Inside This Issue

Table of Contents ..................................................3
Committee on Women and the Legal Profession: Ask Pat .............7
Hearsay ..................................................................8
Clerk’s Certificates ...............................................15
From the New Mexico Supreme Court
  2009-NMSC-034, No. 31,010:
    State v. Trossman .............................................20
  2009-NMSC-035, No. 31,202:
    State v. Chavez ................................................26

Persian in Sunlight by Shirley Patterson (see page 3) Weems Art Gallery, Albuquerque

Special Insert:
CLE At-a-Glance

www.nmbar.org
FEE ARBITRATION PROGRAM

Phone (505) 797-6054 in Albuquerque or
1-800-876-6227
Fax (505) 828-3765

Are you looking for a place to volunteer?
Are you interested in acting as an arbitrator
for fee disputes between clients and attorneys?

The Fee Arbitration Program provides free arbitration to resolve fee disputes between attorneys and their clients. Both attorneys and clients are able to initiate this process. This program is designed to provide an efficient and confidential alternative to litigation. Attorneys who volunteer to be a member of the fee arbitration panel are asked to arbitrate cases as they arise, usually in the attorney's geographical location. The arbitration attorney can decline a case for any reason. We are always in need of attorneys for this panel.

If you are interested in volunteering for this program,
please complete this form or contact
Chris Joseph at 505-797-6054 or cjoseph@nmbar.org.

Please answer the following questions and return this form to the State Bar of New Mexico, Fee Arbitration Program, P. O. Box 92860, Albuquerque, NM 87199-2860 or fax to (505) 828-3765.

Attorney Name:_____________________________________________________ NM Bar No:__________________
Firm/Company:___________________________________________________________________________________
Mailing Address: _________________________________________________________________________________
City/State/Zip:___________________________________________________________________________________
Phone:________________________ Fax:________________________ E-mail:________________________________

What counties would you like to participate in?

☐ Bernalillo  ☐ Curry  ☐ Guadalupe  ☐ LosAlamos  ☐ Quay  ☐ Sandoval  ☐ Torrance
☐ Catron    ☐ De Baca ☐ Harding   ☐ Luna     ☐ RioArriba ☐ Santa Fe   ☐ Union
☐ Chaves    ☐ DonaAna ☐ Hidalgo   ☐ McKinley ☐ Roosevelt ☐ Sierra    ☐ Valencia
☐ Cibola    ☐ Eddy   ☐ Lea      ☐ Mora     ☐ San Juan ☐ Socorro
☐ Colfax    ☐ Grant  ☐ Lincoln  ☐ Otero    ☐ SanMiguel ☐ Taos

Languages spoken:________________________________ I have questions. Please call me at:__________________________
TABLE OF CONTENTS

Notices .............................................................................................................................................................4
Committee on Women and the Legal Profession: Ask Pat ................................................................. 7
Hearsay ........................................................................................................................................................... 8
Legal Education Calendar ......................................................................................................................... 10
Writs of Certiorari .................................................................................................................................... 12
List of Court of Appeals’ Opinions ...................................................................................................... 14
Clerk’s Certificates ................................................................................................................................... 15
Recent Rule-Making Activity .................................................................................................................. 17
Opinions

From the New Mexico Supreme Court

2009-NMSC-034, No. 31,010: State v. Trossman ........................................................................ 20
2009-NMSC-035, No. 31,202: State v. Chavez ............................................................................ 26
Advertising ................................................................................................................................................ 36

Professionalism Tip

With respect to opposing parties and their counsel:

I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings.

Meetings

July
30
Alternative Methods of Dispute Resolution Committee, noon, 2nd Judicial District Court

31
International and Immigration Law Section Board of Directors, noon, State Bar Center

August
3
Attorney Support Group, 5:30 p.m., First United Methodist Church

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

5
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court

7
Prosecutors Section Board of Directors, noon, State Bar Center

State Bar Workshops

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

October
28
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

November
18
Estate Planning/Probate Workshop 6 p.m., State Bar Center, Albuquerque

Cover Artist: Shirley Patterson gave serious attention to digital photography upon her retirement from 35 years as a university professor. She is intrigued with altering photographs using a good computer program. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
**NOTICES**

**COURT NEWS**

**N.M. Supreme Court**

**Board of Legal Specialization**

**Comments Sought**

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.

Robert Batley  
**Recertification—Family Law**

Glenn A. Beard  
**Certification—Employment/Labor Law**

Carol D. Shay  
**Recertification—Employment/Labor Law**

George M. Moore  
**Recertification—Business Bankruptcy Law**

**Compilation Commission Publications**

New Court-approved rules, rule amendments and forms are published by the New Mexico Compilation Commission at www.nmcompcomm.us. Updates are published as Court releases are received. Redlined versions of the rules, easy-to-use forms in Word Perfect and Word formats, court orders and effective dates are provided. The rules on the site supplement the 2009 New Mexico Rules Annotated and will include the rules and forms that will appear in the August 2009 New Mexico Rules Annotated Supplement.

The New Mexico Statutes Annotated 1978™ with compiled, annotated 2009 legislation will be published on New Mexico One Source of Law™ in July with the print version available in August. For more information, call Brad Terry, (505) 363-3116.

**Disciplinary Board Change of Address**

The following change of address for the Disciplinary Board is effective Aug. 3:

Disciplinary Board of the New Mexico Supreme Court  
20 First Plaza NW, Suite 710  
Albuquerque, NM 87102

The post office mailing address and phone/fax numbers will remain the same. The office will be moving locations on July 30–31. This change of address is effective for Virginia L. Ferrara, Sally Scott-Mullins, Christine E. Long, Anne L. Taylor, and Joel L. Widman.

**Proposed Revisions to the Rules of Civil Procedure For the Metropolitan Courts**

The Metropolitan Courts Rules Committee is considering whether to recommend proposed amendments to the Rules of Civil Procedure for the Metropolitan Courts for the Supreme Court’s consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s Web site at http://nm supreme court.nmcourts.gov/ or send written comments to:

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

Comments must be received on or before Aug. 10 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s Web site for public viewing. For reference, see the July 20 (Vol. 48, No. 29) Bar Bulletin.

**Second Judicial District Court**

**Judicial Vacancy**

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of Aug. 1 upon the retirement of the Honorable William F. Lang. Chief Judge Ted Baca has indicated he intends to assign the vacancy to the criminal division. Dean Kevin Washburn, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or via e-mail/fax/mail by calling Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., July 31. Applications received after that date will not be considered. The 2nd Judicial District Nominating Commission will meet at 9 a.m., Aug. 27, at the County Courthouse, 400 Lomas NW, Albuquerque, NM, to evaluate the applicants for this position. The meeting is open to the public.

**Settlement Week 2009**

**Deadlines and Changes**

The 2nd Judicial District Court’s 21st Annual Settlement Week is Oct. 19–23.

- Domestic relations changes are on the Court Alternatives Web site.
- The deadline for requesting a referral of a civil or domestic relations case is July 31.

For complete details regarding referral requests, refer to LR2-602, Section C, of the Second Judicial District Court’s Local Rules governing the Settlement Facilitation Program. Blank referral forms are available in the clerk’s office, Court Alternatives, and online at http://www.nmcourts.gov/second-districtcourt/calt2.html. All referrals should be filled out completely and sent directly...

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**Judicial Records Retention and Disposition Schedules**

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in Criminal, Civil, and Domestic</td>
<td>1974–1993</td>
<td>August 28</td>
</tr>
</tbody>
</table>
to the assigned judge in the case. Include names, addresses and contact numbers of all parties/attorneys (especially pro se parties) involved and any other individuals requiring notice of the settlement facilitation. For more information about Settlement Week call Court Alternatives, (505) 841-7412.

U. S. District Court for the District of New Mexico
2009 Law Day Art and Essay Contest Winners

The Court and the New Mexico Federal Bar Association are pleased to announce the contest award recipients in the 2009 Law Day Art and Essay Contest, “What Freedom Means to Me.” Chief U.S. District Judge Martha Vázquez and Jason Bowles, president of the New Mexico Federal Bar Association, presented the awards June 29 at a ceremony held at the Pete V. Domenici U. S. Courthouse.

<table>
<thead>
<tr>
<th>Art Contest Winners</th>
<th>1st Place ($1,000)</th>
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</thead>
<tbody>
<tr>
<td>Estrella Lucero, La Cueva High School</td>
<td></td>
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<tr>
<td>Heriberto Bajo, Animas High School</td>
<td>$500</td>
</tr>
<tr>
<td>Jarren Gachupin, Jemez Valley High School</td>
<td>$250</td>
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<tr>
<td>Olivia Oms, La Cueva High School</td>
<td></td>
</tr>
<tr>
<td>Jalyssa Driskell, Robertson High School</td>
<td>$250</td>
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<td>Jensen Litke, Farmington High School</td>
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<td>Aspen Chancy, Clovis High School</td>
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<tr>
<td>Gabriella Glanz, Taos High School</td>
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<td>Erin Adair, La Cueva High School</td>
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<thead>
<tr>
<th>Essay Contest Winners</th>
<th>1st Place ($1,000)</th>
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<tbody>
<tr>
<td>Joshua Toth, Roswell High School</td>
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<tr>
<td>Alanna Tempest, Miyamura High School</td>
<td>$500</td>
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<tr>
<td>Michael Y. Ye, La Cueva High School</td>
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<td>Maureen Sandoval, Farmington High School</td>
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<td>Katherine Cavaliere, Animas High School</td>
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<td>Jonathan Hutchinson, Miyamura High School</td>
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<td>Katie Daugherty, Miyamura High School</td>
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<tr>
<td>Aaron Gómez, Farmington High School</td>
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<tr>
<td>Claire Wilson, La Cueva High School</td>
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</table>

Service on Court Committee

Chief U.S. District Judge Martha Vázquez would like to solicit interest of Federal Bar members for future service on the Pro Se Civil Litigants Committee. This committee reviews cases for referral to Pro Bono Panel attorneys. All interested Federal Bar members in good standing should respond to Matthew Dykman, Clerk of Court, U. S. District Court, Pete V. Domenici U. S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, or by e-mail to bbrcmt@nmcourt.fed.us.

STATE BAR NEWS
Appellate Practice Section Annual Meeting

The Appellate Section will hold its annual membership meeting during the lunch break, Sept. 11, at the 20th Annual Appellate Practice Institute. Details on the CLE may be found in the July 27 issue of the Bar Bulletin, CLE-At-a-Glance. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199. Contact Chair Jocelyn Drennan, JDrennan@rodey.com, to place an item on the agenda.

Attorney Support Group

- Afternoon groups meet regularly on the first Monday of the month: Aug. 3, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month: Aug. 17, 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.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners met on July 9 at Buffalo Thunder Resort in Pojoaque. Action taken at the meeting follows:

- Approved the May 15 minutes;
- Accepted the May 2009 financials and executive summaries;
- Reviewed the accounts receivable aging report as well as the directors’ travel reimbursements and credit card file;
- Approved the 2010 budget calendar;
- Approved providing assistance to NMDLA with their database, newsletter, and other support they may need due to the illness of the NMDLA executive director;
- Held an executive session to discuss the executive director’s annual review;
- Provided thirty days’ notice of an amendment to the State Bar Bylaws, Article IV, Section 4.2a, Length of Commissioner Terms, to state: “No Commissioner shall be elected to more than three consecutive three-year terms or serve more than 10 consecutive years”;
- Appointed a legislative committee to review and make recommendations to the Board on general issues affecting the legal profession;
- Approved amendments to the E-mail Services and Membership Data Policies as follows: 1) defining “User” as all individuals or entities, excluding the Supreme Court, lower courts, and the Supreme Court’s divisions or any entity that is governed by the rules of the Supreme Court; 2) spelling out that membership data includes names and addresses of record only; and 3) adding an acknowledgement to user that members may opt out of e-mail services and list sales;

The Edward Group
Disability Income Insurance

Disability insurance is offered by Berkshire Life Insurance Company of America (A+ A.M. Bests) at discount prices. Policies have very strong guarantees and coverage cannot be changed or canceled by the carrier. Policies offer "true" own occupation protection. Policies are available for personal income protection, retirement plan protection or for overhead expenses or partner buyout. The Edward Group also offers coverage with over 50 other carriers for disability, life, long-term care insurance and employee benefits. Visit http://www.edwardgroup.net/disability1.htm and contact John Edward, 1-877-880-4041 toll free or e-mail jbedward@edwardgroup.net.
• Discussed court-ordered mediations held at the Bar Center and that the State Bar is now charging a minimal fee to recoup some of the direct costs; and
• Reported that installation for the videoconferencing is in progress, host sites are almost secured, and it should be available to members in late fall.
Note: The minutes in their entirety will be available on the Bar’s Web site following approval by the Board at the Sept. 11 meeting.

Children’s Law Section Scholarship
The Children’s Law Section is accepting scholarship applications from UNM law students and New Mexico attorneys who have been practicing for no more than three years. The scholarship is being offered to increase awareness of and expertise in the field of children’s law by supporting the attendance of law students and recently admitted attorneys at the 2010 Children’s Law Institute, or alternate children’s law conference, through payment of the recipient’s conference registration fee. Forward a completed application to Kelly Waterfall, PO Box 878, Los Lunas, NM 87031; or fax to (505) 866-1338. If you have any questions regarding the application, contact Kelly Waterfall, kkwaterfall@netzero.com or (505) 480-4148. The application must be submitted by Sept. 15. For more information and an application, visit www.nmbar.org/AboutSBNM/sections/ChildrensLaw/childrenssection.html.

Young Lawyers Division Social Event in Santa Fe
The Young Lawyers Division will host a networking social event from 6 to 8:30 p.m., Aug. 6, at the Rio Chama in the Baca House in Santa Fe. All YLD members are encouraged to come meet other attorneys and learn more about YLD. For more information or to R.S.V.P., contact Emilio Chavez, chavezem18@gmail.com by Aug. 4.

Wills for Heroes Volunteers Needed
The Young Lawyers Division seeks attorney volunteers for a Wills for Heroes event that will be held from 9 a.m. to 4 p.m., Aug. 22, at the District Attorney’s Office, 920 Salazar Rd., Suite A, Taos. Attorneys will draft wills and healthcare powers of attorney free of charge for qualified first responders. No prior experience with wills or estate planning is needed. This is a great opportunity to honor first responders and provide a valuable public service at the same time. Volunteers must have their own laptop computers, but everything else will be provided and supervised. For more information or to volunteer, contact Emilio Chavez, chavezem18@gmail.com, or Alex Russell, alex@russelldefense.com by Aug. 14.

UNM School of Law Free Library Services for New Mexico Attorneys
• Check out circulating books.
• Delivery (fax, e-mail, or mail) of articles or other documents available in our collection. (Requests must include an exact citation.)
• Interlibrary loan of materials from other law libraries. (The Law Library does not charge a fee for this service, but the attorney will be responsible for any fees assessed by the lending library.)
• Onsite access to research databases such as Westlaw-Pro, LexisNexis Academic, Loislaw, Shepard’s, RIA Checkpoint, and many others.
• Onsite access to LexisNexis Academic and Loislaw at the UNM branch campus libraries in Valencia County, Gallup, and Los Alamos (licenses provided by UNM Law Library).
• Advice concerning the licensing of low-cost online legal resources.
For more information about the UNM Law Library and any of these free services, visit http://lawlibrary.unm.edu, call (505) 277-0935, or e-mail libref@law.unm.edu.

Summer Library Hours
Building and Circulation
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 9 a.m.–6 p.m.
Sunday Noon–9 p.m.

Reference
Monday - Friday 9 a.m.–6 p.m.
Saturday Closed
Sunday Noon–4 p.m.

Other News
Tonali Legal Alliance of Women
Four young women received $250 scholarships from the Tonali Legal Alliance of Women. The recipients were Jennifer Anderson and Silvia Delgado, students at the UNM School of Law; and Yesica Martinez and Laura Thornton, who are in the paralegal studies program at Doña Ana Community College. The scholarship committee was impressed by the recipients’ academic achievements and their goals. Tonali is an organization based in Las Cruces. It includes lawyers, paralegals, secretaries, court personnel, judges, and others interested in supporting women in the legal community. The next regular meeting will be in September. For more information, contact Shari Allison, (575) 527-6930.
Dear Pat,

My spouse and I are expecting our first child in October, and I plan to take off twelve weeks after the baby is born. But we have not made plans for child care once I return to work, and we’re not sure whether to sign up for a child care center or hire a nanny. My spouse also is a lawyer, and our schedules are pretty hectic. Do you have any suggestions?

Signed,
Working Parents-to-Be

Dear Working Parents-to-Be,

Deciding how to take care of your child once you return to work is difficult, particularly when your child is not yet born, but it’s important to consider your options now rather than waiting until a week or two before you return to work. Don’t forget that your spouse may also be entitled to family leave during the first year of your child’s life. You may want to stagger the time that you and your spouse take off so that your spouse can care for your child for awhile after you go back to work.

Before deciding to place your child in a day care facility or hire a nanny, think about your other options. Do you have family members who could care for the child, even if only part time? Can you or your spouse arrange to work from home sometimes, particularly during your child’s first year? Can you or your spouse reduce your working hours during your child’s first year? Have you considered sharing babysitting duties or cooperative arrangements with friends or colleagues who also have young children? Being flexible and creative can help you come up with the best situation for you and your family.

A good place to start exploring child care facilities is the Web site of the New Mexico Children, Youth and Families Department, www.newmexickids.org. You can download the Parents’ Guide to Selecting Quality Child Care as well as search for child care facilities by zip code or name. Many child care centers do not take infants or have limited space for infants. Many are associated with religious organizations and give preferences to their members. If you are a member of a religious organization, you should check to see if it has an affiliated child care center. You should expect to pay at least $800 per month for full-time care of an infant. Another option is home child care centers which are often less expensive than regular child care centers and typically provide one child care provider for every three or four infants. Tour several facilities now to see if there is one that you like and try to reserve a place for your child in advance. Try to choose one that is convenient to your home or work, and remember that you typically will have to drive to and from the child care center during rush hour. If there is a waiting list, put your name on the list now, even before your child is born. Remember that many children, particularly infants and toddlers, get sick relatively often if they attend child care centers, and you will have to make other arrangements to care for your sick child.

You also may consider hiring a nanny, particularly during the first year or two. A nanny typically comes to your home and is probably the most convenient option for most new parents, but a good nanny may be hard to find and it is the most expensive option. You should expect to pay at least $10 per hour for a nanny, plus social security taxes if you hire the nanny as an employee. A nanny can take care of your child even when your child is sick, but if the nanny gets sick, you may have to make alternative arrangements on short notice. Probably the best way to find a nanny is by contacting other parents who have used a nanny but whose children have outgrown the nanny (or will have outgrown the nanny by the time you need child care). You also can check craigslist for nannies or nanny agencies that place nannies for a fee. Make sure that you check the nanny’s references carefully. It also is a good idea to have the nanny come to your home for a few days before you go back to work so that you can watch the nanny interact with your child and make sure that the nanny is the person you want to care for your child while you are at work.

If you have space to accommodate another person living in your home, you could consider a live-in nanny or an au-pair, a young person from another country who would commit to care for your child (or children) for a year or two in exchange for room, board, and a weekly stipend. Refer to the Cultural Care Au Pair Web site, www.culturalcare.com, or contact the child care coordinator for Albuquerque and Santa Fe at deena.beard@lcc.culturalcare.com.

Once you decide on a child care facility or nanny, you and your spouse may want to arrange your schedules so that one person takes care of the baby in the morning until the baby is dropped off at the day care center or until the nanny arrives while the other person goes to work early. In the evening switch so that the person who cared for the baby in the morning can stay at work a little later. Whatever option you choose, sign up for your employer’s dependent care savings account if one is available. This allows you to pay up to $5000 per year in child care expenses with pre-tax income.

It is important to remain flexible and to be willing to change course if you try a child care center or nanny that does not work out. What is right for your neighbor’s child may not be right for yours. It is worth taking the time to find a situation that works for you.

Sincerely,
Pat

Ask Pat, provided by the Committee on Women and the Profession, will answer questions about gender bias in the legal profession. Letters are loosely based on real events. Send comments or letters to “Ask Pat,” State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860.
Hearsay

Allison P. Pieroni, an attorney practicing divorce and family law with Atkinson & Kelsey PA, has been re-elected board chair of La Familia Incorporated, a non-profit organization that provides services for families, including adoption, a group home for deaf and hard-of-hearing adolescents, pregnancy counseling, and support for families who provide foster-care treatment homes. Pieroni specializes in adoption, guardianship, kinship guardianship and guardian ad litem. She received her J.D. from the UNM School of Law.

Victor P. Montoya has joined Jackson Lewis LLP, as partner. Formerly a partner with Sutin, Thayer & Browne PC, Montoya advises employers and employees regarding compliance with federal and state laws. He also provides representation in administrative proceedings and civil litigation related to employment, unemployment, wage, disability, and civil rights issues. Montoya practices alternative dispute resolution and is a certified mediator. He is a 1998 graduate of the University of California Davis School of Law where he served as managing editor of the UC Davis Law Review. He received his bachelor's degree from the University of Texas, Austin.

Frances Bassett has joined the Louisville, Colorado, office of Fredericks Peebles & Morgan LLP, a firm that specializes in representing American Indian tribes and Native American organizations throughout the United States. Bassett was previously an assistant attorney general with the New Mexico Attorney General's Office, Division of Water, Environment and Utilities. She specializes in natural resources, water and environmental law, civil litigation and appellate advocacy. Bassett, a graduate of the UNM School of Law, is licensed to practice law in both New Mexico and Colorado. She is a member of the Cherokee Nation and Cherokee South West Township, a satellite community of the Cherokee Nation based in Albuquerque.

R. Thomas Dawe has been elected to the board of the Lupus Foundation of America for a three-year term. He is a partner in Lewis and Rocas' Albuquerque office and is a member of the commercial and tort litigation practice groups. He advises clients on matters related to commercial transactions and other contractual relationships, including insurance. Dawe's extensive experience includes preparation and review of multiple types of contracts and mediation of commercial disputes regarding business liquidations.

Ruth M. Schifani, a shareholder and member of the Executive Committee at Modrall Sperling, was recently elected president of the UNM Alumni Association, which exists to keep alumni and friends of UNM involved with the school. Schifani will lead the board of directors, the governing body of the association and the university's oldest support group. The association currently has approximately 143,000 members. Schifani, a native of Albuquerque, graduated from UNM, cum laude, in 1970 with a degree in English literature. She received her law degree, cum laude, from UNM School of Law in 1976.

New Mexico native Hilary Tompkins won U.S. Senate confirmation for the top legal position in the Department of Interior. Tompkins, a Navajo, formerly served as Gov. Bill Richardson's chief counsel in Santa Fe and has worked in the Navajo tribal courts for the state of New Mexico and for the U.S. Department of Justice. Tompkins will manage legal issues pertaining to public lands, water and mineral management, as well as Indian affairs. Tompkins was born in the Ramah Chapter on the eastern side of the Navajo Reservation in New Mexico.

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send items to: Editor, PO Box 92860, Albuquerque, NM 87199-2860 or notices@nmbar.org.
George “Dave” Giddens was recently selected for inclusion in Super Lawyers: Corporate Counsel Edition for his experience and expertise in bankruptcy and creditor/debtor rights. He is the ninth lawyer in New Mexico to receive this honor. The Super Lawyers list is chosen in three phases: attorneys are named to a candidate pool, then evaluated by a research pool, and finally reviewed by peers who share the same area of expertise. Giddens received his law degree from Kansas University.

Former U.S. Attorney and University of New Mexico School of Law professor Norman Bay was named chief enforcer for the Federal Energy Regulatory Commission. The appointment of Bay to head the commission’s Office of Enforcement was announced in Washington by FERC Chairman Jon Wellinghoff. Bay joins Commissioner Suedeen Kelly, a former UNM Law professor and former New Mexico Public Service Commission chair. Kelly is completing her second term as one of four FERC commissioners. FERC is an independent agency that regulates interstate transmission of electricity, natural gas and oil; licenses and inspects hydroelectric projects; ensures the safe operation of liquefied natural gas terminals and monitors and investigates energy markets. The enforcement office oversees compliance with commission rules and regulations, and detects and crafts remedies to address market manipulation. Bay teaches criminal law, evidence, constitutional law, legislative and administrative processes, and national security law. An Albuquerque native, Bay is a graduate of Albuquerque Academy. He graduated summa cum laude from Dartmouth College in 1982 and cum laude from Harvard Law School in 1986.

Former Assistant U.S. Attorney Gregory B. Wormuth has been sworn in for an eight-year term as U.S. magistrate judge in the district of New Mexico. Wormuth fills a vacancy created by the retirement of the Hon. Leslie C. Smith. Wormuth served as a federal prosecutor in the Las Cruces branch office until beginning work last month as a magistrate judge. He received his undergraduate degree in economics from Davidson College in 1992 and graduated first in his class from Wake Forest University School of Law in 1995.

Presiliano (Raul) Torrez is among 15 honorees for the 2009-2010 class of White House Fellows, which represents a diverse cross-section of professions including medicine, business, media, education, non-profit and state government, as well as two branches of the U.S. military. Selection is highly competitive and based on a record of remarkable professional achievement early in one’s career, evidence of leadership potential, a proven commitment to public service, and the knowledge and skills necessary to contribute successfully at the highest levels of the federal government. The program was created in 1964 by President Lyndon B. Johnson. The Fellows take part in an education program designed to broaden their knowledge of leadership, policy formulation, military operations, and current affairs. They also participate in service projects throughout the year in the Washington, DC area. Torrez works in the attorney general’s Special Prosecutions Division in Albuquerque.

The 2009-2010 Chambers USA Guide has recognized Sutin Thayer & Browne in the areas of litigation and Native American law and as number one in the area of corporate/commercial law. In addition, the following members of the firm received recognition:

- **A. Kelly, Jay D. Rosenblum and Robert G. Heyman** – Corporate/Commercial Law
- **Paul Bardacke** – General Commercial Litigation
- **Christopher A. Holland and Andrew J. Simons** – Native American Law

Southwest Super Lawyers recognized the following Sutin, Thayer & Browne lawyers for their expertise in particular areas of law:

- **Paul Bardacke** – Business Litigation
- **Anne P. Browne** – Real Estate
- **Gail Gottlieb** – Bankruptcy and Creditor/Debtor Rights
- **Kerry C. Kiernan** – Appellate law
- **Twila B. Larkin** in Family law
- **Stevan D. Looney** – Business Litigation
- **Andrew J. Simons** – Business Litigation

Paul Bardacke was also selected as one of the Top 25 lawyers in New Mexico.
LEGAL EDUCATION

JULY

27 Subordinate Lawyers:
   Sit, Stay, Roll Over No More
   Telephone Seminar
   TRT Inc.
   1.0 E, 1.0 P
   1-800-672-6271
   www.trtcle.com

28 Lawyer Substance Abuse
   Addictions and Consequences
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28 Estate Planning for Pets
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   www.nmbarcle.org

29 How to Deal with the Rambo
   Litigator’s Top 10 Dirty Tactics
   Albuquerque
   NBI, Inc.
   5.0 G, 1.0 E
   1-800-930-6182
   www.nbi-sems.com

AUGUST

4 Attorneys Guide to Good
   Lawyering for People
   with Disabilities
   Video Replay
   Center for Legal Education of NMSBF
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   (505) 797-6020
   www.nmbarcle.org

4 Medicare Set Asides
   in Personal Injury Cases
   Video Replay
   Center for Legal Education of NMSBF
   2.7 G
   (505) 797-6020
   www.nmbarcle.org

4 Document Retention
   and Destruction
   Albuquerque
   Lorman Education Services
   6.6 G
   (866) 352-9539
   www.lorman.com

4 I Was from Venus and My
   Lawyers Were from Mars
   Video Replay
   Center for Legal Education of NMSBF
   2.0 E, 1.0 P
   (505) 797-6020
   www.nmbarcle.org

4–5 What Business Lawyers Need to
   Know About Licensing,
   Parts 1 and 2
   Teleseminar
   Center for Legal Education of NMSBF
   2.0 G
   (505) 797-6020
   www.nmbarcle.org

5 Advanced Issues in Real Estate
   Albuquerque
   NBI, Inc.
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7 When a Prosecutor Withholds
   Exculpatory Evidence
   Teleconference
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11 “Second Death” Issues
   in Estate Planning
   Teleseminar
   Center for Legal Education of NMSBF
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12 Construction Law in New Mexico
   Albuquerque
   Paralegal Division, Albuquerque
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   (505) 222-9356

12 Foreclosure and Repossession
   Albuquerque
   Lorman Education
   6.0 G, 1.0 E
   (866) 352-9539
   www.lorman.com

12 Tax Administration Act
   Santa Fe
   Paralegal Division, Santa Fe
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   (505) 986-2502

18 2008 Civil Procedures Update
   Video Replay
   Center for Legal Education of NMSBF
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   (505) 797-6020
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G = General   E = Ethics
P = Professionalism   VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
<table>
<thead>
<tr>
<th>18</th>
<th>Attorneys Guide to Good Lawyering for People with Disabilities</th>
<th>20</th>
<th>Litigating Bad Faith Insurance Claims</th>
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<th>Corporate Governance for Non-Profits</th>
<th>20</th>
<th>Medicaid and Medicaid Planning in New Mexico</th>
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<th>18</th>
<th>What’s Next? How to Refresh, Refocus and Recharge Your Legal Career</th>
<th>21</th>
<th>Trustees and Beneficiaries: Managing Tensions and Conflict</th>
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<th>19</th>
<th>Rules of Evidence and Procedure: State and Federal</th>
<th>24</th>
<th>Ethics Workout: Mental Aerobics for Solving Ethics Problems</th>
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<th>Advising Trustees: Duties, Disclosures, and Liability</th>
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<th>Conflicts Between Federal and State Laws</th>
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<th>Need to Tame or Train the Billable Beast?</th>
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<th>28</th>
<th>Advising Trustees: Duties, Disclosures, and Liability</th>
<th>31</th>
<th>Lawyer Substance Abuse Addictions and Consequences</th>
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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 JULY 27, 2009

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

<table>
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<tr>
<th>No.</th>
<th>Case</th>
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<tr>
<td>NO. 31,845</td>
<td>Guzman v. Laguna Development Corp. (COA 27,827)</td>
<td>7/15/09</td>
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<tr>
<td>NO. 31,841</td>
<td>State v. Solano (COA 28,166)</td>
<td>7/15/09</td>
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<td>NO. 31,840</td>
<td>State v. Garcia (COA 28,465)</td>
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<td>NO. 31,839</td>
<td>State v. Lopez (COA 27,862)</td>
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<td>NO. 31,837</td>
<td>State v. Valenzuela (COA 29,351)</td>
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<td>NO. 31,838</td>
<td>State v. Judd (COA 29,460)</td>
<td>7/10/09</td>
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<td>NO. 31,835</td>
<td>Rodriguez v. Janecka (12-501)</td>
<td>7/10/09</td>
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<td>NO. 31,833</td>
<td>International Union of Firefighters v. Carlsbad (COA 28,189)</td>
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<td>State v. Finch (COA 29,350)</td>
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<td>State v. Gonzales (COA 29,076)</td>
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<td>State v. Herrera (COA 29,200)</td>
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<td>Kavel v. Romero (12-501)</td>
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<td>State v. Gutierrez-Salazar (COA 29,178)</td>
<td>7/7/09</td>
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<td>Shepard v. Ozzello (COA 28,376)</td>
<td>7/7/09</td>
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<td>NO. 31,817</td>
<td>Hynoski v. Harmston (COA 29,434)</td>
<td>7/6/09</td>
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<td>NO. 31,816</td>
<td>Martinez v. Whaley (COA 29,525)</td>
<td>7/6/09</td>
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<td>State v. Bennett (COA 29,183)</td>
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<td>State v. Soliz (COA 28,018)</td>
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<td>State v. Shirley S. (COA 29,401)</td>
<td>7/1/09</td>
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<td>State v. Baldonado (COA 29,097)</td>
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<td>Santiago v. Tapia (12-501)</td>
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CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

(Parties preparing briefs) Date Writ Issued

<table>
<thead>
<tr>
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<td>Ezell v. Rocha (12-501)</td>
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<td>State v. Clements (COA 26,953)</td>
<td>5/26/09</td>
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<tr>
<td>NO. 31,715</td>
<td>Frazier v. Janecka (12-501)</td>
<td>5/21/09</td>
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<td>1/22/08</td>
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<td>7/25/08</td>
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<td>State v. Aragon (COA 26,185)</td>
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<td>State v. Harrison (COA 27,244)</td>
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<td>9/22/08</td>
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<td>10/1/08</td>
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<td>11/5/08</td>
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<td>12/29/08</td>
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<td>NO. 31,460</td>
<td>State v. Garley (COA 28,760)</td>
<td>1/16/09</td>
</tr>
<tr>
<td>NO. 31,480</td>
<td>City of Aztec v. Gurule (COA 28,705)</td>
<td>2/3/09</td>
</tr>
<tr>
<td>NO. 31,491</td>
<td>Ideal v. Burlington Resources Oil &amp; Gas (COA 29,025)</td>
<td>2/3/09</td>
</tr>
<tr>
<td>NO. 31,526</td>
<td>State v. Phillips (COA 27,019)</td>
<td>2/23/09</td>
</tr>
<tr>
<td>NO. 31,549</td>
<td>City of Santa Fe v. Travelers Casualty (COA 28,944)</td>
<td>2/25/09</td>
</tr>
<tr>
<td>NO. 31,433</td>
<td>Romero v. Philip Morris, Inc. (COA 26,993)</td>
<td>2/27/09</td>
</tr>
<tr>
<td>NO. 31,539</td>
<td>McGary v. AMS Staff Leasing (COA 28,867)</td>
<td>2/27/09</td>
</tr>
<tr>
<td>NO. 31,510</td>
<td>State v. Smith (COA 27,704)</td>
<td>3/13/09</td>
</tr>
<tr>
<td>NO. 31,100</td>
<td>Allen v. LeMaster (12-501)</td>
<td>3/13/09</td>
</tr>
<tr>
<td>NO. 31,546</td>
<td>Gomez v. Chavarría (COA 28,072/28,073)</td>
<td>3/24/09</td>
</tr>
<tr>
<td>NO. 31,567</td>
<td>State v. Guthrie (COA 27,022)</td>
<td>3/24/09</td>
</tr>
<tr>
<td>NO. 31,603</td>
<td>Guest v. Allstate Ins. Co. (COA 27,253)</td>
<td>4/2/09</td>
</tr>
<tr>
<td>NO. 31,602</td>
<td>Allstate Ins. Co. v. Guest (COA 27,253)</td>
<td>4/2/09</td>
</tr>
<tr>
<td>NO. 31,612</td>
<td>Ortiz v. Overland Express (COA 28,135)</td>
<td>4/20/09</td>
</tr>
<tr>
<td>NO. 31,656</td>
<td>State v. Rivera (COA 25,798)</td>
<td>5/5/09</td>
</tr>
</tbody>
</table>
WRITS OF CERTIORARI

NO. 31,637 Akins v. United Steel (COA 27,132) 5/14/09
NO. 31,686 McNeill v. Rice Engineering (COA 29,207) 5/20/09
NO. 31,717 State v. Johnson (COA 27,867) 6/17/09
NO. 31,719 State v. Lara (COA 27,166) 6/17/09
NO. 31,738 State v. Marlene C. (COA 28,352) 6/17/09
NO. 31,723 State v. Mendez (COA 28,261) 6/23/09
NO. 31,733 State v. Delgado (COA 27,192) 6/23/09
NO. 31,724 Albuquerque Commons v. City/Albuquerque (COA 24,026/24,027/24,042/24,425) 7/1/09
NO. 31,732 State v. Smile (COA 27,338) 7/1/09
NO. 31,739 State v. Marquez (COA 27,971) 7/1/09
NO. 31,740 State v. McCorkle (COA 29,124) 7/1/09
NO. 31,743 State v. Marquez (COA 28,938) 7/1/09
NO. 31,741 State v. Gardner (COA 27,234) 7/1/09
NO. 31,775 State v. Warren (COA 29,147) 7/15/09

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

NO. 30,787 Cable v. Wells Fargo Bank (On reconsideration) (COA 26,357) 12/15/08
NO. 30,937 State v. Garcia (COA 27,091) 12/16/08
NO. 30,953 State v. Santiago (COA 26,859) 1/12/09
NO. 31,234 Chapman v. Varela (COA 27,069/27,164) 2/9/09
NO. 31,329 Kirby v. Guardian Life (COA 27,624) 2/9/09
NO. 30,956 Davis v. Devon (COA 28,147/28,154) 2/9/09
NO. 30,957 Ideal v. BP America (COA 28,148/28,153) 2/9/09
NO. 30,958 Smith v. Conocophillips (COA 28,151/28,152) 2/9/09
NO. 31,263 Garcia v. Gutierrez (COA 26,484) 2/10/09
NO. 31,192 Reule Sun Corp. v. Valles (On rehearing) (COA 27,254) 3/9/09
NO. 31,258 Marchstadt v. Lockheeed (COA 27,222) 3/11/09
NO. 31,153 State v. Wyman (COA 28,237) 3/25/09
NO. 31,279 Lions Gate v. D’Antonio (COA 28,668) 4/13/09
NO. 31,106 State v. Anaya (COA 27,114) 4/15/09
NO. 31,244 State v. Slayton (COA 27,892) 4/29/09
NO. 31,326 State v. Anaya (COA 28,629) 5/11/09

NO. 31,385 State v. Lucero (COA 27,364) 5/13/09
NO. 31,215 State v. Johnson (COA 26,878) 5/27/09
NO. 30,766 State v. Jones (COA 27,342) 5/27/09
NO. 31,363 Hanosh v. King (COA 28,175) 7/20/09
NO. 31,318 Dept. of Transportation v. S & S Trezza (COA 28,475) 8/10/09
NO. 31,364 Mountain States v. Allstate Ins. Co. (COA 28,686) 8/10/09
NO. 31,213 State v. Dodson (COA 28,382) 8/11/09
NO. 31,288 State v. Savedra (COA 27,288/27,289/27,290) 8/11/09
NO. 31,265 State v. Hill (COA 27,401) 8/31/09
NO. 31,186 State v. Bullcoming (COA 26,413) 8/31/09
NO. 31,416 Carlsbad Hotel Associates v. Patterson (COA 27,922) 9/14/09
NO. 31,308 State v. Sosa (COA 26,863) 9/15/09

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 31,764 NM Gamefowl Association v. King (COA 28,388) 7/14/09
NO. 31,776 State v. Diaz (COA 28,703) 7/14/09
NO. 31,774 State v. Mumau (COA 28,930) 7/14/09
NO. 31,771 State v. Suskey (COA 29,045) 7/14/09
NO. 31,770 State v. Acosta (COA 29,139) 7/14/09
NO. 31,769 State v. Carpenter (COA 29,137) 7/14/09
NO. 31,768 State v. Calvillo (COA 29,068) 7/14/09
NO. 31,767 State v. Salazar (COA 28,950) 7/14/09
NO. 31,792 Holt v. State (12-501) 7/14/09
NO. 31,803 Hasley v. Hatch (12-501) 7/14/09
NO. 31,800 Jaramillo v. Janecka (12-501) 7/14/09
NO. 31,759 State v. Judd (COA 28,550) 7/14/09
NO. 31,757 Martinez v. Cities of Gold (COA 28,762) 7/14/09
NO. 31,756 State v. Chavez (COA 28,948) 7/14/09
NO. 31,826 Ochoa v. State (12-501) 7/14/09
NO. 31,822 Tafoya v. State (12-501) 7/14/09
NO. 31,790 State v. Rodriguez (COA 27,437) 7/16/09
NO. 31,789 State v. Smith (COA 29,094) 7/16/09
NO. 31,788 State v. Reyes (COA 26,593) 7/16/09
NO. 31,787 Roy v. Tafoya (COA 29,250) 7/16/09
NO. 31,784 State v. Almager (COA 28,912) 7/16/09
NO. 31,782 City of Carlsbad v. Tanner (COA 29,154) 7/16/09
NO. 31,783 State v. Ramirez (COA 29,185) 7/16/09
NO. 31,793 State v. Andrade (COA 27,715) 7/16/09
opinions
as updated by the clerk of the new mexico court of appeals
gina m. maestas, chief clerk new mexico court of appeals
po box 2008 • santa fe, nm 87504-2008 • (505) 827-4925
effective july 17, 2009

published opinions

unpublished opinions

no. 29473 1st jud dist santa fe dm-08-957, b chatterjee v t king (dismiss and remand) 7/14/2009
no. 29303 2nd jud dist bernalillo lr-07-119, state v k jordan (affirm) 7/17/2009
no. 29361 5th jud dist lea jq-05-35, cyfd v joel d (affirm) 7/17/2009

slip opinions for published opinions may be read on the court’s web site:
Clerk’s Certificates

Shelby E. Robinson
900 NW Lovejoy Street, #813
Portland, OR 97209
503-309-6396
shelbyerobinson@gmail.com

Alexander K. Russell
Russell Law Firm, P.C.
823 Gold Avenue, SW
Albuquerque, NM 87102
505-922-8980
505-243-1924 (telecopier)
alex@russelldefense.com

Regina A. Ryanczak
Office of the District Attorney
855 Van Patten Street
Truth or Consequences, NM 87901
575-894-9033
575-894-9034 (telecopier)
RRyanczak@da.state.nm.us

Ray O. Sage
1880 Myrtle Avenue
Las Cruces, NM 88001
575-522-1605

Justin J. Solimon
Wiggins Williams & Wiggins, P.C.
PO Box 1308
1805 Rio Grande Blvd., NW
(87104)
Albuquerque, NM 87103-1308
505-764-8400
505-764-8858 (telecopier)
jsolimon@wwlaw.us

David A. Stevens
N.M. State Land Office
PO Box 1148
310 Old Santa Fe Trail
Santa Fe, NM 87504-1148
505-827-5872
505-827-4262 (telecopier)
dstevens@slo.state.nm.us

Christine L. Talley
350 Galloway Street, NW,
Apt. 107
Washington, DC 20011
717-465-1651
chtalley03@yahoo.com

Christina A. Tatum
1001 Armstrong
Clovis, NM 88101

Witter Tidmore
Witter Tidmore, Attorney at Law, P.C.
215 W. San Francisco Street,
#203
Santa Fe, NM 87501
505-982-2979
505-982-8408 (telecopier)
witter@tidmorelawfirm.com

Maria E. Touchet
Gaddy Jaramillo Lawyers
2025 San Pedro, NE
Albuquerque, NM 87110-5951
505-254-9090
505-254-9366 (telecopier)
mia@gaddyfirm.com

Phillip Trujillo
PO Box 32028
Santa Fe, NM 87594-2028
505-988-9815
505-988-1054 (telecopier)
trujillo.phillip@gmail.com

Timothy J. Vigil
LaMerle Boyd & Associates
PO Box 645
236 Montezuma Avenue
(87501)
Santa Fe, NM 87504-0645
505-820-1800
505-946-2964 (telecopier)
tinv@sftitles.com

Richard David Weiner
PO Box 83041
Albuquerque, NM 87198-3041
505-264-9180
rika222@q.com

Eric A. Youngberg
PO Box 7775
Albuquerque, NM 87194-7775
youngberg23@gmail.com

Eugene I. Zamora
N.M. Economic Development Dept.
1100 S. St. Francis Drive
Santa Fe, NM 87505
505-827-2486
505-827-0328 (telecopier)
genozamora@state.nm.us

Effective July 6, 2009:
Chamiza Atencio-Pacheco
UNM School of Law
1 University of New Mexico
MSC11 6070
1117 Stanford, NE
Albuquerque, NM 87131
505-277-0555
505-277-0068 (telecopier)
pacheco@law.unm.edu

As of June 25, 2009:
Edmund M. Kennedy
5045 Hale Parkway
Denver, CO 80220

As of January 15, 2009:
Garnett R. Burks, Jr.
PO Box 6790
Las Cruces, NM 88006-6790

In Memoriam

As of June 25, 2009:
D. Stephen Amland
c/o Spaceport America
901 East University
Bldg. 3, #C
Las Cruces, NM 88001

As of June 22, 2009:
Christopher R. Lopez
2451 Vereda de Encanto
Santa Fe, NM 87505
505-603-8013
clopez@gmail.com

On July 6, 2009:
Richard A. Madril
PO Box 504
Tucson, AZ 85702-0504
520-889-8086
520-889-6414 (telecopier)
RickAMadril@yahoo.com

Clerk’s Certificate of Admission

On June 22, 2009:
Christopher R. Lopez
2451 Vereda de Encanto
Santa Fe, NM 87505
505-603-8013
clopez@gmail.com

On July 6, 2009:
Richard A. Madril
PO Box 504
Tucson, AZ 85702-0504
520-889-8086
520-889-6414 (telecopier)
RickAMadril@yahoo.com
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 JULY 20, 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 Mexico Compilation Commission’s Web site: http://www.nmcompcomm.us/

<table>
<thead>
<tr>
<th>Pending Proposed Rule Changes</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>3-202 Summons (Rules of Civil Procedure for the Metropolitan Courts)</td>
<td>08/10/09</td>
</tr>
<tr>
<td>9-102B Certificate of recusal (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-103B Notice of recusal (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-225 Court’s certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-222 Court’s certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-221 Certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-221A Party’s certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-221 Certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-221A Party’s certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-102 Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-103 Notice of excusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104 Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-102A Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-103A Notice of excusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104A Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104B Notice of assignment (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-103C Notice of assignment (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-701 Judgment (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>8-701 Judgment (Rules of Procedure for the Municipal Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-703 Appeal (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>8-703 Appeal (Rules of Procedure for the Municipal Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>2-105 Assignment and designation of judges (Rules of Civil Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-105 Assignment and designation of judges (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-612 Order on direct criminal contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-613 Judgment and sentence on indirect criminal contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-614 Order on direct civil contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-615 Order on indirect civil contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-616 Conditional discharge order (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-617 Final order of discharge (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-618 Order finding no violation of probation (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-619 Order finding probation violation and continuing sentence (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-620 Probation violation, judgment, and sentence (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>10-313.1 Representation of multiple siblings (Children’s Court)</td>
<td>07/20/09</td>
</tr>
<tr>
<td>22-202 Licensing of firms engaged in court reporting or tape monitoring (Rules Governing the Recording of Judicial Proceedings)</td>
<td>06/08/09</td>
</tr>
<tr>
<td>12-502 Certiorari to the Court of Appeals (Rules of Appellate Procedure)</td>
<td>05/04/09</td>
</tr>
<tr>
<td>1-096.1 Review of election recall petitions (Rules of Civil Procedure)</td>
<td>04/27/09</td>
</tr>
<tr>
<td>12-202 Appeals as of right; how taken (Rules of Appellate Procedure)</td>
<td>04/27/09</td>
</tr>
<tr>
<td>12-308 Computation of time (Rules of Appellate Procedure)</td>
<td>04/27/09</td>
</tr>
<tr>
<td>12-505 Certiorari to the district court; decisions on review of administrative agency decisions (Rules of Appellate Procedure)</td>
<td>04/27/09</td>
</tr>
<tr>
<td>12-603 Appeals in actions challenging candidates or nominating petitions; primary or general elections; school board recalls and recalls of elected county officials (Rules of Appellate Procedure)</td>
<td>04/27/09</td>
</tr>
<tr>
<td>10-343 Adjudicatory hearing; time limits; continuances (Children’s Court Rules)</td>
<td>04/17/09</td>
</tr>
<tr>
<td>17-204 Required records (Rules Governing Discipline)</td>
<td>04/13/09</td>
</tr>
<tr>
<td>14-5120 Ignorance or mistake of fact (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
<tr>
<td>14-5181 Self defense; nondeadly force by defendant (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
<tr>
<td>14-5183 Self defense; deadly force by defendant (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
<tr>
<td>14-5185 Self defense against excessive force by a peace officer; deadly force by defendant (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
<tr>
<td>14-5186 Self defense against excessive force by a peace officer; deadly force by defendant (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
<tr>
<td>16-104 Communication (Rules of Professional Conduct)</td>
<td>03/23/09</td>
</tr>
<tr>
<td>14-6018 Special verdict; kidnapping (UJI Criminal)</td>
<td>04/06/09</td>
</tr>
</tbody>
</table>
### Recently Approved Rule Changes Since Release Of 2009 NMRA

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-016</td>
<td>Pretrial conferences; scheduling; management.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-026</td>
<td>General provisions governing discovery.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-033</td>
<td>Interrogatories to parties.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-034</td>
<td>Production of documents and things and entry upon land for inspection and other purposes.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-037</td>
<td>Failure to make discovery; sanctions.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-038</td>
<td>Jury trial in civil actions.</td>
<td>12/15/08</td>
</tr>
<tr>
<td>1-045</td>
<td>Subpoena.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-045.1</td>
<td>Interstate subpoenas.</td>
<td>08/07/09</td>
</tr>
<tr>
<td>1-071.1</td>
<td>Statutory stream system adjudication suits; service and joinder of water rights claimants; responses.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-071.2</td>
<td>Statutory stream adjudication suits; stream system issues and expedited inter se proceedings.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-071.3</td>
<td>Statutory stream adjudication suits; annual joint working session.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-071.4</td>
<td>Statutory stream adjudication suits; ex parte contacts; general problems of administration.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-071.5</td>
<td>Statutory stream adjudication suits; excusal or recusal of a water judge.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-074</td>
<td>Administrative appeals; statutory review by district court of administrative decisions or orders.</td>
<td>12/15/08</td>
</tr>
<tr>
<td>1-075</td>
<td>Constitutional review by district court of administrative decisions and orders.</td>
<td>12/15/08</td>
</tr>
<tr>
<td>1-088</td>
<td>Designation by judge.</td>
<td>04/08/09</td>
</tr>
<tr>
<td>1-125</td>
<td>Domestic Relations Mediation Act programs.</td>
<td>05/18/09</td>
</tr>
<tr>
<td>2-802</td>
<td>Garnishment.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>4-803</td>
<td>Claim of exemptions on execution.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>4-805B</td>
<td>Application for writ of garnishment.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>5-104</td>
<td>Time.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-121</td>
<td>Orders; preparation and entry.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-207</td>
<td>Withdrawn.</td>
<td>04/06/09</td>
</tr>
<tr>
<td>5-604</td>
<td>Time of commencement of trial.</td>
<td>11/24/08</td>
</tr>
<tr>
<td>5-614</td>
<td>Motion for new trial.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-704</td>
<td>Death penalty; sentencing.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-801</td>
<td>Modification of sentence.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-802</td>
<td>Habeas corpus.</td>
<td>05/06/09</td>
</tr>
</tbody>
</table>

### Rules of Criminal Procedure For the District Courts

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>6-108</td>
<td>Non-attorney prosecutions.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-110A</td>
<td>Audio and audio-visual appearances of defendant.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-113</td>
<td>Victim’s rights.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-201</td>
<td>Commencement of action.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-401</td>
<td>Bail.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-403</td>
<td>Revocation of release.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-502</td>
<td>Plea and plea agreements.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>6-506</td>
<td>Time of commencement of trial.</td>
<td>01/15/09</td>
</tr>
<tr>
<td>6-703</td>
<td>Appeal.</td>
<td>01/15/09</td>
</tr>
</tbody>
</table>

### Rules of Criminal Procedure For the Metropolitan Courts

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>7-106</td>
<td>Excusal; recusal; disability.</td>
<td>01/15/09</td>
</tr>
<tr>
<td>7-401</td>
<td>Bail.</td>
<td>02/02/09</td>
</tr>
<tr>
<td>7-506</td>
<td>Time of commencement of trial.</td>
<td>01/15/09</td>
</tr>
<tr>
<td>7-602</td>
<td>Jury trial.</td>
<td>01/15/09</td>
</tr>
<tr>
<td>7-703</td>
<td>Appeal.</td>
<td>01/15/09</td>
</tr>
</tbody>
</table>

### Rules of Procedure For the Municipal Courts

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>8-103</td>
<td>Rules; forms; fees.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-109A</td>
<td>Audio and audio-visual appearances of defendant.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-111</td>
<td>Non-attorney prosecutions.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-201</td>
<td>Commencement of action.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-401</td>
<td>Bail.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-403</td>
<td>Revocation of Release.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-501</td>
<td>Arraignment; first appearance.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-502</td>
<td>Pleas.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-506</td>
<td>Time of commencement of trial.</td>
<td>01/15/09</td>
</tr>
<tr>
<td>8-703</td>
<td>Appeal.</td>
<td>01/15/09</td>
</tr>
</tbody>
</table>

### Criminal Forms

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>9-406A</td>
<td>Guilty plea or no contest plea proceeding.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>9-408A</td>
<td>Plea and disposition agreement.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>9-604</td>
<td>Judgment and Sentence.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>9-701</td>
<td>Petition for writ of habeas corpus.</td>
<td>05/06/09</td>
</tr>
</tbody>
</table>

### Rules of Appellate Procedure

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>12-302</td>
<td>Appearance, withdrawal or substitution of attorneys.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>12-305</td>
<td>Form of papers prepared by parties.</td>
<td>05/25/09</td>
</tr>
<tr>
<td>12-404</td>
<td>Rehearings.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>12-501</td>
<td>Certiorari to the district court from denial of habeas corpus.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>12-607</td>
<td>Certification from other courts.</td>
<td>04/08/09</td>
</tr>
</tbody>
</table>

### UJI Civil

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Change Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-110A</td>
<td>Instruction to jury.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>13-110B</td>
<td>Oath to interpreter.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>13-1406</td>
<td>Strict products liability; care not an issue.</td>
<td>05/15/09</td>
</tr>
</tbody>
</table>
### Rule-Making Activity

13-1430 Breach of implied warranty of merchantability. 02/02/09  
13-305 Causation (proximate cause). 02/02/09  
13-306 Independent intervening cause. 02/02/09  
13-820 Third-party beneficiary; enforcement of contract. 12/31/08

### UJI Criminal

14-111 Supplemental jury questionnaire. 02/02/09  
14-120 Voir dire of jurors by court. 02/02/09  
14-203 Act greatly dangerous to life; essential elements. 02/02/09  
14-2212 Aggravated battery on a peace officer with a deadly weapon; essential elements. 02/02/09  
14-2217 Aggravated fleeing a law enforcement officer. 02/02/09

### Rules Governing Admission to the Bar

15-301.2 Legal services provider limited law license for emeritus and non-admitted attorneys. 01/14/09

### Rules for Minimum Continuing Legal Education

18-203 Accreditation; course approval; provider reporting. 12/31/08

### Code of Judicial Conduct

21-300 A judge shall perform the duties of office impartially and diligently. 03/23/09

### Rules Governing the Recording of Judicial Proceedings

22-201 Licensing of court reporters and monitors; power to administer oaths. 12/31/08

### Local Rules for the Second Judicial District Court

LR2-123 Opposed motions and other opposed matters; filings; hearings. 06/01/09  
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
20TH ANNUAL APPELLATE PRACTICE INSTITUTE

Friday, September 11, 2009 • State Bar Center, Albuquerque
6.9 General CLE Credits

Co-Sponsors: Appellate Practice Section

8:00 a.m. Registration
8:15 a.m. Introductory Remarks
Jocelyn Drennan, Esq., Rodey, Dickason, Sloan, Akin & Robb, P.A., Chair, Appellate Practice Section
8:30 a.m. Recent Developments in Appellate Practice
Sue A. Herrmann, Esq., Office of the State Engineer
Edward Ricco, Esq., Rodey Dickason, Sloan, Akin & Robb, P.A.
9:10 a.m. Taking Your Appellate Pleadings to the Next Level:
- Petitions for Writ of Certiorari
  Andrew S. Montgomery, Esq., New Mexico Attorney General's Office
- Docketing Statements
  Bruce Rogoff, Esq., New Mexico Court of Appeals
- Principal Briefs & Reply Briefs
  Steven L. Tucker, Esq., Tucker Law Firm, P.C.
10:30 a.m. Break
10:45 a.m. Making an Intelligible, Complete, and Helpful Record for Appeal
Kerry Kiernan, Esq., Sutin, Thayer & Browne, P.C.
Shannon Bacon, Esq., Sutin, Thayer & Browne, P.C.
11:45 a.m. Lunch (provided at the State Bar Center)
1:00 p.m. Insights from the Appellate Courts: Tips, Traps, and Teamwork
Joey D. Moya, New Mexico Supreme Court Chief Counsel
Gina M. Maestas, New Mexico Court of Appeals Chief Clerk
1:40 p.m. The Appellate Lawyer's Toolkit
Hon. Timothy M. Tymkovich, Tenth Circuit Court of Appeals
2:40 p.m. Break
3:00 p.m. Amicus Practice in New Mexico: Lessons Learned on When, What and How
Michael Browde, Esq., Professor Emeritus of Law, UNM School of Law
4:00 p.m. Perspectives on Moving from the Trial Bench to the Court of Appeals
Hon. Timothy Garcia, New Mexico Court of Appeals
Hon. Robert E. Robles, New Mexico Court of Appeals
Hon. Linda M. Vanzi, New Mexico Court of Appeals
5:00 p.m. Adjourn

CRAIG OTHMER MEMORIAL PROCUREMENT CODE INSTITUTE

Friday, September 18, 2009
State Personnel Office Auditorium, 2600 Cerrillos Rd. Santa Fe, NM
3.0 General and 1.0 Ethics CLE Credits

Co-Sponsors: Public Law Section of the State Bar and the NM Public Procurement Association

Standard Fee $149  Public Law Section Members, Government, Legal Services Attorney, Paralegal $129

8:15 a.m. Introductory Remarks
Deborah A. Moll, Moderator
8:30 a.m. The Procurement Code and More
Ronn Jones, Esq., former NM State Purchasing Agent and Deputy Director, NM State Purchasing Division
9:20 a.m. Procurement Code Update and Cooperative Procurements
Judith E. Amer, General Counsel, NM Department of Finance and Administration
Paul M. Kippert, Esq., Chief, Contracts Review Bureau, NM Department of Finance and Administration
10:20 a.m. Update and Hot Topics in NM Construction and Procurement Law
Frank Salazar, Esq., Sutin, Thayer and Browne, Albuquerque, NM
David P. Gorman, Esq., Sheehan, Sheehan & Stelzner, Albuquerque, NM
Sean Calvert, Esq., Calvert Menicucci, Albuquerque, NM
11:10 a.m. Ethical Considerations in Procurement
Victoria B. Garcia, General Counsel, NM Department of Information Technology
12:10 p.m. Questions and Answers
12:30 p.m. Public Law Section Annual Meeting
5:00 p.m. Adjourn
8:00 a.m.  Registration
8:30 a.m.  Perspectives from the EEOC
8:30 a.m.  The Current EEOC Landscape: A Discussion with EEOC Commissioner
Stuart Ishimaru, Esq., EEOC, Washington, DC
8:30 a.m.  Strategies for Success: Mediating Charges before the EEOC
Yvonne Johnson, Esq., ADR Coordinator-District Office, Phoenix, Arizona
10:00 a.m.  Break
10:15 a.m.  Labor Law Update
Danny Jarrett, Esq., Managing Partner, Jackson Lewis, LLP, Albuquerque, Chair, Employment and Labor Law Section
Rita Seigel, Esq., Mediator and Current Employment and Labor Law Section Board Member
11:15 a.m.  Employment Law Update – Recent Developments in Federal Law
S. Charles Archuleta, Esq., Management Partner, Keleher & McLeod, Past Chair and Current Employment and Labor Law Section Board Member
Noon  Lunch (provided at the State Bar Center)
1:15 p.m.  Employment Law Update – Recent Developments in State Law
S. Charles Archuleta, Esq.
2:00 p.m.  Employment Law Jury Instructions: A Committee Update
Presenter TBA
3:00 p.m.  Break
3:15 p.m.  Practice Pointers and Ethical Considerations in Appellate Law (1.0 E)
Danny Jarrett, Esq., Moderator
Appellate Judges Panel: Presenters TBA
4:15 p.m.  Adjourn

STATE BAR VIDEO REPLAYS - State Bar Center, Albuquerque

AUGUST 4
Medicare Set Asides in Personal Injury Cases
2.7 General CLE Credits
9 a.m. – Noon
$109

Attorneys Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
11:00 a.m. – Noon
$49

Trust Accounting: It’s Not an Oxymoron
1.5 Ethics and 1.0 Professionalism CLE Credits
1:00 p.m. – 3:30 p.m.
$99

I Was from Venus and My Lawyers Were from Mars
2.0 Ethics and 1.0 Professionalism CLE Credits
1:15 p.m. – 4:15 p.m.
$129

AUGUST 18
2008 Civil Procedures Update
6.7 General CLE Credits
9:00 a.m. – 4:15 p.m.
$219

What’s Next? How to Refresh, Refocus & Recharge Your Legal Career
3.0 General CLE Credits
9:00 a.m. – Noon
$129

Attorneys Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
1:00 p.m. – 2:00 p.m.
$49

SEPTEMBER 1
Kinship Guardianship
4.0 General, 1.0 Ethics and 1.0 Professionalism CLE Credits
9:00 a.m. – 3:30 p.m.
$189

Attorneys Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
9:00 a.m. – 10:00 a.m.
$49

The 6th Annual Elder Law Seminar
2.9 General and 1.0 Professionalism CLE Credits
10:30 a.m. – 3:00 p.m.
$149

SEPTEMBER 15
2008 Estate Planning Symposium
6.0 General, 1.0 Ethics CLE Credits
8:30 a.m. – 3:30 p.m.
$219

Attorneys Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
9:00 a.m. – 10:00 a.m.
$49

Avoiding Ooops! Uh-oh! & Yikes! Some Ethical Dilemmas for Lawyers
1.0 Ethics CLE Credit
10:30 a.m. – 11:30 a.m.
$49

Medicare Set Asides
2.7 General CLE Credits
1:00 p.m. – 4:00 p.m.
$109
# NATIONAL SERIES

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## NATIONAL TELESEMINARS • 11 a.m. MDT

### AUGUST

**4-5**  
**What Business Lawyers Need to Know About Licensing, Parts 1 and 2**  
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**11**  
**“Second Death” Issues in Estate Planning**  
When planning for the death of a husband and wife, or other couple, what happens when the second person dies? This program will guide you through the decision-points and planning process for planning for the death of the second party, including techniques for lifetime giving during the life of the second party.  
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**18**  
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This program will review recent statutory and regulatory developments in this area, enforcement activity and best practices for corporate governance for nonprofits. Among other topics, the program will discuss director liability, trends in compensation, and other reporting requirements.  
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**25**  
**Advising Trustees: Duties, Disclosures, and Liability**  
The first of two programs on trustee duties, this program will provide you a guide to the non-investment related responsibilities of a trustee duties, including disclosure, conflicts and reporting.  
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**26**  
**The Prudent Investor Rule: Understanding the Rules of Trust Investments**  
The first of two programs on trustee duties, this program will provide a guide to the non-investment related responsibilities of a trustee duties, including disclosure, conflicts and reporting.  
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### SEPTEMBER

**1-2**  
**Understanding the Economics of LLC Deals, Parts 1 and 2**  
This two-part program will guide you through the economics of drafting LLC operating agreements. Among other topics, the program cover will cover the contribution of services and the valuation of those contributions, the allocation of profits and losses, including special allocation, distributions, and much more.  
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**8**  
**Title Insurance Update**  
This program will provide you a wide ranging update on recent changes to title insurance policies and how that will affect your real estate practice. Among other topics, the program will cover changes to owner-covered and loan-covered risks, coverage exclusions and changes to policy conditions.  
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**15**  
**Special Issues in Small Trusts**  
Small trusts have special issues related to administration, investment diversification and costs that either do not exist or are not as pronounced as in larger trusts. This program will review those special issues and discuss practical techniques for managing them.  
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**22**  
**Understanding “Earn-Outs”: Proving the Value of a Business Over Time**  
What happens when the buyer and seller of a business cannot agree on the value of the business? One technique that is often used is an earn-out, which allows the buyer to take control of the business and pay the seller additional sums as the business achieves performance benchmarks over time. This program cover negotiating, structuring and administering earn-outs in business sales.  
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**29**  
**Estate and Gift Tax Audits**  
This program will provide you a guide to defending an estate and gift tax audit other program will cover audit triggers to avoid at the estate planning stage, procedural tips once you get audit letter, hot issues to expect at the audit and other practical tips for settlement.  
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### OCTOBER

**1**  
**E-Discovery in Small Cases**  
Electronic files are ubiquitous and voluminous. The production of processing of electronic evidence can be vastly expensive. Often e-discovery is discussed in the context of multi-million dollar cases. But how do you handle e-discovery in smaller commercial cases, real estate litigation or fiduciary litigation with lower dollar values? This program will provide you a practical guide to techniques for managing e-discovery in smaller cases.  
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**6**  
**2009 Americans With Disabilities Act Update**  
This annual update will provide you a review of statutory revisions to the Americans With Disabilities Act, case law developments and trends in litigation. The program will also discuss emerging claims in ADA litigation and best practices for employer compliance.  
1.0 General CLE Credit $67

**13-14**  
**Fundamentals of Securities Regulation, Parts 1 and 2**  
Securities regulation can affect everyday business transactions whether in the corporate form or in a partnerships/LLCs. These regulations do not apply exclusively to public entities. This program will provide the non-securities law expert with a practical framework for determining the restrictions and potential liability of federal securities law on business transactions with an emphasis on corporate finance in and sales of private businesses.  
2.0 General CLE Credits $129

**20**  
**Fiduciary Litigation Update**  
By some estimates, fiduciary litigation is increasing at a rate of 20% a year. In addition to traditional sources of fiduciary litigation involving investment decisions, conflicts and disclosures, there are constantly new causes of action recognized. This annual update will provide you with a review of case law and statutory developments, and a discussion of trends in trust litigation.  
1.0 General CLE Credit $67

**27**  
**1031/Like Kind Exchange Update**  
In a real estate market where deals have slowed, 1031/Like-Kind Exchanges remain a source of tax-deferred transactional activity. This program will review market-based and regulatory changes affecting Like-Kind Exchanges, with an emphasis on trends in a down real estate market.  
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REGISTER EARLY! Advance registration is recommended as it guarantees admittance and course materials. If space and materials are available, paid registrations will be accepted at the door.

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 program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

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

ATTENTION PERSONS WITH DISABILITIES: Our meetings are held at facilities which are fully accessible to persons with mobility disabilities. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBNM office one week prior to the program.

PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given.

TAPE RECORDING OF PROGRAMS IS NOT PERMITTED.

CLE AUDIT POLICY: Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $10, space permitting. Course materials, breaks and/or lunch, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance and notify staff of their intent to audit. “Walk-in” auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events.

SCHOLARSHIPS: Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to a 50% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6020.
suggested that her child lived there with production were found and the evidence involved with methamphetamine manufacture of a controlled substance. Defendant was arrested in a house in Chapparal, New Mexico, where chemicals and equipment involved with methamphetamine production were found and the evidence suggested that her child lived there with her. In addition to the normal instruction for negligently permitting child abuse, Jury Instruction No. 4 provided that: Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child. Defendant appealed her conviction to the Court of Appeals, arguing (1) that this instruction undermined the jury’s responsibility to find all of the essential elements of her charge, and (2) that there was insufficient evidence to support her conviction. State v. Trossman, No. 26,576, mem. op. at 2 (N.M. Ct. App. Feb. 28, 2008). The Court of Appeals rejected these arguments, id., and Defendant sought a writ of certiorari from this Court. The Court granted certiorari on both issues. State v. Trossman, 2008-NMCERT-004, 144 N.M. 48, 183 P.3d 933 (table). [2] We reverse the Court of Appeals on both issues. First, we hold that Jury Instruction No. 4, which constituted an evidentiary presumption under our Rules of Evidence, was erroneous because a reasonable juror could have concluded that he or she was not required to find the essential element of endangerment beyond a reasonable doubt. Second, we conclude that there was insufficient evidence to support Defendant’s conviction of child abuse. Defendant’s conviction is therefore vacated.

BACKGROUND

[3] The facts in this case are not in dispute. Responding to reports of suspicious purchases of pseudoephedrine, police followed Billy Glenn, later a co-defendant in this case, as he and several unidentified adults made additional purchases of ephedrine and matches, both possible methamphetamine precursors. Glenn was observed entering a house carrying several bags. Police watched the house that evening and then left for approximately thirty-six hours, during which time they obtained a search warrant. When the warrant was executed, police apprehended Defendant, Glenn, and one other female. Inside the house police found fifty-three items consistent with the presence of a methamphetamine lab. One officer also observed what appeared to be a child’s room, although he admitted during cross-examination that he had no personal knowledge about who lived there or whether a child had been present at any particular time. However, a social worker

1Throughout this opinion, our citations refer to Section 30-6-1 as it appeared prior to the amendments in 2005. As a result, we refer to current Section 30-6-1(I) as Section 30-6-1(F). We also note that Defendant’s indictment and judgment incorrectly refer to the child abuse by endangerment provision as being found at Section 30-6-1(C) instead of Section 30-6-1(D).

2As explicitly described in testimony, these included two metal cans of acetone; one gallon and a separate quart of denatured alcohol; baggies; scales; a mason jar with a bi-layered liquid; a heating mantle; a mason jar with a reddish white powder substance; Red Devil lye; a plastic sports bottle; a Pyrex cooking dish; coffee filters; iodine; empty blister packs for pseudoephedrine or ephedrine (but apparently no pills); hydrogen peroxide; a cooler; and stained gloves.
who took jurisdiction over Defendant’s child after the raid later testified that Defendant had told her that Defendant’s child lived at the house. The social worker also testified that the child had been absent on the night before the raid, and that she had not asked whether the child had been absent on any previous nights.

Defendant was charged with violating Section 30-6-1, which at that time provided in relevant part that:

D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

1. placed in a situation that may endanger the child’s life or health . . .
2. The defendant acted with reckless disregard. To find that [Defendant] acted with reckless disregard, you must find that [Defendant] knew or should have known the defendant’s conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [her child].
3. [Defendant] was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child’s welfare;
4. [Defendant’s child] was under the age of 18;
5. This happened in New Mexico on or about August 12, 2004. In addition, the State proposed an instruction with the exact wording of Section 30-6-1(F). The attorneys for Defendant and her co-defendant objected that such an instruction violated their clients’ rights to due process because “innocent activity could be construed to meet the elements of this statute[.]” that the instruction was improper because it could not yet be found in the UJI; and that the instruction would prevent the jury from finding all of the required elements of child abuse. The judge suggested modifications to the language of Section 30-6-1(F), and notwithstanding renewed objections, the jury was eventually instructed on the judge’s modified version of the statute:

INSTRUCTION NO. 4.

Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.

At the end of Defendant’s trial, Defendant moved for a directed verdict on the grounds that there was no evidence “to show that the child was in the proximity or could have been exposed to [dangerous chemicals and equipment].” The motion was denied. The parties proceeded to discuss proposed jury instructions and agreed on an instruction on negligently permitting child abuse under Section 30-6-1(D) based on UJI 14-605 NMRA that read as follows:

INSTRUCTION NO. 3[.]

[Defendant] has been charged with negligently permitting child abuse which did not result in death or great bodily harm. For you to find [Defendant] guilty of child abuse which did not result in death or great bodily harm, as charged in the Grand Jury Indictment, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child];
2. The defendant acted with reckless disregard. To find that [Defendant] acted with reckless disregard, you must find that [Defendant] knew or should have known the defendant’s conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [her child];
3. [Defendant] was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child’s welfare;
4. [Defendant’s child] was under the age of 18;
5. This happened in New Mexico on or about August 12, 2004.

In addition, the State proposed an instruction with the exact wording of Section 30-6-1(F). The attorneys for Defendant and her co-defendant objected that such an instruction violated their clients’ rights to due process because “innocent activity could be construed to meet the elements of this statute[.]” that the instruction was improper because it could not yet be found in the UJI; and that the instruction would prevent the jury from finding all of the required elements of child abuse. The judge suggested modifications to the language of Section 30-6-1(F), and notwithstanding renewed objections, the jury was eventually instructed on the judge’s modified version of the statute:

INSTRUCTION NO. 4.

Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.

[Defendant] was convicted.

Defendant appealed, continuing to claim that the instruction was flawed and the evidence was insufficient to convict her. Trossman, No. 26,576, mem. op. at 2. The Court of Appeals affirmed the conviction. Id. at 8. First, the Court held that Jury Instruction No. 4 was proper because it “simply gave an alternative definition of what can constitute placing a child in a dangerous situation. It did not mandate a conviction . . . .” Id. Second, the Court held that the evidence was sufficient to support Defendant’s conviction because there was testimony that her child lived in the house and that being present around the chemicals was dangerous. Id. at 5-6. We reverse the Court of Appeals and vacate Defendant’s conviction.

DISCUSSION

I. JURY INSTRUCTION NO. 4 COULD HAVE CONFUSED OR MISDIRECTED A REASONABLE JUROR

[Defendant] argues that Jury Instruction No. 4 “mandated a conviction” of child abuse because it “took away an element from the jury’s determination—the element of whether the defendant’s actions of having a variety of lawful materials in her house amounted to child abuse.” In support of this argument, Defendant cites to a series of cases including State v. Parish, 118 N.M. 39, 878 P.2d 988 (1994), which concern the failure of trial courts to instruct juries on all of the essential elements of the crime charged. The State responds that since the Legislature “has gone to the trouble of providing a specific definition of a type of child abuse by endangerment” under Section 30-6-1(F), it was not error for the trial court to instruct on that basis. The State contends that Jury Instruction No. 4 did nothing more than create “a permissive inference,” which did not violate Defendant’s rights because it was rational for the jury to “make . . . the inference set forth in the challenged instruction, i.e., that allowing a child to be in a methamphetamine house is inherently dangerous to the child’s health and well being.” The Court of Appeals agreed with the State, holding that Section 30-6-1(F) created “an alternative definition” of child abuse and that nothing prevented the jury from being instructed on that basis, particularly given the alterations made by the trial court. Trossman, No. 26,576, mem. op. at 8.

[In Parish, 118 N.M. at 41-42, 878 P.2d 988 (1994), the Court held that the evidence was insufficient to sustain the conviction.]

3The record does not include this proposed instruction, but we are able to infer its contents from the discussion between the parties in the transcript.
at 990-91, we explained that jury instructions can be defective in three ways: (1) they can be facially erroneous, requiring reversal; (2) they can be vague, in which case the court must “evaluate whether another part of the jury instructions satisfactorily cures the ambiguity”; and (3) they can be contradictory, requiring reversal because “there is no way to determine whether the jury followed the correct or the incorrect instruction.” Whatever the case, the ultimate concern of the reviewing court must be whether “a reasonable juror would have been confused or misdirected.” Id. at 42, 878 P.2d at 991. To determine whether Jury Instruction No. 4 was erroneous under the standards enunciated in Parish, we must first resolve the conflict between the parties regarding the import of Section 30-6-1(F). 

[9] Rule 11-302(A) NMRA provides that “in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.” (Emphasis added.) A presumption may be instructed to the jury in a criminal trial, subject to certain restrictions considered later in this opinion. Rule 11-302(C). In the most general terms, “a presumption is a standardized practice, under which certain facts [the basic facts] are held to call for uniform treatment with respect to their effect as proof of other facts [the presumed facts].” 2 Kenneth S. Broun, McCormick on Evidence § 342, at 495 (6th ed. 2006). At first glance, the basic facts under Section 30-6-1(F) appear to be both (1) the act of allowing a child “to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance,” and (2) the mens rea standard “knowingly, intentionally or negligently.” These basic facts are given a certain uniform effect (they are “prima facie evidence”) regarding the presumed fact of child abuse under Section 30-6-1(D).

[10] A careful reading of Sections 30-6-1(D) and (F) requires us to slightly modify this conclusion, however. First, we note that the acts described in Section 30-6-1(F) are consistent with only one theory of child abuse: endangerment under Section 30-6-1(D)(1). Sections 30-6-1(D)(2) and (3) create the other possible forms of child abuse when a child is “tortured, cruelly confined or cruelly punished” or “exposed to the inclemency of the weather.” Second, we observe that the mens rea standard of Section 30-6-1(F) (“knowingly, intentionally or negligently”) is nothing more than a restatement of the mens rea standard under Section 30-6-1(D). Given these considerations, we hold that the presumption created by Section 30-6-1(F) can only be understood to allow the basic fact of allowing a child “to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance” to serve as evidence of the essential element of endangerment under Section 30-6-1(D) (1), when this theory of child abuse is at issue. See UJI 14-605.

[11] Rule 11-302 also specifies the effect that the basic facts under Section 30-6-1(F) should have regarding the presumed fact of endangerment. The jury may, but is not required to, infer the presumed fact upon evidence of the basic facts; in other words, “[t]he court is not authorized to direct the jury to find a presumed fact against the accused[,]” if the jury finds the basic facts. Rule 11-302(B); see also Rule 11-302(C). “This provision incorporates the constitutional requirement that presumptions not be conclusive in criminal cases even if unrebutted.” State v. Matamoros, 89 N.M. 125, 127, 547 P.2d 1167, 1169 (Ct. App. 1976) (internal quotation marks and citation omitted); see, e.g., State v. Jones, 88 N.M. 110, 112, 537 P.2d 1006, 1008 (Ct. App. 1975) (concluding that an instruction was impermissibly mandatory when it read that “the requisite knowledge or belief that the property has been stolen is presumed in the case of an individual who is found in possession or control of property stolen from two or more persons on separate occasions.”) (internal quotation marks omitted) (emphasis added). As the United States Supreme Court has explained, to satisfy the mandates of due process, a presumption “must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979). What our criminal rules refer to as a presumption is more properly termed a permissive inference, the purpose of which “is to guide the jury by highlighting the propriety of drawing a factual inference they might otherwise be naturally less likely to draw.” 1 Michael H. Graham,

[4] For example, Jury Instruction No. 3 in Defendant’s case, supra. See also UJI 14-605.

Handbook of Federal Evidence § 303.4, at 296 (6th ed. 2006); see also Jones, 88 N.M. at 113, 537 P.2d at 1009 (“The effect of [the predecessor of Rule 11-302] . . . is to abolish ‘true’ presumptions in criminal cases.”).

[12] Rule 11-302(C) guides the trial court in assuring that a jury instruction is given effect only as a permissive inference:

Whenever the existence of a presumed fact against the accused is submitted to the jury, the court shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

UJI 14-5061 NMRA puts the mandates of Rule 11-302 into a specific form that “shall be given when the state relies upon a statutory ‘presumption’ to prove an element of the crime or when an element is inferred (‘implied’) from certain facts.” UJI 14-5061 Use Note. Pursuant to our reading of the statute, such an instruction based on UJI 14-5061 could have been given in addition to an instruction on the essential elements of child abuse by endangerment and should have read as follows:

Proof that [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child] is an essential element of negligently permitting child abuse as defined elsewhere in these instructions. The burden is on the state to prove that [Defendant] permitted [her child] to be placed in a situation which endangered the life or health of child beyond a reasonable doubt.

In this case if you find that it has been proved that [Defendant] allowed [her child] to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance, you may but are not required to find that it has been proved that
[Defendant] permitted [her child] to be placed in a situation which endangered the life or health of [her child]. You must consider all of the evidence in making your determination. In order to find the defendant guilty of negligently permitting child abuse, you must be convinced beyond a reasonable doubt that the defendant permitted [her child] to be placed in a situation which endangered the life or health of [her child].

{13} Although the trial judge made several well-considered changes to the language of Section 30-6-1(F) before instructing the jury—for instance, changing “shall” to “may”—Jury Instruction No. 4 entirely lacked the marked emphasis placed by Rule 11-302 and UJI 14-5061 on the necessity that the jury find the essential element of endangerment beyond a reasonable doubt. Thus, while we disagree with Defendant’s characterization of Jury Instruction No. 4 as mandating a finding of guilt, we believe that the risk of confusion caused by this instruction is equally troubling. See State v. Montano, 1999-NMCA-023, ¶ 18, 126 N.M. 609, 973 P.2d 861 (reversing a conviction for aggravated battery when a jury instruction implied that the jury need not find that the alleged weapon could have caused death or serious injury and was therefore ambiguous). We perceive a twofold risk under Jury Instruction No. 4: (1) the jury might have understood it to supplant the reasonable doubt standard; and (2) the jury might not have understood that the presumption did not relieve the jury of the necessity of finding the essential element of endangerment. See Ulster County, 442 U.S. at 156.

{14} Neither can we conclude that other instructions cured the error. See State v. Crosby, 26 N.M. 318, 324, 191 P. 1079, 1081 (1920) (“If this instruction was ambiguous and incomplete, and also capable of another, different, and correct interpretation . . . it might then be cured by the subsequent instruction . . .”). Although Jury Instruction No. 2 provided that “[t]he burden is always on the state to prove guilt beyond a reasonable doubt[,]” it did not explain what it was, exactly, that the jury must find beyond a reasonable doubt. If instructed correctly per UJI 14-5061, Jury Instruction No. 4 would have explained that “[i]n order to find the defendant guilty of negligently permitting child abuse, you must be convinced beyond a reasonable doubt that the defendant permitted [her child] to be placed in a situation which endangered the life or health of [her child]” (emphasis added). It is the ultimate fact of endangerment that must be proven beyond a reasonable doubt—not just the basic facts from which the inference may be drawn. We must vacate Defendant’s conviction where there was a possibility that the jury could have convicted her without finding each of the elements of the crime charged beyond a reasonable doubt. See Parish, 118 N.M. at 44-46, 878 P.2d at 993-95 (reversing a conviction when jury instructions failed to place on the State the burden of proving that the defendant did not act in self-defense).

II. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT’S CONVICTION

{15} Defendant claims that the evidence presented at trial was insufficient to support her conviction because it did not show that her child was endangered, since he “was not in the residence at the time that any manufacture of any controlled substance took place.” Defendant argues that our review must employ the criterion of endangerment set forth by our child abuse precedents, that endangered children must be “exposed to a substantial risk to their health.” State v. Trujillo, 2002-NMCA-100, ¶ 21, 132 N.M. 649, 53 P.3d 909. The State argues that Section 30-6-1(F) creates its own substantive standard that obviates the need to determine whether there was sufficient evidence of endangerment, as defined by our precedents. Moreover, the State argues that even under the endangerment standard, testimony established the child’s presence in the house and the dangers that would have resulted from being in the presence of the seized chemicals. The Court of Appeals concluded the jury could infer that Defendant’s child was endangered because dangerous chemicals were stored in the house where he lived. Trossman, No. 26,576, mem. op. at 5-6.

{16} To decide whether there was sufficient evidence, we conduct the following analysis: “[I]nitially, the evidence is viewed in the light most favorable to the verdict. Then the appellate court must make a legal determination of whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” State v. Lopez, 2008-NMCA-111, ¶ 14, 144 N.M. 705, 191 P.3d 563 (internal quotation marks and citation omitted). We “indulge all permissible inferences in favor of upholding the verdict.” State v. Apodaca, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). Also, in reviewing such cases for sufficient evidence, we must not “‘par

{17} As an initial matter, we must settle the debate between the parties over whether the sufficiency of the evidence in this case should be decided, as Defendant urges, under traditional endangerment standards or, as the State argues, solely with reference to Section 30-6-1(F). We concede that the State’s position has, on its face, a certain appeal. Section 30-6-1(F) is framed in terms of “prima facie evidence.” In general legal parlance, “prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” Black’s Law Dictionary 598 (8th ed. 2004); see also Matamoros, 89 N.M. at 127, 547 P.2d at 1169. The Court of Appeals applied this definition to a provision similar to Section 30-6-1(F) in In re Shaneace L., 2001-NMCA-005, ¶ 12, 130 N.M. 89, 18 P.3d 330. In Shaneace L., the Court reviewed the defendant’s conviction under NMSA 1978, Section 30-20-12 (1967) (“Use of telephone to terror, intimidate, threaten,
harass, annoy or offend") for sufficiency of the evidence in light of Section 30-20-12(B), which provided that “[t]he use of obscene, lewd or profane language or the making of a threat or statement . . . shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.” 2001-NMCA-005, ¶ 12. Unlike the case at bar, in Shaneace L., no instruction was given on the basis of this provision. The Court of Appeals held that Section 30-20-12(B) was the Legislature’s way of mitigating “the difficulty in proving the requisite statutory intent[,]” Id. As such, the Court of Appeals concluded that “testimony that Child threatened to kill [the victim] and her baby shortly after the placing of the telephone call is sufficient evidence from which the children’s court could infer that Child had the intent to annoy or harass [the victim].” Id. In short, the Court viewed the “prima facie evidence” provision as creating an evidentiary standard for use in reviewing claims of insufficient evidence. If we were to apply this reasoning to the case at bar, we would hold that there was sufficient evidence of endangerment if a rational jury could have found the basic facts described in Section 30-6-1(F) beyond a reasonable doubt. This would permit a finding of endangerment when, for example, a child was allowed to enter and remain in a house containing iodine that the child’s parent planned to use in methamphetamine production, even if the situation would not qualify as endangerment under our precedents.

We cannot adopt this reasoning. To interpret Section 30-6-1(F) in accordance with Shaneace L. would bring us into conflict with our specific rule on presumptions. Rule 11-302(B) requires that:

When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt.

When the Legislature has directed that one or more basic facts may be considered prima facie evidence of a presumed fact, the trial court must test the sufficiency of the evidence of the presumed fact before the jury may be instructed that the presumed fact may be inferred from the basic fact or facts. In Defendant’s case, Rule 11-302(B) requires that the trial court be satisfied that sufficient evidence has been presented of the child’s endangerment before giving an instruction in accordance with UJI 14-5061. As discussed above, this requirement assures that the presumption does not “undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” Ulster County, 442 U.S. at 156. An evidentiary presumption does not change the State’s burden to establish the essential elements of the crime without reference to the presumption itself. Accordingly, for the purposes of our review, the evidence must have been sufficient to prove endangerment under Section 30-6-1(D)(1).

For this reason, to the extent that Shaneace L. suggests that a statutory provision like Section 30-6-1(F), making a basic fact prima facie evidence of a presumed fact, is a standard for deciding the sufficiency of the evidence, it is overruled. However, we have no quarrel with the ultimate outcome of Shaneace L.; there was certainly sufficient evidence of intent in that case, not because of the presumption, but because of the natural inference that flows from threatening behavior to the intent to annoy or harass. See, e.g., State v. Silva, 2008-NMSC-051, ¶ 18, 144 N.M. 815, 192 P.3d 1192 (observing that “[i]ntent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence” (internal quotation marks and citation omitted)).

Viewing the evidence as a whole under the endangerment standard, we are compelled to agree with Defendant that there was insufficient evidence to support her conviction. We have held that in creating the crime of child abuse by endangerment, “the Legislature did not intend to criminalize conduct creating a mere possibility, however remote, that harm may result to a child.” Graham, 2005-NMSC-004, ¶ 9 (internal quotation marks and citations omitted).

In making this offense a third degree felony, the legislature intended to address conduct with potentially serious consequences to the life or health of a child. The coupling in the statute of the word “health” with the word “life” suggests to us that the legislature intended to address situations in which children are exposed to a substantial risk to their health.

Trujillo, 2002-NMCA-100, ¶ 21; see also UJI 14-603 NMRA (requiring a “substantial and foreseeable risk” to the child). In State v. Jensen, 2006-NMSC-045, ¶ 10, 140 N.M. 416, 143 P.3d 178, we explained that “[p]roof of child endangerment is sufficient for a conviction if a defendant places a child within the zone of danger and physically close to an inherently dangerous situation.”

Applying the substantial and foreseeable risk standard, our courts have found sufficient evidence of endangerment when the defendant invited a minor to drink alcohol, view pornography, and eat possibly tainted food in a filthy house, id. ¶¶ 15-16; when marijuana, a controlled substance determined by the Legislature to be hazardous, had been left by the defendant in his house in locations where children had been playing prior to its discovery and in a baby’s crib, Graham, 2005-NMSC-004, ¶¶ 10-12; when the defendant drove drunk and in a dangerous manner with her children in the car, State v. Castañeda, 2001-NMCA-052, ¶ 22, 130 N.M. 679, 30 P.3d 368; and when the defendant pointed a gun at a woman and threatened to kill her while her daughter stood behind her, State v. McGruder, 1997-NMSC-023, ¶¶ 37-38, 123 N.M. 302, 940 P.2d 150. Our courts have found insufficient evidence of child abuse by endangerment when the defendant had allowed a stroller to roll in front of him beyond his reach and it tipped over, injuring the child, State v. Massengill, 2003-NMCA-024, ¶ 47, 133 N.M. 263, 62 P.3d 354; when the defendant assaulted the child’s mother while the child was in a different part of the house, Trujillo, 2002-NMCA-100, ¶¶ 19-20, 132 N.M. 649, 53 P.3d 909; and when the defendant had left his child in a car with the child’s mother, ten to fifteen feet from the defendant’s drug transaction, State v. Roybal, 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct. App. 1992). These cases clearly require the State to prove the child’s presence in a situation where harm was both probable and sufficiently grave to justify a criminal sanction.

In this case, we are concerned with the lack of evidence that establishes the presence of the child in the home on or about August 12, 2004 and under conditions that could have endangered his life or health. The evidence supporting the jury’s verdict is as follows. A social worker testified that Defendant told her that the child “lived with [Defendant]” at the house in Chapparal, but could provide no specific dates that the child was present at the house,
and in fact stated that the child was not present the night before the raid. A police officer testified that he had seen what appeared to be a child’s room in the house but conceded that he had no personal knowledge about who lived in the room or when he or she had been present. The mere fact that the child normally resided in the home is insufficient. The Legislature requires actual presence, as evidenced by the basic facts detailed in Section 30-6-1(F)—that the child be allowed to enter or remain in the building at the relevant time. Similarly, every New Mexico case cited above has as its premise that the child was actually present when the dangerous situation occurred.

{23} In addition, our cases require a greater showing of risk of harm. Here, there was testimony that on the day of the raid, the house contained numerous items that were most likely used for methamphetamine production in the house. However, there was no evidence regarding when any of the items had been taken into the house, with the possible exception of some matches, pseudoprophedrine, and ephedrine, which testimony implied may have been taken into the house about thirty-six hours before the raid. Police testified that some methamphetamine labs can be moved quickly from place to place and that others cannot, but did not specify into which category the lab in the house fell. Witnesses testified that some of the materials found in the house could be dangerous: iodine could result in burns, lye is a carcinogen, and organic solvents like acetone could be dangerous. However, there was no evidence that any of these legal, household chemicals were actually stored in a manner that could endanger a child in the house. There was ample evidence that the process of creating methamphetamine is extremely hazardous, releasing toxic gases and creating the potential for fires. However, there was no evidence regarding when or how often methamphetamine production had occurred in the house. Indeed, testimony suggested that this process takes only six to eight hours. There was evidence that, because of the hazards inherent in methamphetamine production and the likelihood that an entire house used in processing methamphetamine could become contaminated, police typically use fully contained suits to enter houses containing methamphetamine labs. However, there was no evidence that the house in Chapparal was actually contaminated. Finally, we note that no methamphetamine was found in the house.

{24} Viewing the evidence as a whole, we conclude that there was not sufficient evidence to support a finding of child abuse by endangerment. We concede that if the State had produced evidence that Defendant had allowed her child to be present during the process of methamphetamine production, or had stored such dangerous chemicals in ways that could have harmed her child, we would be highly inclined, in light of the precedents cited above, to conclude that there was sufficient evidence that she placed her child’s life or health at risk. Cf. Graham, 2005-NMSC-004, ¶¶ 10-12 (finding sufficient evidence of endangerment when the defendant had allowed children to play in the vicinity of marijuana and marijuana was found in a child’s crib). In the case before us, however, the State failed to provide any evidence whatsoever that Defendant allowed her child to be present in the house under hazardous conditions. Although a jury is certainly entitled to draw reasonable conclusions from the circumstantial evidence produced at trial, see id. ¶ 10, it must not be left to speculate in the absence of proof. See Silva, 2008-NMSC-051, ¶ 19 (reversing a conviction of tampering with evidence when the State showed that the police had failed to find a weapon that was previously in the defendant’s possession, and did not produce any evidence that defendant had acted in any way to hide or destroy the weapon). In State v. Leal, 104 N.M. 506, 510, 723 P.2d 977, 981 (Ct. App. 1986), the Court of Appeals overturned a conviction for negligently permitting child abuse when the child’s injuries occurred at Defendant’s residence within twelve to eighteen hours before the child was taken to the hospital, but no specific evidence placed Defendant at the scene when the violence was perpetrated by another. We believe that, just as “[t]he fact that an injury occurred is not sufficient to prove this defendant guilty[,]” id., in the case at bar, the likelihood that a hazardous activity probably took place in the house at some time is not sufficient to prove Defendant guilty of allowing her child to be present while it took place. There was no testimony that placed Defendant’s child at the house under any hazardous conditions or suggested that hazardous conditions must have been ongoing in such a way that the jury could have judged the probability that the child must have encountered them at some point. Similarly, there was no testimony that indicated the house was actually contaminated or chemicals were stored in such a way that the child’s presence at any time would have been dangerous. Even if the jury could have concluded that at some point over the months prior to the arrest, Defendant’s child was likely to have been endangered by Defendant’s activities, it would not have been entitled to convict; the jury instructions only charged Defendant for conduct occurring “on or about August 12, 2004.” The State simply did not present any evidence to allow the jury to draw the specific inferences required for it to find endangerment. For these reasons, we find that there was insufficient evidence to support Defendant’s conviction of child abuse.

CONCLUSION

{25} The Court of Appeals’ opinion is reversed. Because the jury was instructed improperly and because there was insufficient evidence to convict Defendant, her conviction is vacated.

{26} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
PETRA JIMÉNEZ MAES, Justice (specially concurring).

MAES, Justice (specially concurring).

{27} I concur in the majority opinion. I write separately, however, because I disagree with the majority that “[t]he mere fact that...” I believe that, absent evidence to the contrary, it is reasonable to infer that a ten-year-old child sleeps in his primary residence and, therefore, the evidence in the present case was sufficient to prove that Defendant permitted the child to enter or remain in the home on or about August 12, 2004. Nonetheless, for the reasons explained in the majority opinion, the evidence was insufficient to prove that the chemicals or equipment subsequently found in the home on the morning of August 12 posed a risk of danger to the child’s life or health approximately two days earlier, on the night of August 10. As aptly stated by the majority, “in the case at bar, the likelihood that a hazardous activity probably took place in the house at some time is not sufficient to prove Defendant guilty of allowing her child to be present while it took place.” Accordingly, the evidence was insufficient to support Defendant’s conviction of negligently permitting child abuse contrary to Section 30-6-1(D).

PETRA JIMENEZ MAES, Justice
From the New Mexico Supreme Court

Opinion Number: 2009-NMSC-035

Topic Index:
Appeal and Error: Substantial or Sufficient Evidence
Constitutional Law: Due Process
Criminal Law: Child Abuse and Neglect; and Felony
Criminal Procedure: Jury Instructions; and Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Respondent,
versus
JULIO CHAVEZ,
Defendant-Petitioner.
No. 31,202 (filed: June 23, 2009)

ORIGINAL PROCEEDING ON CERTIORARI
JAMES WAYLON COUNTS, District Judge

HUGH W. DANGLER
Chief Public Defender
WILLIAM A. O'CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

GARY K. KING
Attorney General
ANITA CARLSON
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

OPINION
RICHARD C. BOSSON, JUSTICE

[1] When Defendant Julio Chavez woke up on the morning of October 2, 2003, he discovered that his infant daughter, Shelby, was not breathing. Despite repeated efforts, she could not be revived. A police investigation into her death revealed that Shelby had been placed to sleep in a dresser drawer filled with blankets and padding because her bassinet had broken a day or two earlier. In addition, police inspected Defendant’s home and discovered impoverished and dirty living conditions that, in the State’s opinion, posed a significant danger to Shelby and her two young brothers, Juan and Leo. As a result, Defendant was charged with two counts of child abuse by endangerment with respect to the two boys based on the living conditions in his home. Defendant was charged with one count of child abuse resulting in death and two counts of other endangerment charges. [2] In this appeal, we first explore the sufficiency and nature of the evidence necessary to sustain a child endangerment conviction when it is based only on filthy living conditions and without any underlying criminal conduct. This is not the first time we have confronted this question. We refer to our recent holding in State v. Jensen, 2006-NMSC-045, ¶ 14, 140 N.M. 416, 143 P.3d 178, where we stated that “[w]hen filthy living conditions provide the exclusive basis for charging a defendant with child endangerment, the State must assist the trier of fact with evidence that supports a finding that there is a reasonable probability or possibility that such filthy conditions endangered the child.” Although we ultimately upheld the endangerment conviction in Jensen, we based our decision on a number of risk factors, including criminal activity coupled with the conditions in the home. This is the first case in which filthy conditions alone provide the basis for the conviction. We conclude that the evidence presented at trial was insufficient to support a finding that Defendant’s conduct created a substantial and foreseeable risk of harm to the children. Whether a defendant’s conduct creates a substantial and foreseeable risk of harm is what determines whether the child was endangered. As we will explain, we no longer find the terms “probability” or “possibility” helpful to our analysis and their use should be discontinued. [3] In addition, we address whether the sleeping environment for baby Shelby created a substantial and foreseeable risk of harm sufficient to support a criminal child endangerment conviction. For the reasons we discuss in more detail below, the evidence did not establish that the risk of harm was substantial and foreseeable, and therefore, we reverse. The Court of Appeals having decided otherwise, we reverse.

BACKGROUND

[4] Defendant and Jennifer Wheeler had three children together over the course of their eight-year relationship: Juan and Leo, ages four and two, and Shelby, who was five months old at the time of her death on October 2, 2003. In April 2003, shortly after Shelby was born, the family relocated from Alamogordo to a mobile home in Tularosa. Jennifer worked long hours, leaving Defendant to stay at home with the children. [5] On October 1 or the day before, Shelby’s bassinet broke. Defendant planned to get a crib for Shelby from his mother, but in the meantime he fashioned a temporary bed for Shelby by placing a 29-by-15 inch dresser drawer on the bedroom floor filled with a pillow, a sheet, and a blanket for padding. That night, Jennifer laid Shelby in the drawer bed to sleep. Shelby awoke around 5:00 a.m. and Jennifer and Defendant placed Shelby back to sleep on her stomach in the drawer. When Defendant woke up hours later, he discovered that Shelby was not breathing and frantically sought help. Resuscitation efforts were ultimately unsuccessful.

[6] At the hospital police interviewed Defendant and Jennifer; and later that afternoon went to inspect their home. One officer created a videotape of what he saw, which was played for the jury at trial. Several witnesses catalogued the unsafe and unhygienic conditions in and around the house, including the presence of rodent droppings in various places in the house, such as the cabinets where the dishes were stored and in Shelby’s makeshift drawer bed. The home had no gas utility or hot water because the propane tank was empty and disconnected. Dirty clothes were scattered throughout the house; a strong-smelling bag of dirty diapers was left on the floor in the master bedroom next to the drawer bed, and there was a bowl of curdled milk on the floor in the kitchen. Outside, the yard contained a trash pit rife with flies and a pungent odor.
The home was also in need of repair and maintenance. The ceiling tiles were stained and starting to grow mold, evidencing a water leak, and one area of the ceiling in the living room appeared ready to collapse. The smoke detector had been disabled and was without a battery. The shower leaked and appeared to have mold, and a razor was left out in the bathroom where it might have been accessible to the children. Outside the home, where the children would run around barefoot and in diapers, there were glass shards from a broken window and a collapsed shed that contained exposed, rusty nails sticking out of lumber on the ground. The ramp leading to the front door of the mobile home contained a gap of several inches. There were also open cans of solvents or cleaners on the porch.

On a positive note, the refrigerator contained fresh milk and cheese, and the record indicates that the children were physically healthy and well-nourished. There was no evidence of drugs or alcohol in the home. Jennifer Wheeler testified that Defendant never used drugs and rarely consumed alcohol, and in fact he had helped her stop using drugs when they met.

On these facts, the State charged Defendant with one count of child abuse resulting in death and three counts of child abuse by endangerment, one count for each child. After a three-day trial which focused on Shelby’s death, the jury acquitted on the charge of child abuse resulting in death, but convicted Defendant of the three endangerment counts, including the count pertaining to Shelby. The Court of Appeals reversed one of the three convictions, holding that Defendant’s abuse of his two sons occurred as a single course of conduct stemming from the conditions in the home and constituted only one violation of the statute. State v. Chavez, 2008-NMCA-126, ¶ 19, 145 N.M. 11, 193 P.3d 558. However, the Court held that the drawer bed presented a danger unique to baby Shelby and was sufficient to support a second, separate conviction for child endangerment. Id. ¶ 20. On certiorari, Defendant argues that the conditions in his home, including the makeshift bed he fashioned for his daughter, were the result of the family’s poverty and did not endanger his children within the meaning of our child abuse statute.

**DISCUSSION**

**Standard of Review**

To the extent Defendant asks us to interpret our criminal child abuse statute, that presents a question of law which is reviewed de novo on appeal. See State ex rel. Children, Youth & Families Dep’t v. Shawna C., 2005-NMCA-066, ¶ 24, 137 N.M. 687, 114 P.3d 367 (citing State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995)). A statute defining criminal conduct must be strictly construed. Santillanes v. State, 115 N.M. 215, 221, 849 P.2d 358, 364 (1993). “A criminal statute may not be applied beyond its intended scope, and it is a fundamental rule of constitutional law that crimes must be defined with appropriate definiteness.” Id. (citing State v. Byebee, 109 N.M. 44, 46, 781 P.2d 316, 318 (Ct. App. 1989)).

After reviewing the statutory standard, we apply a substantial evidence standard to review the sufficiency of the evidence at trial. State v. Treadway, 2006-NMCA-008, ¶ 7, 139 N.M. 167, 130 P.3d 746. “[T]he relevant question is, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (alteration in original) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

In performing this review, we must view the evidence in the “light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Cunningham, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. “The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict.” State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

**Child Abuse and Neglect**

**Giving the special recognition of the needs of children and their inability to protect themselves, our Legislature has adopted a framework of both criminal and civil laws to address child abuse. State v. Graham, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285. Recognizing the wide variety of ways that a child can be harmed by abuse and neglect, our Legislature has empowered the State with a broad array of civil remedies, ranging from the benign, like ensuring that children receive nutritious meals, to the intrusive, such as placement of children in foster care or termination of parental rights altogether. See NMSA 1978, § 32A-4-22(B) (2005). On the far end of this spectrum lies the sanction for criminal child abuse, which classifies abuse as, at a minimum, a third-degree felony punishable by up to three years imprisonment. NMSA 1978, § 30-6-1(D)-(E) (2005). As a practical matter, criminal convictions for child abuse may also lead to the loss of parental rights over those children.**

**On the civil side, the Legislature has enabled the State to act preemptively to protect children “based upon perceived future harm.” Shawna C., 2005-NMCA-066, ¶ 26. The civil process addresses situations in which the child “has suffered or who is at risk of suffering serious harm because of the action or inaction of the child’s parent, guardian or custodian.” NMSA 1978, § 32A-4-2(B)(1) (1999) (emphasis added). Our Court of Appeals recently stated that when evaluating abuse and neglect cases, we emphasize that the focus should be on the acts or omissions of the parents in their caretaking function and not on apparent shortcomings of a given parent due to his or her unfavorable status. While no child would ask to have a poor, incarcerated, or addicted parent, poverty, incarceration, or addiction alone does not perforce equate to neglect as set out in the [civil] statute.**


When parental conduct or the home environment places a child at risk, the State can use its civil powers to remove the danger to the child, either by allowing the child to remain with the parents subject to their compliance with court-ordered conditions, by removing the child from the home, or by transferring legal custody to another. See § 32A-4-22(B). Importantly, this process contemplates that parents will be afforded advance notice and an opportunity to comply with a treatment plan before the State proceeds to more drastic remedies. See § 32A-4-22(C). Parents will have a reasonable opportunity to improve their parenting skills, with the ultimate goal being to preserve and reunify the family.

**Criminal Child Abuse by Endangerment**

Our Legislature has also fashioned a parallel criminal scheme to punish conduct that endangers a child. A third-degree felony, child abuse by endangerment occurs when an adult knowingly, intentionally, or negligently places a child “in a situation that may endanger the child’s life or health.” Section 30-6-1(D)-(E). Child abuse by endangerment, as opposed to physical abuse of a child, is a special classification designed to address situations where an accused’s conduct exposes a child to a significant risk of harm, “even though the child does not suffer a physical injury.” State v. Ungarten, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App.
and construing the criminal law, both our
128 N.M. 345, 992 P.2d 896)). “In writing
intelligence a fair opportunity to determine
whether our Legislature anticipated that criminal
prosecution would be reserved for the most
serious occurrences, and not for minor or
theoretical dangers. See Santillanes, 115
N.M. at 222, 849 P.2d at 365 (criminal
prosecutions are for “conduct that is mor-
cally culpable, not merely inadvertent.”).
Therefore, we have taken a more restrictive
view of the endangerment statute, and have
interpreted the phrase “may endanger” to
require a “reasonable probability or pos-
sibility that the child will be endangered.”
Ungarten, 115 N.M. at 609, 856 P.2d at 571;
see also State v. McGruder, 1997-NMSC-
023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (ap-
plying Ungarten “reasonable probability or
possibility” test).
17 New Mexico courts have evaluated child endangerment under the “reasonable
probability or possibility” standard for the
past sixteen years. In application, however,
this standard has created uncertainty in child
derangement cases because “probability” and
“possibility” connote two different
levels of risk. “Probability” conveys a
certain likelihood that a result will occur,
whereas “possibility” means that something
is merely capable of occurring. As an un-
tended consequence, our use of both terms
to define endangerment has left unclear the
gravity of the risk that the child will suffer a lethal shot
1993). Under this standard, an accused’s
culpability is premised upon the degree of
danger created by his conduct.
16 Taken literally, our endangerment
statute could be read broadly to permit pros-
ecuting for any conduct, however remote
the risk, that “may endanger [a] child’s life
or health.” However, by classifying child
endangerment as a third-degree felony, our
Legislature anticipated that criminal
prosecutions were for “conduct that is mor-
cally culpable, not merely inadvertent.”). As
the Colorado Supreme Court observed
when construing an endangerment statute
identical to our own, “we seriously doubt
whether ‘may’ in a criminal statute provides
a fair description of the prohibited conduct,
since virtually any conduct directed toward
a child has the possibility, however slim,
of endangering the child’s life or health.”
People v. Hoehl, 568 P.2d 484, 486 (Colo.
1977) (en banc) (challenging defendant with
endangerment after allegedly holding child’s
hand to a radiator, resulting in serious sec-
ond- and third-degree burns) (interpreting
prior version of Colo. Rev. Stat. § 18-6-
401(1)(A) (1973)).
19 To avoid due process and vague-
ness problems, courts have interpreted may
to require a greater degree of certainty to
effectuate legislative intent. Black’s Law
Dictionary 1000 (8th ed. 2004); Hoehl, 568
P.2d at 486 (construing an identical endan-
germent statute’s use of “may endanger” as
requiring a “reasonable probability that the
child’s life or health will be endangered”
(emphasis added)); State v. Fisher, 631 P.2d
239, 242 (Kan. 1981) (word “may” as used
in Kansas child abuse statute given restric-
tive construction, indicating reasonable
probability or likelihood the child would
be placed in situation whereby that child’s
life or health will be endangered) (emphasis
added)). But see State v. Hubble, 2009-
NMSC-014, ¶ 13, 146 N.M. 70, 206 P.3d
579 (interpreting the term “may” to require
only a possibility that other traffic would be
affected for purposes of a misdemeanor turn
signal violation).
20 However, we acknowledge there
are many situations that may not produce a
strict mathematical probability of harm, but
nevertheless endanger a child. For example,
if a defendant placed one bullet in a six-shot
revolver, spun the chamber, placed the pistol
to the child’s head, and pulled the trigger,
the risk that the child will suffer a lethal shot
is only 16.67%, less than a statistical prob-
ability. Yet few would doubt the very real
and unacceptable risk of harm to the child.
21 Even more problematic are situa-
tions such as the present case, where the
probability of harm cannot easily be mea-
sured or accurately quantified as a math-
ematical statistic. Therefore, a standard that
requires proof of a strict probability under
all circumstances poses too rigid a bar in its
application. For these reasons, it is appar-
et that neither probability nor possibility
provides an accurate, universal description of legislative intent.
22 Accordingly, we look to the Uni-
form Jury Instruction on child endanger-
ment for guidance on the endangerment
standard. UJI 14-604 NMRA asks the jury
to determine whether the “defendant caused
the child to be placed in a situation which
endangered the life or health of the child.”
The UJI does not define “endangerment.”
See Black’s Law Dictionary 568 (8th ed.
2004) (“endangerment” is “[t]he act or an
instance of putting someone or something in
danger; exposure to peril or harm”).
However, to find that the accused acted with
the requisite mens rea, the jury is instructed
that it must find that “defendant’s conduct
created a substantial and foreseeable risk”
of harm. See UJI 14-604 (emphasis added).
This standard more closely aligns with the
legislative purpose that animates the child
derangement statute - to punish conduct
that creates a truly significant risk of serious
harm to children.
23 Our prior cases illustrate that there
are several factors the factfinder may con-
sider to determine whether the risk cre-
ated by an accused’s conduct is substantive
and foreseeable. One is the gravity of the
threatened harm. See State v. Trujillo, 2002-
NMSC-100, ¶ 21, 132 N.M. 649, 53 P.3d
909 (stating that a defendant’s conduct must
create a substantial risk with “potentially
serious consequences to the life or health
of a child”). It is the gravity of the risk
that serves to place an individual on notice
that his conduct is perilous, and potentially
criminal, thereby satisfying due process
concerns. See State v. Schoonmaker, 2008-
NMSC-010, ¶ 43, 143 N.M. 373, 176 P.3d
1105 (“What distinguishes civil negligence
from criminal negligence is not whether
the person is subjectively aware of a risk of
harm; rather, it is the magnitude of the risk
itself.” (Emphasis added.)).
24 In many of our prior endanger-
ment cases, the seriousness of the threatened in-
jury has often been apparent. See Graham,
2005-NMSC-004, ¶ 10 (defendant left
marijuana in areas accessible to children, including a potent marijuana bud in a baby crib); McGruder, 1997-NMSC-023, ¶ 5-6 (defendant fatally shot mother’s boyfriend before threatening to shoot mother who was standing in front of her child in the line of fire); Ungarten, 115 N.M. 609-10, 856 P.2d 571-72 (defendant brandished knife at child’s father while child was standing directly behind father, and child testified that the knife came so close to his body that he “could not discern whether it was directed at him or his father”); State v. Guilez, 2000-NMSC-020, 129 N.M. 240, 4 P.3d 1231 (defendant failed to secure three-year-old child in a safety seat and drove his truck while intoxicated at night without working head lights or tail lights before crashing into a fence), abrogated by State v. Santillanes, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456; State v Castañeda, 2001-NMCA-052, ¶ 14, 130 N.M. 679, 30 P.3d 368 (defendant drove while intoxicated on the wrong side of a divided highway with children in the vehicle that were unsecured by seatbelts).

We have also relied on the Legislature’s independent assessment of conduct that is inherently perilous when evaluating endangerment convictions. See Graham, 2005-NMSC-004, ¶ 12 (noting that the Legislature’s designation of marijuana as a Schedule I controlled substance, increased penalties for distributing marijuana to minors or in the vicinity of schools, all illustrate a legislative determination that marijuana is a dangerous substance, particularly for minors.). Where a defendant’s underlying conduct violates a separate criminal statute, such legislative declaration of harm may be useful, though not dispositive, to an endangerment analysis when the Legislature has defined the act as a threat to public health, safety, and welfare.

In addition, although no longer the determinative factor, the likelihood that harm will occur remains an important consideration when evaluating the magnitude of the risk. We have declined to uphold endangerment convictions where the risk of harm is too remote, which may indicate that the harm was not foreseeable. See State v Clemonts, 2006-NMCA-031, ¶ 16, 139 N.M. 147, 130 P.3d 208 (reversing child endangerment conviction where defendant committed misdemeanor traffic offenses while engaged in low-speed police chase with children in car but defendant “did not expose a substantial risk to the children’s lives or health as passengers in Defendant’s car” (emphasis added)); State v Roybal, 115 N.M. 27, 34, 846 P.2d 333, 340 (Ct. App. 1992) (reversing conviction for child endangerment where defendant left his six-year-old daughter in car near a drug transaction but removed from any actual threat of harm); Jensen, 2006-NMSC-045, ¶ 10 (holding the State must prove that “a defendant place[d] a child within the zone of danger and physically close to an inherently dangerous situation”).

Sufficiency and Nature of the Evidence

Having clarified the appropriate endangerment standard, we turn to the sufficiency of the evidence necessary to prove a criminal violation. We discuss first the evidence pertaining to the alleged endangerment of the two boys, Juan, age four, and Leo, age two. In this respect, the present case is novel in that we are asked to determine for the first time whether a filthy home environment is sufficient on its own to support a felony endangerment conviction. Our recent decision in Jensen indicates that conditions in a home may, in some extreme circumstances, create a sufficiently dangerous environment to rise to the level of criminal child endangerment. 2006-NMSC-045, ¶ 14. However, we stated in Jensen that the State has the burden to identify the specific dangers posed by the living environment and to present evidence to demonstrate that such filthy conditions endangered the child. Id. ¶ 14. We affirm the principles behind that conclusion here and, consistent with how juries are instructed on the subject, the State must present evidence to prove a substantial and foreseeable risk that such filthy living conditions endangered the child.

In Jensen, the defendant allowed his fifteen-year-old neighbor, Robbie, to become intoxicated at his house, smoke cigarettes, and look at adult pornographic websites on the defendant’s computer every night for more than two weeks. 2006-NMSC-045, ¶ 6. When Robbie was reported missing, police went to the defendant’s home and discovered unimaginable conditions within.

¶ 4-5. Witnesses described the presence of several dogs and even an emu inside the home, which needed to be removed by animal control officers before the police could enter. Id. ¶ 4. An officer testified that, once inside, she observed dog feces and vomit, rotten food, and rodent droppings throughout the home. The officer stated that in the living room area, there were dog feces, dog vomit on the floor, and rat and bird droppings in a cage. The entire kitchen area, including the stove, dishwasher, sink, and counter top, was dirty and littered with rodent droppings. The stove top burners, where Defendant cooked for Robbie, were also littered with rat droppings. The computer table that Robbie frequently used to surf the Internet was covered with trash and had rat or mouse droppings. Black rotten food was in the refrigerator next to some good hamburger meat. There was no place to sit at the dining room table without coming into contact with the extremely dirty conditions. The baseboards looked as though dogs had urinated on them, and the dirty bathroom had empty coke bottles and a filthy looking plastic soda pop jug with a yellowish orange liquid in it. The entire house was littered with dust, papers, bottles, and animal waste that created a constant stench. In fact, an animal control officer who came to take Defendant’s emu had to go outside to avoid vomiting from the smell.}

Id. ¶ 5.

The State argued that these conditions endangered Robbie by exposing him to a risk of contracting hantavirus. Id. ¶ 14. Jensen responded that the conditions in his home only created a speculative possibility of danger, which was unsubstantiated by specific evidence sufficient to satisfy the criminal child endangerment standard. Id. ¶ 13. To that extent, we agreed with the defendant, holding that the State failed to present evidence to assist the jury with understanding how one contracts hantavirus and how one would connect that disease to the particular conditions in the defendant’s home. Id. ¶ 14.

However, the endangerment charge was not premised exclusively on filthy conditions, but rather on a combination of risks including the criminal acts of supplying alcohol to a minor, allowing him to drink in excess to the point of sickness every night for two weeks, and allowing him to view pornography and smoke cigarettes, all within the filthy environment. Given the cumulative effect of this evidence, we affirmed the child endangerment conviction, noting that these factors “distinguish this case from those cases where only filthy conditions are at issue.” Id. ¶ 15.

Jensen supports the proposition that particularly egregious living conditions can conceivably fall within the ambit of criminal child endangerment. The conditions in Defendant Chavez’s home appear to be factually similar to those described in Jensen, 2006-NMSC-045, ¶ 14. However, in Jensen the defendant admitted to supplying alcohol to a minor, thereby creating, at a minimum, a substantial risk that he would engage in the extremely dangerous and illegal act of supplying alcohol to a minor. The conditions in Defendant Chavez’s home all combined, including the presence of several dogs and an emu, a filthy living environment, and the presence of filthy conditions, to create a highly bleak and extraordinarily dangerous living environment. Such living conditions would expose a child to a substantial risk of serious harm.

Id. ¶ 15.

In the present case, we affirm the trial court’s denial of the defendant’s motion for judgment of acquittal and affirm the defendant’s conviction for child endangerment as a felony.

although arguably not as extreme. However, the present case is materially different from Jensen, in part based on the absence of any evidence indicating that Defendant engaged in other, per se unlawful acts to bolster the endangerment charges. Therefore, as we stated in Jensen, “[w]hen filthy living conditions provide the exclusive basis for charging a defendant with child endangerment, the State must assist the trier of fact with evidence that supports a finding that there is a [substantial and foreseeable risk] that such filthy conditions endangered the child.” We now evaluate the present case in light of the standard we set forth above.

Conviction for Endangering the Boys

[32] In order to prove child endangerment in this case, the State was required to show that the conditions created a substantial and foreseeable risk that Juan and Leo would suffer serious injuries from the otherwise lawful conditions in Defendant’s home. We begin our risk analysis by reviewing the gravity of the dangers created by the home environment to determine whether these dangers created a substantial and foreseeable risk of serious injury.

[33] That this was a filthy house is obvious, evidenced by the dirty laundry, dirty dishes, dirty diapers, and mouse droppings throughout the home. The home also contained certain dangerous features, such as the damaged ceiling, the broken glass in the yard, the nail-ridden debris from the collapsed shed, the gap in the floor boards and the front porch, and household chemicals within reach of the children. Sheriff’s Deputy Lisa Delorm testifed that some of the dresser drawers were open and broken, and that the openings were easily accessible to the children who could get inside and get stuck. She also noted that the closets were open and had piles of items stacked inside that could fall on and injure a child. In the bathroom, witnesses observed that the shower and toilet were covered in mold. A razor was accessible to the children. The most salient sanitary issue in the home was the presence of rodent droppings throughout the home, including in the cabinets where dishes and food were stored and on the dishes.

[34] In addition, the home had no hot water available from the tap because the propane which fueled the water heater was empty and disconnected. Clearly, a lack of hot water makes it difficult to sterilize dishes. Although hot water was not available at the faucet, the record indicates that the stove was electric and presumptively capable of boiling water for washing, cooking, and even bathing. Had the children’s mother testified that the family was unable to heat water on the stove, or that the family functioned for months without any ability to heat water, then in light of the other conditions, this aspect of the home would have presented a serious threat to the children’s health. The record, however, reveals no such testimony.

[35] It is apparent that these conditions evidence poverty, filth, and neglect, and that they create some degree of risk, particularly for young children. Jensen, 2006-NMSC-045, ¶ 3 (“[A] child’s susceptibility to harm is a factor a jury might consider when determining whether a defendant has committed child abuse . . . .”). But the question before us is whether these conditions created a substantial and foreseeable threat of serious injury. As we have said, not every risk of injury rises to the level of felony child endangerment. The State was required to establish that the risks arising from this home environment were far greater than those in the average home.

[36] The dangerous aspects identified by the State in Defendant’s home included broken glass, nails, dirty diapers, household chemicals, trash, and mold. Under certain circumstances supported by substantial evidence, similar conditions could conceivably present the kind of risk of serious injury that falls within the statute. Cf. State v. Deskins, 731 P.2d 104, 105-06 (Ariz. Ct. App. 1986) (“[T]he jury heard evidence of unsanitary conditions, including a leaking portable toilet and that the children slept in close proximity to animals which appeared to be diseased and scrap metal automobile parts, tin cans and other discarded items. The children, who were kept barefoot, were not protected from scrap lumber with protruding nails and were exposed to the animal feces . . . . The jury heard evidence that the parents were given one week in which to make changes which were indicated by the caseworker, but failed or refused to do so.”) (Emphasis added.). For example, the length of time that these conditions are allowed to exist and the amount of supervision in the home are certainly factors that can increase or mitigate the degree of risk involved. Unfortunately, although the State offered some testimony on these factors, the record is largely silent in this regard.

[37] The problem with the present case and this record is the lack of any specific evidence connecting these conditions to a substantial and foreseeable risk of harm. Any dirty house can lead to illness or injury, but the critical difference that distinguishes a filthy house from conditions that are criminal is whether those conditions present a truly consequential and foreseeable threat of harm to children. The risk of a cut or a bruise is not the same as the risk of a virulent disease. Our endangerment jurisprudence, as illustrated by Jensen, indicates that most of the hazards present in Defendant’s home do not present the sort of serious risk anticipated by our Legislature, at least in the absence of specific evidence to the contrary.

[38] Of course, the risk of disease and parasites presents a potentially more serious threat of harm. The State presented several witnesses to testify about the extent of the rodent infestation and the prevalence of rodent droppings throughout the home. Although mice are commonly associated with disease, not every exposure to rodents will result in serious illness. Therefore, the presence of mice in a home is not enough on its own to conclude that the children are at risk of contracting a serious illness.

[39] Similar to Jensen, the State failed to present any specific evidence to establish a substantial and foreseeable risk that the children would suffer serious disease as a result of being present in Defendant’s home. The State offered no expert testimony. Instead, the State merely cross-examined Defendant’s own expert, Dr. Sparing, by asking, “Would you agree that having an infestation of mice in a home is not conducive to good health?” Dr. Sparing responded by acknowledging that mice can carry different diseases and parasites, including hantavirus and plague. But Dr. Sparing was never asked to address the specific risk that the children would contract a serious illness from this particular environment.

[40] The State could have met its burden in this case. The risk of serious disease or illness is a matter of science and can be established with empirical and scientific evidence. To determine the presence of disease or parasites, the State could have subjected the rodent droppings to laboratory testing. See State v. Greene, 811 P.2d 356, 358-59 (Ariz. Ct. App. 1991) (stating that “neither the feces nor the spoiled food had been tested for the presence of disease or parasites”). The State could have presented testimony from a health professional explaining the scientific nexus and degree of likelihood regarding these conditions and specific diseases or other significant threats to the welfare of children. The entire house could have been environmentally analyzed for the presence of unusual health risks. The State could have presented statistical information from the Department of Health.
or the Centers for Disease Control on the presence and incidence of hantavirus and plague in or near Tularosa. As we indicated in *Jensen*, our juries deserve more evidentiary assistance, particularly when the risks are based on matters of science, to help them decide whether the threat of serious illness is significantly greater in the particular home in question.

{41} Importantly, the State had been aware of this family even before the investigation into Shelby’s death: Defendant had two prior encounters with the New Mexico Children, Youth and Families Department (CYFD). The first encounter occurred in 2001 when a social worker visited the family’s prior home in Carrizozo. Although the social worker never went inside the home, she reported that a visual inspection revealed “unsanitary” conditions and “safety issues.” It is unclear from the record whether Defendant and his family actually resided in the home at that time, and the record does not indicate that further actions were taken by CYFD after that visit. The second visit occurred only one month before Shelby died, when police officers responded to a CYFD call from Defendant’s cousin and went to the home to perform a welfare check on Shelby. The police left without taking any action, and the record does not reflect any further actions by CYFD between the September 7, 2003 visit and Shelby’s death on October 2, 2003.

{42} The Court of Appeals concluded that these visits placed Defendant on notice that the conditions in his home were perilous. *Chavez*, 2008-NMCA-126, ¶ 10. We agree that the CYFD visits provide an inference that Defendant should have known, at the very least, that he needed to pay attention to conditions in his home. However, the lack of any CYFD action following the two prior visits suggests that those conditions, while unclean, were not seriously threatening and did not necessitate additional, immediate intervention through the civil process. Without a record of further intervention, it is difficult for this Court to envision how conditions that did not merit further civil action could put Defendant on notice of the potential for criminal prosecution.

{43} We do not imply that the State need exhaust all of its civil remedies before turning to criminal sanction. However, use of the civil process seems particularly appropriate here. This is not a case where the children were subjected to physical violence, nor where the parents struggled with addiction and the children suffered as a result—a predicament all too common in child neglect cases. Instead, this is a case where the family struggled with poverty, and our ultimate goal should be to assist, rather than to punish, that status. Had the State intervened in a more meaningful way, the family would have either addressed the home environment or the State could have removed the children to protect their health and safety. Failing to intervene civilly, however, the State then put on a criminal case without the kind of specific and pointed evidence necessary to support the verdict. Evidence of diffuse hazards and a general lack of supervision is insufficient to establish that the children faced specific and identifiable harm in violation of the endangerment statute. Without additional evidence, the risk of harm was only speculative, indicating that Defendant’s conviction was based on the condition of his home rather than the specific dangers arising therefrom.

**Conviction Relating to Endangerment—Not Death—of the Infant Shelby**

{44} Defendant was also charged with child abuse resulting in death and a step-down charge of child abuse by endangerment based on the risk created by allowing his infant daughter Shelby to sleep in a drawer. The autopsy listed the cause of death as “inconclusive,” and the medical examiner testified that he could not tell with any certainty whether the death occurred as a result of Sudden Infant Death Syndrome or because of asphyxiation. The jury ultimately acquitted Defendant on the charge of child abuse resulting in death and, therefore, we do not consider whether the drawer bed caused any injury in fact. The question before us is limited to whether the evidence established that, by allowing Shelby to be placed in the drawer to sleep, Defendant created a substantial and foreseeable risk that Shelby would suffer a serious injury. In addition, the drawer is the only significant factor that distinguishes the conviction relating to Shelby from Defendant’s conviction for endangering his sons. Therefore, to the extent that the unsanitary conditions in the home presented dangers common to all three children, they would merge into a single conviction for purposes of double jeopardy, and we do not consider them again in this section.

{45} The State pursued this case under a criminal negligence theory and, therefore, was required to prove beyond a reasonable doubt that Defendant “knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.” *Id.* § 30-6-1(A)(3). As we recently stated in *Schoonmaker*, criminal negligence for purposes of child endangerment is measured objectively, and occurs when a person should be aware of a substantial and unjustifiable risk [that harm] will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care . . . . 2008-NMSC-010, ¶ 43 (quoting Model Penal Code § 2.02(c) (Official Draft and Revised Comments 1962)) (emphasis omitted). Thus, the State had the burden to first establish the actus reus of endangerment—that the drawer created a substantial and foreseeable risk of harm. Once the danger is established, the State must also show that a reasonable person would have apprehended the risk, and that Defendant recklessly disregarded the risk by allowing Shelby to sleep in the drawer.

{46} The State sought to show that the sleeping arrangement created a serious danger to Shelby due to Shelby’s size in relation to the drawer and bedding. At five months old, Shelby was approximately twenty-six inches long. The drawer that Defendant chose for his daughter measured 29-by-15 inches. Several witnesses testified that the drawer, particularly when filled with soft bedding and a blanket, did not allow Shelby much room to move around. The State presented testimony that if the bedding blocked Shelby’s nose and mouth, she may not have had room to free herself, creating a possibility that she could suffocate. In addition, witnesses testified that if Shelby became pressed up against the wall of the drawer, she might re-breathe her expelled air, high in carbon dioxide, creating a risk of asphyxiation. This is the sort of substantial injury contemplated by our endangerment statute.

{47} However, in addition to the gravity of the potential injury, we must also consider

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1The testimony cited in the dissent confirms only a possibility that harm would occur. As we have already discussed, the term “possibility” is unhelpful as a measure of proof in this context. A remote possibility of harm is insufficient to support a felony conviction, and an endangerment conviction cannot be sustained without proof of a greater degree of risk.
whether it was foreseeable that an injury would actually occur. In performing this review, we note the absence of evidence in the record to indicate that the sleeping conditions presented anything more than a mere possibility of harm.1

{48} The State asked Doctor Ross Reichard, the medical examiner who performed the autopsy on Shelby, whether the sleeping environment was dangerous. Dr. Reichard responded that danger was possible, but that he listed cause of death as “undetermined” because he could not prove one way or the other that the sleeping environment was a cause of Shelby’s death. The State also asked Dr. Reichard whether “placing an infant such as Shelby with her size on her stomach in a fifteen by twenty-nine inch drawer, with soft items in it [makes] it more likely or less likely that she may suffocate,” to which he responded only that it was “worrisome” and that suffocation was a “possibility.” Both of these statements were in relation to the likelihood that the sleeping environment actually caused Shelby’s death, rather than whether harm would foreseeably result from placing Shelby to sleep in the drawer.

{49} The only evidence presented to quantify the likelihood that harm would occur came from Defendant’s own expert witness, Dr. Sparing, who testified that he had never seen a child suffocate in a drawer, and that even if possible, it would be uncommon. He also stated that the risk created by placing a child to sleep in a drawer is very small, unpredictable and unmeasurable, particularly in comparison to conduct that carries a great deal of risk, such as failing to secure a child in a car seat. Dr. Sparing estimated that the risk of harm created by placing a child to sleep on a water bed, for example, is more “definite and predictable” and is much greater than placing a child to sleep in a drawer. He further stated, “We know now that putting children on soft water beds, infants on soft water beds face down, could potentially kill them. Does it kill all of them? No. A very, very tiny number. Maybe one out of a thousand. One out of two or three thousand, something like that.” Dr. Sparing’s testimony provided the only substantive evidence to quantify the probability that harm would occur, and he opined that “a reasonable individual would not look at an environment like this and consider the child to be at risk.”

{50} The elevated risk, if any, created by the small size of the drawer in relation to Shelby’s body, and by including soft bedding in the drawer which restricted the infant’s ability to move, is not quantifiable based solely on common knowledge or experience. Specific evidence was needed to assist the jury in ensuring that a conviction would be based on science and not emotion. This is particularly important in this case, where the trial focused on the death of an infant and the level of parenting was easy to criticize. Natural factors of sympathy and even outrage in the face of an infant death can create a perilous situation where judgment is based on emotion and not evidence.

{51} To meet its burden, the State could have presented testimony from a medical doctor or a health professional to explain and quantify the increase in risk from these factors, individually or in combination. The State could have referred to medical journals or treatises on the risks and causes of infant suffocation or statistical information on the risk of death from certain infant sleeping arrangements. Clearly, some things can be left to ordinary jury knowledge and experience, while others cannot. The fatal flaw here is that the prosecution left its entire case to the jury unaided by the kind of evidence necessary to prove its case.

{52} Defendant’s act of placing a child to sleep in a drawer as a temporary solution to a broken bassinet is not the kind of obvious risk contemplated by our Legislature as a felony. It is difficult to conceive that identical conditions would be prosecuted as felony child endangerment in the absence of the infant’s death. Without additional evidence to establish significantly greater level of risk of injury or death under these circumstances, the jury’s conviction is supported primarily by speculation and surmise.

CONCLUSION

{53} For the reasons stated in this Opinion, we reverse all convictions.

{54} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. SERNA, Justice

CHARLES W. DANIELS, Justice

PETRA JIMENEZ MAES, Justice (concurring in part and dissenting in part)

MAES, Justice (concurring in part and dissenting in part).

{55} I concur in the majority opinion that the evidence in the present case is insufficient to establish that the filthy living conditions in Defendant’s home posed a substantial and foreseeable risk of harm to his three children. I disagree, however, that the evidence was insufficient to permit the jury reasonably to find that Defendant recklessly endangered the life or health of five-month old Shelby by placing her to sleep face-down in a small confined space filled with soft bedding. Accordingly, I respectfully dissent from that portion of the majority opinion.

{56} The deferential standard by which this Court reviews sufficiency of the evidence claims is well established.

[1] The reviewing court engages in a two-step process: First it reviews the evidence [resolving all conflicts and indulging all permissible inferences] with deference to the findings of the [trier of fact]; then it determines whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.

State v. Myers, 2009-NMSC-016, ¶ 13, __ N.M. __ P.3d __ (second alteration in original) (citation omitted). “Our role is not to weigh the evidence, nor do we substitute [our] judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.” State v. Day, 2008-NMSC-007, ¶ 15, 143 N.M. 359, 176 P.3d 1091 (internal quotation marks and citation omitted).

{57} To find Defendant guilty of negligent child abuse contrary to NMSA 1978, Section 30-6-1(D)(1) (2005), the jury was required to find the following essential elements beyond a reasonable doubt: (1) Defendant caused the child to be placed in a situation that endangered the child’s life or health; (2) Defendant knew or should have known that Defendant’s conduct created a substantial and foreseeable risk, Defendant disregarded that risk, and Defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of the child; (3) the child was under the age of eighteen; and (4) this happened in New Mexico on or between September 7, 2003 through October 2, 2003. See UJI 14-604 NMRA. The question is not whether this Court is convinced of Defendant’s guilt beyond a reasonable doubt, but rather, “whether, viewing all of the evidence in a light most favorable to upholding the jury’s verdict, there is substantial evidence in the record to support any rational trier of fact being so convinced.” State v. Graham, 2005-NMSC-004, ¶ 7, 137 N.M. 197, 109 P.3d 285.
The evidence established that Shelby’s bassinet had broken approximately a day or two before her death. Defendant planned to retrieve a crib from his mother, who lived in Carrizozo, but in the meantime, he fashioned a make-shift bassinet out of a dresser drawer. Shelby, at five months old, was approximately twenty-six inches in length, and the drawer was only marginally bigger, measuring 29-by-15 inches. Defendant padded the drawer with a sheet, a blanket, and a pillow.

On the night of October 1, 2003, Jennifer Wheeler was home alone with Leo, Juan and Shelby, while Defendant went to Alamogordo and Carrizozo. Wheeler and the children fell asleep watching television in the living room. At some point Wheeler woke up, changed Shelby’s diaper, and placed her to sleep in the drawer. Sometime between 3:00 a.m. and 5:00 a.m. the next morning, Defendant arrived home. Shelby woke up, and although Wheeler tried to give her a bottle, she refused to eat. Wheeler and Defendant put Shelby back to sleep in the drawer on her stomach because “she liked to go to sleep on her stomach.” Defendant typically would “neatly tuck[]” the blankets around and underneath Shelby, sometimes covering her head, to ensure that the blankets remained in place throughout the night.

A few hours later, Wheeler was shaken awake by Defendant. Defendant was holding Shelby, who was covered from head-to-toe in a blanket, and said, “Shelby’s not breathing. She’s not breathing.” Subsequent resuscitation efforts were unsuccessful and Shelby was pronounced dead later that morning.

The Office of the Medical Investigator launched an investigation into the cause and manner of Shelby’s death. Cheryl Bunker, a field deputy medical investigator for Otero County, interviewed Wheeler and Defendant in connection with the investigation. Both Wheeler and Defendant initially informed Bunker that they had placed Shelby to sleep in a bassinet. When Bunker inspected the home, however, she could not find a bassinet, but she did find the drawer filled with soft bedding. Bunker testified that she became concerned about the drawer because “[t]he sleeping conditions— the baby was placed in a drawer on blankets that were placed inside the drawer. The drawer was—in my opinion—not wide enough or long enough for an infant to move around freely.” Wheeler and Defendant subsequently admitted that Shelby had been sleeping in the drawer on the night that she died.

Pamela Wong, a social worker supervisor with the investigations unit for the Children, Youth and Families Department (Department), also testified about Shelby’s sleeping environment. She explained that the Department understands poverty. We understand the difference between poverty and neglect. There are normally sleeping spaces for children, whether it’s a bed or a crib or a bassinet. Generally, those items are in homes for children to sleep on. Pallets on the floor, perhaps. Normally, you don’t see an infant sleeping in a drawer.

Wong testified that based on her training and experience, the drawer in which Shelby had been placed to sleep was inappropriate for a child of Shelby’s age and size because “there was [not] adequate room in that particular drawer for a five-month-old child.”

At trial, the State admitted into evidence a videotape depicting the drawer in the condition in which it was found by the police on the day that Shelby died. From this videotape, it appears that the drawer was filled to overflowing with soft bedding. Indeed, large blankets or sheets can be seen spilling out of the drawer onto the floor. Additionally, it reasonably could be inferred that the bottom of the drawer was lined with a pillow, which may have been intended to serve as a make-shift mattress. The videotape, as well as the drawer and the blankets, was admitted into evidence and, therefore, was available to the jury for visual inspection during their deliberations.

Doctor Ross Reichard, a forensic pathologist with the Office of the Medical Investigator, was unable to determine the cause and manner of Shelby’s death based on his post-mortem examination of her physical condition. Dr. Reichard testified that although there was no external evidence of physical trauma, he could not exclude the possibility that Shelby had suffocated to death because based on our investigation, the decedent had been sleeping in a small drawer with a fixed wall, just like a regular dresser drawer, with a pad and a blanket. And, so, one of our concerns in small children is their inability to move and free themselves if they’re to get into a situation where their airway may be obstructed. So, a soft mater-

ial may [occlude] their airway. Their face may be between, say, the solid drawer, there may be a blanket or a pillow over which [there was]—based on our investigation, those were likely present. And, that may have resulted in the child re-breathing the same air, which can then lead to their death. Unfortunately, there are limits to modern medicine and pathology as well, and one of those is that there’s certain things that we can’t determine, based on the autopsy. So, for example, if the airway is occluded or the—there’s some sort of obstruction to the breathing, we would not necessarily find any evidence of that on the autopsy. And, so, based on our investigation, we felt that those things were worrisome enough for us that the death was best classified as an undetermined cause, and, therefore, undetermined manner of death.

Dr. Reichard further explained that “[d]epending on the circumstances it can be relatively easy for a child to suffocate at that age,” and that the magnitude of the risk depends on “the size and the surrounding environment and the placement of the infant.” Based on Shelby’s size, the size of the drawer, and the amount of soft bedding inside the drawer, Dr. Reichard testified that, in his opinion, there was a reasonable possibility that Shelby’s sleeping environment posed a risk of danger to her life or health.

Aside from suffocation, the other possible cause of Shelby’s death was Sudden Infant Death Syndrome (SIDS). Dr. Reichard explained that SIDS is a category of deaths that occur in children that are typically older than one month of age, and less than six months, and most of them occur between the ages of one month and four months of age. And, what this is, is a classification that after—of the death—that after a complete autopsy, including a scene investigation, you find no explanation for their deaths. So, it’s a way of categorizing a group of deaths that occur in children, in a relatively specific time frame. And, it’s felt to be a natural death, although no exact explanation for why their death is currently known.

Dr. Reichard testified that to reduce the occurrence of SIDS, the Back to Sleep
campaign encourages parents to put their children to sleep on their backs, and that since this campaign first started in the early 1990s there has been a decrease in the number of SIDS-related deaths. Shelby’s death, however, could not be classified as a SIDS-related death because of the reasonable possibility that she had died from suffocation.

Defendant offered the expert testimony of Doctor Chrisley Sparing, a forensic pathologist and Chief Medical Examiner for the state of Georgia. Dr. Sparing agreed with Dr. Reichard that the cause and manner of Shelby’s death could not be determined based on the results of the autopsy because “[w]e know as pathologists that little babies could be suffocated, and leave no mark on them whatsoever,” and in the present case, there was no “physical evidence from the autopsy to prove or disprove that something like a pillow or a blanket or excess bedding caused the child’s death, or that this is just crib death [SIDS].” Additionally, Dr. Sparing agreed with Dr. Reichard that “infants can be suffocated, you know, rapidly, within just a few minutes,” and that based on Shelby’s age and size, the size of the drawer, and the amount of soft bedding inside of the drawer, there was a reasonable possibility that her sleeping environment posed a danger to her life or health. Specifically,

[66] Defendant offered the expert testimony of Doctor Chrisley Sparing, a forensic pathologist and Chief Medical Examiner for the state of Georgia. Dr. Sparing agreed with Dr. Reichard that the cause and manner of Shelby’s death could not be determined based on the results of the autopsy because “[w]e know as pathologists that little babies could be suffocated, and leave no mark on them whatsoever,” and in the present case, there was no “physical evidence from the autopsy to prove or disprove that something like a pillow or a blanket or excess bedding caused the child’s death, or that this is just crib death [SIDS].” Additionally, Dr. Sparing agreed with Dr. Reichard that “infants can be suffocated, you know, rapidly, within just a few minutes,” and that based on Shelby’s age and size, the size of the drawer, and the amount of soft bedding inside of the drawer, there was a reasonable possibility that her sleeping environment posed a danger to her life or health. Specifically,

[i]f the child became entrapped, especially between the bedding—maybe turned and was up and fell or became lodged in between the bedding and the edge of the inner lining of the drawer, it’s possible that this could interfere with the child’s ability to breathe and the child could possibly suffocate. I have to say in my career, I’ve never seen a child that suffocated in a drawer before. I can’t tell you it’s impossible, but it’s—I mean, all I can say is this possibility exists, although I would say it would be relatively uncommon. Could it happen? Sure. But, that’s the best that I can really say.

[67] Construing the foregoing evidence in the light most favorable to the jury’s verdict, I believe that it was sufficient to support the jury’s factual finding that Defendant’s conduct posed a substantial and foreseeable risk to Shelby’s life or health. Bunker, Wong, Dr. Reichard and Dr. Sparing all testified that the drawer was an inappropriate sleeping environment for an infant of Shelby’s age and size. Indeed, both Dr. Reichard and Dr. Sparing agreed that it is very easy for a five-month-old infant to suffocate and that suffocation can occur in a matter of mere minutes. Additionally, they both agreed that in light of Shelby’s age and size, the size of the drawer, the excessive amount of soft bedding, and Shelby’s prone sleeping position, Shelby’s sleeping environment posed a risk of danger of suffocation. Accordingly, the evidence was sufficient "to support the jury reasonably to find that Defendant’s conduct placed Shelby in a situation ‘that may endanger [her] life or health’ contrary to Section 30-6-1(D)(1)."

[68] The majority concludes, however, that the evidence was insufficient to prove that the risk of danger to Shelby’s life or health was substantial and foreseeable. I respectfully disagree. As the majority acknowledges, the risk of death by suffocation is a “substantial injury” of the type “contemplated by our endangerment statute.” Given the severity of the harm and the ease with which infants may suffocate, parents are on notice that they must be vigilant in their care and supervision of infants. Indeed, it is common knowledge that many everyday household items that pose no risk of harm to adults, i.e., plastic bags and items small enough to fit within a child’s mouth, pose a unique and significant risk of harm to infants, namely, the risk of death by suffocation. Furthermore, consistent with the expert testimony in the present case, it is common knowledge that infants are particularly vulnerable to the risk of suffocation while sleeping and that this risk is heightened when any of the following factors are present: (1) a soft sleeping surface, (2) a prone sleeping position, (3) a confined space with fixed walls in which the infant is unable to move about freely, and (4) soft items that may block the infant’s nose and mouth. In the present case, all of these risk factors were present and, therefore, the jury reasonably could have found that they heightened the risk of suffocation to an unreasonable and intolerable degree. In light of the severity of the harm and the ease and speed with which the harm may occur, it defies logic and experience to characterize this risk as anything less than substantial and foreseeable.

[69] The majority opinion concludes, however, that no rational juror could have found that the risk of harm to Shelby was anything more than a remote possibility in light of Dr. Sparing’s testimony. I disagree. First, I note that the jury was not required to credit Dr. Sparing’s expert testimony, even if uncontradicted. See State v. Jason F., 1998-NMSC-010, ¶ 29, 125 N.M. 111, 957 P.2d 1145; see also State v. Moore, 42 N.M. 135, 160, 76 P.2d 19, 34 (1938) (“The judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive on the jury, but may be disregarded by it.”)). Second, as the following discussion demonstrates, the majority fails to construe Dr. Sparing’s testimony in the light most favorable to the jury’s verdict.

The record reflects the following colloquy between Dr. Sparing and defense counsel with respect to the possibility that Shelby had suffocated on soft bedding:

[Defense Counsel]: And, if it did happen, how would you characterize that, as to cause and manner of death?
[Dr. Sparing]: That would be an accident. I would call it suffocation, and how it occurred is suffocated in bed clothes within drawer. That would be considered to be an accidental death.

[Defense Counsel]: Why not homicide if someone puts blankets in there?
[Dr. Sparing]: Because—

[Defense Counsel]: (Inaudible) expertise?

[Dr. Sparing]: Because, basically, for an accident, we consider that—the terminology we use is “unpredictable,” “unforeseen,” and “unknown.” Basically, a reasonable individual would not look at an environment like this and consider the child to be at risk. It’s a drawer with blankets and bedding in it to sleep in. . . . But, things can happen, and result in the child being dead. And, it’s not predictable. It’s not to say that, you know, you should never, ever, ever do this. But, the risk, albeit small, exists. And, because it’s unpredictable and unforeseen, then we consider those to be accidents. No one intended for such a death to occur. But, accidents happen in all sorts of different ways.
respect to the manner of death if an infant suffocates on soft bedding.

[Defense Counsel]:
  And, you talked about the fact that people are told not to put their infants on soft bedding. If parents do that, is that a homicide?

[Dr. Sparing]:
  I’ve never seen—seen that rule[d], a homicide, or had a case like that come to my office or under my supervision.

[Defense Counsel]:
  Well, why isn’t it—if parents should know better?

[Dr. Sparing]:
  There’s a difference between a risk that is very, very small and hypothetical, and all those unmeasurable, versus that we know carries a great deal of risk. I mentioned car seats earlier. We know that if you put an infant in a car seat and strap it in, strap that car seat in, and there’s a head-on collision, more likely than not, that infant is going to survive and be okay. If it’s not in a car seat, if it’s sitting in mama’s lap, or the car seat isn’t strapped in, and there’s a head-on collision, the injuries are catastrophic, even fatal, more often than not. That is something we know, very, very, very clearly. That’s why car seats are very, very important. But, bedding, when it comes down to it, there are certain situations where, I think, like, say on a water bed. We know now that putting children on soft water beds, infants on soft water beds face down, could potentially kill them. Does it kill all of them? No. A very, very, tiny number. Maybe one out of a thousand. One out of two or three thousand, something like that. But, it’s something that potentially can happen. That doesn’t mean that you should never, ever, ever, say, put a child on soft bedding because that’s where you want a child, in soft bedding. But, there’s a tiny risk that exists that most of the time is pretty much unpredictable. And, because it’s speaking of a tiny risk that’s unpredictable, versus a large risk like a car seat issue that is very, very predictable, that’s why recommendations are very difficult to make, as far as where you put your baby to sleep. Do you put them on a naked mattress? No, you don’t want to do that. You want the child comfortable so it will sleep, but covered up and taken care of. And, the vast majority—you know—ninety-nine point nine nine . . . percent, grow up and do just fine.

[71] As the foregoing summary reflects, Dr. Sparing testified that if an infant suffocates to death on soft bedding, he would categorize the manner of death as an accident, rather than a homicide, even if the parents should have known better, because an accident is “unpredictable,” “unforeseen,” and “unknown.” In the present case, it is undisputed that Shelby’s death, if attributable to her sleeping conditions, was nothing short of a tragic accident. Nonetheless, accidental harm is not excluded from the purview of Section 30-6-1(D)(1), which explicitly provides that “[a]buse of a child consists of Section 30-6-1(D).” (emphasis added.)

[72] This is not to say, however, that mere negligence is sufficient to sustain a conviction of negligent child abuse. As this Court previously has observed, “the child abuse statute contains no indication that the legislature intended felony punishment to attach to ordinary negligent conduct” under Section 30-6-1(D). Santillanes v. State, 115 N.M. 215, 223, 849 P.2d 358, 366 (1993). Indeed, if “‘imprudent and possibly negligent’ conduct were sufficient to expose a care giver to criminal liability for child endangerment, ‘undoubtedly the majority of parents in this county would be guilty of child endangering—at least for acts of similar culpability.’” State v. Massengill, 2003-NMCA-024, ¶ 46, 133 N.M. 263, 62 P.3d 354 (quoting State v. Massey, 715 N.E.2d 235, 238-39 (Ohio Ct. App. 1998)). Accordingly, the State is required to prove that the defendant acted with criminally negligent intent, that is, that “the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.” Santillanes, 115 N.M. at 222, 849 P.2d at 3365.

[73] In the present case, the evidence was sufficient to prove that Defendant’s conduct was criminally negligent. The jury reasonably could have inferred that Defendant acted with reckless disregard with respect to the risk of harm to Shelby by choosing a drawer that was too small for Shelby’s size, placing a soft pillow on the bottom of the drawer, placing Shelby to sleep face-down on her stomach, and covering her head-to-toe with an excessive amount of soft bedding. Defendant could have used a larger drawer or a laundry basket as a make-shift bassinet or alternatively, he could have procured a crib from his mother in Cariz- zoomo. Indeed, the evidence established that Defendant was in Cariz zoomo on the night that Shelby died, but that he did not bother to stop by his mother’s house to pick up a crib for his infant daughter. Additionally, Defendant could have placed Shelby to sleep on her back, used less soft bedding, or arranged the bedding more loosely, all of which would have reduced the risk of harm to Shelby’s life or health. Defendant, however, did not do any of these things.

[74] Although the State was not required to prove that Defendant actually was aware of the risk of harm, evidence existed from which the jury reasonably could have inferred consciousness of guilt. It is well established that lying to the police about the circumstances surrounding a crime or an accident evidences “a consciousness of guilt that would allow the [trier of fact] to find a level of awareness on Defendant’s part that his actions were likely to cause harm.” State v. Worrick, 2006-NMCA-035, ¶ 9, 139 N.M. 247, 131 P.3d 97; see also State v. Faubion, 1998-NMCA-095, ¶ 13, 125 N.M. 670, 964 P.2d 834 (holding that the defendant’s “lies and misleading actions” are evidence of consciousness of guilt). Defendant initially lied to Bunker, informing her that Shelby had been sleeping in a bassinet on the night that she died. The jury reasonably could have inferred that Defendant lied about Shelby’s sleeping environment because he was aware that this environment posed a substantial and foreseeable risk of harm to Shelby’s life or health.

[75] For the foregoing reasons, I believe that the evidence was sufficient to support Defendant’s conviction of negligent child abuse contrary to Section 30-6-1(D)(1) with respect to Shelby. I therefore respectfully dissent.

PETRA JIMENEZ MAES, Justice
KELEHER & MCLEOD proudly announces the addition of an attorney to the firm, RICHARD K. BARLOW.

Mr. Barlow is a graduate of Yale University where he received his Bachelor of Arts and his Law Degrees. Subsequently, he earned his Masters of Law in Taxation Degree from New York University.

Mr. Barlow has been an attorney in New Mexico for thirty-four years. He has been selected for inclusion in The Best Lawyers In America for over 20 years, and he is currently listed in six categories: Tax Law, Trusts and Estates, Non-Profit/Charities Law, Corporate Law, Mergers & Acquisitions Law, and Securities Law. Mr. Barlow also has an “AV” (highest) rating in the Martindale- Hubbell National Lawyers Directory.

Mr. Barlow currently focuses on all aspects of tax law, estate planning, business and corporate law, tax -advanced charitable gifting, and commercial transactions. He often lectures on taxation, estate planning, and business law to attorneys, accountants, and others.

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is Pleased to Announce that

DAVID H. JOHNSON

Has been appointed Vice-Chair of the
American Bar Association Health Law Section
for 2009-10. He will also continue to Chair the
Section’s Health Care Policy Task Force.

2201 San Pedro NE
Building 2, Suite 207
Albuquerque, New Mexico

Phone: 505-837-1900
Telefax 505-837-1800
www.NM Counsel.com

Please Contact Carmen Rawls for more information
505-277-8184 or rawls@law.unm
Assistant University Counsel
Posting# 0802097
The University of New Mexico is seeking candidates for an entry level position in its University Counsel Office Employment Law Section. The position is an assistant counsel position and will work under the supervision and direction of a more senior member of the section. Each candidate should have demonstrably strong skills in legal research and legal writing and analyzing complex law and regulations. The successful candidate must have a career interest in serving as inside counsel to the University. Salary range: $4,582 to $6,327 monthly. Complete position description available on the University of New Mexico Human Resources website http://jobdescriptions.unm.edu/jdweb.cfm. Applications must be submitted online and must also submit a signed cover letter and three references. Please send original writing sample to ssimpson@salud.unm.edu.

Associate Attorney
5-10 years experience in Family Law and Civil Litigation: 2019 Galisteo, C3, SF, NM, 87505. Fax 505.989.3440

Attorney Positions-
1st Judicial District Attorney
The First Judicial District Attorney’s Office has Assistant District Attorney positions available to prosecute DWI and domestic violence cases in Magistrate Court, and Children’s Court cases. Additionally, there are immediate positions available for a Senior Trial Attorney and Deputy District Attorney to prosecute crimes against children. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to Todd Hotchkiss, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM 87504, or via e-mail to tsimpson@salud.unm.edu.

Assistant County Attorney
Sandoval County currently has an opening for the position of Assistant County Attorney. Please visit our website at WWW.Sandoval-County.Com for a full job description. You may contact our office at 505-867-7505. You may also visit the Personnel Office at 711 Camino del Pueblo, Bernalillo, NM, 87004. Sandoval County is an equal opportunity employer.

Town of Hurley Request for Proposal
Legal Services as Town Attorney
Proposal Number LEG-01-2009
The Town of Hurley is soliciting request for Proposals to Provide Legal Services as Town Attorney. Interested firms may obtain complete RFP application packet and any additional information by contacting: Paula Page, Town Clerk Telephone No. (575)537-2287. PROPOSAL DEADLINE: 5:00pm AUGUST 3, 2009.

Want To Work Less?
Looking for established personal injury lawyer who wants to retire or slow down. Plaintiff’s personal injury firm is looking to combine its practice with an established personal injury or work comp lawyer who wants to cut back on his or her hours. Please e-mail abqlaw@msn.com.

Legal Assistant
Civil litigation firm seeks experienced Legal Assistant to work 20-25 hours per week (hours are flexible). Applicants should have at least 3-5 years legal experience. Must be proficient with Microsoft Word. Salary DOE. Submit cover letter, resume and references to Office Administrator, P.O. Box 25305, Albuquerque, NM or fax to 505-842-0485. You may also email kvigil@eatonlaw-nm.com.

Legal Secretaries / Paralegals
High Desert Staffing provides experienced legal support professionals to Albuquerque’s leading law firms. We are currently seeking candidates with 2-5+ years legal experience and strong software and typing skills, for both permanent and temporary positions. Call (505) 881-3449 for immediate interview.

Legal Assistant
Atkinson & Kelsey Divorce and Family Law Firm seeks a highly qualified, experienced legal secretary. Knowledge of court filing procedures a must. Excellent organizational skills are required. Must be proficient with WP8, possess excellent communication skills and pays close attention to details. Highly competitive salary and benefits. Please submit cover letter, resume, salary requirements and references to: Office Administrator PO Box 3070, Albuquerque, NM 87190 or fax 889-3111.
Certified Paralegal Position
Insurance defense firm seeks reliable, experienced Certified Paralegal. Must be hard working, a self-starter, able to work independently and efficiently with all personnel. Please send resume with references to PO Box 92860, Albuquerque, NM 87199-2860, Attn: Box B.

Large Uptown Suite

Top Notch Office Space
Top notch office space approx. 250 sq. ft. Downtown/close to Federal, District, Metro Courts & city-county offices, available August 1st. Share building with well-established law firms at 500 Tijeras NW, Albq. Principal benefits include receptionist (using your existing number), ample on-site parking, 2 large conference rooms, large waiting area, copier/fax equipment with client coding system, stocked kitchen, and more. Must see to appreciate. Good collegiality among 11 attorneys and opportunity for case referrals. Contact Terry Word at 842-1905.

Executive Suites

FOR SALE

Prime Real Estate
Prime Real Estate perfect for home, office or both. 2 blocks from all three courts. Newly renovated and move-in ready. Xoned SU2. 1848 sq.ft. house, attached unit 877 sq.ft. Call Pete 350-1414, Coldwell Banker Legacy, 505-247-3900. 2000 sq.ft. of office space. Call Charles Lill, 505-247-3900, clill@comcast.net

New Mexico Reports
New Mexico Reports, Volumes 69-111 inclusive. $15.00 each or $645.00 for all. Must buy at least 10. Contact Lynette (505) 325-6810.

Searching For Will
Of William C. Moon, born Nov. 19, 1927. Deceased July 1, 2009 in Alb, NM. If located Contact Jean Totzke 505.299.7310

FOR SALE

Three Single Offices Available
Albuquerque Airport, access to I-25. Large conference room, copy center, fax machine, hi-speed internet, reception area, free parking. 3/6/12 month agreements starting at $450.00/month. Call 505.948.5914.
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