing in these fields of specialization who will present a "standing ovation" and high marks on evaluations, as can be seen on the foundation's Web site. Seminars will be held July 17 at the Santa Fe Chamber of Commerce. For more details, visit www.GuardianAngelsFoundation.org or call (505) 920-2871.

UNM School of Law Summer Library Hours

Building and Circulation

| Monday - Thursday | 8 a.m.–9 p.m. |
| Monday - Friday   | 8 a.m.–6 p.m. |
| Saturday          | 9 a.m.–6 p.m.  |
| Sunday            | Noon–9 p.m.   |

Liberty Mutual’s Group Savings Plus® program allows you to purchase auto, home, and renters insurance at low group rates through the convenience of automatic checking account deductions. For a free, no-obligation quote, call Edward Kibbee, 1-866-754-1349 or e-mail Edward.Kibbee@LibertyMutual.com. For more information, visit www.libertymutual.com/lm/edwardkibbee.

NEW CONSUMER LAW SECTION BEING FORMED

State Bar members are seeking to establish a new section of the State Bar to focus on consumer law issues. This section would address consumer matters from both the consumer/debtor and creditor perspectives and include unfair trade practices, consumer contracts, foreclosure, the intersection of bankruptcy with other consumer actions, and mortgage fraud. To join this section or serve on the board of directors, contact David C. Kramer, (505) 620-7936 or david.c.kramer@comcast.net.
The Second Annual New Mexico Legal Service Provider Conference, co-sponsored by the Public and Legal Service Department and the Center for Legal Education of the New Mexico State Bar Foundation, was held at the State Bar Center on June 18–19. Legal service providers from around the state took advantage of the opportunity to earn CLE credits and to network with counterparts from other agencies.

“Two years ago, we invited senior managers from legal service providers throughout the state to come together to discuss how we could potentially work with them to better meet their distinctly different continuing education needs,” said CLE Director Rob Koonce. “That meeting was a real eye-opener. The 2008 conference which stemmed from that initial meeting had 116 attendees. This year, attendance increased by 35 percent. Those numbers are a vote of confidence in what we have been trying to accomplish on their behalf.”

Participants attended seminars on topics such as how providers work together, consumer law, giving legal advice, family violence, immigration law, Medicaid issues, working with clients, statewide resources, benefits, working with people with disabilities, technology, basic legal writing, and more. One track was geared for lawyers and another track was aimed more at support staff. In a series of short “round robins,” each legal agency serving the poor described their services and whom they can accept as clients.

“Overall, it was an exciting opportunity to learn about other services in order to give referrals and to discuss the legal matters we encounter,” said Andre Shiromani of Legal FACS.

In addition to educational sessions and social opportunities, participants were also able to get information, materials, and resources from several organizations that set up display booths (see box) where attendees were able to learn more about the non-legal resources available to clients.

“My goal was for this training to be helpful and enjoyable for the poverty law attorneys and their support staffs who choose to work on a daily basis for so much less than most private attorneys for the benefit of people living in deep poverty,” said Public and Legal Services Director Kasey Daniel.
Hats Off to our Volunteers

The Young Lawyers Division would like to express its gratitude to the following volunteers for generously giving their time and expertise to the May 23rd Wills for Heroes event in Roswell:

Melissa Almond  Jared Kallunki
Teryll Cordona  Greg Nibert
Martha Chicoski  Meagan McNally Norris
Andrew Cloutier  Barbara Patterson
Lori Doerhoefer  Sheryl Saavedra
Ronald Hillman  Brett Schneider
Dustin Hunter  Steve Shanor
Ellen Jessen  Mark Taylor

Special thanks to Kraft and Hunter, LLP for their sponsorship of this event.
CONGRATULATIONS
2009 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

J ustice Pamela B. Minzner
Professionalism Award
John P. Salazar

S eth D. Montgomery
Distinguished Judicial Service Award
Judge Mark B. McFeeley

R obert H. LaFollette Pro Bono Award
Ben A. Longwill

D istinguished Bar Service Award—Lawyer
Randy J. Knudson

D istinguished Bar Service Award—Non-Lawyer
Sally Saunders

Out standing Legal Program Award
Center for Civic Values
New Mexico High School Mock Trial Program

Out standing Young Lawyer
Of the Year Award
Clara Moran

The State Bar of New Mexico will present the awards at a reception at 5 p.m., July 10, during the Annual Meeting at the Buffalo Thunder Resort at Pojoaque, New Mexico. For a detailed list of programs and events, see the insert in the April 6 Bar Bulletin. A registration form is provided on page 9 of this issue, or visit the State Bar’s Web site at www.nmbar.org.
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

Name ______________________________________________________________________________________ NM Bar No. ________________
Name for Badge (if different than above) ___________________________________________________________________________________
Address ______________________________________________________________________________________________________________
City _________________________________________________________________________ State _______________ Zip _________________
Phone ____________________________ Fax ____________________________ Email ______________________________________________
Guest 1 ________________________________ Guest 2 ________________________________ Guest 3 ________________________________

Name badge required to attend all functions.

REGISTRATION FEES

Price   Qty.   Subtotal
Includes CLE tuition, materials, MCLE filing fees, speaker costs, continental breakfasts, breaks and Opening and President’s receptions
☐ Standard Early Registration Fee (Must be postmarked by May 4th)  $295  ______  ______
☐ After May 4th Fee  $395  ______  ______
☐ YLD, Paralegal, Government & Legal Services Attorney  $195  ______  ______
☐ After May 4th, YLD, Paralegal, Government & Legal Services Attorney  $295  ______  ______
☐ Guest (includes name badge, continental breakfasts, breaks and receptions)  $75  ______  ______

Conference Materials - I would like :
☐ CD Version only  Deduct $25 from Registration Fee  ______  ______
☐ Printed Version only (included in Registration Fee) ______  ______
☐ Both CD and Printed Versions  Add $50  ______  ______

SEPARATELY TICKETED EVENTS

The Santa Fe Opera, Saturday, July 11 (SOLD OUT PERFORMANCE)
TICKET SECTIONS:
Ticket sales are first-come first-served and payable no later than May 20, 2009
☐ Front Orchestra $174 ______  ______
☐ Loge $132 ______  ______
☐ Section 2 $132 ______  ______
☐ Section 3 $84 ______  ______
☐ Section 8 $70 ______  ______
☐ Section 9 $70 ______  ______
☐ The Santa Fe Opera Preview Buffet  $50 ______  ______
☐ Bus Transportation to/from opera $15 ______  ______
☐ Towa Golf Course at Buffalo Thunder Resort, Thursday, July 9, 1:00 – 5:00 p.m. (Includes greens fee, cart, range balls, cart signs and scorecard)  $69 ______  ______
I will set up my own team and the players are: _______________________,  _______________________,  _______________________
I would like to be placed on a team (Handicap/Average Golf Score ________)

TOTAL ______

PAYMENT OPTIONS
☐ Enclosed is my check in the amount of $ __________________ (Make Checks Payable to: State Bar of NM)
☐ VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. ____________________________________________________________ Exp. Date __________________CVV# ________
Signature _____________________________________________________________________________________________________________

Register by mail, phone or fax.
Mail: SBNM, P. O. Box 92860, Albuquerque, NM 87199-2860
Phone: (505) 797-6020; Monday - Friday, 9 a.m. - 4 p.m. Fax: (505) 797-6071; Open 24 Hours (Please have credit card information ready).
Cancellations & Refunds: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the beginning date of the event (Due Date: July 2, 2009) by 5:00 p.m. a refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.
MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.
Lewis and Roca attorney Dennis Jontz, along with those listed below, have been selected by Southwest Super Lawyers-2009 for their expertise and experience in particular areas of law:

- **Peter D. Baird**, Business Litigation
- **Rob Charles**, Bankruptcy and Creditor-Debtor Rights
- **Carla Consoli**, Environmental
- **Dale A. Danneman**, Business Litigation
- **Scott D. DeWald**, Mergers and Acquisitions
- **Susan M. Freeman**, Bankruptcy and Creditor-Debtor Rights
- **Sean D. Garrison**, Intellectual Property
- **Richard A. Halloran**, Business Litigation
- **Frances Haynes**, Construction Litigation
- **Steve Hulsman**, Personal Injury Plaintiff: General
- **John N. Iurino**, Business Litigation
- **Hope E. Leibsohn**, Estate Planning & Probate
- **Joseph E. McGarry**, Construction Litigation
- **Robert H. McKirgan**, Business Litigation
- **Robert F. Roos**, Construction Litigation
- **Andrew D. Schorr**, Real Estate
- **Lewis D. Schorr**, Real Estate
- **S.L. Schorr**, Real Estate
- **Gerald K. Smith**, Bankruptcy and Creditor-Debtor Rights
- **D. Randall Stokes**, Real Estate
- **Kenneth Van Winkle Jr.**, Real Estate

In addition, Chambers USA–2009 A Guide to America’s Leading Business Lawyers, ranks Lewis and Roca LLP among the top law firms in five categories including corporate/commercial, environment (including water rights), gaming and licensing, general commercial litigation and real estate. Fourteen of the firm’s lawyers have been listed among the best in their areas of practice, including Dennis Jontz (corporate/commercial) and Thomas Gulley (general commercial litigation).

Chief U.S. District Judge Martha Vázquez was among 20 women from around the state recently honored with the Governor’s Outstanding New Mexico Women Award. The prestigious awards are presented annually by the New Mexico Commission on the Status of Women. Appointed by the governor, judges award women for their extra efforts to improve the status of women in New Mexico. They are rated on community leadership, effectiveness of advocacy for positive change for women and families, and leadership in their careers. Vázquez was appointed New Mexico’s first female federal judge in 1993 and in 2003 became the state’s first female chief judge. The daughter of Mexican immigrants, Vázquez gives credit to her parents for her strong sense of gender equality which led her to enroll in the University of Notre Dame in 1972, the first year the school opened its doors to women.

Albuquerque attorney James A. Branch, Jr. has received three prestigious recognitions: selection by Southwest Super Lawyers-2009, membership in the American Trial Lawyers Association’s Top 100 Trial Lawyers, and Martindale Hubbell’s Rating of AV “Preeminent Attorney,” its highest rating based on peer evaluations. The criteria for invitation into the Top 100 include outstanding qualifications as a trial lawyer, trial results, reputation, leadership, and professionalism.

S. Carolyn Ramos has been elected to the board of trustees of Middlebury College in Middlebury, Vermont. Ramos is a shareholder and director with the Albuquerque law firm of Butt, Thornton & Baehr PC where she practices primarily in the defense of trucking, medical negligence, product liability and other personal injury cases. Ramos graduated from Middlebury College in 1993 with a bachelor’s in sociology and anthropology.

Lewis and Roca attorney Michael McCue has been named a Corporation Service Company (CSC®) Trademark Insider Award recipient for the year 2008 and was also honored with the Top 50 Trademark Attorney Award. CSC grants the annual awards to leading trademark attorneys and law firms based on the number of trademark applications filed in a calendar year. Lewis and Roca continues its leadership position by consistently placing among the top 100 firms in the United States. McCue is a partner and the practice group leader of Lewis and Roca’s Intellectual Property and Technology Practice Group. He has extensive experience litigating cases involving trademarks, copyrights, trade secrets, patents and rights of publicity in federal courts throughout the United States and before the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office.

Gregory B. Wormuth has been appointed to fill a vacant U.S. magistrate judge seat, replacing retiring Judge Leslie C. Smith. Wormuth has been an assistant U.S. attorney in the Las Cruces branch office since 1999. He has spent much of that time as the Organized Crime Task Force attorney, responsible for prosecuting large cases that targeted the leaders of organized crime and drug trafficking organizations and corrupt law enforcement officers. Wormuth appeared before the District Court of New Mexico in more than 1,000 cases and before the 10th Circuit Court of Appeals in numerous arguments. He will serve an eight-year appointment. Wormuth earned his undergraduate degree in economics in 1992 from Davidson College and his juris doctorate degree in 1995 from Wake Forest University School of Law, where he graduated first in his class. U.S. District Judge Robert C. Brack administered the oath of office on May 18 in Las Cruces, with a formal investiture June 19.
The Rodey Law Firm, along with several of its attorneys, is listed in *Chambers USA – 2009 A Guide to America’s Leading Business Lawyers*. Rodey is ranked as a #1 firm in New Mexico in the areas of commercial litigation, corporate/commercial, labor and employment, and real estate. Rodey is ranked as a #2 firm in New Mexico in environment, natural resources and regulated industries. The following Rodey attorneys are individually ranked in *Chambers* for their expertise and experience in these areas of law:

**Ranked 1**

- **Mark Adams**
  - Environment, Natural Resources and Regulated Industries: Water Supply
  - Litigation

- **Sunny Nixon**
  - Environment, Natural Resources and Regulated Industries: Water Supply
  - Litigation

- **Scott Gordon**
  - Labor and Employment

- **Julie Neerken**
  - Labor and Employment: Benefits and Compensation

- **Andrew Schultz**
  - Litigation: General Commercial

- **Bruce Hall**
  - Litigation: General Commercial

- **W. Robert Lasater Jr.**
  - Litigation: Medical Malpractice and Insurance Defense

- **John P. Salazar**
  - Real Estate

**Ranked 2**

- **Alan Hall**
  - Corporate/Commercial

- **Donald Monnheimer**
  - Corporate/Commercial

- **Theresa Parrish**
  - Labor and Employment

- **Nelson Franse**
  - Litigation: Medical Malpractice and Insurance Defense

- **Bruce Hall**
  - Litigation: Medical Malpractice and Insurance Defense

- **Catherine Goldberg**
  - Real Estate

**Ranked 3**

- **Thomas Stahl**
  - Labor and Employment

- **Henry Bohnhoff**
  - Litigation: General Commercial

- **Nelson Franse**
  - Litigation: General Commercial

**Ranked U (Up and Coming)**

- **Justin Horwitz**
  - Corporate/Commercial

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The firm of *Brownstein, Hyatt, Farber, Schreck LLC* has been ranked among the top firms in corporate and commercial practice by *Chambers USA Guide*. The following individual shareholders in corporate and commercial law were also recognized: **David P. Buchholz**, whose practice focuses on government finance law, economic development and state tax incentive law; **Perry E. Bendickson III**, whose practice focuses on private equity, venture capital, corporate finance and mergers and acquisitions; **Bonnie J. Paisley** represents small businesses—primarily technology companies—in various stages of development; and **Jill K. Sweeney**, who focuses on government finance law, economic development and state tax incentive law, government relations and securities law. In addition, the firm’s Nevada office was recognized for corporate and commercial, gaming and licensing, and litigation—general commercial practices.

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**In Memoriam**

**Thomas Lee Marek**, 68, resident of Carlsbad for more than 35 years, passed away May 29 in Lubbock, Texas. Marek was born April 16, 1941, to John Thomas and Marcita Mae (Bobbie) Marek in Waco, Texas. He earned his bachelor’s degree at Baylor University, majoring in history and economics. In 1959 he moved with his family to Albuquerque and attended UNM, where he met his future wife, Shila Jeanne Craigie. They were married on Aug. 31, 1968. He graduated from the UNM School of Law in 1968 and practiced for a few years in Albuquerque with Lorenzo Tapia and Mark Prelo and later with Joe Paone and Jim Vaughan. In late 1972, he moved to Carlsbad and practiced law with McCormick and Forbes Law Firm. The firm he started with Ernie Yarbro eventually became Marek and Francis and remains so today. Marek was the CMS board attorney for 25 years and represented numerous other corporations. He was active in Grace Episcopal Church and was a long-time member of Rotary. He loved the outdoors and sports and was a member of Boy Scouts, Ducks Unlimited and Sportsmen Club. He was a faithful member of the Coffee Klatch. His son Tom Jr. shares the following thoughts about his father. “Dad loved traveling the world with his wife Shila and remembering people by nicknames, (e.g., Cutie, Tomás, #2 Son, JC, Patty Lou, AM/PM).” His sons called him “Chucko.” He had a number of hobbies, but he thoroughly enjoyed the practice of law, serving his church and his family. He was a tremendous husband, father, and servant of his community. If you knew him, you would know he didn’t care for emotional displays so much as hard, disciplined work and lots of good jokes and learning. He loved looking things up or, better yet, getting you to look it up. He would start conversations with strangers wherever he went. His ability to make principled, difficult decisions made his time here important, relevant and invaluable. He will be greatly missed.” Marek is survived by his wife, Shila; his son, Tom Jr. of Dallas, Texas; son, Grant, of Albuquerque; son, John, of Albuquerque; granddaughter, Natalya, of Beaverton, Oregon; sister, Claire O Dowd and husband, Gary of Albuquerque; his brother, John Marek and wife, Lillian of San Antonio, Texas; and numerous nieces and nephews.

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**Danny Jarrett**, managing partner of Jackson Lewis’ Albuquerx office, was recently selected for inclusion in the 2009 *Southwest Super Lawyers*. Only 5 percent of Arizona and New Mexico attorneys were named to the list.

Longtime *Public Defender Rory Rank* of Las Cruces was awarded the Driscoll Award, the New Mexico Criminal Defense Lawyer Association’s highest honor. Rank, who has been with the New Mexico Public Defender’s Office for 16 years, is widely known for his representation of juveniles. He designed and helped begin the first juvenile drug court in New Mexico. He was instrumental in setting up other pilot projects in Las Cruces, such as the juvenile alternative initiative to help divert children from jails, and a program that tries to ensure that minorities are treated fairly in the juvenile justice system. He was a judge advocate general in the Air Force for five years and was in private practice in Alamogordo before joining the Public Defender’s Office in 1993.
## JUNE

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<tr>
<th>Date</th>
<th>Event</th>
<th>Type</th>
<th>Time</th>
<th>Sponsor</th>
<th>Location</th>
<th>Credits</th>
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<tr>
<td>29</td>
<td>Subordinate Lawyers: Sit, Stay, Roll Over No More</td>
<td>Telephone Seminar</td>
<td>1.0 E, 1.0 P</td>
<td>TRT Inc.</td>
<td>1-800-672-6271</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Lawyer Substance Abuse Addictions and Consequences</td>
<td>Telephone Seminar</td>
<td>1.0 E, 1.0 P</td>
<td>TRT Inc.</td>
<td>1-800-672-6253</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>Leverage: Debt Loan Agreements for Business</td>
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## JULY

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17 Guardianship and Conservatorship in New Mexico
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5.0 G, 1.0 E
(505) 920-2871
www.GuardianAngelsFoundation.org

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www.nbi-sems.com

31 Should Corporate Counsel be Corporate Conscience?
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4 Document Retention and Destruction
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4 Medicare Set Asides in Personal Injury Cases
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4 Trust Accounting: It’s Not an Oxymoron
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AUGUST

4 Attorneys Guide to Good Lawyering for People with Disabilities
Video Replay
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4 I Was from Venus and My Lawyers Were from Mars
Video Replay
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4 Lawyer Exposure in Public Offerings
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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 June 29, 2009**

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

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Slip Opinions for Published Opinions may be read on the Court’s Web site: [http://coa.nmcourts.com/documents/index.htm](http://coa.nmcourts.com/documents/index.htm)
**Recent Rule-Making Activity**

*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 June 22, 2009**

- To view pending proposed rule changes visit the New Mexico Supreme Court’s Web site: http://nmsupremecourt.nmcourts.gov/
- To view recently approved rule changes, visit the New MexicoCompilation Commission’s Web site: http://www.nmcompcomm.us/

### Pending Proposed Rule Changes

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http://nmsupremecourt.nmcourts.gov.

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LR2-504 Court clinic mediation program and other services for child-related disputes. 05/18/09
LR2-Form T Court clinic referral order. 05/18/09
PROPOSED REVISIONS TO THE CHILDREN’S COURT RULES

The Children’s Court Rules Committee has recommended proposed amendments to the Children’s Court Rules for the Supreme Court’s consideration.

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to:

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

Your comments must be received on or before July 20, 2009, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

[NEW MATERIAL]
10-313.1. Representation of multiple siblings.

A. Initial appointment.

(1) In the same or related abuse and neglect proceedings, the court may appoint the same attorney to represent the best interests of the children in a sibling group who are under the age of fourteen (14) as guardian ad litem, pursuant to Section 32A-1-7 NMSA 1978, and to represent the children in the sibling group who are fourteen (14) years of age or older as attorney, pursuant to Section 32A-1-7.1 NMSA 1978.

(2) Except as provided in Subparagraph (3) below, an attorney must decline to represent one or more siblings in the same or related abuse and neglect proceedings, and the court must appoint a separate attorney to represent the sibling or siblings, if, at the outset of the proceedings, a concurrent conflict of interest exists. Such conflict of interest exists if the representation of one child will be directly adverse to another child or there is a significant risk that the representation of one or more of the children will be materially limited by the attorney’s responsibilities to another client, a former client or a third person, or by a personal interest of the attorney.

(3) Notwithstanding the existence of a concurrent conflict of interest, an attorney may represent a child if each of the following conditions is met:

(a) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected sibling;
(b) the representation is not prohibited by law;
(c) the representation does not involve the assertion of a claim by one sibling against another sibling represented by the same attorney in the same proceeding; and
(d) any sibling age fourteen (14) or over who is to be represented by the attorney gives informed consent, confirmed in writing, pursuant to Rule 16-107 NMRA, and the attorney determines that the representation does not adversely affect the representation of the best interests of any of the younger siblings.

B. Withdrawal from continued representation.

(1) An attorney representing siblings has an ongoing duty to evaluate the interests of each sibling and assess whether there is a conflict of interest.

(2) It is not necessary for an attorney to withdraw from representing some or all of the siblings if there is merely a possibility that a conflict of interest will develop.

(3) If an attorney believes that a conflict of interest existed at appointment or has developed during representation, the attorney must take the necessary action to ensure that the siblings’ interests are not prejudiced. Such action may include notifying the court or requesting to withdraw.

(4) If an actual conflict of interest arises, and one or more siblings fourteen (14) or over and represented by the attorney will not waive the conflict or the continued representation of all of the siblings by the same attorney is not in the interest of the younger siblings, the attorney may continue to represent one or more siblings if each of the following conditions is met:

(a) the attorney has successfully withdrawn from the representation of the siblings whose interests conflict with those of the sibling or siblings the attorney continues to represent;
(b) the attorney has exchanged no confidential information relevant to the conflicting issue with any sibling whose interests conflict with those of the sibling or siblings the attorney continues to represent; and
(c) continued representation of one or more siblings would not otherwise prejudice the other sibling or siblings formerly represented by the attorney.

C. Circumstances not a conflict. Each of the following circumstances, standing alone, does not demonstrate a conflict of interest:

(1) the siblings are of different ages;
(2) the siblings have different parents;
(3) there is a purely theoretical or abstract conflict of interest among the siblings;
(4) the attorney previously represented one or more of the siblings in another proceeding;
(5) some of the siblings are more likely to be adopted than others;
(6) the siblings have different permanency plans;
(7) the siblings express conflicting desires or objectives, but the issues involved are not material to the case; or
(8) the siblings give different or contradictory accounts of the events, but the issues involved are not material to the case.

[As adopted by Supreme Court Order __________________, effective __________________.]

Committee commentary. — This rule is intended to guide attorneys in their application of Rule 16-107 NMRA of the Rules of Professional Conduct, as amended in 2008, to their work as attorneys for children in abuse and neglect cases in Children’s Court. The model of representation in these cases is unusual in that attorneys and children age fourteen (14) have a traditional attorney-client relationship while attorneys appointed for children under the age of fourteen (14) serve as guardians ad litem (GAL) and represent the child’s best interest. The statute also contemplates that the attorney appointed as GAL for the younger child will become the child’s attorney in the traditional sense when the child turns fourteen (14). See NMSA 1978, § 32A-4-10.

Before this approach was adopted in 2005, courts appointed a single attorney to represent all of the siblings in a case. Since the approach was adopted, there has been some confusion over the representation of siblings when some are fourteen (14) or older and some are younger. However, the value of preserving connections for children in foster care, together with the importance of the sibling relationship, argue for a single attorney to represent siblings to the greatest extent possible. The committee hopes that this rule will assist judges and attorneys in evaluating and resolving possible conflicts in these cases.

[As adopted by Supreme Court Order __________________, effective __________________.]

Kathleen J. Gibson, Clerk
The legitimate needs of the prosecution can and must be balanced against the potential for erosion of important constitutional rights of the accused. In coming to this conclusion, we rely on New Mexico law, not federal precedents, and we reluctantly overrule some of our precedent to the extent those cases fail to recognize the critical distinction between our state’s jurisprudence and the federal rules. We depart from our precedents cautiously, and only after concluding that our earlier opinions were either poorly reasoned, based on an unwarranted reliance on federal law, or both. Based on this departure from precedent, we reverse the Court of Appeals and remand to the district court for further proceedings consistent with this opinion.

BACKGROUND

3 A Bernalillo County grand jury indicted Isaac Belanger (“Defendant”) on August 31, 2004, on one count of criminal sexual penetration of a minor (“CSPM”), two counts of attempted CSPM, three counts of battery, one count of kidnapping, and two counts of bribery of a witness. Defendant’s niece, S.S., accused him of pinning her against a bathroom wall, forcing her to kiss him, putting his hand down her pants and penetrating her vagina with his finger. She was 12-years old at the time, and Defendant was 28. The incident allegedly took place at the house of Defendant’s father (the girl’s grandfather), after an argument about who was going to use the phone. Defendant has denied any wrongdoing. Defendant asserts, and the State does not dispute, that there are no other known witnesses to the alleged incident, and no physical evidence implicating Defendant. Thus, the credibility of S.S., as the sole eye-witness, would appear to be pivotal at trial.

4 In pre-trial proceedings, Defendant attempted to interview another juvenile, D.P., against whom S.S. had leveled similar sexually related charges. The incident between S.S. and D.P. occurred just weeks before the incident involving Defendant. Defendant claims that prosecutors dropped the charges against D.P. after it became clear that S.S. had fabricated her claims against D.P. Thus, Defendant may try to use D.P. to attack S.S.’s credibility at trial. In response, the State denies that S.S. fabricated her claims against D.P., although the State acknowledges that the charges against D.P. were dismissed, and the State has no intention of bringing new charges against him.

5 In response to Defendant’s demands for an interview, D.P., acting on the advice of counsel, invoked his Fifth Amendment privilege against self-incrimination and refused to talk with Defendant. Defendant attempted to overcome D.P.’s Fifth Amendment assertion by asking the prosecutor to apply to the court for use immunity so that D.P. could testify without fear of being prosecuted based on what he said at trial or during the interview. The State refused to request immunity for D.P.

6 Defendant applied to the district court for relief. Based on then-existing law, the district court properly concluded that it had no power to grant immunity unless the prosecution applied for it. See Rule 5-116 NMRA (limiting immunity to application of the prosecutor). Nonetheless, after the prosecution made clear it would not apply
for immunity, the district court advised the State that the court would dismiss the charges if the prosecution did not apply for immunity within one week. Before the deadline passed, the State again informed the court that it would not apply for immunity.

[7] The State appears to have concluded that D.P. had no valid Fifth Amendment right because the charges against him had been dismissed and the likelihood of further charges being lodged were “so remote as to be inconsequential.” Because D.P. was “no longer exposed to any jeopardy from the events that formed the basis of the previous prosecution,” the State regarded immunity as inappropriate. The district court disagreed, concluding that D.P.’s Fifth Amendment privilege conflicted irrevocably with Defendant’s Sixth and Fourteenth Amendment rights to confrontation and due process of law. The State would not request immunity for D.P.; the court dismissed the criminal case against Defendant. The State appealed and the Court of Appeals reversed in a published opinion, State v. Belanger, 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530. The Court determined that the trial court’s dismissal conflicted with State v. Sanchez, 98 N.M. 428, 432-33, 649 P.2d 496, 500-01 (Ct. App. 1982), and concluded that, except in cases of prosecutorial misconduct, courts have “no power to . . . fashion witness use immunity under the guise of due process.” Belanger, 2007-NMCA-143, ¶ 6 (internal quotation marks and citation omitted). Defendant petitioned for review, and we granted certiorari, 2007-NMCSR-010, 143 N.M. 74, 172 P.3d 1286. We reverse.

STANDARD OF REVIEW

[8] This appeal implicates important constitutional rights, including the Fifth Amendment right against self-incrimination, the Sixth Amendment rights to confront witnesses and to receive compulsory process, and the Fourteenth Amendment right to due process of law, including the right to a fair trial, and therefore our review is de novo. See State v. Brown, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134 P.3d 753 (applying de novo standard where “important constitutional rights” are implicated (citing State v. Ataway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (applying de novo standard to “threshold constitutional issues”)).

DISCUSSION

Witness Immunity

[9] Defendant asserts that D.P.’s testimony is essential to his defense. He argues that without a grant of use immunity to D.P., Defendant’s ability to confront his accuser and to obtain compulsory process, protected by the Sixth Amendment to the United States Constitution as well as Article II, Section 14 of the New Mexico Constitution, is compromised. Without these rights, Defendant asserts, his broader right to a fair trial, guaranteed by the Fourteenth Amendment rights because nothing said by D.P. could later be used against him. See Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that “immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege”).

[10] The State, for its part, asserts that it had no obligation to apply for immunity for D.P. and that it was not obliged to justify or explain its reason. In essence, the State takes the position that the case must proceed to trial without D.P.’s testimony, regardless of what D.P. may or may not have to say about S.S. and her credibility.

Use Immunity versus Transactional Immunity

[11] We first discuss the important difference between use immunity and transactional immunity—a distinction that is critical to understanding the basis for our opinion, as well as the shortcomings we perceive in some of our earlier opinions. Transactional immunity involves a promise by prosecutors that a witness will not be prosecuted for crimes related to the events about which the witness testifies. See Piccirillo v. New York, 400 U.S. 545, 559 (1971) (Brennan, J., dissenting). In contrast, under a grant of use immunity, the prosecution promises only to refrain from using the testimony in any future prosecution, as well as any evidence derived from the protected testimony. Kastigar, 406 U.S. at 453. Under use immunity, the prosecution may still proceed with charges against the witness so long as it does not use or rely on the witness’s testimony or its fruits. Transactional immunity, on the other hand, affords the witness a much broader immunity related to the entire transaction and not just the witness’s testimony.

[12] Transactional immunity is broader than the Fifth Amendment privilege. Id. Use immunity, by contrast, is coextensive with the Fifth Amendment privilege. Id. With use immunity, both the prosecution and the witness are left in essentially the same position as if the witness had retained his Fifth Amendment privilege and never testified. The witness is not exposed to criminal liability for testimony given, and the prosecution loses little with respect to its ability to prosecute. All the State surrenders is the ability to use testimony which it otherwise never would have had. See Sanchez, 98 N.M. at 433-34, 649 P.2d at 501-02 (citing Kastigar, 406 U.S. 441, for proposition that use immunity “leaves the witness and the government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity”). The State, if it wishes to prosecute, retains the ability to use other, independently obtained evidence such as material it already had, or material it developed independently of the witness’s testimony. See United States v. Quatermain, 613 F.2d 38, 40 (3d Cir. 1980); see also Kastigar, 406 U.S. at 460 (noting that after a grant of use immunity, the prosecution has “the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony”).

[13] Our older cases occasionally blurred the distinction between use immunity and transactional immunity, and sometimes spoke in overly broad terms by concluding that, absent a constitutional provision or statute, courts could not grant any kind of immunity without prosecutorial consent. See State v. Cheadle, 101 N.M. 282, 286, 681 P.2d 708, 712 (1983); Apodaca v. Viramontes, 53 N.M. 514, 518, 212 P.2d 425, 427 (1949). More recent New Mexico jurisprudence makes clear that only transactional immunity is a legislative prerogative, because it amounts to a decision by the people to exclude an entire class of individuals from application of the state’s criminal laws. See State v. Brown, 1998-NMSC-037, ¶ 63, 126 N.M. 338, 969 P.2d 313 (referring to the “legislative power of amnesty”). Granting use immunity, which is not a form of “amnesty,” is an inherent function of the judiciary under New Mexico law and is governed by court rule. Id. ¶ 61 (“Therefore, to the extent that use immunity serves to compel testimony in a judicial proceeding and serves to establish an evidentiary safeguard to protect the right against self-incrimination,
we conclude that it is within our power of ‘superintending control over all inferior courts’ of New Mexico to enact rules governing this type of [use] immunity.

The New Mexico Rule on Use Immunity

{14} Unlike the federal use immunity rule, which is rooted in Congressional legislation, use immunity in New Mexico is governed by the Rules of Evidence, Rule 11-412 NMRA, the Rules of Criminal Procedure, Rule 5-116, and to a limited extent by statute, NMSA 1978, § 31-6-15 (1979). The only applicable and extant statute, Section 31-6-15, applies only to grand jury proceedings and not to testimony at trial. Brown, 1998-NMSC-037, ¶ 57; State v. Summerrall, 105 N.M. 82, 83, 728 P.2d 833, 834 (1986). Outside the grand jury context, court rule, and not statute, governs a court’s grant of use immunity to witnesses. See Brown, 1998-NMSC-037, ¶ 57.

{15} Rule 11-412 of our Rules of Evidence provides that evidence obtained under an immunity order, as well as any evidence derived from such evidence, may not be used against the person protected by that order with the exception of a charge of perjury based on false testimony. This is use immunity. Rule 5-116 of our Rules of Criminal Procedure provides that the court may issue a written order of immunity “upon the written application of the prosecuting attorney.” Our cases have interpreted this to mean that immunity is available only upon application by the prosecutor. See Cheadle, 101 N.M. at 286-87, 681 P.2d at 712-13; State v. Baca, 1997-NMSC-045, ¶ 37, 124 N.M. 55, 946 P.2d 1066; Sanchez, 98 N.M. at 434, 649 P.2d at 502.

{16} Some older New Mexico opinions appear to have assumed, incorrectly, that the immunity rules (as opposed to the statute) derived their authority from a legislative grant of power to the courts. See, e.g., Viremontes, 53 N.M. at 517-18, 212 P.2d at 427; State v. Thoreen, 91 N.M. 624, 627, 578 P.2d 325, 328 (Ct. App. 1978). However, more recent and better reasoned authority makes clear that while transactional immunity is a legislative prerogative to be defined by statute, the grant of use immunity is a power which “inhere[s] in the judiciary.” Brown, 1998-NMSC-037, ¶ 60. In the case before this Court, we consider not transactional immunity, but use immunity, which this Court defines in the exercise of its inherent judicial authority. Until today, this Court has limited use immunity to situations initiated by the “application of the prosecuting attorney.” Id. ¶ 64.

{17} This Court’s inherent rule-making power permits us to create rules of criminal procedure, evidence and other matters that fall within the realm of pleading, practice and procedure. See generally Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976) (holding that rules governing testimonial privileges are solely within the court’s power); State ex rel. Anaya v. McBride, 88 N.M. 244, 246-47, 539 P.2d 1006, 1008-09 (1975) (stating that the quo warranto procedural requirement is beyond the power of the legislature). More recent authority suggests that although the Court has “ultimate rule-making authority,” that power is not necessarily exclusive, and may co-exist with harmonious legislative enactments. See Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, ¶¶ 5-9, 138 N.M. 398, 120 P.3d 820; Maples v. State, 110 N.M. 34, 39, 791 P.2d 788, 793 (1990) (Montgomery, J., dissenting). This power over procedural and evidentiary issues ultimately stems from the constitutional grant to this Court of “superintending control over all inferior courts.” N.M. Const. art. VI, § 3; see also Brown, 1998-NMSC-037, ¶ 61 (same).

{18} The evolution of the criminal procedure rule on immunity, Rule 5-116, demonstrates the judiciary’s authority to change it. In fact, this Court has frequently exercised its inherent rule-making power to alter the rules pertaining to immunity. For example, Rule 58, an earlier version of criminal procedure Rule 5-116, provided for transactional immunity. See Rule 5-116, Committee commentary; Sanchez, 98 N.M. at 433, 649 P.2d at 501. Without any authorizing legislation, the rule required the State to “forego the prosecution of the person for criminal conduct about which he is questioned and testifies.” Rule 5-116, Compilier’s Annotations (citing Campos v. State, 91 N.M. 745, 580 P.2d 966 (1978)).

{19} The Committee, exercising the power of this Court, amended the rule in 1979 to remove the reference to transactional immunity, and it has been a “use immunity” rule ever since. Later, the Committee, again acting under the authority of this Court and the Court of Appeals opinion in Sanchez, amended the commentary to specify that only the prosecution could apply for use immunity. See Rule 5-116, Committee commentary. The commentary had earlier posited that either the prosecution or the defense could apply for immunity. Id.

{20} Less than three months before the Court of Appeals ruling in Sanchez, the Committee commentary asserted that courts could unilaterally grant witness immunity, an assertion that in some ways resembles the rule we announce today. Rule 58 Final Draft, Committee commentary, 4/1982. The commentary noted that “in order to assure fundamental fairness,” a defendant “may be entitled to a witness immunity order under the Fifth and Sixth Amendments of the United States Constitution.” Id. This assertion followed a similar claim, in dictum, by the Court of Appeals prior to Sanchez, in State v. McGee, that “[a] court order of use immunity may have been an appropriate way of accommodating the competing interests of the State and the defendant.” 95 N.M. 317, 320, 621 P.2d 1129, 1133 (Ct. App. 1980).

{21} What we learn from this history is that use immunity in New Mexico courts has not remained static. It has evolved over the years as an exercise of inherent judicial authority over our state courts and, notably, in the absence of any contrary legislative expression pertaining to trials. We also understand that both courts and our rules committees have considered and discussed a rule similar to the one we announce today which broadens the ability of either party to request use immunity and compelled testimony for a witness. That approach was ultimately rejected in favor of the federal approach, which, as we will soon discuss, is not at all parallel to our own state rules.

The Federal Rule on Use Immunity

{22} Congress enacted the federal “use immunity” statute, 18 U.S.C. §§ 6001-6005, in 1970, and the United States Supreme Court upheld its constitutional validity two years later, in Kastigar, 406 U.S. 441. It offers a study in contrast with the New Mexico rule. Unlike the New Mexico rule, the federal rule on witness immunity is purely statutory—a grant of authority from Congress to prosecutors. With the exception of Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980), which located an inherent judicial power outside the statute, every federal court of appeals to squarely consider the issue has held that federal courts may not grant defense-witness use immunity—certainly not under the federal statute, and not outside the statute’s reach either, although at least one case recognizes the hypothetical possibility of such an extra-statute grant. See, e.g., United States v. Turkish, 623 F.2d 769, 777 (2d Cir. 1980).

{23} The federal statute provides that federal district courts “shall issue” an order providing for use immunity “upon the request of the United States attorney.” 18
U.S.C. § 6003(a). As the majority of courts have interpreted the statute, federal district courts play little more than a ministerial role in administering use immunity under 18 U.S.C. §§ 6001-6005. See, e.g., Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975) (“The function of the district court is limited to determining whether the government’s request for immunity complies with the statutory procedure.”). There is one widely recognized exception.

Where a court finds prosecutorial misconduct, it may force the prosecution to grant immunity or dismiss the case. New Mexico has recognized this prosecutorial misconduct exception as it applies to our own rules, and our courts may step in and grant witness immunity independent of the prosecution where prosecutors “deliberately intend to disrupt the fact-finding process.” State v. Cristlip, 110 N.M. 412, 415, 796 P.2d 1108, 1111 (Ct. App. 1990), overruled on other grounds by Santillanes v. State, 115 N.M. 215, 225 & n.7, 849 P.2d 358, 368 & n.7 (1993); see also Baca, 1997-NMSC-045, ¶ 39 (“barring a clear showing of prosecutorial misconduct, use immunity can only be sought by the prosecution”).

This exception is rarely applied, however, because prosecutorial misconduct of this sort is so difficult for defendants to prove. See State v. Velasquez, 99 N.M. 109, 112, 654 P.2d 562 (Ct. App. 1982) (noting that “the defendant has a difficult burden to show prejudice” in making out a case of prosecutorial misconduct in the grand jury context). Furthermore, some federal courts have held that under the federal immunity statute, they lack the power even to review prosecutorial immunity decisions about grants of immunity. See, e.g., United States v. Herman, 589 F.2d 1191, 1203 (3d Cir. 1978). We find no instance in New Mexico where a court has granted use immunity on its own because of prosecutorial misconduct.

The district court in this case found no prosecutorial misconduct. We disturb neither that finding nor our case law as to the prosecutorial misconduct exception. We highlight it only to show that as a practical matter it leaves little, if any, role for courts in the federal system, and under the majority rule in the state systems.

Given that the federal rule is legislatively based, it is not surprising that an overwhelming majority of federal courts have held that courts have no inherent power to grant use immunity to a defense witness without the consent of the prosecution and in the absence of prosecutorial misconduct. See, e.g., United States v. Lenz, 616 F.2d 960, 962-63 (6th Cir. 1980) (“While use immunity for defense witnesses may well be desirable, its proponents must address their arguments to Congress, not the courts.”) (Citation omitted.); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976); United States v. Alessio, 528 F.2d 1079, 1081 (9th Cir. 1976); Thompson, 516 F.2d at 988.

Although it is clear that federal courts have rejected inherent judicial authority to grant defense witness immunity, the United States Supreme Court, as well as several federal appeals courts, have recognized inherent judicial power to grant immunity in other contexts, in order to protect constitutional rights. See Simmons v. United States, 390 U.S. 377, 394 (1968) (finding it “intolerable that one constitutional right should have to be surrendered in order to assert another,” and holding that testimony made by a defendant in a Fourth Amendment suppression hearing cannot be used at trial unless he fails to object); In re Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978) (recognizing use immunity for testimony predicate to Speech and Debate Clause).


Over the years, periodic expressions of support have surfaced for judicially imposed use immunity. See, e.g., United States v. Gaither, 539 F.2d 753, 754-55 (D.C. Cir. 1976) (Bazelon, C. J., concurring in denial of rehearing en banc); United States v. Leonard, 494 F.2d 955, 958 n.79 (D.C. Cir. 1974) (Bazelon, C. J., concurring in part and dissenting in part); United States v. La Duca, 447 F. Supp. 779, 786 (D.N.J. 1978) (“The availability of use immunity can protect the government’s interest in potential future prosecution of a witness while also satisfying the interest of the criminal defendant in the presentation of testimony which can exculpate him.”). The concept has also garnered some enthusiastic support in academia.


The New Mexico Rule-Making Authority Differs from the Federal Model

Under the federal Constitution, Congress exercises considerable control over rules and procedure of the federal courts, and where the judicial branch does have its own power to promulgate rules, it is largely on authority delegated by Congress. See Mistretta v. United States, 488 U.S. 361, 385-88 (1989) (explaining Congress’s power to regulate court procedure, or to delegate that power). By contrast, the New Mexico Constitution has always afforded the judiciary virtually independent control over inferior tribunals, as well as court rules. Under the New Mexico Constitution, the New Mexico Legislature has no power akin to the constitutionally mandated power of Congress to “constitute Tribunals inferior to the supreme Court,” U.S. Const. art. I, § 8, cl. 9. This power of Congress to create the federal court system, supplemented by the authority granted by the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, has been understood to give Congress the power “to prescribe rules of evidence and standards of proof in the federal courts.” Vance v. Terrazas, 444 U.S. 252, 265 (1980); see also id. at 266 (noting that such power is “undenied and has been frequently noted and sustained”); Hanna v. Plumer, 380 U.S. 460, 472 (1965) (Congress has “power to make rules governing the practice and pleading” in federal courts). By contrast, the New Mexico Constitution itself creates the courts inferior to this Court, while leaving the Legislature residual power to create “other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.” N.M. Const. art. VI, § 1; see also Stout v. City of Clovis, 37 N.M. 30, 33, 16 P.2d 936, 938 (1932) (same).

It is clear, then, that this Court exerts an authority over its own courts,
and therefore its own rules, that federal courts lack. But even if that were not true, we could comfortably conclude that the federal immunity rule is quite unlike our own rule. The federal immunity statute, which is the first and last word on federal immunity, explicitly grants the immunity power to prosecutors. Our statute does not, and does not even apply beyond the grand jury. The portion of our immunity law which does specify prosecutorial authority is Rule 5-116 of our Rules Criminal Procedure, which, as we have already noted, is within our inherent authority to change. Albuquerque Rape Crisis Ctr., 2005-NMSC-032, ¶ 5. We have amended rules in the past, as well as jury instructions, by court opinion. See State v. Pieri, No. 31, 119, slip op. at 25 (N.M. Sup. Ct. April 23, 2009); State v. Balderama, 2004-NMSC-008, ¶ 38 n.4, 135 N.M. 329, 88 P.3d 845 (amending a portion of the Uniform Jury Instructions).

{33} Our conclusion that this Court controls use immunity rules flows naturally from the well-accepted proposition that New Mexico courts control issues of evidence and testimony—a proposition which is far less true in the federal system. In granting use immunity, courts are acting upon their inherent power to control their courtroom and to establish procedural rules. See State ex rel. Bliss v. Greenwood, 63 N.M. 156, 161-62, 315 P.2d 223, 227 (1957) (noting that courts have inherent power to hold non-compliant witnesses in contempt); Ammerman, 89 N.M. at 309-12, 551 P.2d at 1356-59 (stating that courts have power over certain privileges as matters of evidence). A long line of cases in this state support the proposition that the control of testimony is a judicial prerogative. See Brown, 1998-NMSC-037, ¶ 61; Greenwood, 63 N.M. at 162, 315 P.2d at 227 (noting and discussing the contempt power of courts); Albuquerque Rape Crisis Ctr., 2005-NMSC-032, ¶ 34 (Bosson, C.J., dissenting) (“The decision to allow someone not to give testimony, and the balancing of policy considerations implicit in such a decision, goes to the heart of judicial authority.”); Rule 11-501 NMRA (stating that “no person has a privilege to . . . refuse to be a witness . . . [or] refuse to disclose any matter” except as provided by constitution or court rules).

{34} Some of our cases even suggest that the control of court rules on evidence and procedure is an exclusive judicial power, and that the Legislature has no role. See Ammerman, 89 N.M. at 312, 551 P.2d at 1359. While we have recently tempered our reliance on this theory of judicial exclusivity, see Albuquerque Rape Crisis Ctr., 2005-NMSC-032, ¶ 5, this Court has always been understood to govern its own decisions on procedure, pleading and other core judicial functions. See Michael B. Browde & M.E. Occhialino, Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints, 15 N.M. L. Rev. 407 (1985) (charting an increasingly court-centered power over rules of procedure and pleading, but also noting, at 427, that New Mexico had, at least until the 1930’s, a “long tradition of shared responsibility for rule-making”).

{35} In conclusion, New Mexico use immunity law, unlike its federal counterpart, is a creature of the courts, and therefore amenable to judicial change. By virtue of our decisional law, as well as this Court’s superintending control, we have more latitude than those courts which have addressed this issue in other jurisdictions. And at the risk of overstating the obvious, our Legislature has not expressed any views, contrary or otherwise, on use immunity at trial and on the role of the prosecutor. Therefore, in exercising our “ultimate rule-making authority” over procedure and pleading, Albuquerque Rape Crisis Ctr., 2005-NMSC-032, ¶ 5, we have no doubt that this Court has the authority to permit district courts to grant use immunity in limited circumstances with or without the concurrence of the prosecutor.

{36} To the extent our precedents hold differently, they are no longer persuasive for all the reasons discussed herein, and we overrule them on that point of law. For example, in both Cheadle, 101 N.M. at 286-87, 681 P.2d at 712-13, and Baca, 1997-NMSC-045, ¶ 37, we did not discuss the important distinction between federal law and our own jurisprudence, or for that matter the vital difference between use immunity and testimonial immunity. Instead, both cases appeared to conclude, based on the federal model, and without much analysis or discussion, that prosecutorial control over the immunity process could not be altered absent constitutional or statutory authority. As we have explained, our prior adherence to the federal paradigm and its grant of prosecutorial control over use immunity no longer withstands critical analysis. We overrule both cases with respect to that conclusion, holding that our courts do have the authority to grant a witness use immunity under certain limited circumstances.

{37} Ironically, the Court of Appeals opinion in Sanchez, 98 N.M. 428, 649 P.2d 496, that preceded Cheadle, 101 N.M. 282, 681 P.2d 708, and Baca, 1997-NMSC-045, is in accord with today’s opinion, to the extent that it implicitly recognized our judiciary’s independent authority to alter immunity rules, a power not granted to federal courts. However, the Sanchez Court determined that this distinction with federal law “does not warrant adoption here from a different result” from that followed by federal jurisdictions and continued to honor the prosecutor’s control over the immunity process. Sanchez, 98 N.M. at 433, 649 P.2d at 501. Today we come to a different conclusion about whether to follow federal practice, but we draw comfort from the Sanchez Court’s earlier recognition that ultimately the decision to follow federal authority is ours alone to make. Accordingly, we overrule Sanchez as to its ultimate conclusion. We also hereby amend Rule 5-116 to delete the words “upon the written application of the prosecuting attorney,” and refer the matter to the Rules of Criminal Procedure Committee for further review.

{38} In order to guide district courts seeking to determine whether court-granted immunity is appropriate, we establish the following overview for such determinations, which also incorporates the applicable elements of Rule 5-116 and Rule 11-412. Before granting use immunity to a defense witness over the opposition of the prosecution, district courts should perform a balancing test which places the initial burden on the accused. The defendant must show that the
proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the district court must then balance the defendant’s need for the testimony against the government’s interest in opposing immunity. A court cannot determine whether a judicial grant of use immunity is necessary “without assessing the implications upon the Executive Branch.” *Turkish*, 623 F.2d at 776. In opposing immunity, the State must demonstrate a persuasive reason that immunity would harm a significant governmental interest. If the State fails to meet this burden, and the defendant has already met his burden, the court may then exercise its informed discretion to grant use immunity which our appellate courts would review for abuse of discretion.

**Application to the Present Case**

{39} Because the present case came to us before it went to trial, the record is underdeveloped. But at least two important aspects of the case appear to be clear enough. The first is that the State’s explanation of why it refused to grant D.P. use immunity is unpersuasive and practically non-existent. The second is that Defendant’s ability to present an effective defense arguably may suffer if he is unable to explore D.P.’s testimony. We cannot rule out at this point that D.P.’s testimony may be material to Defendant’s theory of the case. We leave it to the district court on remand to pursue this issue at greater length. We do not restrict the court’s ability on remand to decide anew whether use immunity is ultimately essential to Defendant in this particular case and, if so, whether to grant use immunity to D.P. All we decide, at this juncture, is that the district court has the power to consider the grant of use immunity under the circumstances. Because of the lack of a developed record, we also cannot say at this juncture which of D.P.’s constitutional rights, if any, may be imperiled. We leave it to the district court to consider, in light of further fact-finding, whether it is the Sixth Amendment rights of confrontation or compulsory process, or simply the broader Fourteenth Amendment rights of a fair trial. We further note that immunity for the purposes of an in-camera interview is not necessarily the same as immunity for purposes of trial. That is, a district court’s decision to grant immunity for the purpose of understanding what the witness’s testimony at trial will be, does not bind that court to a grant of immunity at trial. The two decisions are separate. Immunity for one purpose does not equate to immunity for the other.

{40} As for the State’s refusal to grant immunity, the prosecution asserted that it had no intent to charge D.P. but, nonetheless, refused to apply for immunity. The State declined, not because prosecutors had any intention of pursuing further charges, or because they believed a case might later arise against D.P., or because they believed the general interests of justice would be advanced. The State appears to have refused to grant immunity simply because it did not want to and opposed anyone deciding differently.

{41} The prosecution’s stated rationale was twofold. First, the State asserted that D.P. had no valid Fifth Amendment right because the case against D.P. had already been adjudicated and the State had no plans to pursue further charges. Second, the prosecution asserted “the general principle” that the State should not be “forced to grant immunity every time the defense request[s] it.” The State invoked the possibility of a “flood gate” opening to “every Tom, Dick and Harry coming into this system and saying, well, you need to grant me immunity.”

{42} The first claim is as circular as it is unpersuasive. If the prosecutor truly had no plans to prosecute, and could foresee no set of facts in which Defendant might be prosecuted, then the State stands to lose very little by granting D.P. use immunity.

{43} To successfully assert a Fifth Amendment privilege, a witness must have “reasonable cause to apprehend danger from a direct answer” of a question. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Further, the danger of prosecution must be “real and appreciable.” *Brown v. Walker*, 161 U.S. 591, 599 (1896). But the Fifth Amendment right against self-incrimination does not vanish merely because the prosecution claims it will not prosecute. *See United States v. Jones*, 703 F.2d 473, 478 (10th Cir. 1983) (“Once the court determines that the answers requested would tend to incriminate the witness, it should not attempt to speculate whether the witness will in fact be prosecuted.”). It is broadly recognized that, barring a number of well-defined exceptions, the failure to invoke the Fifth Amendment waives its protections. *See United States v. Monia*, 317 U.S. 424, 427 (1943). The fact that a prosecutor has promised not to prosecute would not change this analysis, possibly barring some sort of contractual agreement the likes of which are absent in this case. Furthermore, it is clear that there are many charges that could reasonably result from revelations made by D.P. in his testimony, and the district court so found.

{44} The second basis for the prosecutor’s refusal reveals the hazards of giving the State sole and essentially unchecked control over immunity determinations. The assertion that use immunity should not be granted in D.P.’s case because of “the general principle” that it would encourage others to seek immunity is no justification at all in Defendant’s particular case. Carried to its logical conclusion, it would mean there is essentially never an appropriate time for use immunity. This highlights the fundamental problem with the current rule: it puts the prosecution in control of critical constitutional rights of the accused, while excluding the moderating influence of an impartial judiciary.

{45} It is true that prosecutors have a duty to serve the broad interests of justice by ensuring the integrity and fairness of the criminal justice system, and not just tally up convictions. *See State v. Cooper*, 2000-NMCA-041, ¶ 15, 129 N.M. 172, 3 P.3d 149 (“The sole duty of a prosecutor is to see that justice is done.”); *State v. Brule*, 1997-NMCA-073, ¶ 18, 123 N.M. 611, 943 P.2d 1064 (“The prosecutorial role is to pursue a charging pattern that reconciles the community interest in proper enforcement of the law and the interest, shared by the community and the defendant, in fairness to the defendant.”), rev’d on other grounds, 1999-NMSC-026, ¶ 15, 127 N.M. 368, 981 P.2d 782. But prosecutors are also, by definition, partisan combatants in our adversarial system. It has always been the role of courts in this system to mediate this kind of conflict between the prosecution and the defense.

{46} The State’s grounds for refusing immunity here are notably weaker than prior justifications in our other immunity cases. In *Sanchez*, 98 N.M. at 431, 649 P.2d at 499, the defendant, an alleged car thief, proposed to put on the stand a man who would testify that it was he, the witness, and not the defendant who committed the crime. The district court refused to grant use immunity, and the Court of Appeals affirmed. Unlike the State in the present case, prosecutors in *Sanchez* had a clear and undeniable desire to prosecute the proposed defense witness for the underlying crime if the jury believed his testimony. In the present case, the witness is not confessing to any part in the crime for which Defendant is
charged, and the State claims no interest in prosecuting the witness even for perjury.

In Cheadle, 101 N.M. at 286-87, 681 P.2d at 712-13, a murder defendant proposed to put on the stand a witness who would testify that the accused was with him, the witness, the night of the murders. The district court refused to grant immunity to the proposed witness, and this Court affirmed. Id. at 287, 681 P.2d at 713. The State’s reasons for rejecting immunity were more compelling than in the present case. If the defense witness testified as proffered, the State would have a legitimate interest in prosecuting the witness for harboring a fugitive.

Foundations of the Majority Immunity Rule

In coming to the decision we announce today, we are not unmindful of the policy concerns raised in other forums against allowing courts to grant immunity without the concurrence of the prosecution. We address the principal concerns and our reasons for taking a different view. Underlying all of these concerns is a fear about the judiciary encroaching on the authority of the legislative and executive branches.

Separation of Powers

The fundamental concern about giving courts unilateral authority to grant use immunity is that doing so invades the province of either the legislative branch, the executive branch, or both. See, e.g., United States v. Angiulo, 897 F.2d 1169, 1191 (1st Cir. 1990). The roots of these fears run deep. As the United States Supreme Court noted in detail in Kastigar, 406 U.S. at 443, immunity statutes are a tradition spanning more than two centuries of Anglo-American jurisprudence. Such statutes generally grant the power of immunity to prosecutors, not to courts.

As we have previously discussed, in the instance of transactional immunity we agree that separation-of-powers concerns resonate deeply, because transactional immunity amounts to a decision not to prosecute at all. The decision to grant this broad and sweeping immunity is one which courts are not well-suited to make. See Brown, 1998-NMSC-037, ¶ 59.

Furthermore, the determination of whom and when to prosecute, while not entirely exempt from judicial review, lies nonetheless at the heart of the prosecutor’s powers. See State v. Ogden, 118 N.M. 234, 240-41, 880 P.2d 845, 851-52 (1994); see also Boone v. Kentucky, 72 Fed. Appx. 306, 307 (6th Cir. 2003) (noting that absolute immunity extends to a prosecutor’s decision “on whether to prosecute a case”).

There are good reasons for prosecutors to decide unilaterally whom to prosecute, as well as when and when not to prosecute. Many courts, federal and state, have amply expressed these reasons. See, e.g., United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); Application of Hassan v. Magistrates Court of New York, 20 Misc. 2d 509 513-14 (1959); Murphy v. Sumners, 54 Tex. Crim. 369, 370 (1908).

According to the federal rule, courts are essentially powerless to consider the constitutional rights of a defendant in the case of immunity for defense witnesses. See, e.g., Turkish, 623 F.2d at 773-74. Although this is the majority position, it is nonetheless an extreme one. It is rare in criminal jurisprudence that a court is completely foreclosed from enforcing or protecting the constitutional rights of the accused. The anomaly is particularly striking in the instance of use immunity, which is much more akin to a classic judicial function than is the granting of transactional immunity.

We fully acknowledge that the imposition of use immunity, though less burdensome to prosecutors than transactional immunity, may still pose significant challenges to the prosecution. District courts considering whether to grant use immunity should seriously consider these difficulties. Under traditionally recognized use immunity rules, the government retains a “heavy burden” to show that its case against an immunized witness is not derived from the immunized testimony. Kastigar, 406 U.S. at 461. Furthermore, a prosecutor may feel compelled to curtail cross-examination of a witness granted use immunity, in order to limit the potential universe of testimony that the witness can later claim was used in a subsequent prosecution. We recognize that these concerns are real, and that the burden on prosecutors even for use immunity can be substantial. See State v. Valles, 118 N.M. 572, 577, 883 P.2d 1269, 1274 (1994) (stating that in order to carry its burden, the State must present evidence, not just argument, and must make a preponderance showing). We have previously noted that when the State grants use immunity, it runs a “grave risk” that the future prosecution of an immunized witness for past crimes “may, as a practical matter, be impossible.” Id. at 580, 883 P.2d at 1277 (internal quotation marks and citation omitted); see also United States v. North, 910 F.2d 843, 862 (noting that, when a witness is granted use immunity, the government “is taking a great chance that the witness cannot constitutionally be indicted or prosecuted”), opinion withdrawn and superseded in part on reh’g, 920 F.2d 940 (D.C. Cir. 1990).

However, we also recognize that prosecutors deal regularly with use immunity rules, and are more than capable of successful prosecutions despite them. See, e.g., State v. Olivas, 1998-NMCA-024, ¶ 7, 124 N.M. 716, 954 P.2d 1193 (rejecting defendant’s argument that prosecution used immunized statements in violation of Kastigar). This Court has established certain guidelines for separating immunized testimony from other evidence, see Valles, 118 N.M. at 577-78, 883 P.2d at 1274-75, and clear rules are also available elsewhere. See U.S. Attorneys’ Manual, U.S. Department of Justice, Criminal Resource Manual § 726, Steps to Avoid Taint (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00726.htm. We are confident that our state’s district attorneys can and will produce similar guidelines for defense witnesses. Under the balancing test, we announce today, prosecutors have ample opportunity to argue to district courts that the burdens of use immunity would so hinder their ability to prosecute that they outweigh whatever interest the defendant may have in obtaining witness immunity. Ultimately, the trial court will have to decide on a case-by-case basis.

Clogging the Courts

In its briefing before this Court, as well as its argument to the district court, the State justified its refusal to grant immunity, in part, on fears that granting immunity would open the “floodgate” to defense witnesses demanding immunity for their testimony. As a result of today’s opinion, district courts may see an increase in requests for defense witness immunity, but a desire for efficiency is no reason to

1In noting the relative strength of the defense witness’s arguments in these cases, we do not purport to pre-determine the outcome of any future cases with facts similar to Sanchez or Cheadle. Because of the fact-intensive and case-specific analysis which the district court must carry out in determining whether to grant defense witness immunity, it is of course impossible to anticipate how the principles announced today will play out in any given set of facts.
withhold testimony which could provide essential constitutional protection to defendants. A desire for judicial expediency provides no excuse to short-change a defendant in his quest for constitutional protection. See United States v. McIver, 688 F.2d 726, 731 (11th Cir. 1982) (noting the “futility of attempting to substitute efficiency for constitutional requirements of due process”). Furthermore, we have long noted that district courts have supervisory control over the proceedings before them, and are fully capable of quickly dispatching control over the proceedings before them, due process”). Furthermore, we have long noted that district courts have supervisory control over the proceedings before them, and are fully capable of quickly dispatching meritorious arguments. See Pizza Hut of Santa Fe, Inc. v. Branch, 89 N.M. 325, 327, 552 P.2d 227, 229 (Ct. App. 1976) (“[W]e have held that trial courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”). With these well-established principles, courts will be able to prevent needless and time-consuming mini-trials over the issue of witness immunity.

“Immunity Baths”

Grants of immunity, whether made by prosecutors or by the courts, are inherently subject to abuse by witnesses. A witness may lie, or alter his testimony, in order to receive immunity. In the case of defense witness immunity, the risk is in some senses two-fold. For example, a friend of the accused may testify falsely under an immunity grant, stating that he, and not the accused, is guilty of the crime. Confused thereby, the jury may be unable to decide to convict beyond a reasonable doubt. With the grant of immunity, the prosecution may be left without a case, and the real perpetrator, either one in this hypothetical scenario, is never held accountable. Some courts have described this so-called “immunity bath” technique as a basis for not permitting judicially granted immunity. See, e.g., In re Kilgo, 484 F.2d 1215, 1222 (4th Cir. 1973). We recognize the concern is legitimate. However, where the issue is use immunity alone, and not transactional immunity, the concern largely, though not entirely, diminishes. The incentive for a witness to lie in exchange for mere use immunity is small. In the case of transactional immunity, the lying witness can secure for himself freedom from prosecution for a series of events in which he may have been involved. With use immunity, such a witness receives virtually nothing in return for his lie. The prosecution does not promise to refrain from prosecuting for the events described, but only for the testimony itself. Furthermore, use immunity does not protect against prosecution for perjury. See Rule 11-412 (stating that evidence or testimony obtained after a grant of use immunity may not be used against a person compelled to testify, “except a prosecution for perjury committed in the course of the testimony”).

And yet the incentive for prosecutors to grant defense witness immunity is small. Given the certainty that such testimony cannot help a prosecutor’s case, it is not surprising that prosecutors grant immunity to defense witnesses only sparingly, if at all. The United States Department of Justice as a matter of policy mandates that prosecutors will not grant immunity to defense witnesses “except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial.” U.S. Attorneys’ Manual, available at http://www.usdoj.gov/usaou/eousa/foia_reading_room/usam/title9/23mcrm.htm#9-23.214. We found no cases mentioning such a grant, while immunity grants to State witnesses are legion. See, e.g., Vallejos, 118 N.M. at 574, 883 P.2d at 1271; Brown, 1998-NMSC-037, ¶5-10, State v. Lunn, 82 N.M. 526, 529, 484 P.2d 368, 371 (Ct. App. 1971) (discussing Dutton v. Evans, 400 U.S. 74 (1970)).

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OPINION

PETRA JIMENEZ MAES, JUSTICE

This is the second time this case has come before us for review. See City of Las Cruces v. Sanchez, 2007-NMSC-042, 142 N.M. 243, 164 P.3d 942. The sole issue in the first appeal was “whether a district court has jurisdiction to entertain a city’s appeal from a municipal court’s dismissal of charges against a defendant on grounds other than the constitutionality of an ordinance or the sufficiency of a complaint.” Id. ¶ 7. We held that a municipality has a constitutional right to appeal a final judgment or decision from municipal court and remanded the case to the district court for a trial de novo. Id. ¶ 21.

In the district court following our remand, Steven Sanchez (Defendant) filed a motion to suppress evidence arising from his arrest for the violation of several municipal ordinances, including aggravated driving while under the influence of intoxicating liquor (DWI). See Las Cruces, N.M., Municipal Code (LCMC) § 27-12-6-12.1(D)(1) (2004), available at http://www.las-cruces.org/legal/city_clerk/codes-dir/. The district court granted the motion and dismissed the case with prejudice on the ground that the warrantless misdemeanor arrest was illegal, because the offense did not take place in the presence of police officers and the presence requirement for the misdemeanor arrest was not otherwise excepted by a valid arrest under NMSA 1978, Section 66-8-125 (1978). We held that the arrest was valid under Section 66-8-125(A)(1), because the arresting officer had reasonable grounds to believe that Defendant had been present at the scene of the accident and had committed the crime of DWI. Therefore, the legality of Defendant’s arrest did not require the offense to be committed in the presence of an officer. Because the validity of the arrest under Section 66-8-125 was the sole issue decided by the district court, we reverse the court’s suppression order and remand the case for further proceedings.

BACKGROUND

Officers received a report that a vehicle had crashed into a house, and that the vehicle’s driver and passengers had fled the accident scene on foot. Arriving five to ten minutes after the crash, the officers did not encounter either a driver or passengers at the accident scene.

PROCEDURAL HISTORY

The City of Las Cruces (City) first filed the charges against Defendant in Las Cruces municipal court. The court, however, dismissed the charges against Defendant. Handwritten on the court’s disposition form is the apparent reason for the dismissal: “Crime not observed by officers—no statutory exception to warrant requirement.” The City appealed, but the district court dismissed the appeal on the ground that the City did not have a right to appeal from the municipal court’s dismissal, which resulted in this Court’s first review of this case. We reversed the dismissal and remanded the case to the district court for a trial de novo. Sanchez, 2007-NMSC-042, ¶¶ 20-21.
After remand, Defendant filed a motion to suppress the evidence arising from his warrantless misdemeanor arrest, asserting that the arrest was invalid under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant argued that the arrest violated New Mexico’s misdemeanor arrest rule, because the offense was not committed in the presence of an officer. The City argued that the arrest was valid under Section 66-8-125, which provides an exception to the misdemeanor arrest rule by permitting an officer to arrest without a warrant any person “present at the scene of a motor vehicle accident” when the officer has reasonable grounds to believe that person has committed a crime. Section 66-8-125(A)(1), (B). The district court found that “[Section] 66-8-125 does not provide for an exception for the warrant requirement for arrest unless the law enforcement officer encounters the person at the scene of the accident,” and therefore, the court concluded that “the ‘accident scene’ exception to the general misdemeanor arrest rule does not apply and Sanchez’ warrantless arrest was illegal.”

The district court granted Defendant’s motion to suppress and dismissed the case. We consider as common knowledge, give him probable cause to believe or reasonable grounds, based on personal investigation which may include information from eyewitnesses, to believe the person arrested has committed a crime. This is a question of statutory interpretation that we decide de novo. Cook v. Anding, 2008-NMMSC-035, ¶ 7, 144 N.M. 400, 188 P.3d 1151. Our goal in the interpretation of statutes is to effectuate the Legislature’s intent in enacting the statute. Id.

Generally, in New Mexico, an officer may execute a warrantless misdemeanor arrest only if the offense was committed in the officer’s presence. State v. Ochoa, 2008-NMSC-023, ¶ 11, 143 N.M. 749, 182 P.3d 130; see Cave v. Cooley, 48 N.M. 478, 482, 83, 152 P.2d 886, 888 89 (1944). “[A] crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.” Ochoa, 2008-NMSC-023, ¶ 11 (internal quotation marks and citation omitted).

Section 66-8-125 creates an exception to this general rule by allowing officers to arrest “without a warrant any person . . . present at the scene of a motor vehicle accident.” See Ochoa, 2008-NMSC-023, ¶ 12 (“The legislature has created specific exceptions to the ‘presence’ requirement.” (citing § 66-8-125(B)). Defendant argues that for the arrest to be valid under Section 66-8-125, the officers first had to encounter Defendant at the scene of the accident. We disagree.

An officer has two immediate concerns upon arriving at an accident scene—care for the injured and traffic safety.” State v. Calanche, 91 N.M. 390, 393, 574 P.2d 1018, 1021 (Ct. App. 1978). After attending to those duties, Section 66-8-125(B) requires that an officer establish reasonable grounds through personal investigation that an individual committed a crime, before the officer can execute a warrantless arrest under the statute. See Calanche, 91 N.M. at 393, 573 P.2d at 1021. In Calanche, the Court of Appeals held that when the defendant was taken to the hospital during the arresting officer’s investigation and the officer developed subsequent reasonable grounds on which to arrest the defendant, the defendant’s arrest at the hospital was valid under Section 66-8-125. Id. The Court of Appeals reasoned that the arrest was valid because officers are required to investigate an accident prior to making an arrest under the statute: “We do not believe the Legislature intended that a person involved in an accident could avoid a valid warrantless arrest by leaving the accident scene before the officer’s investigation developed grounds to arrest that person.” Id. Therefore, Section 66-8-125(A) (permitting warrantless arrest of a person “present at the scene of a motor vehicle accident”) and Section 66-8-125(B) (requiring an investigation) must be read in accordance with one another to effectuate the statutory authority to arrest and to satisfy officers’ statutory duty to investigate. See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n, 2009-NMSC-013, ¶ 17, ___ N.M. ___, 206 P.3d P.3d 135 (“Thus, the meaning of the term is ambiguous, and we will look to the Act’s related provisions to determine what the Legislature intended.” (citing Gen. Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985) (“[This Court] read[s] the act in its entirety and construe[s] each part in connection with every other part in order to produce a harmonious whole.”) (citation omitted)).

We agree with Defendant that Calanche is distinguishable from the present case on its own facts. In Calanche, the arresting officer encountered the defendant at the scene of the accident, and the defendant was then involuntarily removed from the scene to receive medical treatment. In the present case, Defendant left the scene of the accident voluntarily.

We believe, however, that limiting officers’ authority to arrest under Section 66-8-125, by prohibiting the arrest of an individual who is removed from the scene of the accident before officers arrive to investigate, would be inconsistent with the legislative intent of the statute. The ineffectual result of such a limitation is especially pernicious in DWI investigations. Because evidence of intoxication fades over time, officers must promptly locate and investigate an individual suspected of DWI. If officers are required to encounter an individual at the scene of an accident for an arrest to be valid under Section 66-8-125, then the officers’ authority to arrest without a warrant would be defeated by an individual’s mere absence from the scene prior to the investigating officers’ arrival.
This would create the added delay of requiring a warrant for the individual’s arrest and would provide an intoxicated individual with a potential means of avoiding a DWI charge where the added delay of obtaining a warrant allows evidence of the individual’s level of intoxication at the time of driving to dissipate. Such a limitation would provide an intoxicated individual with an enticing incentive to flee. Therefore, we hold that the Legislature intended to authorize officers to arrest without a warrant individuals who either are or were present at the scene of a motor vehicle accident, when the arresting officer has developed reasonable grounds, through personal investigation, to believe the individual committed a crime. The Legislature did not intend to predicate this authority on whether the officer first encountered the individual at the accident scene.

{16} The arrest, however, must take place with reasonable promptness from the time of the accident. “The requirement of reasonable promptness is designed to prevent too great an inroad on the rule requiring a warrant of arrest if practicable.” Calanche, 91 N.M. at 393, 573 P.2d at 1021 (citation omitted). Once the arresting officer’s investigation satisfies Section 66-8-125(B), the subsequent arrest of an individual pursuant to the officer’s investigation is valid if the arrest is made with reasonable promptness. See Id. {17} In the present case, the arresting officer had reasonable grounds to arrest Defendant without a warrant under Section 66-8-125(B). During his investigation of the accident scene, Officer Benevidez checked the abandoned vehicle’s registration and license plate number, which revealed Defendant’s name and the address at which he was eventually arrested. This evidence was corroborated by the passenger’s identification of Defendant as the driver. Officer Benevidez also interviewed witnesses at the accident scene, and he spoke with and observed Defendant after Defendant was taken into custody. Officer Benevidez developed grounds to believe that Defendant was the driver of the vehicle and had been driving under the influence of alcohol. Thus, Officer Benevidez’s personal investigation provided adequate grounds to believe that Defendant had committed the crime of DWI.

{18} Evidence at the suppression hearing established that officers arrived at the scene of the accident within five to ten minutes of the accident. Officers’ testimony indicated that the house at which Defendant was located and arrested was near to the scene of the accident. Therefore, the evidence established that the arrest was made with reasonable promptness following the accident. Accordingly, we hold that Defendant’s warrantless arrest was valid under Section 66-8-125, and therefore, the offense need not have been committed in the presence of an officer.

CONCLUSION

{19} The sole basis for the district court’s suppression order was that the offense was not committed in the presence of an officer. Therefore, we reverse the judgment of the district court and remand the case for further proceedings.1

{20} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice

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1We need not decide whether Defendant’s arrest under Section 66-8-125 comports with the reasonableness requirements of the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. This argument was not presented in the district court and was not argued before this Court.
From the New Mexico Supreme Court

Opinion Number: 2009-NMSC-027

Topic Index:
Constitutional Law: Confession
Criminal Law: Criminal Law, General; Evidence; and Murder
Criminal Procedure: Affidavit for Search Warrant; Confession; Motion to Suppress; Probable Cause; Search and Seizure; and Search Warrant
Evidence: Suppression of Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JOSEPH EVANS,
Defendant-Appellant.
No. 30,443/30,454 consolidated (filed: May 27, 2009)

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT
OF MCKINLEY COUNTY
ROBERT A. ARAGON, District Judge

HUGH W. DANGLER
Chief Public Defender
MICHAEL L. ROSENFIELD
Assistant Public Defender
Albuquerque, New Mexico
for Appellant

GARY K. KING
Attorney General
MARTHA ANNE KELLY
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

OPINION

RICHARD C. BOSSON, JUSTICE

This Opinion addresses two interlocutory appeals, which we hereby consolidate on our own motion. Joseph Evans (“Defendant”) appeals the district court’s denial of his motion to suppress his confession, which he argues was involuntary. The State appeals the district court’s suppression of physical evidence stemming from a search warrant which the district court concluded lacked probable cause. We affirm the district court’s decision not to suppress the confession and reverse as to the suppression of the physical evidence. This case is remanded to the district court for further proceedings.

BACKGROUND

Police discovered Felicia Penaloza’s body partially wrapped in a fitted, white bed sheet, lying face-down in an arroyo northwest of Gallup on September 12, 2005. She was 16 years old. The Office of the Medical Investigator determined that she had been asphyxiated by a ligature around her neck, and by a black plastic trash bag tied over her head. The plastic bag was cinched around her neck with an “electrical type wire,” according to an affidavit that police filed in support of an application for a search warrant.

According to the same affidavit, police interviewed Seferino Griego three days after discovering Penaloza’s body. Griego incriminated Defendant in the crime. Police also interviewed Defendant’s mother, Sheree Thornton, whose account gave police further reason to believe Defendant may have been involved in the crime. We will address the statements of Griego and Thornton in detail below. Thornton also allowed New Mexico State Police Agent Patrick Ness to view the basement of her house where Defendant apparently kept a bedroom. Agent Ness saw exposed electrical wiring, sheets, two mattresses without linen, and a number of electrical wires of different sizes and colors. Police then interviewed a McKinley County Probation Officer who overheard Griego accuse Defendant of killing Griego’s “girlfriend,” and Defendant later say, “I guess I am a murderer.”

On September 17, 2005, New Mexico State Police Agent Henrietta Soland applied to McKinley County Magistrate Judge John Carey for a warrant to search Thornton’s house. Magistrate Judge Carey granted the application, and police executed the search warrant on the same day, finding, among other things, a piece of an electrical cord which police claim matched the cord found around Victim’s neck.

The following day Agent Ness, who had not participated in the execution of the search warrant, and Agent Soland interviewed Defendant at the McKinley County Adult Detention Center. Defendant had been detained there for 13 days on charges unrelated to the present case. In a 90-minute interrogation, conducted in the afternoon in a visiting room at the detention center, Defendant ultimately acknowledged culpability in Victim’s death. His story changed considerably throughout the course of the interrogation. He initially denied any involvement in the death, saying that he was merely present at his house when Victim was there. Then he denied killing her, but said he put the bag over her head after she was dead. Then he said he was with her when she “quit moving.” And finally, he claimed he accidentally strangled her, although it is unclear in his testimony that he confessed to strangling her in the same manner as described in the medical examiner’s autopsy report. Throughout the second half of the interrogation, Agent Ness made several statements which Defendant claims were impermissibly coercive.

Procedural History

The District Attorney for the Eleventh Judicial District charged Defendant by criminal information on November 29, 2005 with an open count of murder in connection with Victim’s death. The information also charged Defendant with one count of kidnapping and one count of tampering with evidence. Defendant waived his right to a preliminary hearing.

Both of the appeals in this case are before this Court pursuant to State v. Smallwood, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821, where we held that this Court has jurisdiction over interlocutory appeals in which a criminal defendant “may possibly be sentenced to life imprisonment or death.”

The first appeal, by the State, challenges the district court’s suppression of the physical evidence obtained in the search of Thornton’s house. The district court overturned Magistrate Judge Carey’s finding of probable cause, but offered no explanation for its ruling, except for “the lack of probable cause as portrayed in the affidavit.”
The State argues that the affidavit provided the magistrate with a sufficient factual basis to conclude that there was probable cause to search. For reasons explained below, we agree and therefore reverse the district court on this issue.

{9} In the second appeal, Defendant argues that his confession was invalid because police tactics in eliciting the confession amounted to unconstitutional coercion. We disagree, and therefore affirm the district court for reasons explained in detail below.

DISCUSSION

Probable Cause for Search Warrant

{10} The Fourth Amendment to the United States Constitution requires police to obtain a warrant, issued by a judge or magistrate, before executing any search or seizure, subject to “a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967). Probable cause to search a specific location exists when there are reasonable grounds to believe that a crime has been committed in that place, or that evidence of a crime will be found there. See State v. Gonzales, 2003-NMCA-008, ¶¶ 11-12, 133 N.M. 158, 61 P.3d 867.

{11} Put another way, before a valid search warrant may issue, the affidavit must show: (1) that the items sought to be seized are evidence of a crime; and (2) that the criminal evidence sought is located at the place to be searched.” State v. Herrera, 102 N.M. 254, 257, 694 P.2d 510, 513 (1985); see also State v. Baca, 97 N.M. 379, 379-80, 640 P.2d 485, 485-86 (1982) (same). There are no “bright-line, hard-and-fast rules” for determining probable cause, but the degree of proof necessary to establish probable cause is “more than a suspicion or possibility but less than a certainty of proof.” State v. Nyce, 2006-NMSC-026, ¶ 10, 139 N.M. 647, 137 P.3d 587 (internal quotation marks and citations omitted).

{12} Our inquiry focuses on the issuing judge’s conclusion as to probable cause. In this case, that means we look at the magistrate’s conclusions, not the district court’s. If we conclude that the magistrate’s conclusions as to probable cause were correct, we uphold those conclusions regardless of the decision reached by the district court.

{13} We break our inquiry into two components. First we look at the magistrate’s probable cause determination as to Victim’s death. Then we address the related but separate question of probable cause that evidence from the murder would be found in the specific location to be searched.

{14} Defendant argues that the search warrant affidavit was insufficient because it relied principally on the statement of Seferino Griego, who told police, among other things, that he saw Defendant with Victim shortly before she died. If it were true that the only evidence the State presented in its affidavit was a single witness’s account that Defendant was seen with Victim around the time of her death, Defendant might well be correct. But the State presented much more than that. In addition to Griego’s account, the State offered evidence obtained from the prior consensual search of Defendant’s bedroom, including “numerous electrical wires/ chords [sic] of different sizes and colors.” In the same search, the agent also saw two mattresses without linens and other bedding material—observations which take on added importance given that Victim’s body was found wrapped in sheets and tied with electrical wires.

{15} The State also presented statements from Defendant’s mother which showed Defendant telling conflicting stories about his activities the night he borrowed his mother’s van, around the time Victim disappeared. The State presented a statement from a probation officer who told police that during a chance encounter between Defendant and Griego in the booking area of the McKinley County jail, Griego loudly accused Defendant of killing Griego’s “girlfriend.” The probation officer said that Defendant did not immediately respond to Griego’s accusation, but once he was in his holding cell, said “I guess I am a murderer.”

{16} In addition, the State presented Griego’s allegation that Defendant had called him around the time of Victim’s death saying cryptically that he, Defendant, needed to “take out the garbage” and “take out the trash.” Griego told police that the conversation confused him.

{17} Like Griego’s statements to police, the allegation that Defendant said, “I must be a murderer,” by itself, would likely not give rise to a finding of probable cause. Jailhouses are commonly understood to be places of exaggeration, deception, and braggadocio. Police gave little information in the affidavit about the manner in which Defendant spoke. Was he boastful, contemptuous, sarcastic? It is not clear. Nonetheless, the statement can be considered in context with all the other information police provided in support of the search warrant application.

{18} Similarly, the stripped mattresses and exposed electrical wires in Defendant’s bedroom, along with the electrical wires and sheets on Victim’s body, would be insufficient if they stood alone. Nothing in the affidavit definitively matches the electrical wires in the basement bedroom with the wire found around Victim’s neck. Police apparently made such a match only after executing the search warrant. In State v. Hernandez, 111 N.M. 226, 229, 804 P.2d 417, 420 (Ct. App. 1990), our Court of Appeals held that there was no probable cause to support a search warrant where police presented evidence that blood had been found at the scene of a burglary and the defendant was later found to have a cut on his hand. The blood at the scene was apparently not matched chemically or genetically to the accused. A trail of stolen items led from the burgled location “in the direction towards” the accused’s residence. Id. at 227, 804 P.2d at 418. Considering only the evidence of blood at the scene and on the accused’s hand, along with the trail of stolen items, our Court of Appeals found a lack of probable cause to search the accused’s house. Id. at 229, 804 P.2d at 420.

{19} Defendant argues that the present case is the same as Hernandez, asserting that the affidavit contains “a glaring lack of any concrete information.” Defendant further argues that the primary reason given to acquire the search warrant is that one person, Griego, said Defendant was the last person seen with Victim. In arguing that this Court should treat the present warrant the same way the Court of Appeals treated the affidavit in Hernandez, Defendant overlooks two important things. First, Griego’s testimony is not the only basis the State provided for a search warrant. Second, far from a “lack of concrete information,” the affidavit contains, as we have described, a considerable amount of information from several different sources.

{20} Like the investigators in Hernandez, the police in this case found physical evidence at the scene of the crime which provides a link to further evidence found on the accused or, in this case, in Defendant’s bedroom. In Hernandez, the evidence at the scene was blood, and the evidence on the accused was the cut hand. In the present case, the evidence at the scene was electrical wires and missing bed sheets, while the evidence at the scene was similar wires and bed sheets on the corpse. The critical difference between the cases is that here, police provided valid and significant evidence, in addition to the physical evidence,
connecting Defendant with the crime. In Hernandez, police did not.

{21} True, the affidavit in this case provides no single piece of evidence as telling as the “reddish stain” and foul odor in the trunk of the accused murderer’s car in State v. Ferrari, 80 N.M. 714, 717, 460 P.2d 244, 247 (1969), where this Court concluded that a police search warrant affidavit adequately supported probable cause. But such overwhelming physical evidence is not required in every case to establish probable cause. Here, the police demonstrated substantial investigative efforts to supplement the physical evidence they did have: the electrical wire and bed sheets. They obtained statements from at least three named witnesses, including a description of Defendant’s own words in jail and the strong suggestion that he had told associates and family members different things about his activities on the evening in question. All of this information viewed “as a whole,” Gonzales, 2003-NMCA-008, ¶ 14, makes clear that the magistrate judge was justified in finding a probability that Defendant was involved in Victim’s disappearance and death.

{22} Defendant argues that there is “no causal relationship” between Victim’s disappearance and Defendant’s statement that he needed to “take out the garbage.” He similarly argues that the affidavit “totally fails to show any significance” in the fact that Griego last saw Defendant with Victim. These arguments are unavailing. We have never said that police must establish every link in the inferential chain that leads to probable cause. Rather, all that is required is that police make a showing that permits “more than a suspicion or possibility but less than a certainty of proof.” Nyce, 2006-NMSC-026, ¶ 10 (internal quotation marks and citations omitted).

The Affidavit Established a Sufficient Nexus With the Place Searched

{23} We now turn to the issue of whether the evidence supports a finding of probable cause to believe that evidence might be found in the basement bedroom of the house of Defendant’s mother.

{24} We take this opportunity to clear up some ambiguity in our case law. Some of our cases have implied that probable cause to believe a suspect has committed murder necessarily produces probable cause to search the suspect’s home. See Ferrari, 80 N.M. at 718, 460 P.2d at 248 (observing that probable cause that a suspect committed murder “[is ordinarily sufficient] to justify the search of [the suspect’s] house and the surrounding area and his business”). That is not true in every case. Probable cause to believe a defendant has committed a crime, and particularly the crime of murder, will often exist simultaneously with probable cause to believe there is evidence in the accused’s home. But probable cause does not follow ineluctably from an allegation of murder or any other crime. The link between the two conclusions must be made by the reviewing judge or magistrate on a case-by-case basis. Numerous courts in our sister states, as well as federal courts, have made clear that probable cause to believe an accused has committed a crime does not necessarily equate to probable cause that the home of the accused will contain evidence of the crime. See, e.g., United States v. Waxman, 572 F. Supp. 1136, 1146 (E.D. Pa. 1983) (“It does not follow in all cases, however, that simply from the existence of probable cause to believe a suspect is guilty, there also is probable cause to search his residence.”); State v. Dillon, 419 So. 2d 46, 51 (La. Ct. App. 1982) (“[F]acts supporting probable cause to arrest do not necessarily give rise to probable cause to search a defendant’s residence . . . .”); Commonwealth v. Cinelli, 449 N.E.2d 1207, 1216 (Mass. 1983) (In the context of a murder charge, relying on United States v. Charest, 602 F.2d 1015, 1017 (1st Cir. 1979), for the proposition that “[i]nformation establishing that a person is guilty of a crime does not necessarily constitute probable cause to search the person’s residence.”).

{25} The fundamental inquiry is whether there is probable cause to believe there will be evidence of a crime at a particular location. See Herrera, 102 N.M. at 257, 694 P.2d at 513. Residence may be a component of this, but residence is not necessary, nor is it always sufficient, to establish probable cause to believe that the location to be searched contains evidence of a crime. Police must give the issuing magistrate probable cause to believe that evidence will be at the particular location in question, whether it is a suspect’s home or not.

{26} In this case, there was probable cause to search even though it is not totally clear in the affidavit that Defendant made his residence at his mother’s house. The affidavit sought a warrant to search a house at 1506 South Cliff Drive in Gallup. Before filing the affidavit, police had already done a preliminary, consensual search of the basement.

{27} In that initial search, police discovered electrical wiring and bedding similar to those found at the crime scene which, as we have already noted, provide an inferential link between Defendant and Victim’s death. In addition to this indication that there would be further evidence at the house, Thornton told police that Defendant had been in her house on, or near, the night Victim was last seen with Defendant, and that Defendant left the residence in Thornton’s van. It would be a reasonable inference from the information presented in the affidavit that Victim was also at Thornton’s house on the night in question. Defendant told his mother he needed to borrow her van to pick Victim up from Griego’s house. Defendant later told a different, and conflicting, story to his mother, saying that he had come home alone and that Victim had showed up at Thornton’s house with another man. Regardless of which story is true, both place Victim at Thornton’s house on the night in question. Finally, it appears from the face of the affidavit that Thornton and Defendant referred to the basement as “home”—a suggestion that the basement was Defendant’s primary residence.

ADMISSIBILITY OF CONFESSION

{29} Defendant argues that his September 18, 2005 statement to police, admitting culpability in Victim’s death, should have been suppressed for two reasons. First, he asserts that police used coercive tactics which rendered his statement involuntary. Second, Defendant argues that because police relied on information unlawfully seized from the basement room in his mother’s house, the confession was tainted. Defendant further argues that his September 19, 2005 confession, made one day after the first confession, should have been suppressed because it was tainted by the initial, allegedly coerced confession.

{30} Defendant agrees with the State that he voluntarily waived his Miranda rights, and he makes no claim to this Court that he did not receive his Miranda warnings and validly waived them. Rather, he asserts only that police used coercive means to obtain his confession, after the proper Miranda waivers.
Because we have already determined that police lawfully seized the evidence from the house of Defendant’s mother, we need not address his argument that unlawfully seized evidence tainted the confession. We begin, then, with Defendant’s contention that his September 18 statement was coerced.

STANDARD OF REVIEW


We base our determination of whether a confession is voluntary on whether “official coercion” has occurred. State v. Munoz, 1998-NMSC-048, ¶ 21, 126 N.M. 535, 972 P.2d 847 (internal quotation marks and citation omitted). Official coercion occurs when “a defendant’s ‘will has been overborne and his capacity for self-determination [has been] critically impaired.’” Id. ¶ 20 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). There must be an “essential link between coercive activity of the State . . . and a resulting confession by a defendant.” Id. ¶ 21 (quoting Colorado v. Connelly, 479 U.S. 157, 165 (1986)); see also State v. Barr, No. 30,191, slip op. at 11 (N.M. Sup. Ct. May 22, 2009).

On a claim that police coerced a statement, the prosecution bears the burden of proving by a preponderance of the evidence that a defendant’s statement was voluntary. State v. Fekete, 120 N.M. 290, 298, 901 P.2d 708, 716 (1995). The failure to make such a showing requires a ruling that the confession was involuntary as a matter of law. State v. Tindle, 104 N.M. 195, 198, 718 P.2d 705, 708 (Ct. App. 1986).

Defendant asserts that he was high on methamphetamines during his September 18 interrogation at the McKinley County Detention Center, where he was already incarcerated on an unrelated charge. He claims the drugs, combined with a lack of sleep, made him hallucinate during the interrogation. He appears to assert, although it is somewhat unclear in the record, that in describing his actions to police he was narrating what he saw in his hallucinations, rather than describing his memory of reality. Defendant alleges that, in concert with other aspects of the interrogation, which we detail below, the hallucinations made his confession involuntary.

The district court viewed with skepticism Defendant’s claims about the purported hallucinations and their effect on his capacity. The court concluded, after hearing testimony from Defendant and from his interrogators, that Defendant “was in full control of his faculties when these interviews took place.”

If faced with conflicting evidence, we defer to the district court’s factual findings, so long as those findings are supported by evidence in the record. State v. Cooper, 1997-NMSC-058, ¶ 26, 124 N.M. 277, 949 P.2d 660 (citing Culombe, 367 U.S. at 603). We are unable to view the witness’s demeanor or his manner of speech, and therefore are not in a position to evaluate many of the aspects of witness credibility that the trier of fact may evaluate. While we are not required to accept the district court’s conclusion that Defendant was fully able to distinguish between reality and fantasy during his interrogation, we do give credence to that factual finding, particularly because there is little in the record, apart from Defendant’s own words, which suggests otherwise.

Our own reading of the transcript discloses no indications that Defendant was “narrating” from hallucinations. To be sure, there is a disjointed and rambling quality to Defendant’s long and, at times, nonsensical responses. In addition to the lack of obvious signs in the transcript that Defendant was describing things that did not exist, there is no indication in the record that the law enforcement officers who interrogated Defendant were aware of his purportedly vulnerable mental state. Case law makes clear that when interrogators are unaware of, and therefore cannot exploit, the mental or emotional vulnerabilities of a suspect, the crucial link between the confession and official action is missing. See Connelly, 479 U.S. at 165; see also Fekete, 120 N.M. at 299, 901 P.2d at 717 (“[A] confession is not involuntary solely because of a defendant’s mental state.”).

It is clear, therefore, that Defendant’s assertion of hallucinations is insufficient to render his confession involuntary. Our analysis does not end there, however, because we must look to the totality of circumstances in making our determination as to the voluntariness of Defendant’s confession.

We turn next to Defendant’s claims that several statements made by his interrogators were coercive to the point that they made his confession involuntary. All of the statements were made by Agent Ness and were in response either to Defendant’s claims that he was not involved in the killing, or that his involvement was only minimal. They were part of Agent Ness’s larger effort to convince Defendant that confessing would be beneficial to his case—an effort we discuss in greater detail below. The State stipulated that Agent Ness made the statements that follow:

“You’re digging a hole you’re not gonna able to get out of.”

“This is the one percent of the time, I tell you, if you keep quiet they’re gonna hammer you.”

“If you leave it like it is, you’re through . . . .”

Defendant’s interrogator made this statement after Defendant denied involvement in the killing:

“Just because you don’t wanna be a rat, you’re gonna be treated as a monster in court and you’re never gonna get out of prison.”

These statements were part of an interrogation at the county jail that lasted about 90 minutes. They occur in rapid succession, about midway through the interrogation, and after many minutes of long and somewhat rambling statements by Defendant. It is clear on reading the transcript of the interrogation that Defendant essentially dominated the first half of the discourse. About halfway through the interrogation, Agent Ness began steering the interview by asking more pointed questions.

Many cases have noted that threats and promises may rise to the level of coercive behavior by police. See, e.g., Tindle, 104 N.M. at 199, 718 P.2d at 709 (holding that an express promise of leniency “renders a confession involuntary as a matter of law”); cf. State v. Dobbs, 2006-NMCA-051, ¶¶ 16-21, 139 N.M. 431, 134 P.3d 122 (holding that an interrogator leaving the “overall impression” that the accused would receive treatment if he confessed does not amount to coercion); State v. Munoz, 111 N.M. 118, 121, 802 P.2d 23, 26 (Ct. App. 1990) (holding that a confession was voluntary where police told the accused that “in his experience, first offenders who cooperated were less likely to go to jail than other defendants”).

We have also noted, however, that where promises are merely implied, they are only one factor to be considered in the overall totality of circumstances. Tindle, 104 N.M. at 199-200, 718 P.2d at 709-10. Threats of physical violence, where credible, can render a confession involuntary. See Arizona v. Fulminante, 499 U.S. 279, 286-87 (1991).
THREATS

{43} The critical difference in the case law between impermissibly coercive threats and threats which do not cross the line is in how credible and immediate the accused perceives the threat to be. Threats which the accused may perceive as real have been held to be impermissibly coercive. See id. (holding that where defendant-inmate had a below-average IQ and had already received “rough treatment” by other inmates and was a convicted child murderer, a promise to protect him from further physical violence if he confessed amounted to a “credible threat” of physical violence). On the other hand, threats that merely highlight potential real consequences, or are “adjurations to tell the truth,” are not characterized as impermissibly coercive. See, e.g., Tindle, 104 N.M. at 197-200, 718 P.2d 707-10 (holding that police threat to the defendant that the court would “hang [your] ass” if the defendant did not confess, a comment which was disputed by the State, did not render confession involuntary). It is not per se coercive for police to truthfully inform an accused about the potential consequences of his alleged actions. See United States v. Munoz, 150 F. Supp. 2d 1125, 1135 (D. Kan. 2001).

{44} Three of the four statements at issue here could be taken as threats: (1) “they’re gonna hammer you”; (2) “you’re through”; and (3) “you’re gonna be treated like a monster in court and you’re never gonna get out of prison.” All of these statements lie between the two poles described above—the statements are more than adjudications to tell the truth, but less than credible threats of violence. “You’re never gonna get out of prison” can reasonably be taken to refer to a potential life sentence—although vague though they are—cannot credibly be taken to threaten Defendant with physical violence.

{45} Viewing the interrogation as a whole, what Agent Ness appeared to be trying to tell Defendant is that unless he explained himself to Ness—unless he confessed—he would not be able to explain himself to a jury, which would have only the physical evidence with which to judge Defendant. That physical evidence, Agent Ness told Defendant, was damning. In truth, Defendant might have another chance to explain himself at trial, if he chose to testify. Telling Agent Ness the truth, however, even if Defendant ultimately did not testify, could accomplish the same goal. In short, Agent Ness’s statements constitute half-truths—a reasonable expression of opinion about consequences to Defendant if he did not talk, but an exaggeration when it came to telling Defendant that the interrogation with police was his best chance to talk. The exaggeration is particularly acute when contrasted with the Miranda warnings given, which highlight the accused’s right to remain silent and that anything said may be used against him. On the other hand, there is some truth to Agent Ness’s assertions to Defendant. If, as Defendant maintained for a short time during the interrogation, he accidentally strangled Victim during a struggle, that could produce a markedly different result at trial than if he strangled her in cold blood. It could bring about a conviction for second-degree murder rather than first-degree murder.

{46} Our case law makes clear that deception is not coercive per se. See State v. Aguirre, 91 N.M. 672, 674, 579 P.2d 798, 800 (Ct. App. 1978) (“[D]eception, in itself, is not a basis for ruling, as a matter of law, that a confession should be suppressed.”). The degree of deception is but one factor to consider in deciding whether a confession was given contrary to the accused’s free will. Considering the deception as one factor in our analysis, we must also consider Defendant’s probable reaction to those statements. Cooper, 1997-NMSC-058, ¶ 27 (citing Culombe, 367 U.S. at 603, 604). At the time of the confession, Defendant was a 30-year-old man who, in the district court’s words, was “in full control of his faculties,” and who had prior exposure to the criminal justice system. Agent Ness made veiled and somewhat ambiguous threats to Defendant, but unlike the “mentally dull” teenage defendant in Payne v. Arkansas, 356 U.S. 560, 567 (1958), or an illiterate defendant with mental retardation, as in Culombe, 367 U.S. at 620, Defendant had an adult capacity to sort exaggerated tough talk from real threats. There is certainly a point at which police threats, promises, or deception, would cross the line into coercion, but that line has not been crossed here.

{47} Defendant also asserts that because he maintained his innocence “for approximately the first hour” of the interrogation before claiming culpability, and because he admitted to actions that do not comport exactly with Victim’s manner of death, his confession was involuntary. Defendant asserts that “[w]hen the product of a ‘confession’ is a misstatement of how the homicide was committed, it must, by definition, not be a volitional act.” (Emphasis added.) This assertion is untenable as a simple matter of self-evident fact. Defendant is claiming, in essence, that people do not intentionally lie: he is asserting that where a statement is factually inaccurate, it could not have been made on purpose. There is no basis for assuming, out of hand, that an imprecise confession is involuntary. An accused may be willing to admit the bare facts of a crime, but unwilling to confront the unpleasant details. It does not mean that the bare facts are not true.

{48} Additionally, it is not definitively clear, as Defendant would have it, that he confessed to something that did not happen. Defendant claims that he described putting a type of choke hold on the Victim, while the Office of the Medical Examiner determined that Victim’s death was caused

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1The record discloses that Defendant did not have any criminal convictions prior to the incarceration mentioned in this case. The charges for which he was incarcerated do not appear in the record.

2Agent Ness also made one deceptive factual claim, and several others that might have been deceptive, although given the incomplete record before us, it is impossible to determine if they were. Agent Ness claimed that police had found Defendant’s “biological lipids” on Victim’s body—a meaningless phrase which appears to be aimed at evoking DNA evidence. Agent Ness also told Defendant that police had found Defendant’s fingerprints on the bag over Victim’s head, evidence which does not appear in the affidavit or anywhere
by ligature asphyxiation, as well as by the plastic bag placed over Victim’s head.

This discussion centers around the following exchange between Agent Henrietta Soland (“HS”) and Defendant (“JE”):

HS: And you, you had your, your arm around her.
JE: I just had my arm just, I was holding her down, I had my arm, I had my arm up like this, okay.
HS: Like a choke hold?
JE: Yeah, but I was holding her down. I was sitting on the couch and she was sitting beside me....and I was holding her, and all of a sudden I was closing my eyes and it was like please and she stopped.

It is true that Defendant acknowledges the suggestion by Agent Soland that he had her in something “like a choke hold.” But his description immediately following that acknowledgment does not sound much “like a choke hold” at all. We are also deprived of whatever gesture Defendant gave when he said he had his arm “up like this.” Given the disjointed descriptions that Defendant gave throughout the interrogation, we cannot say definitively that he described killing Victim “accidentally” by “choking her to death with his arm,” as Defendant now claims.

The Office of the Medical Investigator concluded that Victim died due to asphyxiation from ligature strangulation combined with airway obstruction with a plastic bag. The bag around Victim’s head, we must note, is fully consistent in the accounts of both Defendant and the medical examiner. The only difference is that the medical examiner concluded that a ligature—a wire, rope, cord or the like—that strangled Victim, while Defendant’s account is ambiguous as to how the strangulation happened. Defendant does not mention anywhere using a rope or cord of any sort, except when he described tying the bag around Victim’s head.

This is not the sort of discrepancy that supports a claim that Defendant confessed to a crime he did not commit. It is, rather, a minor inconsistency. It is possible that this sort of inconsistency suggests that Defendant did not commit the crime, but that is a question ideally suited for a jury to determine. It is not a question we answer at this stage, and it does not render his confession involuntary as a matter of law.

Defendant also argues that his confession was involuntary because Agent Ness was “proficient” at interrogation techniques, and because Defendant was in custody at the time of the interrogation.

We reverse the district court’s decision not to suppress Defendant’s confession. We affirm the district court’s decision to suppress the physical evidence seized as a result of the search warrant. We remand for further proceedings consistent with this Opinion.

Because we conclude that the September 18 statement was voluntary, we need not address Defendant’s argument that the later confession, on September 19 was tainted by the first.

CONCLUSION

We affirm the district court’s decision not to suppress Defendant’s confession. We reverse the district court’s decision to suppress the physical evidence seized as a result of the search warrant. We remand for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice

else in the record. Agent Ness also strongly implied that Victim’s blood was found on Defendant’s clothes, another evidentiary claim not supported in the present record. Because this is an interlocutory appeal, there is insufficient evidence in the present record to determine whether these last two claims are true. Although Defendant did not raise this issue before this Court, we note that our Court of Appeals has previously noted that misrepresentations “do not necessarily invalidate a confession.” Lobato, 2006-NMCA-051, ¶ 13; see also Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (noting that while it was relevant that police had falsely told the defendant that the co-conspirator had already confessed, such circumstances were “insufficient . . . to make this otherwise voluntary confession inadmissible”). In the event of a conviction, Defendant may raise these and other issues on appeal.
Opinion

Jonathan B. Sutin, Judge

[1] On September 29, 2007, Cruz Holguin won a random drawing for a $250,000 prize at the Ohkay Owingeh Casino and Resort (the Casino) that Tsay Corporation (Tsay) sponsored. Holguin alleged that Tsay refused to pay him $250,000 and instead required him “to elect to receive either $125,000 less income tax withholding or to receive payment of $250,000 spread over a period of [twenty] years.” Pursuant to a limited waiver of immunity contained in a Tribal-State Class III Gaming Compact, a patron of the Casino was entitled to sue Tsay for damages arising out of bodily injury or property damage. Holguin sued Tsay for damages for breach of contract, conversion, unfair practices, and for two counts of invasion of privacy. This Court granted the interlocutory appeal, stating that its order for lack of subject matter jurisdiction is immediately appealable.

[2] This Court granted the interlocutory appeal, but now grants Tsay’s petition for a writ of error and reverses the district court. This Court has jurisdiction under the collateral order doctrine. That doctrine permits review beginning with a denial of a motion to dismiss based on tribal sovereign immunity. See Carrillo v. Rostro, 114 N.M. 607, 616, 617-19, 845 P.2d 130, 139, 140-42 (1992) (adopting the collateral order doctrine and prescribing a writ of error as the proper procedural device for review of a denial of a motion for summary judgment); see also Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept of Labor, 187 F.3d 1174, 1178-80 (10th Cir. 1999) (holding that the denial of a tribal immunity claim satisfies the collateral order doctrine and stating “tribal immunity is of the sort that is immediately appealable.”).

[3] We hold that Tsay is immune from suit based on a claim for emotional injury resulting from invasion of privacy. Therefore, the district court does not have subject matter jurisdiction of Holguin’s claim.

BACKGROUND

[4] Holguin’s complaint alleged that he participated in one of Tsay’s “Million Dollar Giveaway” drawings (the drawing), that he reasonably believed that he was entitled to the full $250,000 he had won from the drawing, that Tsay refused to pay him the full $250,000, that Tsay falsely advertised Holguin as winning the full $250,000, and that Tsay reaped significant economic benefit by that false and misleading advertisement and from the unauthorized use and appropriation of his likeness and name.

[5] Tsay’s motion to dismiss relied on provisions relating to its limited waiver of immunity contained in the Tribal-State Class III Gaming Compact between the State of New Mexico and Ohkay Owingeh (amended April 24, 2007), approved by the Principal Deputy Assistant Secretary of the Department of the Interior, 72 Fed. Reg. 36,717 (July 5, 2007) (the Compact). Tsay is a tribal entity owned by Ohkay Owingeh, and Tsay operates the Casino.

[6] Section 8(A) of the Compact sets out a “policy concerning protection of visitors.” This provision states that “[t]he safety and protection of visitors to a gaming facility is a priority of the Tribe, and it is the purpose of this section to assure that any such persons who suffer bodily injury or property damage . . . shall have an effective remedy for obtaining fair and just compensation.” Section 8(D) of the Compact states that “[t]he Tribe . . . waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage . . . . This is a limited waiver and does not waive the Tribe’s immunity from suit for any other purpose.”

[7] Tsay also relied on two other documents: (1) an Ohkay Casino document titled “$1 Million Giveaway Rules & Regulations” (the rules) that applied to the drawing, and (2) an Ohkay Casino information data sheet on which there is a “Photograph Release Agreement” signed by Holguin (the release). The rules state that the “[w]inner of $250,000 will have the choice of half the $250,000 cash ($125,000) or an annuity option valued at $250,000 over a 20-year span.” The rules further state that “[w]inners agree that as a condition of prize acceptance, the Ohkay Casino . . . is authorized to use winner’s name and photo for advertising and publicity with no compensation.” The release states that “Ohkay Casino . . . has sole permission to use my name [and] photograph . . . for the purpose of advertisement and give all further and future rights to those images.”

[8] The district court denied Tsay’s motion to dismiss as to the two counts of invasion of privacy and certified the action for interlocutory appeal, stating that its order appeal, alternatively, a writ of error.

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-056

Topic Index:
Civil Procedure: Collateral Order
Government: Sovereign Immunity
Indian Law: Gaming; Indian Law, General; and Tribal and State Authority and Jurisdiction

CRUZ HOLGUIN,
Plaintiff-Appellee,
versus
TSAY CORPORATION,
Defendant-Appellant.
No. 28,777 (filed: May 5, 2009)

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
TIMOTHY L. GARCIA, District Judge

TIMOTHY L. BUTLER
Santa Fe, New Mexico
for Appellee

LEE BERGEN
BERGEN LAW OFFICES, L.L.C.
Albuquerque, New Mexico
for Appellant

involved “a controlling question of law concerning the scope of tribal sovereign immunity as set forth in [Section] 8 of [the Compact].”

DISCUSSION

[9] We review a district court’s ruling on a Rule 1-012(B)(1) lack of subject matter jurisdiction issue de novo. *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, ¶4, 136 N.M. 682, 104 P.3d 548 (filed 2004). We also review de novo whether an Indian tribe or an entity under its control has waived its sovereign immunity. *Id.*

[10] Tsay argues that the words “bodily injury” and “property damage” unambiguously require physical damage to a patron’s person or property and cannot be construed to mean or include emotional injury resulting from the invasion of privacy alleged. We agree with Tsay.

[11] As New Mexico law has developed, the words “bodily injury” and “property damage” in Subsections 8(A) and (D) of the Compact relating to the safety of visitors and limited waiver of immunity are not ambiguous and mean “physical damage to . . . persons or property,” *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶¶ 21-25, 28, 139 N.M. 85, 128 P.3d 513 (filed 2005). The drafters intended to provide a remedy to patrons who suffer physical injury to their persons or property. *Id.* ¶¶ 22, 24, 28. A waiver of immunity beyond that which is written in the Compact cannot be implied but must be express and unequivocal; also, a limited waiver must be strictly construed. *Id.* ¶ 10; *Sanchez*, 2005-NMCA-003, ¶¶ 7, 10; see *Missouri River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 852 (8th Cir. 2001) (stating that the waiver “must be clear” and when a tribe consents to suit, “any conditional limitation it imposes on that consent must be strictly construed and applied” (internal quotation marks and citations omitted)); *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 (“A tribe can . . . waive its own immunity by unequivocally expressing such a waiver. . . . Without an unequivocal and express waiver of sovereign immunity . . ., state courts lack the power to entertain lawsuits against tribal entities.” (citations omitted)).

[12] Analyses in cases interpreting language in insurance contracts can be relevant to issues of sovereign immunity. *See Brennan v. Bd. of Regents of Univ. of N.M.*, 2004-NMCA-003, ¶¶ 6-8, 135 N.M. 68, 84 P.3d 685 (filed 2003). Requiring physical injury when applying the term “bodily injury” in insurance contracts is fixed law in New Mexico. *See Gonzales v. Allstate Ins. Co.*, 122 N.M. 137, 138, 140, 921 P.2d 944, 945, 947 (1996) (holding the term “bodily injury” in the insurance policy at issue was not ambiguous and that emotional distress from loss of consortium did not constitute bodily injury or fall within that term); *Hart v. State Farm Mut. Auto. Ins. Co.*, 2008-NMCA-132, ¶¶ 8-10, 145 N.M. 18, 193 P.3d 565 (determining that New Mexico cases addressing whether emotional injury is included in the concept of “bodily injury” required the conclusion that the child did not suffer bodily injury), cert. denied, 2008-NMCERT-008, 145 N.M. 254, 195 P.3d 1266; *Economy Preferred Ins. Co. v. Jia*, 2004-NMCA-076, ¶ 11, 135 N.M. 706, 92 P.3d 1280 (stating that to interpret the terms of the insurance policy, the court “must differentiate between bodily injury and emotional injury,” and stating that “the alternative would be to extend coverage for bodily harm to all emotional injury, a result that is inconsistent . . . with common-sense notions of what a reasonable insured would understand from the policy language”).

[13] We can see no basis on which the district court could have appropriately denied Tsay’s motion to dismiss as to the two counts of invasion of privacy. Holguin has presented no argument or authority that overcomes the controlling law requiring physical injury or damage. We are unpersuaded by Holguin’s argument that use of his name and likeness is no different than if he were robbed of his jewelry and money at gunpoint. We leave that hypothetical, which, unlike the present case, involves threat, risk, and potential of physical harm, for another day. Presently, we are dealing solely with an alleged emotional injury resulting from an alleged inchoate, incorporeal invasion of his privacy. We cannot characterize Holguin’s claim as one for damages for physical injury to himself or physical damage to property, and thus cannot characterize the claim as one for bodily injury or property damage.

CONCLUSION

[14] We reverse the district court’s denial of Tsay’s motion to dismiss as to the two counts of invasion of privacy. We hold that Tsay’s motion with regard to these counts should have been granted. We instruct the court to enter an order dismissing Holguin’s complaint as it pertains to these two remaining counts for lack of subject matter jurisdiction.

[15] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

ROBERT E. ROBLES, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-057

Topic Index:
Government: Public Records
Statutes: Legislative Intent


No. 27,858 (filed: May 7, 2009)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
KAREN L. TOWNSEND, District Judge

LISA MANN
ERIN E. LANGENWALTER
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Albuquerque, New Mexico

JIM DINES
GREGORY P. WILLIAMS
DINES & GROSS, P.C.
Albuquerque, New Mexico

JAY BURNHAM
City Attorney
WILLIAM COOKE
Deputy City Attorney
CITY OF FARMINGTON
Farmington, New Mexico

for Appellant

for Appellees

for Amicus Curiae

OPINION

JAMES J. WECHSLER, JUDGE

[1] Petitioners The Daily Times and the New Mexico Foundation for Open Government (NMFOG) made requests of the City of Farmington (the City) to inspect applications for the position of city manager pursuant to the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2005). The City denied the requests. The issue presented on appeal requires this Court to determine whether the City met its burden under State ex rel. Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977), of establishing that a countervailing public policy outweighed the public’s interest in disclosure. We hold that the City did not meet its burden. We further hold that the Newsome analysis applies in this case because the requested documents do not fit within an exception stated in IPRA. We affirm the district court’s decision requiring disclosure.

BACKGROUND

[2] A nationwide search for the position of city manager was launched by the mayor of Farmington, with the approval of the city council, in January 2007, following the city manager announcing his intent to retire. Although the mayor had the ability to appoint a replacement for the position of city manager without soliciting applications, the City contends that the mayor decided to post the vacancy locally, regionally, and nationally, in order to generate a larger pool of qualified applicants. In addition to soliciting applications, the mayor created a citizens’ panel of prominent individuals to represent the community and have input in the selection process and requested that the city department heads participate in the process. Ninety-one individuals applied for the position of city manager by the closing date of March 5, 2007.

[3] On March 1, 2007, The Daily Times made a formal request pursuant to IPRA for a list that identified all the applicants for the city manager position and for copies of all the applications received by the City. The City denied The Daily Times’ request, asserting that the applicants’ privacy outweighed the open government policy stated in IPRA, and, therefore, only “the identities of those selected as finalists and invited for on-site interviews would be released at the time the finalist list is determined.” Following the City’s denial of The Daily Times’ IPRA request, NMFOG also submitted a formal request to the City pursuant to IPRA, requesting the same information. The City denied NMFOG’s request on the same grounds.

[4] Petitioners filed a petition for writ of mandamus, requesting that the district court direct the City to produce the requested information. A two-day evidentiary hearing was held on the merits of the request, and the City presented testimony to support its argument that public policy considerations supported non-disclosure. Specifically, the City presented testimony that it made the decision to keep the names confidential because (1) it hoped to obtain a larger and more qualified applicant pool; (2) other application processes for city managers in a variety of other cities and states were closed processes; and (3) by not stating the application process was open, the City had implicitly guaranteed a confidential selection process until the finalists were selected. The City also presented testimony showing that requiring the City to disclose the names of the applicants and the contents of their applications would have a chilling effect on individuals willing to apply for public positions. At the conclusion of the evidence, the district court found that the City failed to meet its burden of establishing that disclosure would be prejudicial to the public interest. The district court therefore concluded that the requested documents were public and issued a peremptory writ of mandamus requiring their disclosure.

ARGUMENTS ON APPEAL

[5] On appeal, the City argues that the district court erred in its application of the “rule of reason” by imposing an additional burden of proving “why disclosure would be prejudicial to the public interest”; that the district court should have shifted the burden to the parties requesting disclosure to show how the public would be harmed.
if the records were withheld; and that the district court’s failure to conclude that the City had established a countervailing public policy in favor of non-disclosure based on the evidence presented amounted to an irrebuttable presumption in favor of disclosure. In their cross appeal, Petitioners argue that the district court erred by applying the “rule of reason,” contending that IPRA, on its face, resolves the issue presented by this case. We address these arguments in turn.

**IPRA AND THE “RULE OF REASON”**

[6] We review statutory construction de novo. See Bd. of Comm’rs of Doña Ana County v. Las Cruces Sun-News (Doña Ana), 2003-NMCA-102, ¶ 19, 134 N.M. 283, 76 P.3d 36. In interpreting statutes, we seek to ascertain legislative intent by first looking to the statute’s plain language. *Id.* When the “statute’s language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation.” *Id.*

[7] IPRA embodies New Mexico’s policy of open government and provides that “[e]very person has a right to inspect public records of this state.” See § 14-2-1(A). Under the provisions of IPRA, public records are broadly defined to include: all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

Section 14-2-6(E). IPRA provides a broad right to inspect public records, subject to twelve identified exceptions. Section 14-2-1(A), and those particularly relevant to this Court’s discussion herein, include:

1. records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;
2. letters of reference concerning employment, licensing or permits;
3. letters or memorandums that are matters of opinion in personnel files or students’ cumulative files; . . . .
4. public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public institution of higher education;
5. as otherwise provided by law.

Section 14-2-1(A). These limited exceptions to the public’s right to inspect public records, in conjunction with a broad definition of public records, further IPRA’s purpose of ensuring that “all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” Section 14-2-5.

[8] Independent of the statutory exceptions contained in Section 14-2-1(A), our Supreme Court has recognized a non-statutory exception to disclosure. See *Newsome*, 90 N.M. at 798-99, 568 P.2d at 1244-45; see also Spadaro v. Univ. of N.M. Bd. of Regents, 107 N.M. 402, 404, 759 P.2d 189, 191 (1988) (stating that “[t]he Supreme Court in *Newsome* . . . carved out a non-statutory ‘confidentiality exception’ to disclosure under [IPRA]”). This non-statutory exception, also referred to as the “rule of reason,” requires the district court to balance “the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor confidentiality and nondisclosure.” See *Spadaro*, 107 N.M. at 404, 759 P.2d at 191. This balancing test is intended to supplement IPRA by providing a mechanism for addressing claims of confidentiality that have not yet been specifically addressed by our Legislature. See *Newsome*, 90 N.M. at 797, 568 P.2d at 1243 (noting that we apply the “rule of reason” in the absence of legislative direction). Thus, “[t]he rule of reason analysis is applicable only to claims of confidentiality asserted for public records that do not fall into one of the statutory exceptions to disclosure contained in Section 14-2-1.” *Spadaro*, 107 N.M. at 404-05, 759 P.2d at 191-92; see also State ex rel. Barber v. McCotter, 106 N.M. 1, 2, 738 P.2d 119, 120 (1987) (“Such balancing only applies . . . to information not covered by statute.”).

[9] In applying the “rule of reason,” however, it is still the responsibility of our courts to give effect to the “strong public policy favoring access to public records.” See *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 121 N.M. 688, 691, 917 P.2d 451, 454 (1996). As our Supreme Court acknowledged in *Newsome*, a “citizen’s right to know is the rule and secrecy is the exception.” *Newsome*, 90 N.M. at 797, 568 P.2d at 1243. Thus, “when there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.” *Derringer v. State*, 2003-NMCA-073, ¶ 9, 133 N.M. 721, 68 P.3d 961.

[10] To determine whether disclosure is required, we begin “[e]ach inquiry . . . with the presumption that public policy favors the right of inspection.” See *Doña Ana*, 2003-NMCA-102, ¶ 11. A public entity seeking to overcome this presumption bears the burden of demonstrating that a countervailing public policy exists. *Id.* In *Doña Ana*, this Court succinctly summarized the public entity’s burden as requiring proof of “why . . . disclosure would be prejudicial to the public interest,” or, in other words, what benefit is derived from non-disclosure. See *Id.* Once the public entity has overcome the presumption in favor of disclosure, the court must assess the competing public interests by “determin[ing] whether the explanation of the custodian is reasonable” and “weigh[ing] the benefits to be derived from non-disclosure against the harm which may result if the records are not made available.” *Id.* (internal quotation marks and citation omitted).

**REQUIREMENT OF DISCLOSURE**

[11] The City makes multiple arguments regarding the proper construction and application of the “rule of reason.” The City asserts that the “rule of reason” provides a balancing test to be followed when invoking the twelfth exception to IPRA, Section 14-2-1(A)(12) (“as otherwise provided by law”). However, the “rule of reason,” as noted above, is a non-statutory exception to disclosure. See *Newsome*, 90 N.M. at 794, 798, 568 P.2d at 1240, 1244. The twelfth exception has generally been interpreted as referring to exceptions contained in other statutes and properly promulgated regulations. See, e.g., *City of Las Cruces*, 121 N.M. at 690-91, 917 P.2d at 453-54. Thus, we do not address the City’s argument that the applications were exempt from disclosure pursuant to Section 14-2-1(A) (12) because the City has not identified any statute or regulation that prohibits disclosure of the information requested.

[12] The City additionally argues that *Newsome* established a burden-shifting test under which the City only bore an “initial burden” of establishing a countervailing public policy and that, therefore, the district court improperly placed the burden on the City to show that prejudice would result from disclosure. To the extent the City
contends that the district court placed an additional burden on the City by requiring it to demonstrate the harm that would result from disclosure, we see no difference between this burden and the burden articulated in Newsome requiring the City to demonstrate the benefits of non-disclosure. See Newsome, 90 N.M. at 798, 568 P.2d at 1244. To the extent the City contends that a “shifting burden is a logical and necessary interpretation of the Newsome test” and asks this Court to conclude that a burden should be placed on the party requesting the documents to demonstrate the harm to the public from non-disclosure, we disagree and decline to place part of the burden on the requesting party.

{13} Nowhere in Newsome does our Supreme Court place a burden on the party requesting documents. Instead, Newsome clearly places “[t]he burden . . . upon the custodian to justify why the records sought to be examined should not be furnished.” Id. Further, it would be contrary to this state’s public policy in favor of disclosure to place a burden on the requesting party that may be difficult or perhaps impossible to meet because the custodian of the records has refused to make the information contained in the records known to the requesting party. We believe our Supreme Court intended to avoid the difficulties associated with placing part of the burden on the requesting party by creating a procedure in Newsome that allowed the courts to view, in camera, the information in the possession of the custodian and make a determination regarding the competing public policies based on that information. See Doña Ana, 2003-NMCA-102, ¶ 11 (noting that, “to determine whether the explanation of the custodian is reasonable and to weigh the benefits to be derived from non-disclosure against the harm which may result if the records are not made available.”). Our courts can competently satisfy this duty by weighing the explanation furnished by the custodian against the harm customarily associated with secrecy in government—the impairment of the public’s ability to assess the actions of public officials and to hold such public officials accountable. The requesting party has no burden to make an evidentiary showing regarding the harm that would result from non-disclosure.

{15} The City also contends that, by not accepting the evidence presented as sufficient to justify non-disclosure, the district court created an irrebuttable presumption in favor of disclosure and that, if the evidence the City presented was insufficient, no public entity will know the degree of evidence required. The City’s argument, however, is premised on a misunderstanding of how the “rule of reason” operates. As this Court held in State ex rel. Blanchard v. City Commissioners of Clovis, 106 N.M. 769, 772, 750 P.2d 469, 472 (Ct. App. 1988), Newsome establishes threshold requirements that must be met before the district court ever engages in the balancing portion of the test. These threshold requirements include the custodian’s justification as to why “the records should not be furnished.” State ex rel. Blanchard, 106 N.M. at 772-73, 750 P.2d at 472-73. Once this threshold showing has been made, the district court then engages in balancing the competing public policy interests. See id.

{16} In this case, the City attempted to put on evidence that disclosure of the applications would deter potential applicants and reduce the quality and scope of the applicant pool. While there is disagreement as to whether the City’s proof of its justification was speculative, even if the City had proven that it would receive fewer applications if the hiring process were open, it would still be left to the district court to determine whether the City’s justification was sufficient to outweigh the public’s interest in disclosure. Therefore, pursuant to the “rule of reason,” the amount of evidence offered to support the custodian’s justification is of little significance if the policy itself is insufficient to outweigh the public’s interest in disclosure.

{17} Even if the City presented sufficient evidence of its justification that its ability to solicit as many well-qualified applicants would be hindered if the hiring process were open, to hold that non-disclosure is appropriate, the City’s concern must be of greater public importance than the public’s interests in ensuring that the City’s selection process was legitimate and that the people the public had put in charge to make these decisions had, in fact, exercised their discretion in such a way that the most qualified applicant was indeed selected. The testimony presented by the City indicates that, absent disclosure, the public would be required to rely on the citizens’ panel, including several public officials, to have acted appropriately in representing the community in the City’s selection of the finalists for the position of city manager. In this Court’s opinion, New Mexico’s policy of open government is intended to protect the public from having to rely solely on the representations of public officials that they have acted appropriately. See § 14-2-5; see also City of Las Cruces, 121 N.M. at 691, 917 P.2d at 454 (stating that “a citizen has a fundamental right to have access to public records” (internal quotation marks and citation omitted)). As a result, when, as here, the application is for a high-ranking public position, the public’s interest in disclosure outweighs the City’s concern that fewer public employees will apply, and, thus, disclosure is required.

{18} A number of other courts that have weighed similar competing policy interests have also concluded that disclosure was required. See, e.g., Chambers v. Birmingham News Co., 552 So. 2d 854 (Ala. 1989); City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982). In City of Kenai, two municipalities argued that they had “an interest in attracting the largest and most qualified applicant pool” and that this interest could be best accomplished “by not disclosing the names and resumes of applicants.” 642 P.2d at 1323 (internal quotation marks omitted). The Alaska Supreme Court held that disclosure was required, stating:

Public officials such as City Managers, and Chiefs of Police have substantial discretionary authority. The qualifications of the occupants of such offices are of legitimate public concern. Disclosing the names and applications of applicants allows interested members of the public, such as the newspapers here, to verify the accuracy of the representations made by the applicants, and to seek additional information which may be relevant to the selection process. The applicants’ claim that
revealing the names and applications of office seekers will narrow the field of applicants and ultimately prejudice the interests of good government is not sufficiently compelling to overcome the public’s interest in disclosure. . . . It is not intuitively obvious that most well qualified potential applicants for positions of authority in municipal governments will be deterred from applying by a public selection process, and we have been referred to no studies tending to prove that point.

The applicants' individual privacy interests in having their names and applications not revealed are also not of an order sufficient to overcome the public’s interest. The applicants are seeking high government positions. Public officials must recognize their official capacities often expose their private lives to public scrutiny. . . . It may be that in some cases an individual will not wish his current employer to know that he has applied for another job. That desire is one which cannot be accommodated where the job sought is a high public office. See id. at 1324 (internal quotation marks and citation omitted).

{19} We consider this analysis persuasive, particularly because City of Kenai addresses many of the arguments advanced by the City. Therefore, we conclude that an implicit guarantee of confidentiality, as the City argues it made to its applicants in this case, is insufficient to overcome the public’s interest in information regarding applicants for a high-profile public position. Moreover, in City of Kenai, the court rejected the applicants’ argument that disclosure would “narrow the field of applicants and ultimately prejudice the interests of good government.” Id. In this case, the City made a similar argument in favor of non-disclosure; however, based on the speculative nature of the City’s argument—that people might not apply—this justification is also insufficient to overcome the public’s interest in disclosure. See Doña Ana, 2003-NMCA-102, ¶ 33 (rejecting policy reason asserted by custodian of records when speculative).

APPLICABILITY OF NEWSOME

{20} As an additional argument in support of disclosure, Petitioners contend on cross appeal that the district court erred in applying Newsome in this case, arguing that our Legislature has implicitly determined that all employment applications, other than those for university presidents, must be disclosed. Specifically, Petitioners rely on the Legislature’s amendment to IPRA excluding “public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public institution of higher education,” Section 14-2-1(A)(7), to advocate that no balancing test is necessary in this case because, by not including other types of applications as part of the exception, the Legislature intended disclosure of all other applications. While we agree that the Legislature did not include other employment applications within this exception to disclosure, we do not believe that the Legislature implicitly meant that there should be unfettered disclosure of all other types of employment applications. Contrary to Petitioners’ argument, we believe the “rule of reason” still applies.

{21} Petitioners cite to cases stating that the Newsome balancing test “only applies . . . to information not covered by statute” to argue that employment applications are addressed by the statute and, thus, the “rule of reason” does not apply. See Barber, 106 N.M. at 2, 738 P.2d at 120; Spadaro, 107 N.M. at 404-05, 759 P.2d at 191-92. As we read these cases, however, only when the documents fit within an exception to IPRA do our courts refrain from applying Newsome. See Barber, 106 N.M. at 2, 738 P.2d at 120; Spadaro, 107 N.M. at 404-05, 759 P.2d at 191-92. These cases do not support abandoning the “rule of reason” simply because IPRA includes a related exception that does not apply to the requested information. In fact, if this interpretation had been intended by Newsome, there would have been no need to establish the “rule of reason.” See Newsome, 90 N.M. at 797-98, 568 P.2d at 1243-44 (establishing the “rule of reason” to determine whether documents contained in personnel records that were not explicitly exempted from the statute should be disclosed despite the fact that the statute included exceptions relating to various other types of personnel records). We therefore disagree with Petitioners’ contention that the district court erred in applying Newsome. Because we rule in favor of Petitioners, we do not address their argument that the district court erred in allowing Donna Brooks to testify as an expert witness.

CONCLUSION

{22} The district court did not err in requiring disclosure of the requested documents. Accordingly, we affirm.

{23} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge
The 8th Annual Summer Golf Classic on August 7, beginning at noon, with a shotgun start at 1 p.m. at Isleta Eagle Golf Course.

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505-277-8184 or rawls@law.unm

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Ms. Moss received her B.A. in Political Science from the University of New Mexico in 1998 and J.D. from Howard University School of Law in 2002, where she was an esteemed member of the Howard Law Journal.

Ms. Moss has previously represented clients in both the private and public sectors with a primary emphasis in civil litigation and insurance defense. Her practice has involved a variety of matters including civil rights, premises liability, medical malpractice, procurement code interpretation, contract negotiation and interpretation, tort law, and employment law.

Ms. Moss will specialize in civil litigation and insurance defense with her primary practice areas being medical malpractice, professional malpractice (hospitals and long-term care facilities), and health care law.

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Attorneys & Counselors at Law

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**Position Announcement**

The Judicial Standards Commission is currently accepting resumes from prospective candidates for the position of Executive Director. The position is exempt (not classified), and reports directly to the Judicial Standards Commission. The salary range for this position is $43.27 to $50.58 hourly and will be commensurate with experience. The Judicial Standards Commission’s Executive Director acts as the chief executive officer of the agency. In that capacity, the Executive Director is responsible for all aspects of agency operations including the preparation, management and administration of agency appropriations and funds, supervision of agency staff, development of policies and procedures for the effective management of the agency and other additional duties as assigned by the Commission. The position also requires supervision of all matters requiring prosecution of formal disciplinary charges as approved by the Commission; the supervision and preparation of all aspects of litigation before the Commission and before the New Mexico Supreme Court in hearings or other matters involving the Commission’s recommendation of discipline, retirement or removal of a judge in accordance with N.M. Constitution art. VI Section 32. Admission to the New Mexico bar is required at the time of hire. The position requires strong research, writing and communication skills, as well as experience in managing professional staff. A high level of trustworthiness, discretion and sound judgment is required for the position. Resume with cover letter, writing sample and three (3) professional references must be received at the offices of the Judicial Standards Commission by 5:00 p.m., on July 14, 2009. Materials should be sent to the attention of David S. Smaak, Chairman, at P.O. Box 27248, Albuquerque, NM 87125-7248.

**Attorney**

Busy law firm seeking an attorney with at least two years experience in Social Security Law. This person should have strong research and writing skills and the ability to work independently. Salary competitive and commensurate to experience and qualifications. Spanish speaking a plus. Please send resume to Nichole Henry, Whitener Law Firm, P.A., 4110 Cutler Avenue, N.E., Albuquerque, NM 87110 or e-mail to nichole@whitenerlawfirm.com.

**Assistant County Attorney**

Los Alamos County is accepting applications for Assistant County Attorney. This job includes providing advice on diverse and challenging legal issues. Minimum requirements include: Juris Doctorate or Bachelors of Law Degree from an accredited law school; seven years of experience in the practice of law including two years of advising public or private sector policymakers; member of New Mexico State Bar or if from another state must be awaiting State Bar exam results and be a member of New Mexico State Bar within four months of employment. Salary range is $78,842 to $126,147. Applications and full information are available at www.losalamosnm.us or by calling 505-662-8041. Application deadline is July 31, 2009 at 5:00 PM. Note: Applications may be reviewed and interviews may begin as early as July 10, 2009. A selection may be made prior to the closing date. (EOE) Situated at the base of the Jemez Mountains in beautiful northern New Mexico, Los Alamos is a community of about 19,000 people with a low crime rate and excellent schools. It is a great place to raise children. Our community has a worldwide reputation for its scientific and technological research and development. Recreational opportunities are nearly unlimited. Los Alamos is home to Pajarito Ski Hill, the Larry L. Walkup Aquatic Center, an 18-hole golf course, an outdoor ice skating rink, numerous hiking and bike trails, and many organized sports leagues and events. We are located within a short drive from the Bandelier National Monument, the Valles Caldera National Preserve and the Jemez Mountain Recreation Area. Cultural activities abound with concerts, art fairs and exhibits, lectures, dance performances and theater events scheduled often throughout the year. Additionally, we are located near the culturally rich communities of Taos and Santa Fe. Further information about our community can be found at www.locate.losalamos.com.

**Associate U.S. Attorney Position**

The U.S. Attorney’s Office for the District of New Mexico is recruiting for an Assistant U.S. Attorney (AUSA) position. The AUSA will serve in the Narcotics Unit in the Albuquerque office. In this capacity, the incumbent will assist with prosecutions of narcotics offenses, including gang-related cases. Prosecutions of narcotics offenses include enforcement of Title 21 and cases involving the trafficking of all controlled substances. Qualifications: Applicants must possess a J.D. degree, be an active member, in good standing, of the bar (any jurisdiction), and have at least six (6) years post-J.D. experience, which includes handling narcotics offenses. Previous experience in prosecuting gang-related cases is preferred. Salary Information: AUSA pay is administratively determined based, in part, on the number of years of professional attorney experience. The range of pay for this position is $65,884 to $101,984, including locality pay. The complete vacancy announcement may be viewed at: http://www.usdoj.gov/usao/nm/, under Employment Opportunities. Closing date: July 6, 2009.
Bilingual Personal Injury Case Manager
Our busy personal injury firm is seeking a full time Bilingual (English/Spanish) Case Manager. Previous personal injury, medical or insurance experience is required. Qualified candidates will have the ability to efficiently multitask while remaining professional and courteous. Those applying should take pride in their work, enjoy working in a fast paced environment, be extremely organized and have a passion for customer service. Office hours are Monday - Friday, 8 am - 5 pm with flex time available each Friday. Typical duties will include, but will not be limited to the following: Frequent verbal and written communication with clients, medical providers, attorneys and insurance companies regarding personal injury claims; Thorough and accurate documentation of files; Frequent review of medical records and insurance documents. Completion of intake interviews with potential clients; Meeting multiple simultaneous deadlines daily. Benefits include health, dental, life, 401k, paid holidays and paid time off. Please submit your resume, professional references and salary requirements to bmiller@hughesandcoleman.com or fax to 1-866-413-7286.

Associate Attorney
Strong research & writing skills important. Practice involves employment law, civil rights, representing public entities and federal civil procedure. Travel required. Please send cover letter, resume & salary req to Kevin Brown, 2901 Juan Tabo NE # 208, Alb, NM 87112.

New Mexico Legal Aid Managing Attorney - Socorro, NM
New Mexico Legal Aid (NMLA) has an opening for a Managing Attorney in its Socorro, NM office. NMLA provides free civil legal services for low-income individuals and families in the following practice areas: domestic relations and domestic violence, housing, public benefits, and consumer issues. Duties include the daily management of the Law Office that serves the counties of Socorro, Sierra, Valencia as well as direct representation. Requirements: Looking for a highly motivated individual who is passionate and strongly committed to helping the disadvantaged in the community. Three (3) years of legal experience including supervisory responsibilities. Must possess strong written and oral communication skills, as well as law office management experience. The Managing Attorney will oversee litigation, manage an individual caseload and build collaborative relationships within the community. License to practice law in New Mexico preferred, or ability to sit for the next New Mexico Bar Exam. Competitive salary based on experience. Excellent fringe benefits (health, dental, and long-term disability), generous leave. EEO Employer. Send Resume to: Gloria A. Molinar, NMLA, PO Box 25486, Albuquerque, NM 87125-5486 or email to: gloriam@nmlegalaid.org. Deadline: July 7, 2009.

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