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www.nmbar.org
Constitution Day is designated by Public Law 108-447 Sec. 111 Division J - SEC. 111(b) which states that all levels of educational institutions receiving federal funds are required to educate students about the U.S. Constitution.

Constitution Day is an event taking shape across the country designed to teach 5th graders about the Constitution. Each fifth grader participating will receive a pocket-size Constitution!

During the week of September 14-18, volunteer attorneys will be partnered with 5th grade teachers in their area to co-teach a lesson on the Constitution. Suggested course materials will be provided, and you will get to deliver pocket-sized Constitutions to the children! Each presentation should last 1-1.5 hours per classroom.

Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place.

☐ YES! I’d like to be a Constitution Day Volunteer!*  
(*)requires $30 donation from each attorney to cover classroom materials

☐ I am unable to volunteer my time but I would like to donate toward the effort of putting a pocket-size constitution in the hands of all New Mexico fifth graders (Amount $________ )

NAME_____________________________________________________ Bar ID ____________

ADDRESS ___________________________________________________________________
____________________________________________________________________________
(city)        (state)                              (zip)
____________________________________________________________________________
(phone)    (fax)    (email)

Send this completed form to Marilyn Kelley  
Email: mkelley@nmbar.org; or fax (505) 797-6074; or US mail:  
New Mexico State Bar Foundation, Public & Legal Services Department  
Attention Marilyn Kelley  
PO Box 92860, Albuquerque, NM 87199
AN INVITATION

COMES TO SANTA FE
HOSTED BY SPIRIT PRODUCTIONS AND SANTA FE CHAMBER OF COMMERCE

Brought to you by the Membership Services Committee

Where: Spirit Productions
#10 Rudy Rodriguez Drive
Santa Fe, NM 87508

Date: Tuesday, September 29, 2009
Time: 5:30-7:00 pm

Presentation: Spirit Productions will have a 10-minute presentation on how to present your business on the Web. SBNM members will have an opportunity to meet with members of the Santa Fe Chamber of Commerce.

Food and beverages.
Drawing for the “The Painted Pony” (DVD) along with several other giveaways.

For more information or to RSVP, please contact
Marcia Ulibarri, Account Executive, State Bar of New Mexico
505.797.6058  |  mulibarri@nmbar.org
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
10:10 a.m.  Break
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

TWO WAYS TO REGISTER
INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, Open 24 hours

Name ___________________________________________  NM Bar # ________________________________
Street __________________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________________
Phone ___________________________________________  Fax ____________________________________________________
E-mail ____________________________________________________________________________________________________________
☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________  Make check payable to: CLE
Credit Card # ___________________________________________  Exp. Date ________________  CVV# ________________
Authorized Signature _______________________________________________________________________________________________
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No. 09-8300-031: In the Matter of the Amendments of Rule 12-502 NMRA ......................................... 23
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Professionalism Tip
With respect to opposing parties and their counsel:
In the preparation of documents and in negotiations, I will concentrate
on substance and content.

Meetings
September
9
ADR Education Group, noon, 2nd Judicial District Court
9
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
9
Membership Services Committee, noon, via teleconference
10
Intellectual Property Section Board of Directors, noon, Rodey Law Firm

State Bar Workshops
September
10
Lawyer Referral for the Elderly Workshop
10:30 a.m.–12:30 p.m., Presentation
1:30–5 p.m., Clinics
España Senior Center, Española
11
Lawyer Referral for the Elderly Workshop
10 a.m.–11:30 p.m., Presentation
1–4 p.m., Clinics
Phil Lovato Senior Center, Taos

Cover Artist: Jack Atkins (www.jackatkins.com) paints the Southwest’s intense desert light, its spectacular vistas, and the people and things that create its sense of place. This fourth-generation New Mexican uses vivid colors and dramatic compositions to tell the story of this area’s underlying sense of drama and history. Atkins’ paintings are in a contemporary realistic style. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.

September 7, 2009, Vol. 48, No. 36
NOTICES

COURT NEWS

N.M. Supreme Court
Board Governing the Recording of Judicial Proceedings
Reporter Monitor Problems

The Supreme Court Board Governing the Recording of Judicial Proceedings ensures that outstanding reporting/recording services are provided to members of the State Bar and to hearing agencies. If any user of recording services encounters a reporter/monitor problem, the board requests counsel notify it with the following information: the date and type of hearing, the person or service that recorded the hearing and the nature of the problem. E-mail notifications to Board Administrator Linda McGee, ccr@ccrboard.com; mail to PO Box 92648 Albuquerque, NM 87199-2648; or call (505) 821-1440.

Board of Legal Specialization
Comments Solicited

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

Linda L. Ellison
Certification—Family Law

Minimum Continuing Legal Education Board

One vacancy exists on the Minimum Continuing Legal Education Board. Attorneys interested in volunteering time on this board may send a letter of interest and/or resume to: Kathleen Jo Gibson, Chief Clerk PO Box 848 Santa Fe, NM 87504-0848. Deadline for submissions is Sept. 21.

Second Judicial District Court
Judicial Nominating Commission

The 2nd District Court Judicial Nominating Commission convened Aug. 27 in Albuquerque and completed its evaluation of the 17 applicants for the vacancy on the court. The commission recommends the following seven applicants (in alphabetical order) to Governor Bill Richardson:

The Honorable Julie N. Altwies
Roger Thomas Dawe
Jacqueline D. Flores
Yvette K. Gonzales
Alisa Ann Hadfield
Kimberly A. Middlebrooks
Michael L. Rosenfield

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
E-mail: attorneyinfochange@nmcourts.gov
Fax: (505) 827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
E-mail: address@nmbar.org
Fax: (505) 828-3755
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

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>
</tr>
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<tbody>
<tr>
<td>1st Judicial District</td>
<td>Exhibits in Criminal, Civil, Domestic</td>
<td>1974–1993</td>
<td>October 30</td>
</tr>
<tr>
<td>Court (505) 827-4687</td>
<td>Relations, Children’s Court, and Probate Cases</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Board of Bar Commissioners
Meeting Agenda
11 a.m., Sept. 11, State Bar Center.
1. Approval of July 9, 2009 meeting minutes
2. Finance Committee report
3. Acceptance of July financials
4. Approval of 2010 budget worksheet
5. Bylaws/Policies Committee report and recommendations
6. Personnel Committee report and recommendations
7. Board of Bar Commissioners 2010 officer nominations
8. Public Legal Education Commission report and approval of bylaws
9. EAJ Committee report
10. Legislative Committee report
11. UPL Task Force report
12. Vacancy in Seventh Bar Commissioner District
13. BBC election schedule
14. President’s report
15. President-Elect’s report
16. Executive Director’s report
17. Bar Commissioner reports
18. Rocky Mountain Mineral Law Foundation Annual Institute report
19. New business

Children’s Law Section
Noon Knowledge
The Honorable Monica Zamora will address updates to the Children’s Court Rules at noon, Sept. 11, in conference rooms A and B at the Juvenile Justice Center, 5100 2nd Street, NW, Albuquerque. Contact Judy Flynn-O’Brien, jafob@unm.edu or (505) 277-1050, to R.S.V.P. so that adequate seating and materials will be available.

Scholarships
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. Direct questions regarding the application to 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/childrensection.html.

Paralegal Division
Luncheon CLE Series
The Paralegal Division invites members of the legal community to bring a lunch and attend Natural Resources Law presented by Stuart Butzier of Modrall, sperling, Roehl, Harris & Sisk PA. The program will be held from noon to 1 p.m., Sept. 9, at the State Bar Center and offers 1.0 general CLE credit. The registration fee is $16 for attorneys, $10 for members of the Paralegal Division, and $15 for non-members. Registration begins at the door at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 247-0411.

Public and Legal Education Commission
Constitution Day Volunteers Needed
The Public and Legal Education Commission and the New Mexico State Bar Foundation are coordinating participation in Constitution Day, designated by Public Law 108-447 which requires educational institutions receiving federal funds to educate students about the U.S. Constitution. During the Week of Sept. 14–18, volunteer attorneys will be partnered with fifth grade teachers to co-teach lessons. Over 100 attorneys will be partnered with fifth grade teachers to co-teach lessons. Over 100 schools have already expressed interest. For more information and to volunteer, see page 2 of this issue of the Bar Bulletin or visit the State Bar Web site at http://www.nmbar.org/Public/educationalprograms.html.

Real Property, Trust and Estate Section
Annual Meeting and CLE
The Real Property, Trust and Estate Section will hold its annual membership meeting during lunch, Sept. 24, at the 2009 Estate Planning, Probate and Trust Law Symposium at the State Bar Center. Contact Chair Patrick Dolan, pdolan@catchlaw.com or (505) 820-7741, to place an item on the agenda.
section for a $15 membership fee, which will pay for lunch and for section membership dues through 2010. Join the section and pay the annual dues prior to the section meeting and speaker presentation. R.S.V.P. to Tony Horvat, thorvat@nmbar.org.

**Young Lawyers Division**

**Wills for Heroes**

The Young Lawyers Division is seeking attorneys, paralegals (to serve as witnesses) and notaries for a Wills for Heroes event in Ruidoso. Attorneys will draft, free of charge, wills and healthcare powers of attorney for qualified first responders from 9 a.m. to 4 p.m., Sept. 19, at the Ruidoso Fire Department, 313 Cree Meadows Drive, Ruidoso. 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 (no Macs) with MS Word. Everything else will be provided and supervised. For more information or to volunteer, contact Martha Chicoski, mary.martha.chicoski@farmers.com, by Sept. 10.

**UNM**

**School of Law**

**Mexican-American Law Student Association**

**Golf Tournament**

The New Mexico legal community is invited to participate in the 10th Annual Mexican American Law Student Association Golf Tournament to be held Sept. 19 at the Desert Greens Golf Course in Albuquerque. For further details, contact Michael Calderon, calderonmi@law.unm.edu.

**OTHER NEWS**

**ACLU of New Mexico CLE Program**

The American Civil Liberties Union will present *Section 1983—Litigation in the 21st Century* (1.0 ethics, 1.0 professionalism, and 5.0 general CLE credits) from 8 a.m. to 5 p.m., Sept. 25, at the CNM Workforce Training Center, 5600 Eagle Rock Avenue NE, Albuquerque. The fee is $125 for attorneys. The program is free to 2009 bar applicants and to solo practitioners/public interest attorneys with less than a year of practice. The program will cover the nuts and bolts of civil rights litigation: pitfalls, hurdles, discovery, appeal basics, and attorneys’ fees. The featured guest is National ACLU President Susan Herman. Register at www.aclu-nm.org or call (505) 266-5915, ext. 1010.

**LETTER TO THE EDITOR**

Dear Editor:

Simply put, New Mexico courts cannot make additional budget cuts. In these trying times, justice is the one commodity that must remain intact, fully funded and supported by Governor Richardson, the Legislature and the people of New Mexico.

As president of the State Bar of New Mexico, I am writing on behalf of the state’s more than 8,000 lawyer members to urge Governor Richardson, the Legislature and the people of New Mexico to support our courts and judicial branch in these difficult financial times.

As the state faces serious budget shortfalls and contemplates additional cuts and as the Legislature prepares for an October session to make those cuts, the State Bar of New Mexico urges careful deliberation over the judicial budget. The state’s judiciary has made painful cuts already, to the detriment of the very people it seeks to serve— you. Additional cuts will further damage an already strapped system. This is not an acceptable solution for our state. Unfortunately, it seems that whenever there is a budget shortfall, those most at risk, such as children or individuals in need of the justice system, are the first to suffer cuts in the funding of those agencies they rely upon.

Difficult economic times have an adverse impact on our judicial system. When times are tough, we see an increase in virtually every area of the law that demands court attention. Whether it is in the criminal arena or in civil matters ranging from bankruptcy and foreclosures to divorce and family issues to employment and benefits, the need for court services increases in troubled times; it does not decrease.

Unlike in most business settings where one can adjust for difficult times in numerous ways, such as reducing inventory or overhead costs, the court system sees the inverse as its reality. As the economy worsens, courts get busier. Caseloads are enormous and the courts already operate at full capacity with reduced staff and resulting delays. The only place to make further cuts is in personnel, through mandatory furloughs and leaving vacant positions unfilled. Any more reduction in staff will make an almost impossible task completely impossible.

Again, on behalf of the more than 8,000 lawyers of New Mexico and for the sake of the vulnerable in our population, we urge Governor Richardson, the Legislature and the people of New Mexico to support our unique judicial system.

Remember the words of William Gladstone, “Justice delayed, is justice denied.”

*Henry A. Alaniz, Esq., President State Bar of New Mexico*

The Board of Editors authorizes publication of letters to the editor as a vehicle for responding to previously published articles and letters and for encouraging discussion of topics of substantive legal interest among members of the State Bar. The Board will exercise its discretion in publication decisions and will edit submissions for length and content. Letters are solely the opinion of the author.

**Disability Rights N.M. Fund-raising Event**

In celebration of their 30-year anniversary, Disability Rights New Mexico (formerly New Mexico Protection and Advocacy) is having a fund-raising golf tournament on Sept. 15 at Sandia Resort and Casino Golf Course. Lunch is provided for all participants and prizes will be awarded. Tee off time is 7:30 a.m. and fees are $100 per golfer. For more information, call (505) 256-3100 or toll free 1-800-432-4682.
Payment for services that have already been rendered may become an issue in the termination of an attorney-client relationship. If the attorney is prepared to refund any payments received and to act in a prompt manner to minimize any detriment to the client, then “cause” should not be an issue. In such a case, the attorney should write a letter to the client clearly terminating the representation with a minimal comment as to the reasons and providing the client with all significant documentation and a refund of any fees paid.

If there has, in fact, been a formal entry of appearance in a legal proceeding, then the specific rules and procedures of the court must be followed and documented in either a substitution of counsel (which could be a pro se entry by an individual) or a formal hearing for withdrawal (which may be required if the client is an entity such as a corporation or limited liability company).

Because of the added difficulties in terminating the attorney-client relationship after an entry of an appearance in litigation, much greater care should be taken in the client selection process. The sooner the better is the basic guiding principle for the attorney and the client. Delay tends to create more problems than it solves, and the existence of deadlines or scheduled hearings can create the need for the attorney to demonstrate “cause.”

Cause will generally be examined with a view towards the best interests of the client. How will the client be prejudiced by the attorney’s terminating the arrangement? Non-payment for legal services may or may not be sufficient cause. On the eve of trial or a major hearing, don’t be surprised if the court doesn’t find it to be sufficient grounds for the attorney to terminate his or her representation of the client.

The other situation where “cause” may become important is where an attorney wants to be paid for the reasonable value for work that has been performed, and a court may award different compensation, taking into consideration whether the termination was with or without cause.

The basic professional rules regulating compensation apply, placing the burden of proving reasonableness and value on the attorney. In seeking payment where the case was based upon a flat fee or a contingency fee, attorneys may find themselves having to establish the amount and basis for entitlement to compensation, keeping in mind that the “lode star” or beginning of the analysis will be the detailed time records showing specific information about the services that were rendered. Some attorneys choose to render legal services on a flat fee or contingency basis because they want to avoid keeping track of their time. This practice might result in the loss of important financial and management information (such as productivity and profitability information) as well the risk of non-payment for work when the attorney-client relationship is terminated by either the attorney or the client.
Equal Access to Justice is a 501(c)(3) organization composed of private attorneys who raise money from the private bar to fund civil legal service providers in New Mexico. Donations from New Mexico attorneys help to fund the state’s four largest legal aid providers: New Mexico Legal Aid, New Mexico Center on Law and Poverty, Law Access New Mexico and DNA-People’s Legal Services. Equal Access to Justice promotes these four civil legal service providers and conducts fund-raising from the private bar on their behalf. Equal Access to Justice has a campaign director who coordinates campaign activities and administers financial recordkeeping. Equal Access to Justice has completed the third year of a three-year transition to become an entity of the State Bar of New Mexico Foundation. The statement below is an unaudited annual campaign report from March 31, 2008 to April 1, 2009. Equal Access to Justice thanks all who contributed to EAJ in 2008–09. Thank you for doing your part to provide justice for all.

**Revenue**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total contributions and interest</td>
<td>$266,939</td>
</tr>
<tr>
<td>08-09 Start-up revenue reserved from 07-08</td>
<td>$11,731</td>
</tr>
</tbody>
</table>

**Administrative Expenses**

<table>
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<th>Description</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Personnel</td>
<td>$54,479</td>
</tr>
<tr>
<td>Office Rent</td>
<td>$1,200</td>
</tr>
<tr>
<td>Insurance</td>
<td>$900</td>
</tr>
<tr>
<td>Communications</td>
<td>$497</td>
</tr>
<tr>
<td>Financial</td>
<td>$262</td>
</tr>
<tr>
<td>Conferences</td>
<td>$2,519</td>
</tr>
<tr>
<td>Labor</td>
<td>$868</td>
</tr>
<tr>
<td>Dues and Fees</td>
<td>$995</td>
</tr>
</tbody>
</table>

**Fund-Raising Expenses**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Materials</td>
<td>$7,343</td>
</tr>
<tr>
<td>Postage</td>
<td>$1,756</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>$2,160</td>
</tr>
<tr>
<td>Supplies</td>
<td>$691</td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td><strong>$73,670</strong></td>
</tr>
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**Allocations to Legal Programs**

<table>
<thead>
<tr>
<th>Program</th>
<th>Amount</th>
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<tbody>
<tr>
<td>New Mexico Legal Aid</td>
<td>$107,116</td>
</tr>
<tr>
<td>New Mexico Center on Law and Poverty</td>
<td>$42,418</td>
</tr>
<tr>
<td>Law Access New Mexico</td>
<td>$25,233</td>
</tr>
<tr>
<td>DNA-People’s Legal Services</td>
<td>$25,233</td>
</tr>
<tr>
<td><strong>Total Allocation</strong></td>
<td><strong>$200,000</strong></td>
</tr>
</tbody>
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**Net Revenue**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reserved for 2009-10 campaign start-up</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

**Expense Ratio**

<table>
<thead>
<tr>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>26%</td>
</tr>
</tbody>
</table>

**Equal Access to Justice Board of Directors**

- Mark T. Baker
- Bryan P. Biedscheid
- Jason M. Burnette
- Susan G. Chappell
- Robert J. Desiderio
- Russell D. Elliott
- Ruth Fuess
- Lynn Ann Gentry
- Levon Henry
- Patrick T. Mason
- Thomas W. Olson
- Thomas L. Popejoy
- Kim Posich
- Ruth O. Pregenzer
- Charles K. Purcell
- Edward R. Ricco
- Conrad M. Rocha
- Timothy M. Sheehan
- William Strouse
- Kate Mulqueen
- Campaign Director
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Location</th>
<th>Credits</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Title Insurance Update</td>
<td>Albuquerque, Santa Fe</td>
<td>1.0 G</td>
<td>(505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>9</td>
<td>Family Law</td>
<td>Santa Fe, Albuquerque</td>
<td>1.0 G</td>
<td>(505) 986-2502, (505) 247-0411 or (505) 222-9356</td>
</tr>
<tr>
<td>9</td>
<td>Natural Resources Law</td>
<td>Albuquerque</td>
<td>1.0 G</td>
<td>(505) 247-0411 or (505) 222-9356</td>
</tr>
<tr>
<td>11</td>
<td>20th Annual Appellate Practice Institute</td>
<td>Albuquerque</td>
<td>6.9 G</td>
<td>(505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>15</td>
<td>Attorneys Guide to Good Lawyering for People with Disabilities</td>
<td>Albuquerque</td>
<td>1.0 P</td>
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## Writs of Certiorari

**Effective September 7, 2009**

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<td>McGary v. AMS</td>
<td>28,867</td>
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<td>31,308</td>
<td>State v. Sosa</td>
<td>26,863</td>
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<td>31,186</td>
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<td>31,360</td>
<td>State v. Morales</td>
<td>26,969</td>
<td>11/10/09</td>
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</table>

### PETITION FOR WRIT OF CERTIORARI DENIED:

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<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
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<th>Submission Date</th>
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<tbody>
<tr>
<td>31,867</td>
<td>State v. Shelby</td>
<td>29,100</td>
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<tr>
<td>31,868</td>
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<tr>
<td>31,872</td>
<td>State v. Dombos</td>
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<tr>
<td>31,898</td>
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<tr>
<td>31,906</td>
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<tr>
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<tr>
<td>31,871</td>
<td>State v. Jordan</td>
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# Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court District</th>
<th>Case Name</th>
<th>Order of the Court</th>
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<tbody>
<tr>
<td>27822</td>
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<td>CV-05-7589, R ROYBAL v M DE FUENTE (reverse and remand)</td>
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<tr>
<td>27842</td>
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<td>CV-06-1678, C KIRKPATRICK v SANTA FE COUNTY BOARD OF COMMISSIONERS (affirm)</td>
<td>affirm</td>
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<tr>
<td>27859</td>
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<tr>
<td>28613</td>
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<td>CV-04-819, H HELTMAN v A CATANACH (reverse and remand)</td>
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</tr>
<tr>
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</table>

# Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
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<th>Order of the Court</th>
<th>Date Opinion Filed</th>
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</thead>
<tbody>
<tr>
<td>29513</td>
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<td>JQ-07-43, CYFD v CECILIA M (affirm)</td>
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<tr>
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<tr>
<td>27756</td>
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<tr>
<td>28927</td>
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<td>DM-06-31, J SPENGLER v C SPENGLER (dismiss)</td>
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<tr>
<td>29273</td>
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<td>CV-06-425, E LUCERO v WEXFORD HEALTH (dismiss)</td>
<td>dismiss</td>
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<tr>
<td>29290</td>
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<td>dismiss</td>
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<tr>
<td>29381</td>
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<td>CR-08-316, STATE v A RUIZ (affirm)</td>
<td>affirm</td>
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<tr>
<td>29437</td>
<td>13th Jud Dist Valencia</td>
<td>CV-06-244, J ANAYA v P OWENS (affirm)</td>
<td>affirm</td>
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</tr>
<tr>
<td>29293</td>
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<td>LR-07-118, STATE v R BENALLY (affirm)</td>
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<tr>
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<td>CV-08-55, PROPERTY OWNERS v LINCOLN CO (affirm)</td>
<td>affirm</td>
<td>8/28/2009</td>
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<tr>
<td>29552</td>
<td>AD AD AD-09-03-65, LCCF</td>
<td>v D JASPERSE (dismiss)</td>
<td>dismiss</td>
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<tr>
<td>29414</td>
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<tr>
<td>29459</td>
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<td>reverse and remand</td>
<td>8/28/2009</td>
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</tbody>
</table>

Slip Opinions for Published Opinions may be read on the Court’s Web site:
http://coa.nmcourts.gov/documents/index.htm
RECENT RULE-MAKING ACTIVITY

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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

EFFECTIVE AUGUST 31, 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/

PENDING PROPOSED RULE CHANGES:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-096</td>
<td>Challenge of nominating petition (Rules of Civil Procedure for the District Courts)</td>
<td>09/08/09</td>
</tr>
<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>
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<td>Interrogatories to parties</td>
<td>05/15/09</td>
</tr>
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<td>Production of documents and things and entry upon land for inspection and other purposes.</td>
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</tr>
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<td>1-037</td>
<td>Failure to make discovery; sanctions</td>
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</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>
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</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>
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<tr>
<td>10-313.1</td>
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<tr>
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</table>

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2009 NMRA:

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

<table>
<thead>
<tr>
<th>Rule</th>
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</tr>
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<td>1-016</td>
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</table>
### Rule-Making Activity

**Rules of Criminal Procedure for the Metropolitan Courts**

<table>
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<tr>
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<th>Date</th>
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</thead>
<tbody>
<tr>
<td>7-106</td>
<td>Excusal; recusal; disability.</td>
<td>01/15/09</td>
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<tr>
<td>7-110A</td>
<td>Audio and audio-visual appearance of defendant.</td>
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<tr>
<td>7-401</td>
<td>Bail.</td>
<td>02/02/09</td>
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<tr>
<td>7-502</td>
<td>Pleas and plea agreements.</td>
<td>09/10/09</td>
</tr>
<tr>
<td>7-506</td>
<td>Time of commencement of trial.</td>
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</tr>
<tr>
<td>7-602</td>
<td>Jury trial.</td>
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<tr>
<td>7-703</td>
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</table>

**Rules of Procedure for the Municipal Courts**

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<tbody>
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<td>8-103</td>
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<tr>
<td>8-502</td>
<td>Pleas.</td>
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<td>Time of commencement of trial.</td>
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<td>Appeal.</td>
<td>01/15/09</td>
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**Criminal Forms**

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<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>9-102</td>
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<tr>
<td>9-102A</td>
<td>Certificate of excusal or recusal.</td>
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<td>9-406A</td>
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<td>9-408A</td>
<td>Plea and disposition agreement.</td>
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<tr>
<td>9-604</td>
<td>Judgment and Sentence.</td>
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<tr>
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**Rules of Appellate Procedure**

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<tr>
<td>12-505</td>
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<tr>
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<tr>
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13-110A Instruction to jury. 12/31/08
13-110B Oath to interpreter. 12/31/08
13-1406 Strict products liability; care not an issue. 05/15/09
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
14-5120 Ignorance or mistake of fact. 09/16/09
14-5181 Self defense; nondeadly force by defendant. 09/16/09
14-5183 Self defense; deadly force by defendant. 09/16/09
14-5185 Self defense against excessive force by a peace officer; nondeadly force by defendant. 09/16/09
14-5186 Self defense against excessive force by a peace officer; deadly force by defendant. 09/16/09
14-6018 Special verdict; kidnapping. 09/16/09

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 OF PROFESSIONAL CONDUCT

16-104 Communication. 11/02/09

RULES GOVERNING DISCIPLINE

17-204 Required records. 01/01/10

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
21-400 Disqualification. 09/04/09

RULES GOVERNING THE RECORDING OF JUDICIAL PROCEEDINGS

22-202 Licensing of firms engaged in court reporting or tape monitoring. 09/09/09
22-201 Licensing of court reporters and monitors; power to administer oaths. 12/31/08

RULES GOVERNING REVIEW OF JUDICIAL STANDARDS COMMISSION

27-104 Filing and service. 09/04/09

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
IN THE MATTER OF THE AMENDMENTS OF FORMS 4-505A AND 4-808A NMRA OF THE RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Rules of Civil Procedure Committee to amend Forms 4-505A and 4-808A NMRA of the Rules of Civil Procedure, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Forms 4-505A and 4-808A NMRA of the Rules of Civil Procedure for District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Form 4-505A and 4-808A NMRA of the Rules of Civil Procedure shall be effective October 12, 2009;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced forms by publishing the same in the Bar Bulletin and NMRA and posting the same on the New Mexico Compilation Commission web site <www.nmcompcomm.us/nmrules>.

IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of August, 2009.

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

4-505A. Subpoena for production or inspection.

SUBPOENA FOR PRODUCTION OR INSPECTION

[ ] DOCUMENTS OR OBJECTS

[ ] INSPECTION OF PREMISES

TO:______________________________

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY

I certify that on the____ day of ______________, ____________, in ______________ County, I served this subpoena on ______________ by delivering to the person named a copy of the subpoena and a fee of $____________ (insert the amount of fee tendered or, if no fee is tendered, “none”).

______________________________

Deputy sheriff

RETURN FOR COMPLETION BY OTHER PERSON MAKING SERVICE

I, being duly sworn, on oath say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that on the ______ day of ______________, ____________, in ______________ County, I served this subpoena on ______________ by delivering to the person named a copy of the subpoena and a fee of $____________ (insert the amount of fee tendered, or, if no fee is tendered, “none”).

______________________________

Person making service

SUBSCRIBED AND SWORN to before me this ______ day of ______________, ____________ (date).

______________________________

Judge, notary or other officer authorized to administer oaths
THIS SUBPOENA issued by or at request of:

Name of attorney of party

Address

Telephone

CERTIFICATE OF SERVICE BY ATTORNEY
I certify that I caused a copy of this subpoena to be served on the following persons or entities by (delivery) (mail) on this day of ____________, __________.

(1) ______________________________________
   (Name of party)
   (Address)

(2) ______________________________________
   (Name of party)
   (Address)

Attorney ______________________________________
Signature ______________________________________
Date of signature ______________________________________

TO BE PRINTED ON EACH SUBPOENA
1. This subpoena must be served on each party in the manner provided by Rule 1-005 NMRA. If service is by a party, an affidavit of service must be used instead of a certificate of service.

2. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

3. If a person’s attendance is commanded, one full day’s per diem must be tendered with the subpoena, unless the subpoena is issued on behalf of the state or an officer or agency thereof. Mileage must also be tendered at the time of service of the subpoena as provided by the Per Diem and Mileage Act. See Section 38-6-4 NMSA 1978 for per diem and mileage for witnesses. See Paragraph A of Section 10-8-4 NMSA 1978 for per diem and mileage rates for nonsalaried public officers. Payment of per diem and mileage for subpoenas issued by the state is made pursuant to regulations of the Administrative Office of the Courts. See Section 34-9-11 NMSA 1978 for payments from the jury and witness fee fund.

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

A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

Subject to Subparagraph (2) of Paragraph D below, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises or within fourteen (14) days after service of the subpoena may file a motion to quash the subpoena and serve the motion on all parties to the action. If an objection is served or a motion to quash is filed and served on the parties, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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

(1) fails to allow reasonable time for compliance,
(2) requires a person who is not a party or an officer of a party to travel to a place more than one hundred miles from the place where that person resides, is employed or regularly transacts business in person, except as provided below, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
(3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(4) subjects a person to undue burden.

If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(2) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party, or
(3) requires a person who is not a party or an officer of a party to incur substantial expense to travel, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial material,
preme Court Order No. 08-8300-002, effective March 15, 2008; of civil procedure by Supreme Court Order No. 09-8300-030, effective October 12, 2009.}

4-808A. Notice of right to claim exemptions from execution.

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

v. No.

________________________, Plaintiff

________________________, Defendant

NOTICE OF RIGHT TO CLAIM EXEMPTIONS FROM EXECUTION

1. THE JUDGMENT CREDITOR (IS SEIZING) (HAS A RIGHT TO SEIZE) YOUR PROPERTY

A ruling has been made in this case that you owe money to the judgment creditor. The judgment creditor may collect that money from seizure and sale of your property. (Before the judgment creditor has the sheriff seize your property, you may have a right to claim exemptions of certain property.)

2. PURPOSE OF THIS NOTICE:

This notice is to tell you that some kinds of property or money may NOT be taken from you even after the court has ruled that you owe the judgment creditor money. This property is protected under state law. The property which may not be taken is called “exempt property”. YOU MUST FILE A CLAIM OF EXEMPTION FORM TO CLAIM ANY EXEMPT PROPERTY. YOU MAY WISH TO CONSULT WITH AN ATTORNEY BEFORE COMPLETING AND FILING THE CLAIM OF EXEMPTION FORM.

Here is a list of some exempt money and property. Other kinds of money or property not listed may also be exempt.

3. PARTIAL LIST OF EXEMPTIONS FROM EXECUTION

Part I. Homestead exemption

(This exemption may only be used in the district court.)

A judgment debtor who owns, leases or is purchasing a dwelling occupied by the judgment debtor is entitled to hold as exempt property a homestead in the amount of sixty thousand dollars ($60,000) under Section 42-10-9 NMSA 1978.

Part II. Exemption in lieu of homestead exemption

(Parts II and III are for use in the district court, magistrate court and metropolitan court.)

Residents of this state who do not claim a homestead exemption are entitled to an exemption of real or personal property in the amount of five thousand dollars ($5,000) under Section 42-10-10 NMSA 1978. You may not claim this exemption if you claimed a homestead exemption above.

Part III. Personal property exemptions

In addition to the property claimed as exempt above, judgment debtors are entitled to claim certain personal property exemptions. Most of those exemptions are listed below.

a. personal property worth up to $500;
b. tools of the trade worth up to $1,500;
c. a motor vehicle worth up to $4,000 or that amount of equity in a more valuable vehicle;
d. jewelry worth up to $2,500;
e. clothing, furniture, books and medical-health equipment being used for the health of the claimant or a member of the household of the claimant and not in a profession;
f. pension or retirement funds;
g. not more than $5,000 in benefits from a benevolent association of which the judgment debtor is a member;
h. building materials not financed by the judgment creditor in this action as provided by Section 48-2-15 NMSA 1978;
i. a partner’s interest in specific partnership property subject to the limitations of Section 54-1-25 NMSA 1978;
j. worker’s compensation benefits subject to the limitations of Section 52-1-52 NMSA 1978;
k. occupational health benefits as provided by Section 52-3-37 NMSA 1978;
l. unemployment compensation benefits subject to the limitations of Section 51-1-37 NMSA 1978 for necessities furnished while the debtor was unemployed and child support;
m. public assistance and welfare benefits;
n. cash surrender values and benefits of life insurance contracts;
o. payment from life, accident and health insurance policies or annuity contracts;
p. crime victims’ reparation fund payments;
q. fraternal benefit society benefits;
r. the minimum amount of shares necessary for certain cooperative associations subject to the limitations provided by Section 53-4-28 NMSA 1978;
s. the debtor’s membership interest in the property of a club or association pursuant to Section 53-10-2 NMSA 1978;
t. oil and gas equipment not financed by the judgment creditor to be used for purposes for which it was purchased as provided by Section 70-4-12 NMSA 1978;
u. allowances to surviving spouse and children from estate of a deceased estate subject to the limitations of Sections 45-2-401 and 45-2-402 NMSA 1978. You may not claim an exemption for personal property which is subject to a security interest under the Uniform Commercial Code given to the judgment creditor.

4. HOW TO PROTECT EXEMPT PROPERTY.

The sheriff may not seize your personal clothing, furniture and books or any jewelry unless the total value of all jewelry is more than $2,500. For other property, you must claim an exemption or it may be seized and sold. A claim of exemptions on execution form is attached for you to complete and file with the court. YOU MUST COMPLETE AND RETURN THE ATTACHED CLAIM OF EXEMPTIONS ON EXECUTION FORM TO THE CLERK OF THE COURT WITHIN TEN (10) DAYS AFTER SERVICE OF THIS NOTICE UPON YOU. YOU MUST ALSO SERVE A COPY OF THE COMPLETED AND SIGNED CLAIM OF EXEMPTIONS ON EXECUTION FORM ON THE JUDGMENT CREDITOR.
If the judgment creditor disputes a claimed exemption, the clerk or the judge will notify you of the date and time for a court hearing on your claim. You must go to that hearing and explain why your money or property is exempt. You must bring to the hearing any proof that your money or property is exempt.

If you do not complete and file the claim of exemptions on execution form within ten (10) days and attend the hearing, your property may be seized and sold by the sheriff.

FAILURE TO COMPLETE AND FILE A CLAIM OF EXEMPTIONS ON EXECUTION FORM WITHIN TEN (10) DAYS AND SERVE A COPY ON THE JUDGMENT CREDITOR WILL RESULT IN THE LOSS OF YOUR RIGHT TO CLAIM AN EXEMPTION.

(The following proof of service may be used ONLY if the judgment debtor has entered an appearance in the case.)

AFFIDAVIT OF SERVICE

I declare, under penalty of perjury, that this notice, a claim of exemptions on execution form and a copy of the judgment in the above cause of action were mailed on the _____ day of __________, ______ from _______________, (street address or post office branch) in _______________, New Mexico.

_____________________________
Signature

_____________________________
Date of signature

(If the judgment debtor has not entered an appearance, personal service of this notice must be made on the judgment debtor and the following Return of Service must be completed and filed with the court.)

RETURN

STATE OF NEW MEXICO  )
) ss
COUNTY OF ____________  )

(If the judgment debtor has not entered an appearance, personal service of this notice must be made on the judgment debtor and the following Return of Service must be completed and filed with the court.)

(If the judgment debtor has not entered an appearance, personal service of this notice must be made on the judgment debtor and the following Return of Service must be completed and filed with the court.)

(check only if service by sheriff or deputy)

[ ] I certify that I served the Notice of Right to Claims Exemptions (Execution) (in said county) (in ______________, County) on the _____ day of __________, ______, by delivering a copy thereof, with copy of judgment attached in the following manner: ________________________

(check one box and fill in appropriate blanks)

[ ] to defendant ________________, a person over fifteen (15) years of age and residing at the usual place of abode of defendant ________________, who at the time of such service was absent therefrom. Abode located at ________

[ ] by posting a copy of the Notice of Right to Claim Exemptions in the most public part of the premises of defendant ________________ (used if no person found at dwelling house or usual place of abode). Abode located at ________

[ ] to ________________, an agent authorized to receive service of process for defendant ________________.

[ ] to ____________________, (parent) (guardian) of defendant ________________ (used when defendant is a minor or an incompetent person).

[ ] after due diligence I was unable to serve this notice.

Fees: _____________________

_____________________________
Signature of person making service

_____________________________
Title (if any)

Subscribed and sworn to before me this __________ day of __________, ______

_____________________________
Judge, notary or other officer authorized to administer oaths

_____________________________
Official title

USE NOTE

1. Strike out the inapplicable alternative.
2. If service is made by the sheriff or a deputy sheriff of a New Mexico county, the signature of the sheriff or deputy need not be notarized.

[As amended, effective January 1, 1993; May 1, 1994; January 1, 1996; as amended by Supreme Court Order No. 09-8300-030, effective October 12, 2009.]
No. 09-8300-031

IN THE MATTER OF THE AMENDMENTS OF RULE 12-502 NMRA OF THE RULES OF APPELLATE PROCEDURE

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Appellate Rules Committee to amend Rule 12-502 NMRA of the Rules of Appellate Procedure, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 12-502 NMRA of the Rules of Appellate Procedure hereby are APPROVED;

IT IS FURTHER ORDERED that Marquez v. Wylie, 89 N.M. 544, 434 P.2d 69 (1967), notwithstanding, the amendments of Rule 12-502 NMRA of the Rules of Appellate Procedure shall be effective immediately for all pending cases in New Mexico district courts and the New Mexico Court of Appeals;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules by publishing the same in the Bar Bulletin and NMRA and posting the same on the New Mexico Compilation Commission web site <www.nmcompcomm.us/nmrules>.

IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of August, 2009.

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

12-502. Certiorari to the Court of Appeals.

A. Scope of rule. This rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals and of actions of the Court of Appeals pursuant to Rule 12-505 NMRA of these rules.

B. Time. The petition for writ of certiorari shall be filed with the Supreme Court clerk within thirty (30) days after final action by the Court of Appeals and served immediately on respondent. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the petition shall be accompanied by the docket fee. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the Court of Appeals shall be the filing of its decision with the Court of Appeals clerk unless timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing that was timely filed.

C. Petition.

(1) Cover. The cover of the petition shall show the names of the parties, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., State of New Mexico, Plaintiff-Respondent vs. John Doe, Defendant-Petitioner), and the name, mailing address and telephone number of counsel filing the petition, or, if a party is not represented by counsel, the name, mailing address and telephone number of the party.

(2) Contents. The petition shall contain a concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(a) the date of entry of the decision and any order on motion for rehearing thereon;
(b) the questions presented for review (the Court will consider only the questions set forth in the petition);
(c) the facts material to the questions presented;
(d) the basis for granting the writ, specifying where applicable:

(i) any decision of the Supreme Court with which it is asserted the decision of the Court of Appeals is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from the part of the Supreme Court decision showing the alleged conflict;

(ii) any decision of the Court of Appeals with which it is asserted the decision from which certiorari is sought is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from that part of the prior Court of Appeals decision showing the alleged conflict;

(iii) what significant question of law under the Constitution of New Mexico or the United States is involved; or

(iv) the issue of substantial public interest that should be determined by the Supreme Court;

(e) a direct and concise argument amplifying the reasons relied upon for granting the writ, including specific references to the briefs filed in the Court of Appeals showing where the questions were presented to the Court of Appeals; and

(f) a prayer for relief, including whether the case should be remanded to the Court of Appeals for consideration of issues not raised in the petition if the relief requested is granted.

(3) Attachments. The petition shall have attached a copy of the decision of the Court of Appeals and, if decided on the summary calendar, a copy of any calendaring notices; and, if decided by the Court of Appeals pursuant to Rule 12-505 NMRA, a copy of the final order or judgment of the district court and any district court findings or decision leading thereto, as well as a copy of the administrative decision under review by the district court. If a motion for rehearing was filed, the motion and the order of the Court of Appeals on the motion shall be attached.

D. Length limitations. Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) Body of the petition defined. The body of the petition consists of headings, footnotes, quotations and all other text except any cover page, table of contents, table of authorities, signature blocks and certificate of service.

(2) Page limitation. Unless the petition complies with Subparagraph (3) of Paragraph D of this rule, the body of the petition shall not exceed ten (10) pages; or

(3) Type-volume limitation. The body of the petition shall not exceed three thousand one hundred fifty (3,150) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or three hundred forty-two (342) lines, if the party uses a monospaced type style or typeface, such as Courier.
E. Statement of compliance. If the body of the petition exceeds the page limitations of subparagraph (2) of Paragraph D of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (3) of Paragraph D of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (1) of Paragraph D of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

F. Conditional cross-petition. Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition for writ of certiorari, to be considered only if the Court grants the petition. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the conditional cross-petition shall be accompanied by the docket fee. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by the other provisions of this rule, except as provided in Paragraph B.

G. Response. A respondent may file a response to the petition within fifteen (15) days of service of the petition or within fifteen (15) days of the granting of the petition. The response shall comply with Paragraphs D and E of this rule. No other response may be submitted.

H. Notice to Court of Appeals. A copy of the petition for a writ of certiorari shall be delivered by the Supreme Court clerk to the Court of Appeals clerk who shall deliver the record of the cause to the Supreme Court on request, and recall any previously issued mandate.

I. Briefs. In the event the writ of certiorari is issued, additional briefs may be filed only as directed by the Supreme Court.

J. Oral argument. Oral argument shall not be allowed unless directed by the Supreme Court.

K. Service. Service of any paper shall be made and proof thereof accomplished in accordance with Rule 12-307 NMRA.

L. Copies. If the petition for writ of certiorari has been filed pro se by a petitioner adjudged indigent, only the original petition shall be filed. In all other cases, copies shall be filed in accordance with Rule 12-306 NMRA.

[As amended, effective July 1, 1990; August 1, 1992; October 1, 1995; January 1, 2000; November 1, 2003; as amended by Supreme Court Order 07-8300-24, effective November 1, 2007; by Supreme Court Order 09-8300-031, effective August 24, 2009, for all pending cases in the district courts and the Court of Appeals.]

Committee commentary. – Although NMSA 1978, Section 34-5-14(B) provides a twenty-day time limit for filing a petition for a writ of certiorari, time requirements are a matter of procedure within the Supreme Court’s rule-making power. See Cummings v. State, 2007-NMSC-048, ¶ 17, 142 N.M. 656, 168 P.3d 1080; see also State v. Arnold, 51 N.M. 311, 314, 183 P.2d 845, 846 (1947) (“The creating of a right of appeal is a matter of substantive law and outside the province of the court’s rule making power. Nevertheless, once the legislature has authorized the appeal, reasonable regulations affecting the time and manner of taking and perfecting the same are procedural and within this court’s rule making power.”). Accordingly, Paragraph B of this rule now permits the filing of a petition within thirty days of final action by the Court of Appeals.

[Adopted by Supreme Court Order 09-8300-031, effective August 24, 2009, for all pending cases in the district courts and the Court of Appeals.]
IN THE MATTER OF THE AMENDMENT OF RULE 5-604 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration upon the Court’s own motion to provisionally amend Rule 5-604 NMRA for one year, and the Court being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that Rule 5-604 NMRA of the Rules of Criminal Procedure for the District Courts hereby is AMENDED, provisionally for one year;

IT IS FURTHER ORDERED that the amendments to Rule 5-604 NMRA of the Rules of Criminal Procedure for the District Courts shall be effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendment of Rule 5-604 NMRA by publishing the same in the Bar Bulletin and NMRA and posting the same on the New Mexico Compilation Commission website <www.nmcompcomm.us/nmrules>. IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of August, 2009.

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

5-604. Time of commencement of trial. [Provisionally approved effective September 1, 2009, until September 1, 2010.]

A. Arraignment. The defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later.

B. Time limits for commencement of trial. The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:

(1) the date of arraignment, or waiver of arraignment, in the district court of any defendant;
(2) if the proceedings have been stayed to determine the competency of the defendant to stand trial, the date an order is filed finding the defendant competent to stand trial;
(3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;
(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;
(5) if the defendant is arrested or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;
(6) if the defendant is arrested or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;
(7) if the defendant has been placed in a preprosecution diversion program, the date of the filing with the clerk of the district court of a notice of termination of a preprosecution diversion program for failure to comply with the terms, conditions or requirements of such program;
(8) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5-304 NMRA.

C. Extensions of time in district court. For good cause shown, the time for commencement of trial may be extended by the district court for six (6) months. The district court may grant additional extensions, but in doing so the district court shall consider the following factors:

(1) the complexity of the case;
(2) the length of the delay in bringing the defendant to trial;
(3) the reason for the delay in bringing the defendant to trial;
(4) whether the defendant has asserted the right to a speedy trial or acquiesces in the delay; and
(5) the extent of prejudice, if any, to the parties from the delay.

D. Procedure for extensions of time. The party seeking an extension of time shall file with the clerk of the court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the trial. The petition shall be filed within the applicable time limit prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limit if it is based on exceptional circumstances beyond the control of the parties or trial court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the court. If the court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the trial must commence.

E. Effect of noncompliance with time limits.

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

F. Applicability. This rule shall not apply to cases on appeal from the metropolitan, magistrate or municipal court.

[As amended, effective September 1, 1998; May 1, 2000; as amended by Supreme Court Order 07-8300-18, effective August 13, 2007; by Supreme Court Order No. 08-8300-052, effective November 24, 2008; by Supreme Court Order No. 09-8300-032, approved provisionally for one year, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court.]

Committee commentary. — Paragraph A of this rule requires arraignment within fifteen (15) days after the filing of the information or indictment or the date of arrest on the district court charges, whichever is later. State v. Dominguez, 91 N.M. 296, 573 P.2d 230
(1977). A failure of the state to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Paragraph B of this rule requires that the trial of a criminal case commence within six (6) months after the latest of any of eight enumerated events occurs. An extension of time must be obtained if the delay is caused by an event which is not listed in Paragraph B of this rule. For example, an extension of time will be necessary if the six (6) months will expire while a defendant who was arrested in New Mexico for a criminal offense committed in this state is in another state for trial for an offense committed in that state or while the criminal proceedings are stayed under a writ granted by either a federal or state court. For a further time limitation of the trial of a defendant also charged with crimes in another state, see Section 31-5-12 NMSA 1978 and State v. Duncan, 95 N.M. 215, 619 P.2d 1259 (Ct. App. 1980).

A violation of Paragraph B of this rule can result in a dismissal with prejudice of criminal proceedings, including habitual criminal proceedings. See State v. Lopez, 89 N.M. 82, 547 P.2d 565 (1976). However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Where the state in good faith files a nolle prosequi and later files the same charge, the time under Paragraph B of this rule begins to run from the information, indictment or date of arrest, whichever is later, on the second charge. This interpretation would not apply if it is clear that the state is attempting to circumvent the purpose of Paragraph B of this rule. State ex rel. Delgado v. Stanley, 83 N.M. 626, 495 P.2d 1073 (1972); see also, State v. Lucero, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977). Where a case is transferred from children’s court to the district court, the time begins to run when the criminal information is filed in the district court, not when a petition is filed in children’s court. A judgment in any proceedings on a petition in children’s court is not to be deemed a conviction of a crime. State v. Howell, 89 N.M. 10, 546 P.2d 858 (Ct. App. 1976).

Subparagraph (3) of Paragraph B of this rule includes new trials which result from a mistrial declared pursuant to Rule 5-611, newly discovered evidence pursuant to Rule 5-614 or the granting of motion to vacate or set aside a judgment pursuant to Rule 5-802.


The granting of an extension of time under Paragraph C of this rule is final and may not be challenged on the appeal after conviction. State v. Sedillo, 86 N.M. 382, 524 P.2d 998 (Ct. App. 1974) (decided under former version of the rule providing for extensions of time granted by the Supreme Court); see also State v. Jaramillo, 88 N.M. 60, 537 P.2d 55 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The rule requires that a motion for extension of time beyond the six-month trial limit be filed within the six-month period; however, an exception allows a petition to be filed within ten (10) days after the expiration of the six-month trial period if there were exceptional circumstances beyond the control of the parties or the judge for the failure to file the petition within the six-month period. It is believed that exceptional circumstances would include the death or illness of the judge, prosecutor or defense attorney immediately preceding the commencement of the trial which was to commence the day prior to the expiration of the six-month trial requirement. Time is computed pursuant to Paragraph A of Rule 5-104.

The 2007 amendments to Paragraph C of the rule expanded the district court’s aggregate authority to grant extensions under the rule from three (3) months to six (6) months. In 2009, Paragraph C was again amended to remove the six-month limitation on the district court’s aggregate authority to grant extensions under the rule. In addition, the 2009 amendments to the rule no longer permit the filing of petitions for extensions of time to commence trial with the Supreme Court. Although the district court is now the sole entity responsible for deciding whether to extend the time limits under the rule, good cause for an extension still must be shown, and the 2009 amendments require that the district court consider a number of factors when deciding whether to grant an extension of the time greater than six (6) months. The factors are patterned after guidelines and factors set forth in state and federal case law for determining whether a defendant’s right to a speedy trial has been violated. See State v. Garza, 2009-NMSC-045, ¶ 048, 182 N.M. 1, 235 P.3d 1259 (2010) (revising benchmarks for determining when delay triggers application of the Barker v. Wingo four-factor balancing test, which is twelve (12) months for simple cases, fifteen (15) months for cases of intermediate complexity, and eighteen (18) months for complex cases). Although Garza emphasizes the need for a showing of actual prejudice in most cases to establish a speedy trial violation, the district court retains discretion to deny a request to extend the time for commencement of trial under this rule even if there is no showing of actual prejudice from the delay. [Amended by Supreme Court Order No. 09-8300-032, approved provisionally for one year, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court.]
various counterclaims are relevant to this appeal.

Appeal and Error: Appellate Review; and Substantial or Sufficient Evidence
Civil Procedure: Burdens of Proof; Findings and Conclusions; and Prima Facie Case
Evidence: Presumptions; Prima Facie Case; Relevancy, Materiality, and Competency; and Substantial or Sufficient Evidence
Wills, Trusts and Probate: Undue Influence

IN THE MATTER OF THE ESTATE OF
GREGORIA C DE BACA, Deceased,
EDWINA CHAPMAN and GILBERT C DE BACA,
Plaintiffs-Petitioners,
versus
VIOLA A. VARELA and VINCENT VARELA,
Defendants-Respondents.
No. 31,234 (filed: July 20, 2009)

ORIGINAL PROCEEDING ON CERTIORARI
CAROL J. VIGIL and DANIEL A. SANCHEZ, District Court Judges

J. RONALD BOYD
LAW OFFICE OF RONALD BOYD
Santa Fe, New Mexico
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Opinion

Edward L. Chávez, Chief Justice

1 When Gregoria C de Baca died on May 11, 2004, she was survived by nine children: Rosina Villa, Rudy C de Baca, Viola Varela, Simon C de Baca, Tom C de Baca, Daniel C de Baca, Gilbert C de Baca, Edwina Chapman, and Donna C de Baca. Gregoria’s will, dated August 28, 2002, left one dollar to each of her children except Viola, who the will appointed as personal representative and to whom the will conveyed the remainder of Gregoria’s estate via its residuary clause. Viola already had received much of Gregoria’s real property via five inter vivos warranty deeds that had been signed and recorded about three years before Gregoria’s death and about one year before the will was executed. Edwina and Gilbert, subsequently joined by Rudy, Daniel, Rosina, and Donna, brought actions in district court to set aside the will and deeds as the products of Viola’s undue influence. After a trial, the district court voided the will and the deeds. The Court of Appeals concluded that there was insufficient evidence to support the district court’s finding of undue influence regarding the will, but did not reach the issue of the deeds. Chapman v. Varela (In re Estate of C de Baca), 2008-NMCA-108, ¶¶ 11, 47, 144 N.M. 709, 191 P.3d 567.

2 We reverse the Court of Appeals and hold that there was sufficient evidence to support the district court’s findings of a confidential relationship between Gregoria and Viola and suspicious circumstances surrounding the execution of her will. Accordingly, under our rules governing civil presumptions, we hold that sufficient evidence existed for the district court’s ultimate conclusion that the will was void as the product of Viola’s undue influence. Finally, because the Court of Appeals did not decide the validity of the deeds, and because this issue was not specifically briefed to the Supreme Court, we remand to the Court of Appeals for its determination of this issue.

I. BACKGROUND

3 Gregoria C de Baca died on May 11, 2004, at the age of 84. Edwina and Gilbert, claiming that Gregoria died intestate, submitted an application in district court for informal appointment as personal representatives. They were subsequently named personal representatives of Gregoria’s estate. In a separate action that was later consolidated with the probate proceedings in district court, Edwina and Gilbert claimed that five inter vivos warranty deeds of Gregoria’s real property to Viola were procured by forgery, misrepresentation, or undue influence. Viola subsequently petitioned the district court to admit Gregoria’s will into probate, and in accordance with the will, to remove Edwina and Gilbert as personal representatives and appoint her in their place. The will provided one dollar to each of Gregoria’s children except for Viola and purported to detail Gregoria’s grievances with several of them. In contrast, the will

1 Siblings also sought to set aside a deed of real property from Gregoria to Viola’s son, Vincent, but neither this claim nor Vincent’s various counterclaims are relevant to this appeal.
praised Viola, noted that Gregoria’s bank accounts and real property had already been conveyed to her, and devised the residue of Gregoria’s estate to her. Viola was appointed personal representative and made various counterclaims that are not relevant to this appeal. Edwina and Gilbert, joined by Rudy, Daniel, Rosina, and Donna (collectively “Siblings”), petitioned the district court to set aside the will as a product of undue influence. After a bench trial, the district court removed Viola as personal representative and made the personal representative and made the personal representative and made the court to set aside the will as a product of undue influence. After a bench trial, the district court removed Viola as personal representative and made the court to set aside the will as a product of undue influence.

{4} Viola sought review in the Court of Appeals, which reversed the district court, holding that there was insufficient evidence that the will was the product of undue influence. **Chapman**, 2008-NMCA-108, ¶ 47. In reaching its conclusion, the Court of Appeals held that “[t]he evidence regarding old age, unnatural disposition, domination, and secrecy did not establish that Viola substituted her own intent for Gregoria’s.” Id. Given this shortfall and the Court’s conclusion that Viola did not participate in procuring the will, but did provide “consideration in the form of love, friendship, and help with daily living[,]” id., the Court of Appeals concluded that the district court could not have found clear and convincing evidence of undue influence. *Id.* The Court of Appeals averred that it did not need to reach the question of whether the deeds were the product of undue influence, *id.* ¶ 11, presumably because even if they were invalid, Gregoria’s real property would pass to Viola via the will’s residuary clause. Siblings seek review on a number of issues that, taken together, amount to a challenge of the Court of Appeals’ holding on the sufficiency of the evidence of undue influence. The New Mexico Trial Lawyers Association joins them as Amicus Curiae in criticizing the Court of Appeals’ opinion.

**II. DISCUSSION**

**A. STANDARD OF REVIEW**

{5} To find sufficient evidence to support the district court’s invalidation of Gregoria’s will because of undue influence, we must be able to conclude that a reasonable fact finder could have found clear and convincing evidence of undue influence. **Gersbach v. Warren (In re Estate of Gersbach)**, 1998-NMSC-013, ¶ 31, 125 N.M. 269, 960 P.2d 811. Clear and convincing evidence is evidence that would “instantly tilt[.]” the scales in the affirmative when weighed against the evidence in opposition . . . .” In **re Locatelli**, 2007-NMSC-029, ¶ 7, 141 N.M. 755, 161 P.3d 252 (per curiam) (internal quotation marks and citation omitted). In determining sufficiency, we keep in mind that “[t]he duty to weigh the credibility of witnesses and to resolve conflicts in the evidence lies with the trial court, not the appellate court. We consider the evidence in the light most favorable to the prevailing party and disregard any inferences and evidence to the contrary.” **Doughty v. Morris**, 117 N.M. 284, 287, 871 P.2d 380, 383 (Ct. App. 1994) (citation omitted). However, we give no deference to the district court’s conclusions of law. See **Primetime Hospitality, Inc. v. City of Albuquerque**, 2009-NMSC-011, ¶ 10, 146 N.M. 1, 206 P.3d 112 (“We review these questions of law de novo, without deference to the district court’s legal conclusions.”). We are mindful of Viola’s complaint that the district court’s findings are “insufficient” and “are conclusions listed [as] factual findings.” Although we disagree that the district court’s findings are so insufficient that they necessitate a remand, we recognize that some of the district court’s findings are conclusions of law, and we do not afford such conclusions any deference in our review.

**B. DEFINING UNDUE INFLUENCE**

{6} The first dispute between the parties concerns exactly what it is that the district court must have been able to find by clear and convincing evidence to set aside Gregoria’s will because of undue influence. However, as a preliminary matter, the parties do not disagree over the most general outlines of this doctrine. Undue influence “means influence, improperly exerted, which acts to the injury of the person swayed by it or to the injury of those persons whom [he or she] would have benefited.” **Brown v. Cobb**, 53 N.M. 169, 172, 204 P.2d 264, 266 (1949). We have hesitated to provide precise elements for undue influence because “any attempt to define it may well suggest a clear path of evasion.” *Id.* The contestant of a will (in this case, Siblings) bears the burden of persuading the finder of fact that undue influence occurred. NMSA 1978, § 45-3-407 (1975).

{7} Many years ago, we observed that the fundamental problem of proving undue influence was that:

“In the nature of things it would be a rare case where the details of conversation or conduct could be shown indicating undue persuasion and influence. Such acts would be exercised only in the absence of witnesses, or at most, in the presence of those whose interest and inclination would impel to their denial.” **Cardenas v. Ortiz**, 29 N.M. 633, 640, 226 P. 418, 421 (1924) (internal quotation marks and citation omitted). For this reason, New Mexico law has traditionally allowed the contestant of a will to meet certain procedural hurdles, detailed later in this opinion, by raising a presumption of undue influence. Moreover, “because of the difficulty in obtaining direct proof in cases where undue influence is alleged, proof sufficient to raise the presumption is inferred from the circumstances.” **Montoya v. Torres**, 113 N.M. 105, 110, 823 P.2d 905, 910 (1991). “The presumption arises if a confidential or fiduciary relation with a donor is shown together with suspicious circumstances.” *Id.*

*Id.* Such circumstances include:

1. old age and weakened physical or mental condition of testator;
2. lack of consideration for the bequest; (3) unnatural or unjust disposition of the property; (4) participation of beneficiary in procuring the gift; (5) domination or control over the donor by a beneficiary; and (6) secrecy, concealment, or failure to disclose the gift by a beneficiary.

*Id.* “This is not an exhaustive list, nor is it a list of circumstances that are always suspicious. Furthermore, the presence of any of these circumstances is not in itself dispositive.” **Gersbach**, 1998-NMSC-013, ¶ 8.

{8} The parties disagree over the effect the presumption should have on our review for substantial evidence. Viola urges us to accept the reasoning of the Court of Appeals. That Court noted that “[i]n order to uphold the . . . judgment [of undue influence], we would need to conclude that, viewing the evidence in the light most favorable to [the contestant], a reasonable fact finder could find clear and convincing evidence that the testator made a gift he would not have made absent improper influence.” **Chapman**, 2008-NMCA-108, ¶ 46 (modifications in
Surveying the evidence discovering the testator’s intent.” Id. ¶ 17 (emphasis added). Surveying the evidence in light of this standard, the Court noted that “[a]lthough Siblings presented a great deal of evidence that appears to satisfy the elements [sic] of undue influence, closer examination reveals that very little of the testimony and evidence is relevant to the determination of Gregoria’s intent.” Id. ¶ 47. The Court of Appeals explained that it took this approach out of concern that making proof of undue influence too easy could undermine testamentary freedom. Id. ¶ 13.

Siblings and Amicus, on the other hand, argue that by requiring proof going to the ultimate issue of whether Gregoria’s intent was subverted through undue influence, the Court of Appeals “would require contestents to prove facts that are often unknowable” and thereby “denie[d] the contestants their well-established right to a presumption . . . .” Siblings and Amicus claim that “New Mexico undue influence law puts upon the contestant only the burden of showing a confidential relationship and circumstances which over the decades have proven to be reliable indicia of an abuse of a confidential relationship.” We believe that this position is essentially correct.

To explain our conclusion, we must briefly expound on the effect of presumptions in civil cases in New Mexico. Rule 11-301 NMRA provides that:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party upon whom it was originally cast.

Rule 11-301 operates in undue influence cases as follows. In a jury trial, once a presumption of undue influence is raised, the contestant’s burden of going forward with the evidence is satisfied and he or she is not susceptible to a motion for judgment as a matter of law. Mortgage Inv. Co. v. Griego, 108 N.M. 240, 244, 771 P.2d 173, 177 (1989) (“Presumptions governed by the [rule] operate to avoid a directed verdict . . . .”); Martínez v. Cantu (In re Estate of Gonzales), 108 N.M. 583, 584, 775 P.2d 1300, 1301 (Ct. App. 1988) (“[A] party may rely on a presumption to establish his or her prima facie case.”). In addition, once evidence sufficient to raise the presumption has been introduced, a “burden of going forward with evidence to rebut or meet the presumption” is imposed upon the proponent of the will. Rule 11-301. Our case law is not consistent regarding the effect of failing to “rebut or meet” a presumption, but we need not resolve this issue as it is not before us. Compare Griego, 108 N.M. at 243-44, 771 P.2d at 176-77 (“If the adverse party offers no evidence contradicting the presumed fact, the trial court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact.”), with Gonzales, 108 N.M. at 585, 775 P.2d at 1302 (“If the proponent does not meet this burden, the contestant’s evidence might require a finding of undue influence.”). In a non-jury trial such as this one, the impact of a presumption is slightly different. We have observed that due to the use of involuntary dismissal rather than directed verdicts in bench trials, “as a practical matter, presumptions in a civil nonjury trial under Rule 301 are little more than rhetorical devices; one can argue them to a judge but they have no mandatory effect upon his decision[,]” which is reached by weighing the evidence. Griego, 108 N.M. at 244, 771 P.2d at 177 (emphasis removed) (citation omitted).

More importantly for the purposes of our sufficiency of the evidence review on appeal, under Rule 11-301 a presumption once raised in both jury and non-jury trials continues to have evidentiary force, regardless of the contradictory evidence presented by the party against whom it is employed. Thus, although the raising of the presumption does not mandate any final result at trial, if the fact finder concludes that the party raising the presumption has prevailed and we find sufficient evidence to support the raising of the presumption, we will not set aside the fact finder’s conclusion on appeal. This is because Rule 11-301 “eliminated the ‘bursting bubble’ theory of presumptions, and a presumption now retains evidentiary effect throughout the trial, so as to permit the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact.” Roberts Oil Co. v. Transamerica Ins. Co., 113 N.M. 745, 756, 833 P.2d 222, 223 (1992). Under the defunct bursting bubble theory, once a presumption was rebutted, the basic facts that raised it remained, but they were given no special evidentiary value and might or might not be enough to reach the fact finder. In contrast, without a bursting bubble theory, the presumption always remains and the basic facts can justify a finding of the presumed fact, even if, in the absence of the presumption, the basic facts might not justify such a finding. See 2 Kenneth S. Broun, McCormick on Evidence § 344, at 508-10 (6th ed. 2006). In other words, “the inference may continue to operate in an evidentiary sense even after introduction of evidence tending to establish the contrary, and may sufficiently influence the trier of facts to conclude that the presumed fact does exist.” State Farm Mut. Auto. Ins. Co. v. Duran, 93 N.M. 489, 492, 601 P.2d 722, 725 (Ct. App. 1979). The justification for this change was that denying any evidentiary effect to a rebutted presumption gave presumptions “too slight and evanescent an effect[,]” Trujillo v. Chavez, 93 N.M. 626, 629, 603 P.2d 736, 739 (Ct. App. 1979) (internal quotation marks and citation omitted), and ignored the fact that many presumptions are created for policy reasons that “may persist despite the existence of proof rebutting the presumed fact.” 2 Broun, supra, § 344, at 509.

It is precisely because of the evidentiary effects of presumptions that our law employs them in undue influence cases, where, as we noted above, direct proof is notoriously elusive. The mechanism of a presumption allows the will contestant to get the issue of undue influence before the fact finder by offering only proof of a confidential relationship and suspicious circumstances.

Of course, even if a party successfully raises a presumption that could be used by the fact finder to justify a finding

We note that the effect of presumptions in civil cases is thus markedly different than in criminal cases, where a presumption can have no inherent evidentiary effect. See State v. Trossman, 2009-NMSC- . ¶ 18, __ N.M. __, P.3d __ (No. 31,010, June 22, 2009) (noting that a presumption in a criminal case may not “undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt” (internal quotation marks and citation omitted)).
of the ultimate fact of undue influence, the risk of nonpersuasion never shifts from the party on whom it was originally placed: the will contestant. Rule 11-301; § 45-3-407. The ultimate question before the trier of fact is whether the will contestant has proven that “the testator made a gift he would not have made absent improper influence.” Gersbach, 1998-NMSC-013, ¶ 31; see Barber v. Pound (In re Estate of Strozzi), 120 N.M. 541, 542-43, 903 P.2d 852, 853-54 (Ct. App. 1995) (approving a jury instruction requiring the jury to find either (1) that a confidential relationship existed and that the will proponent “used that position to unfairly and improperly influence [the decedent] to his injury, or to the injury of those persons he would have benefited in the absence of the influence[,]” or (2) that the will proponent “unfairly and improperly influenced [the decedent] as to prevent him from exercising a free and understanding judgment when he executed his will.”). However, the fact finder is permitted to draw its conclusion based entirely on the basic facts and the presumption, if it so chooses. See Strozzi, 120 N.M. at 544-45, 903 P.2d at 855-56 (also noting an instruction on the presumption, and noting that “[r]espondents do not contest that the verdict must be affirmed if Petitioners established the existence of a confidential relationship and certain suspicious circumstances.”).

We note that some of our cases may have inadvertently obscured the distinction between the evidence required to raise the presumption and the ultimate question of undue influence. See, e.g., Gersbach, 1998-NMSC-013, ¶¶ 28-29 (stating that “[t]o give rise to a presumption of undue influence, and the need for the beneficiary to rebut the presumption, the evidence must justify an inference of misconduct which produced a desired or foreseeable result[;]” and that “[u]nless the evidence presented by [contestant] justified an inference that the gift was the result of improperly exerted influence, such questions do not require an answer . . .”). Although we do not believe that the outcomes of any such cases are unsound, these misstatements do not represent our law, because they seem to require that the evidence of the basic facts must give rise to a natural inference of specific instances of misconduct. To require the evidence of the basic facts to give rise to a natural inference of specific instances of misconduct would render the presumption meaningless.

For this reason, we disagree with the Court of Appeals that its role was to “consider the existence of suspicious circumstances not as ends in themselves but as clues in discovering the testator’s intent[,]” Chapman, 2008-NMCA-108, ¶ 17, and that the evidence of undue influence “must do more than raise a suspicion.” Id. ¶ 13 (internal quotation marks and citation omitted). The role of the appellate court reviewing sufficiency of the evidence to support a finding of undue influence is simply to determine whether the presumption of undue influence could have been raised.

C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DISTRICT COURT’S FINDING OF UNDUE INFLUENCE

Our review for substantial evidence requires us to consider whether the evidence as a whole was sufficient to prove the existence of a confidential relationship and suspicious circumstances. See Strozzi, 120 N.M. at 544-45, 903 P.2d at 855-56. We first review the evidence cited by the district court as supporting its findings of a confidential relationship and each of the individual suspicious circumstances to determine whether it was relevant. Although the Court of Appeals was incorrect when it concluded that much of this evidence was not relevant to the issue of undue influence because it was not “relevant to the determination of Gregoria’s intent[,]” Chapman, 2008-NMCA-108, ¶ 47, our cases do require that the evidence depended upon being relevant to the presumption factors. See, e.g., Gonzales, 108 N.M. at 585-86, 775 P.2d at 1302-03 (“No New Mexico case has based a presumption of undue influence on the fact that the testator was elderly without evidence that the testator’s age had affected his or her mental ability.”). In this regard, Viola urges us to strictly limit the evidence admissible to prove undue influence to facts closely connected in time and subject matter to the execution of the will, but Siblings and Amicus suggest that to do so would needlessly overlook evidence relevant to determine whether a confidential relationship and suspicious circumstances existed. We conclude that in many instances, the Court of Appeals’ focus on proof going directly to the ultimate fact of undue influence led it to disqualify evidence that, while certainly not determinative in and of itself, could properly have contributed to the district court’s conclusions. See id. at 586, 775 P.2d at 1303 (“None of the individual circumstances surrounding the execution of decedent’s will is sufficient to raise a presumption of undue influence. That leaves the question of whether a presumption of undue influence arises when the trial court’s findings are considered as a whole.”).
1. CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

Citing the evidence that Gregoria had depended on Viola for transportation, meals, and housekeeping, had given Viola a power of attorney and placed Viola’s name on her bank accounts, the district court concluded that a confidential or fiduciary relationship existed between the two. We agree with the Court of Appeals that this was supported by sufficient evidence. Chapman, 2008-NMCA-108, ¶ 16. In Gersbach, we recognized that our previous test for confidential relationships was potentially too broad because it only required a showing that “one person place[d] trust and confidence in the integrity and fidelity of another.” 1998-NMSC-013, ¶ 11 (internal quotation marks and citation omitted). However, we found a confidential relationship where:

The record indicates [decedent] and [proponent] were close friends. The two often spent time together alone and talked on the phone frequently, conversations to which [contestant] was not a party. The record also indicates that [decedent] trusted [proponent]. [Proponent] was permitted to pay a minimal rent on the farm . . . . The trial court found that [decedent] “had disclosed to [proponent] the location of substantial amounts of cash” . . . and that [decedent] “loaned money to [proponent] without setting any particular terms for the repayment of those debts.” These facts support the district court’s finding that a confidential relationship existed.

Id. ¶ 12 (citation omitted). The relationship between Viola and Gregoria certainly rose to this level. Viola admitted that she had a close relationship with Gregoria, seeing her daily, bathing her, buying her groceries, cleaning her house, accompanying her to doctor’s appointments, and paying her bills. Viola also admitted that she had a joint checking account with Gregoria and had received a durable power of attorney from her. Particularly after Gregoria’s hearing declined following a stroke, testimony indicated that Gregoria used Viola as an intermediary to communicate with others and may simply have allowed Viola to speak for her. Finally, Gregoria allowed Viola to participate in the drafting and execution of her will and the deeds. This level of trust and dependence satisfies even the most stringent definitions of a confidential or fiduciary relationship.

2. SUSPICIOUS CIRCUMSTANCES

a. Old Age and Weakened Physical or Mental Condition

The district court considered Gregoria’s ill health and resultant dependence on her family as evidence contributing to its finding of suspicious circumstances. For instance, it found that “[i]n [her] last few years Gregoria C de [B]aca also suffered from age related and stroke related loss of cognitive functioning and memory loss.” The Court of Appeals held that this evidence should not have contributed to a finding of undue influence, explaining that evidence of Gregoria’s declining physical and mental condition did not demonstrate the susceptibility to influence required under our case law. See Chapman, 2008-NMCA-108, ¶ 18.

We disagree. It is true that “[n]o New Mexico case has based a presumption of undue influence on the fact that the testator was elderly without evidence that the testator’s age had affected his or her mental ability.” Gonzales, 108 N.M. at 585-86, 775 P.2d at 1302-03. Evidence of ailments with no effect on cognition are simply irrelevant to determine whether the decedent might have been unduly influenced. For this reason, in Lucero v. Lucero (In re Estate of Lucero), 118 N.M. 636, 642, 884 P.2d 527, 533 (Ct. App. 1994), superceded by statute on other grounds as recognized in Garcia v. Taylor (In re Estate of Frietze), 1998-NMCA-145, ¶ 17, 126 N.M. 16, 966 P.2d 183, the Court of Appeals upheld a directed verdict against will contestants, despite posthumous examinations of testator’s medical records generally suggesting senile dementia and cortical atrophy, because undisputed evidence suggested that the decedent was lucid at the time of the execution of the will. Similarly, in Gonzales, 108 N.M. at 586, 775 P.2d at 1303, the Court of Appeals found that the contestants had not raised a suspicion of undue influence when they showed the decedent to be old and sick, but the only evidence regarding her mental state showed her to be alert. Further, when mental weakness is the only suspicious circumstance in a case, even more definitive evidence of susceptibility may be required. See In re Estate of Keeney, 121 N.M. 58, 62, 908 P.2d 751, 755 (Ct. App. 1995) (holding that evidence of ill health and emotional instability would not, without more, have supported a presumption of undue influence, but that when combined with the testimony of a psychologist who stated that the decedent’s health problems would lead to susceptibility to influence, this evidence, with little else in the way of suspicious circumstances, was sufficient to raise a genuine issue of fact regarding the existence of undue influence).

b. Unnatural or Unjust Disposition

The district court found that Gregoria’s will was an “[unjust] and unnatural disposition” because “[t]he conveyances and the Will were at variance with the previous declarations and known affections of Gregoria C de Baca.” The Court of
Appeals disagreed. It noted first that because Viola is Gregoria’s daughter, “[t]he devise in the present case does not fit easily into the traditional definition of an unnatural gift because although Viola is a natural object of Gregoria’s bounty, so were the other eight children . . . .” Chapman, 2008-NMCA-108, ¶ 19. The Court explained that the mere fact that the will did not distribute Gregoria’s property as would the intestacy statutes could not contribute to a finding of undue influence; instead, the Court of Appeals required “evidence that the division of property did not reflect the intent of the testator . . . .” Id. The Court gave some credence to the statements of Siblings and other witnesses that Gregoria had expressed intentions and affections contrary to the will, see id. ¶¶ 22, 24-25, but found more convincing the evidence “that when Gregoria wanted to make a gift, she made it.” Id. ¶ 23. It also noted that “[t]here is no evidence that Gregoria intended to divide her property equally among her children . . . .” Id. ¶ 26. The Court concluded that the evidence “does not provide insight into Gregoria’s intentions” and could not contribute to a finding of suspicious circumstances. Id.

Although we agree with the Court of Appeals that some of the evidence ostensibly contributing to the district court’s ruling that the will was an unnatural or unjust disposition was not relevant, we reach this conclusion partly in a different manner. To begin, however, we concur with the Court of Appeals that Gregoria’s will does not fit the traditional definition of an unnatural disposition. In Gersbach, we explained that “[a] ‘natural disposition’ has been defined as one ‘which provides for a testator’s heirs at law. As one court succinctly put it: “[T]he natural object of a will maker’s bounty is one related to him/her by consanguinity.”’ 1998-NMSC-013, ¶ 24 (citation omitted).

Viola is one of Gregoria’s children, and as such, Gregoria’s testamentary gift to her was not unnatural, even if Gregoria’s other children were excluded. If any transfer that diverged from the intestacy statute could be considered unnatural, testamentary freedom would be threatened.

However, our cases have also defined unnatural or unjust dispositions to include transfers of property at odds with a testator’s previously expressed intentions and affections. For instance, in Doughty, 117 N.M. at 289-90, 871 P.2d at 385-86, the Court of Appeals upheld a trial court’s finding of an unnatural or unjust disposition when one child had been effectively disinherited via inter vivos transfers to another child, but the evidence, including the decedent’s will, indicated “that [decedent] enjoyed a close relationship with both her children and she commented that she wanted [both children] to share her estate equally.” Similarly, in Montoya, 113 N.M. at 111-12, 823 P.2d at 911-12, we upheld a trial court’s finding of undue influence based in part on a suspicious unnatural or unjust disposition when “the gift to [decedent’s step-grandson] may have been inconsistent with [decedent’s] previously expressed intention” to give the property to her son.

In this case, the bulk of Siblings’ testimony relating to this factor concerned Gregoria’s real property. Five witnesses testified that Gregoria had planned to give her house to Gilbert, who received just one dollar in the will. The only other evidence potentially going to the issue of unjust disposition concerned the falsehood of some of the assertions in the will. For instance, the will stated that Rosina had not seen Gregoria for twenty years, had stolen and never paid back $18,000, and had been unappreciative and rude. Rosina testified that she had not seen Gregoria over the last twenty years, had never taken $18,000, and had not behaved as the will claimed she did. The will stated that Gilbert had refused to pay the bills while living in Gregoria’s house, had made unpleasant remarks or been moody, and had never repaid loans. Gilbert testified that he had attempted to pay the bills, had a close relationship with his mother and had not made such remarks, and had provided some money to Gregoria, but had been assured by her that he did not need to repay the full amount of the loans.

We disagree with the Court of Appeals’ reasons for rejecting this evidence.

First, the Court stated that because Gregoria gave gifts when she was so inclined, the testimony about the real property was not relevant to undue influence. Our standard of review precludes us from re-weighing the evidence on appeal. See Doughty, 117 N.M. at 287, 871 P.2d at 383. Second, we can find no support for the Court’s requirement of evidence that the testator intended to divide her property equally for a contrary disposition to be unjust. If the will had been intended to dispose of property contrary to Gregoria’s previously stated intentions, we see no reason that such evidence should be categorically excluded from contributing to a suspicion of undue influence.4

Nevertheless, we still hold that the evidence concerning the real property was not relevant to whether the will was an unjust disposition. We reach this conclusion because there is no evidence that the will was intended to dispose of any of the real property that was the focus of Siblings’ evidence. On the contrary, the warranty deeds to Viola were the instruments that were intended to dispose of Gregoria’s real property, including the house that Siblings claimed was to be given to Gilbert. Although Siblings’ actions to void the deeds have raised the potential that the real property could in fact pass via the residuary clause of the will, no evidence suggests that this was part of Viola’s design. To the contrary, the residuary clause was added to the will at the suggestion of an attorney more than a year after the execution of the deeds. Although, as we discuss below, Viola participated heavily in drafting earlier versions of the will around the time of the execution of the deeds, these earlier versions included no residuary clause and specifically stated that the real property had already been conveyed to Viola. Because no evidence suggests that the will was intended by either Viola or Gregoria to convey Gregoria’s real property, evidence about Gregoria’s intentions regarding the real property are irrelevant to our determination of whether the will was an unjust disposition.

Without this evidence, precious little remains to show that Gregoria’s will

4We note that Gersbach may have suggested that the bar for proving unnatural or unjust dispositions in New Mexico is higher than this. 1998-NMSC-013, ¶ 28. However, the authority relied upon in this portion of Gersbach is Margaret B. Alcock, Comment, Estates and Trusts, 13 N.M. L. Rev. 395 (1983), and it appears to contain a crucial error. Alcock’s article stated that In re Will of Ferrill (Thorp v. Cash), 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981) made it “virtually impossible for a testator who is old and infirm to dispose of his property in a manner that a judge or jury might interpret as unnatural or unjust.” Alcock, supra at 401. Given that the Ferrill Court approved a finding of unnatural or unjust disposition, and given the context within Alcock’s article, it seems that she meant to write that it is virtually impossible that a judge or jury might not interpret any given disposition as unjust or unnatural after Ferrill. As we have explained, the presumption makes it easier for a will contestant to get before the jury, although it may not make it any easier for that contestant to win.
was an unjust disposition; Siblings’ other testimony stated that the sentiments in the will were false, but did not suggest that Gregoria had any intention to leave other parts of her estate to them. Such evidence alone is certainly not sufficient to support a finding of suspicious circumstances. However, it would be arbitrary to refuse to consider evidence that a will is full of false or unrepresentative assertions about the people it disinvests. See 3 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 29.126, at 812 (2004) (explaining that “evidence is admissible to explain the actual relations which existed between testator and the beneficiaries under the will, on the one hand, and the relations between the testator and the natural objects of his bounty, on the other, including the conduct of the beneficiaries and heirs respectively toward testator, and his actual feelings for them, as far as such conduct, feelings, and the like, furnish motives and reasons for or against the will” (footnotes omitted)). Since evidence of Gregoria’s relations with her children appears somewhat relevant to the question of undue influence, we see no reason to hold that the district court should not have considered it along with the other evidence.

c. Participation in the Procurement

[30] The district court found that “Viola Varela was directly involved in the procurement of the Will and the deeds to herself.” The Court of Appeals held that there was insufficient evidence to support this finding. Chapman, 2008-NMCA-108, ¶ 27. Citing Gonzales, 108 N.M. at 586, 775 P.2d at 1303, the Court of Appeals held that Siblings had to show that Viola “became the beneficiary of the will by securing its legal execution.” Chapman, 2008-NMCA-108, ¶ 27. In other words, the proponent’s participation had to be “necessary for the legal execution of the will.” Id. ¶ 29. As a result, the Court refused to consider evidence of Viola’s participation in creating earlier versions of the will that never took legal effect, or the extent to which she participated in non-legally required ways in the will’s final execution. Id. ¶ 27. Because it was undisputed that Viola took no part in the ultimate legal execution of the will and because “no evidence that Viola’s actions relating to the execution of the will influenced Gregoria’s stated intent[,]” the Court of Appeals found insufficient evidence that Viola participated in procuring the will. Id. ¶ 29-30. We disagree.

[31] First, the Court’s definition of participation in the procurement was incorrect. In Gonzales, the case relied upon by the Court of Appeals, we simply observed that because the will proponent’s signature on the will was not legally required for its execution, “[i]t cannot be said that [the proponent] participated in procuring the will by securing its execution when his signature was unnecessary.” 108 N.M. at 586, 775 P.2d at 1303 (emphasis added). This holding does not require that the contestant have taken a legally required role in the will’s execution to have participated in its procurement; instead, it merely states the obvious: if the proponent’s role was not legally required, the contestant cannot argue that the proponent participated in the procurement by securing its execution. The proponent still might have participated in the procurement in other ways.

[32] Other New Mexico case law supports this interpretation. In Doughty, 117 N.M. at 290, 871 P.2d at 386, the Court of Appeals found substantial evidence to support the district court’s finding of participation in the procurement relating to inter vivos transfers that effectively disinherited the decedent’s daughter. The decedent had wanted to make an inter vivos gift of Chevron stock to her children, but she also wanted to receive dividends on the stock throughout her life. Id. at 286-87, 871 P.2d at 382-83. However, the decedent’s daughter would only accept the gift if income taxes on the dividends would be taken from the dividends. Id. Decedent’s son communicated this to the decedent, which upset her, but did not inform the daughter that the decedent was upset. Id. at 287, 871 P.2d at 383. This precipitated the decedent’s inter vivos transfer of other assets to the son. Id. at 290, 871 P.2d at 386. The son further enabled the transfer of these assets by visiting the bank, instructing the bank to prepare the required documents, and delivering them to his mother at the hospital. Id. The son was not present at the signing, but the Court of Appeals nevertheless concluded that “he initiated, pursued, and completed the entire process.” Id. Similarly, in Hummer, 75 N.M. at 284, 404 P.2d at 117, we found evidence to support the trial court’s finding of participation in the procurement where the proponent of the will, though not legally necessary for the execution of the will, id., had taken decedent to the attorney to execute it and had convinced her en route of everything it should contain. Id. at 277, 284, 404 P.2d at 112, 117.

[33] With these cases in mind, we conclude that the evidence considered by the district court was relevant to the question of undue influence. Evidence was presented that about a year and a half before the will was executed, a separate and nearly identical document had been signed by Gregoria and notarized. Victoria Varela, Viola’s daughter, testified that she had typed this earlier will based on Gregoria’s dictation, without reference to any notes or drafts. Viola, in her testimony, adopted her daughter’s version of events. However, Viola also admitted that before Victoria had typed the earlier will, Viola had purchased a will template at a stationery store and typed it up herself, creating a document nearly identical to the earlier will that Victoria claimed to have written from Gregoria’s statements without reference to any notes or drafts. Despite this revelation, Viola persisted in claiming that the template was not used to create the earlier will. Moreover, Viola’s and Victoria’s testimony contradicted statements made by Viola elsewhere in her testimony and in her deposition that her mother had written out a rough draft which was used to type the earlier will.

[34] After the earlier will was drafted, Viola took her mother to have it notarized, but failed to follow the formalities required under the Probate Code. Attorney Ruben Rodriguez testified that a year and a half later, Viola contacted him to have the earlier will “check[ed] and redo[ne]” apparently specifying that the language in the earlier will should be copied exactly. Viola and Gregoria then came to Rodriguez’s office on two different occasions. The first time, both Viola and Gregoria were present, and they explained again that they wanted a more professional will, but that it should contain the same language as the earlier will. Accordingly, the will as it was finally executed is largely identical to the earlier will, with the exception of the addition of a residuary clause to Viola’s benefit. The second time they visited Rodriguez, Viola was asked to leave while Rodriguez confirmed that the will reflected Gregoria’s intent and then properly executed it.

[35] From this evidence, the finder of fact reasonably could have inferred that Viola both wrote the language that ended up in the will and also shepherded it through multiple drafts and meetings with a notary and an attorney until the will had been properly legally executed in nearly the exact form in which Viola had first drafted it. Common sense dictates that this sort
of conduct could be considered a more suspicious form of participation in the procurement of a will than merely affixing a legally required signature. The district court properly considered this evidence in making its ultimate determination of whether the presumption was raised.

d. Domination or Control

{36} The district court made the following findings relating to domination or control:

11. Viola Varela used her position of confidence and power to her advantage to influence and control the actions and decisions of Gregoria C de Baca.

12. Viola Varela used her position of influence and control to manipulate the bank accounts of Gregoria C de Baca.

17. Viola Varela had an assertive and domineering personality. Gregoria C de Baca was submissive when around Viola.

18. Viola Varela attempted to poison the relationship between Gregoria C de Baca and her other children by making disparaging and derogatory remarks about them and attempting to restrict their access to Ms. C de Baca.

19. Viola Varela interfered with the efforts of Gregoria C de Baca to obtain independent legal counsel.

{37} Using Hummer as its touchstone, the Court of Appeals reversed the district court, holding that there was insufficient evidence to demonstrate control and dominance, since “[i]t is undisputed that Gregoria was afraid of Viola or that Viola induced Gregoria to believe things that she otherwise would not have believed.” Chapman, 2008-NMCA-108, ¶ 32. The Court acknowledged the evidence that Viola spoke for Gregoria and disparaged the other siblings, but noted that no evidence had shown that the other siblings’ relationships with their mother were interrupted by Viola. Id. The Court also noted the testimony of the psychologist who evaluated Gregoria and of Gregoria’s doctor, both to the effect that Gregoria had not been dominated by Viola. Id. ¶¶ 33-34.

As for Viola’s alleged interference with Gregoria’s attempt to secure legal counsel to return the land deeded to Viola, the Court of Appeals held that “[e]ven if Viola influenced Gregoria’s decision to fire [the attorney], we do not believe that evidence supports a further inference that Viola manipulated Gregoria into making a will that did not reflect her intentions.” Id. ¶ 37.

None of this evidence helped to decide “the ultimate issue—whether Gregoria intended the distribution of her property that is set out in the will.” Id. ¶ 38.

{38} We see no reason to categorically exclude the evidence considered by the district court, even though, under our precedents, it might not be sufficient by itself to decide the issue of undue influence. The Court of Appeals was correct that the decedent in Hummer was more dominated by the proponents of her will than is true in this case. 75 N.M. at 284, 404 P.2d at 117 (“There is evidence that decedent was easily influenced, made no independent suggestions with anything anyone stated to her, and that she agreed with what the last person to talk to her had to say.”). However, Hummer gives no indication that this level of domination is the baseline below which evidence of dominance or control may not even be considered. We do not see why less definitive evidence should not be considered. See, e.g., Peralta, 2006-NMCA-033, ¶ 22 (taking into account evidence that “[t]wo of the decedent’s children were maligning [a third child] to [the decedent] in an apparent effort to isolate [the decedent]”). Other authorities also state a less exacting standard: 3 Bowe & Parker, supra § 29.78, at 692-93 opines that “[e]vidence which tends to show that the beneficiary acquired control over testator’s mind before the will was made, and retained such control beyond the period at which the will was executed, is admissible, even if such evidence relates to a remote period of time” (footnotes omitted).

{39} Moreover, this section of the Court of Appeals’ opinion appears to draw some inferences against the party that prevailed at trial. See Chapman, 2008-NMCA-108, ¶¶ 33, 37, 40. For instance, the evidence presented by a psychologist, the family doctor, and the attorney who executed the will that Gregoria was not dominated by Viola is evidence contrary to the district court’s ultimate finding of undue influence. As we have noted, when reviewing for sufficiency of the evidence, “[w]e consider the evidence in the light most favorable to the prevailing party and disregard any inferences and evidence to the contrary.” Doughty, 117 N.M. at 287, 871 P.2d at 383. The question is whether, disregarding these witnesses as the finder of fact was entitled to do, there was evidence to support a finding of control or dominance.

{40} We find support in the record for all of the findings of fact made by the district court on this point: that Viola may have taken part in firing an attorney retained by Gregoria to investigate the deeds; that Viola spoke for Gregoria; that Viola disparaged the other siblings, although not to the point of estranging them; that Gregoria was submissive around Viola; and that Viola manipulated Gregoria’s bank accounts.

{41} We see no reason to categorically exclude this evidence from consideration, even if it might not be sufficient in and of itself to raise the presumption of undue influence. We find curious, for example, the Court of Appeals’ statement that “[e]ven if Viola influenced Gregoria’s decision to fire [her attorney], we do not believe that evidence supports a further inference that Viola manipulated Gregoria into making a will that did not reflect her intentions.” Chapman, 2008-NMCA-108, ¶ 37. The firing in question occurred only a few months after the execution of the will and would certainly seem to suggest that Viola was exerting control over Gregoria, if accepted as true by the finder of fact. Although this evidence does not directly go to the issue of Gregoria’s intent regarding the will, it flies in the face of reason to hold that it could not contribute in any way to raising a suspicion of undue influence.

e. Secrecy

{42} The district court found that “Viola Varela was secretive. She did not keep Gregoria C de Baca or her brothers and sisters informed of some actions taken concerning the properties and assets of Gregoria C de Baca.” The Court of Appeals again disagreed, holding that there was insufficient evidence to support this finding because other family members had already discovered the deeds after Viola’s son angrily boasted of owning all of Gregoria’s property. Chapman, 2008-NMCA-108, ¶ 44. They were therefore able to confront Gregoria about the property transfer, unlike the contestant in Doughty, who only found out about her mother’s inter vivos transfers when it was too late to ask her about them. Id. For this reason, the Court of Appeals concluded that the evidence of secrecy did not help “this Court determine whether the transfer was not the mother’s intention.” Id. Our analysis differs.

{43} It is undisputed that despite ample opportunities, Viola did not tell her siblings or Gregoria’s other potential heirs, other than her own children, about the will. This seems to be sufficient evidence of secrecy to us, but because the Court of Appeals
addressed the deeds, so will we. Siblings discovered the deeds through Viola’s son’s inadvertence and did not discover the will until after Gregoria’s death. It is true that because of the nature of many undue influence cases, secrecy often prevents the contestant of the will or other conveyance from determining whether the testator or grantor had been unduly influenced by directly asking him or her. See, e.g., Dougherty, 117 N.M. at 287, 290, 871 P.2d at 383, 386. However, this eventuality seems to be due to cases involving the dead rather than an underlying policy behind the inquiry into secrecy. Simply because Gregoria’s children were able to ask her about the deeds does not indicate to us that Viola’s secrecy was any less suspicious, especially with regard to the will. Indeed, when Siblings asked Gregoria about the deeds, Gregoria claimed that she had not executed them. While this gave Siblings the opportunity to attempt to undo some of Viola’s alleged undue influence, their failure to do so during Gregoria’s lifetime—possibly due to improper intervention by Viola into their efforts to find an attorney for Gregoria—does not negate the suspicious character of Viola’s secrecy. Moreover, if Siblings had succeeded in their first effort to revoke the deeds, they never could have confronted Gregoria with the provisions of the will that are directly in question in this case; Siblings did not discover the will until after Gregoria died. This seems to us to be a perfect example of the sort of conduct a fact finder might properly take into account in deciding whether suspicions were raised that a will proponent was attempting to prevent others from discovering his or her undue influence.  

f. Lack of Consideration  
{44} It does not appear that the district court made any finding relevant to the issue of lack of consideration. However, citing Gersbach, the Court of Appeals concluded that the evidence of Viola’s service to Gregoria and the opinions of various witnesses that Gregoria wanted Viola to inherit her estate either helped to rebut the presumption of undue influence or prevented it from arising in the first place. Chapman, 2008-NMCA-108, ¶ 45. This is a misreading of our law, but an understandable one given the lack of clarity on this point found in Gersbach. On the one hand, Gersbach notes that “lack of consideration for a testamentary gift ordinarily is not a suspicious circumstance. Ordinarily, a testator intends to confer a benefit.” 1998-NMSC-013, ¶ 20. On the other hand, Gersbach also stated that “the existence of consideration may help rebut a presumption of undue influence” or that “a friendship of long standing may help prevent a presumption of undue influence from arising.” Id. ¶ 21 (emphasis added).  

{45} Gersbach was correct to the extent that it suggested that lack of consideration is not a suspicious circumstance in many cases involving wills. Montoya, 113 N.M. at 111, 823 P.2d at 911 (holding that “[a] lone, the lack of consideration may not be a suspicious circumstance,” but that in combination with other suspicious circumstances that made a gift unlikely, it might be considered). It was also correct that evidence of consideration certainly might be taken into account by the finder of fact in deciding whether the contestant has met his or her burden of persuasion—although, as discussed above, it is not clear whether this can accurately be described as “rebutting the presumption.” However, Gersbach also suggested that evidence of friendship or other consideration can prevent a presumption from arising in the first place. Although this statement may contain a grain of truth—for example, the bar for proving that an unjust disposition could be higher when the will proponent is a long-standing friend than when he or she is a stranger—this factor cannot be a free-standing invitation for the appellate court to reweigh the evidence presented by the parties. To take Viola’s friendship and service into consideration in deciding whether the presumption arose in this case would amount to a drawing of inferences contrary to the findings of the district court. Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177 (“The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.”).  

g. Viewed as a Whole, There Was Sufficient Evidence of Suspicious Circumstances  
{46} We have found support for the district court’s findings of old age or weakened physical or mental condition; participation in the procurement, domination, or control; and secrecy. Although these factors in combination will not necessarily raise a suspicion of undue influence in all cases, and the specific pieces of evidence in this case might not be enough individually to justify a finding of suspicious circumstances, we hold that under the facts of this case, the district court was justified in concluding that suspicious circumstances existed. The finder of fact could reasonably have found that Viola, who had a relationship with Gregoria suggesting some measure of dominance, drafted and secured the execution of a will for Gregoria benefitting herself and disparaging her siblings at a time when Gregoria was suffering from various ailments that could have affected her cognition, and then kept the will secret from Gregoria’s other children until after Gregoria’s death. Together, this evidence was sufficient to allow the trier of fact to conclude the existence of suspicious circumstances by clear and convincing evidence.  

D. THERE WAS SUFFICIENT EVIDENCE TO RAISE THE PRESUMPTION AND SUPPORT THE DISTRICT COURT’S FINDING OF UNDUE INFLUENCE  
{47} Because there was sufficient evidence for the finder of fact to conclude that Viola and Gregoria shared a confidential or fiduciary relationship and additionally that suspicious circumstances existed, there was by definition sufficient evidence to raise the presumption of undue influence. Once raised, this presumption “permit[ted] the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact.” Roberts Oil Co., 113 N.M. at 756, 833 P.2d at 233. Therefore, we must conclude that there was sufficient evidence to support the district court’s finding of undue influence.  

III. CONCLUSION  
{48} Because there was sufficient evidence presented at trial to support the district court’s finding that Gregoria’s will was the product of undue influence, we reverse the Court of Appeals and affirm the district court. We remand the case to the Court of Appeals to determine the question of undue influence regarding Gregoria’s deeds to Viola.  

{49} IT IS SO ORDERED.  
EDWARD L. CHÁVEZ,  
Chief Justice  

WE CONCUR:  
PATRICIO M. SERNA, Justice  
PETRA JIMÉNEZ MAES, Justice  
CHARLES W. DANIELS, Justice  
KAREN L. PARSONS  
(sitting by designation)
Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-081

Topic Index:
- Appeal and Error: Standard Of Review
- Civil Procedure: Summary Judgment
- Contracts: Duty To Defend; and Indemnification Agreement
- Negligence: Indemnification; Personal Injury; and Vicarious Liability
- Remedies: Indemnification

CITY OF ALBUQUERQUE,
Defendant/Cross-Claimant/Appellee,
versus
BPLW ARCHITECTS & ENGINEERS, INC.,
Defendant/Cross-Defendant/Appellant.
No. 27,837 (filed: June 9, 2009)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
WILLIAM F. LANG, District Judge

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RENNI ZIFFERBLATT
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OPINION

CYNTHIA A. FRY, CHIEF JUDGE

[1] This case arises from a dispute over an indemnification clause in a contract between the City of Albuquerque and BPLW Architects & Engineers, Inc. (BPLW) for the design and construction of the rental car facility at the Albuquerque International Airport. After a pedestrian was injured at the facility, the City requested a defense from BPLW pursuant to the indemnification clause. BPLW denied the request, and the City filed a claim against BPLW. The district court granted partial summary judgment in the City’s favor, finding that BPLW was required to defend the City in the lawsuit brought by the pedestrian because the claim arose from BPLW’s design and construction of the facility. BPLW appeals. We affirm.

BACKGROUND

[2] In 1998, the City entered into an architectural services contract with BPLW for the design of the rental car facility at the airport. While BPLW was initially responsible only for the design of the facility, the contract provided that the City could require BPLW to perform construction services if needed. Pursuant to this provision, BPLW took full responsibility for the construction administration services for the project and proceeded to oversee the construction of the facility it had designed. The project was completed, and the City took possession in 2001. Two weeks after the facility opened, a pedestrian, John Pound, fell off a curb while exiting one of the car rental buildings located at the facility. Pound suffered extensive injuries and filed suit against the City, alleging that the curb from which he fell was excessively high and that the City had “failed to properly construct the curb and adjacent pavement,” had “failed to correct a hazardous condition, specifically the excessively high curb,” and had “failed to inspect and/or maintain the curb and adjacent pavement where” he had fallen. Pound later filed an amended complaint, reasserting his allegations against the City and adding a number of additional defendants, including BPLW. In the amended complaint, Pound alleged that BPLW had negligently designed the curb and had failed to use reasonable care in the inspection and supervision of the construction of the curb.

[3] As revealed by discovery later, the curb that Pound fell from was adjacent to a handicap ramp and varied in height from about eleven inches, where the curb met the top of the ramp, to less than one inch where the base of the ramp began. According to BPLW, this curb was a “header curb” built in compliance with a standard design specification for header curbs provided by the City. The portion of curb where Pound fell was apparently located near the door to one of the rental car buildings, about a foot high, and it was neither marked to indicate that there was a sharp change in elevation nor blocked by any type of barrier to prevent a person from stepping off the curb. Pound alleged that it was the placing of this high curb in a pedestrian pathway that caused him to fall.

[4] After receiving Pound’s complaint, the City requested that BPLW honor its contractual obligation to defend and indemnify the City. BPLW refused. The City then filed a cross-claim against BPLW, alleging that BPLW had a contractual duty to defend and indemnify the City for any cause of action arising out of BPLW’s performance of the contract. The City and BPLW later independently settled the claims brought against them by Pound, leaving only the cross-claim between the City and BPLW to be litigated.

[5] The City then filed a partial motion for summary judgment limited solely to the issue of whether BPLW had a duty to defend. The district court granted the City’s motion, finding that BPLW had a duty to defend, and awarded the City approximately $90,000 in attorney fees for the expenses the City incurred defending the claims Pound brought against it. The district court also certified its order as final under Rule 1-054(B) NMRA, finding that there was no just reason for delay. BPLW timely appealed.

[6] On appeal, BPLW argues that it did not have a contractual duty to defend the City because none of Pound’s allegations alleged that the City was vicariously liable for BPLW’s negligence and because all of the allegations against the City were for the City’s direct negligence, not BPLW’s. BPLW also argues that it does not have a duty to defend because the indemnity clause contained an exception that relieves BPLW of its duty to defend the City if the cause of action arises out of the City’s negligence in approving designs or providing design specifications. Because the City approved
all of the designs for the rental car facility and because the curb in question complied with a City design specification, BPLW argues that the cause of action falls within this exception to its duty to defend.

**DISCUSSION**

**Standard of Review**

[7] On appeal from the grant of summary judgment, we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute. *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 15, 123 N.M. 752, 945 P.2d 970; *see Gormley v. Coca Cola Enters.*, 2005-NMSC-005, ¶ 8, 137 N.M. 192, 109 P.3d 280. However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment. *Rutherford v. Chaves County*, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199. Neither party argues that there are any material facts in dispute, nor do we find any disputed facts in our review of the record. Instead, both parties argue that resolution of this appeal depends solely on the legal question of when a contractual duty to defend is triggered and on the interpretation of the indemnity clause between BPLW and the City. Thus, we review the district court’s grant of summary judgment de novo.

**The Duty to Defend Arises From the Terms of the Contract and the Allegations of the Complaint**

[8] The City argues that in order to determine whether a duty to defend exists, we should look at the terms of the contract and the allegations contained in the complaint. According to the City, if the allegations in the complaint fall within the terms of the contract, then the duty to defend is triggered. BPLW, on the other hand, argues that a contractual duty to defend can only be triggered if vicarious liability is alleged in the underlying complaint. While BPLW acknowledges that our case law suggests that the City’s view is correct, it argues that the cases that set out this rule all involve insurance contracts and thus that the rule is inapplicable to a duty to defend contained in other types of contracts. See, e.g., *Bernalillo County Deputy Sheriffs Ass’n v. County of Bernalillo*, 114 N.M. 695, 697, 845 P.2d 789, 791 (1992) (holding that an insurer’s duty to defend arises from the allegations in the complaint against the insured). We disagree with BPLW and, as we explain below, we hold that a contractual duty to defend is triggered by the allegations in the complaint.

[9] In disputes stemming from insurance contracts, the “duty to defend arises out of the nature of the allegations in the complaint,” *Miller v. Triad Adoption & Counseling Servs., Inc.*, 2003-NMCA-055, ¶ 9, 133 N.M. 544, 65 P.3d 1099, and is determined “by comparing the factual allegations in the complaint with the insurance policy.” *Lopez v. N.M. Pub. Sch. Ins. Auth.*, 117 N.M. 207, 209, 870 P.2d 745, 747 (1994). If a complaint “states facts that bring the case within the coverage of the policy,” then the duty to defend will be triggered. *Bernalillo County Deputy Sheriffs Ass’n*, 114 N.M. at 697, 845 P.2d at 791. However, “[i]f the allegations of the complaint clearly fall outside the provisions of the policy, neither defense nor indemnity is required.” *Id.*

[10] BPLW argues that these rules are inapplicable and “irrelevant to a non-insurance scenario.” As its sole support for this argument, BPLW cites a number of Florida cases that it interprets as holding that a contractual duty to defend is triggered only when vicarious liability is alleged in a complaint. E.g., *Metro. Dade County v. CBM Indus. of Minn.*, Inc., 776 So. 2d 937, 939 (Fla. Dist. Ct. App. 2001) (finding duty to defend where complaint stated a cause of action for vicarious liability); *SEFC Bldg. Corp. v. McClosey Window Cleaning, Inc.*, 645 So. 2d 1116, 1117 (Fla. Dist. Ct. App. 1994) (refusing to find duty to defend where complaint alleged only active negligence of indemnitee); *Metro. Dade County v. Fla. Aviation Fueling Co.*, 578 So. 2d 296, 298 (Fla. Dist. Ct. App. 1991) (finding duty to defend where complaint alleged vicarious liability). Contrary to BPLW’s argument, these cases did not hold that a duty to defend can only be triggered if the allegations of a complaint allege vicarious liability. Instead, these cases were decided on the ground that the indemnity agreements in question expressly precluded indemnity for the indemnitee’s own negligence. In *CBM Industries*, for example, the indemnity agreement expressly stated that “nothing herein shall . . . require [CBM] to indemnify the [c]ounty against liability resulting from the willful, negligent, or unlawful acts . . . of the [c]ounty.” 776 So. 2d at 938 (first alteration in original) (emphasis omitted) (internal quotation marks omitted). Because the contract expressly excluded indemnification of claims that the county was negligent, the only way the county could establish a contractual duty to defend was through the vicarious liability claims asserted against it. *Id.; see SEFC Bldg. Corp.*, 645 So. 2d at 1117 (refusing to find duty to defend from the indemnitee’s own negligence where an indemnity agreement did not expressly state “such intent in clear, unequivocal terms”).

[11] BPLW does not make any further argument in support of its contention other than the bare assertion that the rules comparing the complaint’s allegations with the contract should not apply to anything other than insurance contracts. While we recognize that the primary purpose of an insurance contract is to defend and indemnify an insured and that the primary purpose of the contract at issue in this case is for construction services, not indemnity, we are not persuaded that we should create a new rule for determining when a non-insurance contractual duty to defend arises. In both types of contracts, the duty to defend is a contractual obligation that the parties have bargained for as a part of their agreement. Because the duty to defend is a contractual obligation, we hold that regardless of the type of contract containing it, the duty to defend arises when the language of a complaint states a claim that falls within the terms of the contract.

**BPLW Has a Contractual Duty to Defend the City, Even for the City’s Own Alleged Negligence, as Long as the City’s Negligence Arises From BPLW’s Negligence**

[12] We now consider whether Pound’s allegations against the City fall within the scope of BPLW’s duty to defend. BPLW argues that all of Pound’s allegations against the City were that the City, not BPLW, was negligent and that the indemnity clause does not require BPLW to defend the City for the City’s own negligence. BPLW further argues that requiring it to indemnify the City when the City is alleged to be negligent would violate the public policy expressed in NMSA 1978, Section 56-7-1 (1971) (amended 2003 and 2005), which makes void any indemnity agreement in a construction contract that requires an indemnitor to indemnify an indemnitee for the indemnitee’s own negligence. The City, on the other hand, argues that the indemnity clause requires BPLW to defend the City for any cause of action that arises from the negligent act, error, or omission of BPLW even if the complaint alleges that the City itself was negligent.

[13] Neither party disputes that Pound’s allegations against the City were that the
City itself, not BPLW, was negligent. Thus, resolution of this appeal requires us to interpret the contract between the parties and determine whether the indemnity clause required BPLW to defend the City even if the City is alleged to have been negligent. The parties do not contend that the contract was ambiguous, and, therefore, “the interpretation of language in [the] contract is an issue of law which we review de novo.” Krieger v. Wilson Corp., 2006-NMCA-034, ¶ 12, 139 N.M. 274, 131 P.3d 661 (filed 2005).

In order to determine the applicability of an indemnity provision in a contract, “[we] apply the general rules of contract construction in determining the meaning of the language used” by the parties. Id. ¶ 13. This requires us to construe the contract “as a harmonious whole” and to give every word and phrase “meaning and significance according to its importance in the context of the whole contract.” Id. (internal quotation marks and citation omitted). The indemnity clause between the City and BPLW provides that BPLW agrees to defend, indemnify, and hold harmless the City against all suits . . . brought against the City because of any injury or damage received or sustained by any person . . . arising out of or resulting from any negligent act, error, or omission of [BPLW] . . . arising out of the performance of this Agreement.

Aside from the specific exceptions that we discuss below, there is no language in the contract that limits BPLW’s duty to defend the City to complaints that do not allege that the City was negligent. Instead, the plain language of this clause indicates that the duty to defend applies to all suits against the City arising out of a negligent act, error, or omission of BPLW arising out of the performance of the agreement. Consequently, BPLW has a duty to defend the City, even if only the City is alleged to be negligent, as long as the cause of action arises from the alleged negligent act, error, or omission of BPLW.

Although this provision does not explicitly state that BPLW must indemnify the City for the City’s own negligence, our Supreme Court has held that a provision such as this is to be broadly construed to provide indemnity for the indemnitee’s own negligence if “the intention to save [the indemnitee] harmless . . . is clear and unequivocal” in the contract. Metro. Pav. Co. v. Gordon Herkenhoff & Assocs., 66 N.M. 41, 43, 341 P.2d 460, 461 (1959). Here, the contract provides that BPLW will defend the City from all suits against the City that arise out of BPLW’s negligence in the performance of the contract. The only limitation on this duty is that

[n]othing in the Agreement shall be construed to require [BPLW] to (defend) indemnify and hold harmless the City . . . from and against liability . . . caused by or resulting from in whole or in part the negligence, act or omission of the City . . . [1] arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the City . . . or [2] the giving or failure to give directions or instructions by the City . . . where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

Aside from these very specific and limited exceptions that relieve BPLW of its duty to defend if the cause of action arises from the City’s negligent approval or preparation of designs and specifications, the contract does not contain any other limiting language excluding claims that the City was negligent. BPLW’s obligation to defend the City from all suits therefore includes causes of action alleging that the City itself was negligent, as long as the cause of action arises from BPLW’s performance of the agreement.

The gist of Pound’s complaint against all defendants was that the design of the curb and surrounding area was dangerous; Pound also alleged that BPLW designed the site.

Indeed, the language used to delineate the specific exceptions to BPLW’s duty to defend, which is quoted in the preceding paragraph, supports our interpretation of the indemnity clause. This language—used to relieve BPLW of its duty to defend if the cause of action arises from the City’s negligent approval or preparation of designs and specifications—is derived almost verbatim from the 1971 version of Section 56-7-1, the anti-indemnity statute in effect at the time the contract was drafted. Section 56-7-1 mandated that any indemnity agreement in a construction contract that requires an indemnitor to indemnify an indemnitee for the indemnitee’s own negligence is “against public policy . . . void and unenforceable” unless the agreement specifically provides that the indemnity does “not extend to liability . . . arising out of . . . the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the indemnitee, or the agents or employees of the indemnitee.”

Notably, the statute required the exclusionary language used by BPLW and the City only if an indemnity agreement required an indemnitor to indemnify the indemnitee for the indemnitee’s own negligence. See id. By using language that is required only under such circumstances, it is clear that the parties specifically intended BPLW to indemnify and defend the City when the City is alleged to be negligent as long as the cause of action arises from BPLW’s design or construction of the facility. If, as BPLW argues, the indemnity clause did not require BPLW to indemnify the City for the City’s alleged negligence, then the exclusionary language would not have been necessary. See Pub. Serv. Co. of N.M. v. Diamond D Constr. Co., 2001-NMCA-082, ¶¶ 19, 31, 131 N.M. 100, 33 P.3d 651 (noting that “[w]e will not read a particular provision of a contract such that another provision is rendered meaningless”). Thus, the clear intent of the contract is for BPLW to defend the City from any lawsuit alleging that the City itself was negligent, as long as the cause of action arises from BPLW’s alleged negligence, unless the claim arises from the City’s negligent approval or preparation of a design or specification.

We also reject BPLW’s argument that requiring it to defend the City for the City’s alleged negligence violates the public policy expressed in Section 56-7-1. A 2003 amendment to Section 56-7-1 eliminated the exclusionary language, which was used in the contract’s indemnity clause, required by the 1971 version of the statute. See § 56-7-1 (1971); 2003 N.M. Laws, ch. 309, § 1; 2003 N.M. Laws, ch. 421, § 1. The statute now provides that

[a] construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract . . . against liability . . . only to the extent that the liability . . . is caused by, or arises out of, the acts or omissions of the indemnitor or its officers, employees or agents.

Section 56-7-1(B)(1). Both the current version and the version in effect at the time the contract was executed, however, have the same effect because both ensure that an in-
demnitor only has to indemnify for causes of action that arise from the indemnitor’s own negligent conduct. In addition, both versions of the statute are based on a public policy promoting safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence. See Tucker v. R.A. Hanson Co., 956 F.2d 215, 218 (10th Cir. 1992) (noting that “[t]he purpose of Section 56-7-1 is to protect construction workers and future occupants of a building by ensuring that all those involved in its construction know that they will be held financially liable for their negligence”); Guitard v. Gulf Oil Co., 100 N.M. 358, 362, 670 P.2d 969, 973 (Ct. App. 1983) (noting that the mining anti-indemnity statute, NMSA 1978, § 56-7-2 (1971) (amended 1999 and 2003), was intended to promote public safety by ensuring that each party to a mining contract is held accountable for its own negligence and will therefore have an incentive to operate in a safe manner).

Here, requiring BPLW to fulfill its contractual obligation to defend the City against any suit against the City arising out of BPLW’s alleged negligence in the performance of the contract does not violate Section 56-7-1 or the policy behind it. Instead, this interpretation of the contract is fully consistent with the requirements of the statute. It promotes safety in the construction project because it ensures that BPLW will be accountable for any harm caused by its performance of the agreement.

Pound’s Claims “Arise From” BPLW’s Design and Construction of the Facility

We now consider whether Pound’s allegations fall within the scope of the indemnity clause and arise from BPLW’s performance of the agreement. The complaint stated a claim of negligence, alleging that the City owed and breached a duty of reasonable care in the construction and maintenance of the curb by “fall[ing] to properly construct the curb and adjacent pavement,” and stated a claim of premises liability, alleging that the City failed to properly inspect and construct the area where Pound fell. These claims state two distinct allegations: (1) the City negligently constructed the curb and (2) the City negligently failed to maintain and make safe the area where Pound fell. BPLW argues that it does not have a duty to defend because Pound’s allegations are directed at the City’s direct negligence, not BPLW’s. While we agree with BPLW that Pound alleged that the City was negligent, we disagree with BPLW’s assertion that the suit did not arise from BPLW’s alleged negligence.

The indemnity clause requires BPLW to defend the City from any action “arising out of or resulting from any negligent act, error, or omission of [BPLW] . . . arising out of the performance of” the contract. The phrase “arising out of” is given a broad interpretation by our courts and is generally “understood to mean ‘originating from,’ ‘having its origin in,’ ‘growing out of[,]’ or ‘flowing from.’” Krieger, 2006-NMCA-034, ¶ 14. Using this definition of the phrase “arising out of,” BPLW has a contractual duty to defend the City for all claims that originate from, have their origin in, grow out of, or flow from the negligent performance of its contract with the City. The undisputed facts indicate that BPLW was responsible for the design and supervision of the construction of the curb. Thus, all of the allegations regarding the design and construction of the curb clearly arise from BPLW’s allegedly negligent performance of the contract and therefore fall within the duty to defend.

BPLW further argues that because some of the claims also allege that the City breached its duty to maintain and make safe the premises, BPLW is relieved of its obligation to defend. In support of this argument, BPLW cites Williams v. Central Consolidated School District, 1998-NMCA-006, ¶ 16, 124 N.M. 488, 952 P.2d 978 (filed 1997), a case in which this Court held that “[e]ven if a building is designed by an independent private architect, the state is responsible for its own duty of care in and around the work of the architect as part of its ‘operation or maintenance’ of the building.” In that case, a student had fallen through a negligently designed window that, due to its location and the type of glass, created a dangerous condition for students. Id. ¶¶ 3-4. BPLW misconstrues the case as relieving its duty to defend the City. Williams dealt solely with whether the state could be sued for negligent maintenance of a building when the unsafe condition was caused by an architect’s design defects. Id. ¶ 16. Williams did not, however, address whether the architect would have been required to indemnify the state had there been an indemnity agreement like the one in the present case.

Here, Pound alleged that the City negligently failed to inspect and maintain the curb that Pound fell from. Contrary to BPLW’s argument, these claims, like the claims that the curb was negligently constructed, “arise from” BPLW’s allegedly negligent performance of the contract. Pound alleged that the City failed to fix a curb that was dangerously high. However, had BPLW designed and constructed the curb in such a way as to avoid the dangerous condition, then there would not have been any dangerous condition for the City to make safe. Thus, the claims that the City failed to inspect and maintain the curb area “arise from” BPLW’s performance of the contract because the claims have their origin in, grow out of, and flow from the allegedly negligent design and construction of the curb by BPLW.

The Exclusionary Language of the Indemnity Clause Does Not Relieve BPLW of Its Duty to Defend

BPLW next argues that the exclusionary provisions of the indemnity clause relieve it of its duty to defend because the curb was built and designed in accordance with standard design specifications for header curbs provided by the City and because the City approved the plans prior to the construction of the facility. The exclusionary language of the indemnity clause relieves BPLW of its duty to defend the City from liability “arising out of the preparation or approval of maps, drawings, . . . designs or specifications by the City.”

According to BPLW, the curb that Pound fell from was constructed and designed in full compliance with the City’s DWG.2415, a design-specification sheet that details how to construct various types of curbs used in city construction projects. DWG.2415 contains drawings specifying the City’s requirements for the construction of seventeen different types of curbs and gutters and includes information on the dimensions of the various curbs as well as the type of construction materials that must be used to build the curbs. The specifications for the header curb, the type of curb at issue, indicate that a header curb can be up to eighteen inches high and that there is no requirement that any type of safety rail be placed above the curb.

BPLW argues that because it relied on the City’s design specifications for the header curb, it does not have a duty to defend under the exclusionary language of the contract. According to BPLW, it was the City’s design specifications that caused the curb to be unusually high,
not any design defect in BPLW’s construction and design of the curb. We disagree. {28} In order for BPLW to be relieved of its duty to defend under the exclusionary language of its contract with the City, the cause of action must arise from the City’s preparation or approval of maps, drawings, designs, or specifications. The cause of action in this case, however, does not arise from the design specifications for a header curb. While BPLW may have been required to build all header curbs complying with the City specifications, there is no indication that BPLW was required to use a header curb in the specific location where the curb was actually constructed. In the process of designing the rental car facility, BPLW opted to install a header curb in the particular location where Pound fell. According to the allegations in Pound’s complaint, it was the placing of an excessively high curb in a pedestrian path that is alleged to have caused the fall, not some defect in the design specifications for the header curb. {29} To the extent that Pound’s allegations even mention DWG.2415, Pound only alleges that the City violated the design specifications when it constructed the curb, not that there was some defect in the design specifications themselves. Because BPLW, not the City, was responsible for the placement of the curb in a particularly dangerous location, the alleged failure to comply with the specifications falls within BPLW’s duty to defend the City, not the exclusionary language of the contract. Thus, for purposes of determining whether BPLW had a duty to defend, Pound’s complaint states a claim that arises from BPLW’s design and construction of the curb in question, not from some defect in the City’s design specifications for header curbs such that BPLW would be relieved of its duty to defend. {30} BPLW next argues that it is relieved of its obligation to defend the City because the City approved all of the plans BPLW had designed prior to the construction of the facility. There are no allegations in the complaint that Pound’s injuries arose from the City’s approval of BPLW’s design for the rental facility. Instead, all of the allegations against the City relate to the design and construction of the facility. Because BPLW designed and constructed the facility, these allegations all arise from BPLW’s performance of the contract and are subject to BPLW’s general obligation to defend the City. Indemnification {31} BPLW finally argues that the district court erred in denying its motion for summary judgment in which BPLW sought a determination that it did not have a duty to indemnify and reimburse the City for the settlement the City paid to Pound. The district court’s grant of partial summary judgment, however, dealt solely with whether BPLW had a duty to defend, not whether BPLW had a duty to indemnify. In addition, “the duty to indemnify is distinct from [the] duty to defend,” and resolution of whether a party has a duty to defend does not necessarily depend on there being a duty to indemnify. Ins. Co. of N. Am. v. Wylie Corp., 105 N.M. 406, 409, 733 P.2d 854, 857 (1987). While we look to the allegations in the complaint and the terms of the contract to determine whether a duty to defend has been triggered, whether BPLW will also be required to indemnify the City requires the resolution of material facts by the district court. Thus, the issue of BPLW’s duty to indemnify the City is not properly before us, and we therefore do not address it.

CONCLUSION {32} For the foregoing reasons, we affirm the district court’s grant of partial summary judgment in favor of the City of Albuquerque. {33} IT IS SO ORDERED. CYNTHIA A. FRY, Chief Judge

WE CONCUR: JONATHAN B. SUTIN, Judge RODERICK T. KENNEDY, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-082

Topic Index:
Children: Termination of Parental Rights
Civil Procedure: Final Order
Domestic Relations: Adoption; Parental Rights; and Time Limitations

IN THE MATTER OF THE ADOPTION PETITION
OF HOMER F. and JOYCE F.,
Petitioners-Appellees,
versus
JEREMIAH E.,
Respondent-Appellant,
and
IN THE MATTER OF SAM JACKSON F., a Child.
No. 28,694 (filed: June 30, 2009)

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
J. RICHARD BROWN, District Judge

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Guardian ad Litem

Opinion

CELIA FOY CASTILLO, Judge

{1} Grandparents filed a petition to adopt Father’s child (Child) and served Father with a motion to imply his consent to the adoption. After two separate hearings on the matter, two orders were entered—one in December 2006 (2006 order) and another, amended order in June 2008 (2008 amended order)—implying Father’s consent to the adoption of Child. Father filed an application for interlocutory appeal of the 2008 amended order, which was granted. On appeal, we necessarily examine the effect of the 2006 order and conclude that the 2006 order was a final, appealable order and, further, that once the order was entered and not timely appealed, Father was no longer a party to the adoption proceedings. Accordingly, we quash this interlocutory appeal and remand to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

{2} Child was born to Mother and Father on January 24, 1999. Mother and Father were never married. From birth, Child has lived with his maternal grandparents (Grandparents). In April 1999, Grandparents were appointed guardians and conservators over Child. Eight years later, in September 2006, Grandparents filed a petition for adoption under the Adoption Act, NMSA 1978, Sections 32A-5-1 to -45 (1993, as amended through 2007) (Adoption Act).

{3} As a part of the petition for adoption, Grandparents filed a motion requesting the district court to imply the consent of Father, pursuant to Section 32A-5-18. Father, acting pro se, filed a response to the petition and contested the adoption. In early November 2006, the district court held a hearing on the consent issue and orally ruled that Father’s consent should be implied. After the hearing, Father obtained counsel and on December 8, 2006, filed a second response to the petition for adoption. In addition, Father filed a motion to reconsider and vacate the ruling made by the district court at the November 2006 consent hearing. On December 14, 2006, the district court held a hearing on Father’s motion. The next day the district court entered the 2006 order, which implied Father’s consent based on his failure to care for, communicate with, and support Child during the requisite time period set forth in the statute. See § 32A-5-18(A). In addition, based on the arguments at the hearing, the district court appointed a guardian ad litem. The 2006 order was not signed by Father’s counsel prior to its entry.

{4} Nearly a year passed before the next action was taken in the case. Apparently in response to the retirement of the original judge, Grandparents and Father stipulated to the assignment of a new judge. A status conference was conducted in December 2007, and the district court indicated that it would listen to the tapes of the December 14, 2006 hearing and then set the case for either a second status conference or an adjudicatory hearing on the petition for adoption.

{5} In February 2008, the district court issued a letter to Father, Grandparents, and Child’s guardian ad litem. In that letter, the court outlined its understanding of the case: that Father’s consent had been implied over objection; that the parties understood the 2006 order to be final; that Father had requested and been given time to file proposed findings and conclusions, but he did not file either; that Father had indicated that he was going to appeal the 2006 order, but no appeal was filed; that Father was not entitled to notice of further proceedings; and that Father was no longer a party to the cause. Father responded to the letter with a motion to reconsider. He argued that he was still a party to the adoption proceeding and that the 2006 order was not final.

{6} The district court held a hearing on Father’s motion and, as a result of the hearing, the district court entered the 2006 amended order. That order, in relevant part, permitted Father to take an interlocutory appeal of the consent determination and stayed the proceedings pending the outcome of the appeal. Father applied for and this Court granted an interlocutory appeal of the 2008 amended order. Additional facts will be developed as the issues are discussed.

II. DISCUSSION

{7} “Adoption, unknown at common law, is a creature of statute” and “[i]n New Mexico, adoption is governed by the Adoption Act, the interpretation of which is an issue of law we review de novo.” Helen G. v. Mark
J.H., 2008-NMSC-002, ¶ 7, 143 N.M. 246, 175 P.3d 914 (internal quotation marks and citation omitted).

[8] After interlocutory appeal was granted, this Court assigned the case to the general calendar, with directions for the parties to address finality of the 2008 amended order. In this regard, the parties also addressed the finality of the 2006 order. We observe that if the 2006 order is final, there are no issues for this Court to consider because no timely appeal was filed. Father argues that we can consider his appeal because the 2006 order was interlocutory, the 2008 amended order properly modified the 2006 order and was also interlocutory, and his appeal from the 2008 amended order was timely. Specifically, Father asserts that the 2006 order was not final because the court had not fully disposed of the petition and because it would be unjust under the circumstances of the present case to prevent Father from participating as a party in the adoption proceeding. Father also argues that the 2006 order is void for lack of certain required signatures. We begin with Father’s finality arguments.

A. Finality of the 2006 Order

[9] Rule 1-054(B)(2) NMRA governs the finality of judgments upon multiple parties; it states that “a judgment may be entered adjudicating all issues as to one or more, but fewer than all parties.” Rule 1-054(B)(2) further states that “[s]uch judgment shall be a final one unless the court . . . expressly provides otherwise and a provision to that effect is contained in the judgment.” Id. No such provision was included in the 2006 order. An order is final when all issues of law and fact have been determined and the case is disposed of by the district court to the fullest extent possible. Estate of Griego ex rel. Griego v. Reliance Standard Life Ins. Co., 2000-NMCA-022, ¶ 13, 128 N.M. 676, 997 P.2d 150. Father argues that because the district court has not yet adjudicated the allegations of the petition, the case has “by no means been disposed of to the fullest extent possible.” Father’s primary argument is that even if his consent is implied, he still has the right to participate in the adoption proceeding until the final order of adoption is entered. Although we agree that the petition remains yet to be acted upon, once Father’s consent has been obtained in some fashion, we see no statutory role for him to play in that proceeding. We address each of Father’s points in the context of our analysis.

1. The Statutory Effect of Consent

[10] Father argues that the 2006 order is not final because “all it does is find that Father impliedly consented to the adoption.” Based on review of the Adoption Act, however, we conclude that any finding of consent to adoption effectively terminates the consenting parent’s rights to participate further in the adoption proceeding and, thus, an order of implied consent is final as to that parent. The Adoption Act recognizes three types of a father: an acknowledged father, an alleged or biological father, and a presumed father. See § 32A-5-3(F), (G), (V). Different rights are afforded fathers of different status. See Helen G., 2008-NMSC-002, ¶¶ 8-10. Father’s status is not clear from the record. At oral argument before this Court, however, the parties agreed that Father is Child’s acknowledged father. Accordingly, Father’s consent to adoption or relinquishment of parental rights is required. Section 32A-5-17(A)(5) (requiring the consent of the adoptee’s acknowledged father).

[11] Consent may either be voluntarily obtained, see § 32A-5-21, or implied by the district court based on a parent’s actions. See § 32A-5-18(A). “The implication of a consent or relinquishment under this section shall have the same effect as though the consent or relinquishment had been given voluntarily.” Section 32A-5-18(B). The Adoption Act additionally sets out the time frame in which the necessary consents must be obtained or adjudicated before the district court may determine the merits of the petition for adoption. See § 32A-5-18(C) (requiring the district court to “render its decision on the implied consent prior to proceeding with the adjudicatory hearing”); see also § 32A-5-36(F)(3) (requiring the district court to determine at the time of adjudication that all necessary consents have been obtained). A parent who provides voluntary consent waives the right to notice of further proceedings on the petition. See § 32A-5-21(A)(12). Thus, because the effect of a voluntary consent is imputed to an implied consent, see § 32A-5-18(B), a parent who is the subject of an order of implied consent has no right to notice of further proceedings on the petition.

[12] In addition, consent to adoption cannot be withdrawn—even prior to the adjudication of the petition—unless the parent can establish fraud. See § 32A-5-21(1). Although fraud is not an issue here, we further address the statutory procedure for establishing that parental consent was fraudulently obtained in order to demonstrate the parent’s limited role once consent has been established. Under Section 32A-5-36(D), any procedure initiated on a fraud petition must be concluded by the biological parent before the district court adjudicates the merits of the petition for adoption. Thus, all issues regarding a parent’s consent are required to be resolved before the petition for adoption is adjudicated.

[13] Father cites Helen G. to argue that the order implying his consent to the adoption is not final because his legal rights in Child remain intact until the final decree of adoption is entered. Helen G. held that a father who is neither the presumed nor the acknowledged father of the child does not have the right to withhold his consent to an adoption. 2008-NMSC-002, ¶ 51. The Court concluded that Section 32A-5-37(B) “effectively” terminated the legal relationship between biological parents and a child after a legal relationship between the child and the adoptive parents is created by a final decree of adoption. Helen G., 2008-NMSC-002, ¶ 35. Critically, however, that case did not address the status of a father whose consent had been implied under Section 32A-5-18(A) or the effect of a consent after it has been implicitly or voluntarily given because as we have explained, the father in Helen G. had no entitlement to give or withhold consent. As a result, Helen G. does not provide authority for the argument that Father’s rights regarding Child in the present case remain intact until the entry of the adoption decree when his implied consent to this adoption has already been adjudicated.

[14] Our review of these consent provisions leads us to conclude that the Adoption Act does not contemplate a parent’s further participation in an adoption adjudication after the required consents have been obtained. Consequently, we further hold that because the parent’s consent to adopt has been secured, thus eliminating the right to participate in the adoption proceeding, parental rights have effectively been terminated—or relinquished, in the case of a voluntary consent—at that time. See Karen D. Laverdiere, Content Over Form: The Shifting of Adoption Consent Laws, 25 Whittier L. Rev. 599, 600 (2004) (explaining that in general, “the consent to adoption constitutes the relinquishment of parental rights” (internal quotation marks and citation omitted)).

2. Father’s Status as a Biological Father

[15] Despite these statutory provisions, Father points to Section 32A-5-36(C) and contends that the district court must hear evidence on the merits of a petition “when a biological father appears to contest the
adoption.” Father misreads this section of the Adoption Act. Section 32A-5-36(C), in its entirety, provides for the following:

If any person who claims to be the biological father of the adoptee has appeared before the court and filed a written petition or response seeking custody and assuming financial responsibility of the adoptee, the court shall hear evidence as to the merits of the petition. If the court determines by a preponderance of the evidence that the person is not the biological father of the adoptee or that the child was conceived through an act of rape or incest, the petition shall be dismissed and the person shall no longer be a party to the adoption. If the court determines that the person is the biological father of the adoptee, the court shall further determine whether the person qualifies as a presumed or acknowledged father whose consent is necessary for adoption, pursuant to Section 32A-5-17.[4]

If the court determines that the person is the biological father, but does not qualify as a presumed or acknowledged father, the court shall adjudicate the person’s rights pursuant to the provisions of the Adoption Act.[7]

Father appears to interpret this language to mean that a biological father who has filed a response to a petition for adoption is entitled to participate in the district court’s adjudication of the adoption petition. We disagree.

Our Supreme Court has explained that Section 32A-5-36(C) addresses the situation where “a biological father who does not have the right to withhold consent to the adoption seeks custody of the adoptee at the hearing on the adoption petition.” Helen G., 2008-NMSC-002, ¶ 35. Father is an acknowledged father and not a biological father as defined by the statute. As such, Father had the right to withhold his consent to the adoption. Thus Helen G. and Section 32A-5-36(C) do not apply to Father. See Helen G., 2008-NMSC-002, ¶ 35 (explaining that when a biological father who does not have the right to withhold consent wants his rights heard, he may file a petition or response seeking custody or assuming financial responsibility of the adoptee, in which case, “the district court shall adjudicate the person’s rights” at the adjudicatory hearing (internal quotation marks and citation omitted)).

Further, Section 32A-5-36(C) indicates that the district court shall adjudicate the objecting parent’s rights. Father’s rights have already been adjudicated under the Adoption Act: his consent to the adoption was implied. Based on Father’s status as an acknowledged father, as well as the district court’s previous determination of his rights under the Adoption Act, Section 32A-5-36(C) does not establish that any issue remains regarding Father’s rights to Child.

3. Open Adoption

Father also argues that because Grandparents alleged in the petition that the adoption will not be open, Section 32A-5-35(E) requires that the open adoption allegation—and, thus, Father’s continued right to contact with Child—be proven at the adjudicatory hearing. Section 32A-5-35(A) permits the parents of the child and the petitioner to “agree to contact between the parents and the petitioner or contact between the adoptee and one or more of the parents or contact between the adoptee and relatives of the parents.” The question of open adoption is therefore not reliant on a parent’s right to contact with a child, but instead is based on an agreement between the adoptive parents and the biological parents. Although the district court will consider the open adoption issue at the adjudicatory hearing, nothing in the statute suggests that Father has a right to contest Grandparents’ position on open adoption at that hearing. To the contrary, the statute indicates that in order to initiate an open adoption, Father and Grandparents must “agree to contact.” Section 32A-5-35(A).

Because an agreement between the parties is required, Father is foreclosed from appearing at the adjudicatory hearing and taking an adversarial stance on the question of open adoption. Should the district court find at the adjudicatory hearing that an open adoption is in Child’s best interests, such a finding would not resurrect Father’s parental rights, which were terminated by the 2006 order on implied consent.

4. Actions of the Parties

To support his interlocutory argument, Father points to the actions of Grandparents, the district court, and the guardian ad litem in continuing to treat him as a party to the adoption petition, despite Grandparents’ position on appeal.

5. Procedural Irregularities

Father contends that because of the procedural and statutory irregularities that he alleges occurred in this case, it would be unfair for this Court to conclude that the 2006 order is final and that he is no longer a party to the adoption proceeding. Specifically, Father contends that because he was not represented by counsel at the...
November 2006 consent hearing, he did not have an opportunity to present his case. We disagree.

{22} The only section of the Adoption Act that refers to the appointment of counsel is Section 32A-5-16(E), which refers to the termination of parental rights. This section requires the district court to “upon request, appoint counsel for an indigent parent who is unable to obtain counsel or if, in the court’s discretion, appointment of counsel for an indigent parent is required in the interest of justice.” Father did not request counsel, and there is nothing in the record to indicate that Father was indigent at the time of the consent hearing or that justice required the appointment of counsel. The record demonstrates that Father participated in the November consent hearing, asked questions of the witnesses, testified, and made a statement on his own behalf. Thus, Father has not demonstrated that he was entitled to counsel. Father chose to represent himself at the beginning of the proceedings, and there is nothing in the record to show that an injustice occurred. See Woodhull v. Meinel, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126 (“Although pro se pleadings are viewed with tolerance, a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar.”) (internal quotation marks and citation omitted)), cert. denied, 2009-NM-CERT-001, 145 N.M. 655, 203 P.3d 870.

6. Finality Determination and Effect

{23} Based on the foregoing analysis as well as the need for permanency, we conclude that the 2006 order finding Father’s implied consent to the adoption was a final, appealable order. “[T]he term ‘finality’ is to be given a practical, rather than a technical, construction.” Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992), limited on other grounds by Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993). The most practical means of recognizing a parent’s rights while at the same time providing the petitioner and the child with some permanency is to require the parent to immediately appeal a final determination of implied consent.

{24} As a result of this holding, we do not address Father’s position that the June 2008 amended order properly amended the 2006 order. A final order, once it is entered, cannot be altered or amended except by motion to vacate or modify, by motion under Rule 1-060 NMRA, or by application under Rule 1-059 NMRA. See St. Clair v. County of Grant, 110 N.M. 543, 549, 797 P.2d 993, 999 (Ct. App. 1990). Father does not argue that any of these exceptions to finality apply to the 2008 amended order. Absent any applicable exception, our holding that the 2006 order was a final order is dispositive.

B. Lack of Signature on the 2006 Order

{25} Father additionally argues that even if the 2006 order was a final order, it is void because it lacked the signature of his counsel that is required under LR5-202(C) NMRA and Rule 1-058(C) NMRA. We are unpersuaded.

{26} Rule 1-058(C) provides that “before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.” The record shows that Father’s counsel had such an opportunity. The content of the 2006 order was the subject of the December 2006 hearing on Father’s motion to reconsider. Father argues that “being present at a hearing on a different motion does not constitute consent to enter” the 2006 order. We disagree. Counsel for Father, counsel for Grandparents, and the court had the order in front of them at the hearing. Father was able to object and in fact did. His primary argument was that the district court did not have jurisdiction to enter the order based on the failure to appoint a guardian ad litem. There was no argument that the order did not accurately reflect the decision of the court following the hearing on Grandparents’ motion to imply Father’s consent. The district court ruled against Father on the jurisdictional argument and informed the parties that he would sign the order in the form presented by Grandparents’ counsel. Thus, based on the facts of this case, we are satisfied that the district court complied with Rule 1-058(C).

{27} Father also relies on LR5-202(C), which states that [orders and judgments will not be signed by the judge unless they have been initialed by attorneys for all parties to the cause or pro se parties. Should the attorney for any party fail or refuse to so initial a proposed order or judgment within five (5) working days, the attorney submitting the proposed order shall certify to the court that opposing counsel or pro se party has failed or refused to initial the same.

While we agree that the 2006 order did not have the initials of Father’s counsel, Father does not provide any authority for his position that this failure automatically renders the order void. See Stockton v. N.M. Taxation & Rev Dep’t, 2007-NMCA-071, ¶ 16, 141 N.M. 860, 161 P.3d 905 (declining to address arguments that are unsupported by authority).

{28} In addition, the purpose behind Rule 1-058 and LR5-202(C) is to ensure that the parties have notice of the language on an order before its entry so that if there is a disagreement, a presentment hearing can be held. If there is a presentment hearing or equivalent, which occurred in this case, the purpose of the rules is met. Here, the parties received notice of the proposed order and were allowed to assert their arguments. In the event of a conflict, Rule 1-058 as the statewide rule would control over the local rule. Rule 1-083 NMRA (mandating that “[l]ocal rules and forms shall not conflict with, duplicate or paraphrase statewide rules or statutes”). Accordingly, we conclude that Grandparents and the district court sufficiently complied with Rule 1-058 and that the lack of initials did not render the order void.

{29} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
MICHAEL E. VIGIL, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-083

Topic Index:
Civil Procedure: Admissions and Denials; Dismissal; Pleadings; and Summary Judgment
Criminal Law: Sexual Exploitation of Children; and Sexual Offences
Miscellaneous Statutes: SORNA (Sexual Offender Registration and Notification Act)
Statutes: Interpretation

THOMAS EDWARD VIVES,
Petitioner-Appellant,
versus
WILLIAM J. VERZINO, LOS ALAMOS COUNTY SHERIFF,
and NEW MEXICO DEPARTMENT OF PUBLIC SAFETY,
JOHN DENKO, SECRETARY,
Respondents-Appellees.
No. 28,480 (filed: June 30, 2009)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
JAMES A. HALL, District Judge

RAY TWOHIG
RAY TWOHIG, P.C.
Albuquerque, New Mexico
for Appellant

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INCORPORATED COUNTY
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Los Alamos, New Mexico

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Chief Counsel and Special Assistant
NEW MEXICO DEPARTMENT
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Santa Fe, New Mexico
for Appellees

Opinion
ROBERT E. ROBLES, JUDGE

[1] This case presents two questions: (1) whether failure to respond to a petition results in admissions to conclusions of law that are binding on the court in subsequent summary judgment proceedings, and (2) whether an individual whose adjudication was withheld after pleading nolo contendere to a sex offense in Florida must register as a sex offender in New Mexico. The district court denied the motion for summary judgment of Thomas Edward Vives (Petitioner) seeking to bind Respondents to the allegations of the complaint and for a ruling as a matter of law that Petitioner did not have to file as a sex offender in New Mexico. The district court granted Respondents' cross-motion for summary judgment on the merits. We affirm the district court.

I. BACKGROUND

[2] In Florida in 1992, Petitioner pled nolo contendere to engaging in a sex act with a child under eighteen years old, contrary to Florida Statute Section 794.041(2)(b) (1992) (repealed by Laws 1993, c. 93-156, § 4). As a result, he was required to serve thirty days imprisonment, two years of community control, and five years of probation, as well as pay restitution for mental counseling of the victim, have no unsupervised contact with children under eighteen years old, surrender his teaching credentials, and register as a sex offender in Florida.

[3] In 2000, Petitioner moved to New Mexico and did not register as a sex offender. In 2004, William J. Verzino, the sheriff of Los Alamos County, issued notice to Petitioner that he was required to register under the Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2007). Petitioner was informed that if he did not register, he would be charged and prosecuted with a fourth-degree felony.

[4] Petitioner registered as a sex offender with the Los Alamos County Sheriff’s Department and, in July 2005, filed a petition for declaratory and injunctive relief, naming the Los Alamos County Sheriff and the New Mexico Department of Public Safety as Respondents, seeking to be removed from the sex offender registry. Both Respondents filed motions to dismiss for lack of jurisdiction under Rule 1-012(B)(1) NMRA. In November 2005, Petitioner filed an amended petition, which was met by more motions from Respondents to dismiss for lack of jurisdiction. Following an exchange of responses on the motions to dismiss, the district court held a hearing and denied the motions to dismiss.

[5] Six months later, Petitioner filed an unopposed motion to vacate the pretrial conference and to remove the case from the trial docket, stating that the parties agreed that the case could be resolved by summary judgment “since the facts appear not to be disputed and the case turns on an issue of law.” Petitioner proposed that he file a motion for summary judgment and that Respondents could then “file a cross[-]motion for summary judgment.” Once the briefing was complete, “the [c]ourt can then decide the case on the basis of undisputed facts without the necessity for expending [c]ourt time on the trial of this case.” (The parties refer to Respondents’ counter-motion for summary judgment as a cross-motion, a fact this Court does not change for consistency.) The district court
granted Petitioner’s motion and, shortly thereafter, Petitioner filed a motion for summary judgment. Respondents filed a response to Petitioner’s motion and filed their own cross-motion for summary judgment. After a reply from Petitioner, the district court held a hearing and, ultimately, denied Petitioner’s motion for summary judgment and granted Respondents’ cross-motion for summary judgment. This appeal followed.

II. DISCUSSION

A. Failure to Answer Petition

[6] On appeal, Petitioner argues that Respondents never filed an answer to his amended petition and, under Rule 1-008(D) NMRA, the failure to deny averments in a pleading to which a responsive pleading is required is tantamount to an admission of those averments. Specifically, Petitioner argues that his statements in his amended petition that “[h]e is not required by law to register as a sex offender in New Mexico,” that “[h]e is being forced to register until his response to Petitioner’s motion for summary judgment in which they responded to the assertions made by Petitioner and, in the alternative, they moved the court for the opportunity to amend. See Rule 1-015(A) NMRA (“[A] party may amend his pleading... by leave of court . . . and leave shall be freely given when justice so requires.”). Additionally, Respondents argued that the facts were not in dispute, a point this Court notes by the very fact that both parties moved for summary judgment based on the same undisputed material facts. See Rule 1-056(C) NMRA (“The judgment sought shall be rendered forthwith if the pleadings, deposits, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).

[9] In denying Petitioner’s motion for summary judgment, the district court stated that the hearing was on a request for summary judgment, not default. The district court further found that, in order for Petitioner to prevail, it would have been necessary for the court to conclude that, based on the facts in the complaint, the Petitioner was entitled to judgment as a matter of law. Because the district court disagreed with Petitioner’s statutory interpretation, it held that summary judgment could not be granted in Petitioner’s favor even if the court had concluded that Respondents had admitted all of the factual allegations in the complaint. Moreover, the district court observed that had the parties been there on a request for default, it would be form over substance to not allow Respondents to respond. Even though no answer was filed, it was appropriate for the district court to go forward and address summary judgment. It specifically held that it would accept Respondents’ reply to Petitioner’s motion for summary judgment as responsive pleadings.

[10] Petitioner invoked Rule 1-056 by filing for summary judgment. Petitioner’s desire to have his uncontested conclusions of law be taken as admitted and applied by the court is not persuasive, since allegations of fact are deemed admitted by failure to respond under Rule 1-056(E), not conclusions of law. See id. (“[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”) (emphasis added); see also Brown v. Taylor, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) (“The moving party may not be entitled to judgment even if the non-moving party totally fails to respond to the motion.”); Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002) (holding that when a party fails to respond to a motion for summary judgment, a court should accept as true all material facts properly asserted and supported, but should only grant the motion if the moving party is entitled as a matter of law). Moreover, Respondents did reply to Petitioner’s motion for summary judgment, and they filed a cross-motion for summary judgment with supporting memorandum as provided by Rule 1-056(D)(2).

Regardless, this case is not about an application for default due to a party failing to answer a petition, nor is it about failing to respond to a motion for summary judgment or responding insufficiently. This case is simply about two parties asserting that there is no genuine issue as to material fact, and the court applying the applicable law. “When a party actually admit[s], for purposes of the summary judgment motion, the veracity of the allegations in the complaint, a reviewing court should consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law.” GCM, Inc. v. Ky. Cent. Life Ins. Co., 1997-NMSC-052, ¶ 13, 124 N.M. 186, 947 P.2d 143 (alteration in original) (internal quotation marks and citation omitted). In other words, in ruling on a motion for summary judgment, a court is not wed to a party’s assertion of conclusions of law whether in a petition, complaint, or motion for summary judgment, even if the conclusions are admitted by the opposing party.

B. Requirement to Register

[11] Petitioner next argues that he was not convicted according to New Mexico law and is therefore not required to register as a sex offender in New Mexico. Petitioner does not claim that he did not engage in a sex act with a child under eighteen years old, and he does acknowledge that such an offense is covered by SORNA in New Mexico. Petitioner admits that he was required to register as a sex offender in Florida in compliance with Florida Statute Section 944.607(2)(b) (2007), which defines a conviction of a sex offense for registration purposes to be “a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld.” (Emphasis added.) However, the Florida court did not adjudicate Petitioner’s guilt. A review of the history of statutes and case law is helpful to understanding definitions.

[12] “The meaning of language used in a statute is a question of law that we review
Mexico's conditional discharge pursuant to Section 29-11A-3(A) (2000) (current version at Section 29-11A-3(D) (2007)). At that time, New Mexico case law did not require registration if the ultimate disposition resulted in a conditional discharge. *State v. Herbstman*, 1999-NMCA-014, ¶ 20, 126 N.M. 683, 974 P.2d 177 (filed 1998). This view was adopted by the Legislature in a 2005 amendment to Section 29-11A-3(A), which defined a “conviction” for sex offender registration as “a conviction in any court of competent jurisdiction and includes a deferred sentence, but does not include a conditional discharge.” (Emphasis added.)

13 The parties make no claims as to which version of amended statutes should apply in this case and, accordingly, we do not discuss that issue. Under both, with a conditional discharge, the court does not enter an adjudication of guilt. See § 31-20-13(A). Petitioner instead observes that, in *Herbstman*, this Court held that the terms “adjudicated guilty” and “convicted” were used interchangeably by the Legislature. 1999-NMCA-014, ¶ 21 (internal quotation marks omitted). Thus, Petitioner contends that the district court erred in denying him summary judgment because his plea of nolo contendere to a sex offense, contrary to Florida Statute Section 794.041(2) (b), resulted in adjudication being withheld, which is a similar outcome to New Mexico’s conditional discharge pursuant to NMSA 1978, Section 31-20-13 (1994) and should be treated as such.

14 We consider Petitioner’s view of the respective state statutes to be a narrow one. We initially note that Florida, in plain and ordinary language, defined a conviction for purposes of sex offender registration to be a determination of guilt regardless of whether adjudication is withheld. Fla. Stat. § 944.607(2)(b); see Fla. Stat. § 944.606(1)(A) (2007); Fla. Stat. § 921.0111(2) (1997) (repealed 1998). Petitioner asserts that the adjudication of guilt is controlling in New Mexico as to whether he is required to register. Citing two Florida cases, *McFadden v. State*, 732 So. 2d 412 (Fla. Dist. Ct. App. 1999) and *Overstreet v. State*, 629 So. 2d 125 (Fla. 1993), Petitioner argues that Florida has treated the withholding of adjudication as something other than a conviction in the past. Those cases, however, concerned impeachment and habitual offender sentencing, not sex offender registration. When construing a statute, we read it “in connection with other statutes concerning the same subject matter.” *Quantum Corp. v. State Taxation & Revenue Dep’t*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848.

15 In examining Petitioner’s sentence in Florida, we recognize several distinctions between Florida’s withholding of adjudication and New Mexico’s conditional discharge. Aside from an individual being required to register as a sex offender in Florida under a withheld adjudication, our conditional discharge statute does not provide for the types of punishment that Petitioner received. Under a conditional discharge order, a court only has the statutory authority to place an individual on probation on terms and conditions authorized by NMSA 1978, Section 31-20-5 (2003) and NMSA 1978, Section 31-20-6 (2007). Section 31-20-13(A); *State v. Fairbanks*, 2004-NMCA-005, ¶ 18, 134 N.M. 783, 82 P.3d 954 (filed 2003) (rejecting that a defendant with a conditional discharge can be obligated to pay a lab fee). In Florida, Petitioner received thirty days in jail, was obligated to participate in community control, was required to pay for counseling for the victim, and had to surrender his teaching certification. The totality of the punishment that Petitioner received and the requirement to register as a sex offender could not have been applied in New Mexico with a conditional discharge.

16 We also consider that the purpose of SORNA is to assist law enforcement agencies in protecting communities by requiring sex offenders to register in the county in which the sex offender lives and by requiring a registry with public access to such information. Section 29-11A-2; *State v. Brothers*, 2002-NMCA-110, ¶ 14, 133 N.M. 36, 59 P.3d 1268. SORNA is intended for public safety, not punishment. *State v. Williams*, 2006-NMCA-092, ¶ 6, 140 N.M. 194, 141 P.3d 538. Petitioner’s argument contradicts the Legislature’s intentions and advocates for the creation of a safe harbor in New Mexico for sex offenders that were required to register in other states. “In interpreting statutes, we seek to give effect to the Legislature’s intent, and in determining intent we look to the language used and consider the statute’s history and background.” *Key v. Chrysler Motors Corp.*, 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996).

17 Petitioner also implies that the question of whether his Florida disposition is defined as a “conviction” turns on choice of law, but he nevertheless asserts that SORNA does not provide for choice of law. We agree with Petitioner that New Mexico’s laws are determinative in this case. Section 29-11A-3(A) defines a “conviction” as “a conviction in any court of competent jurisdiction and includes a deferred sentence, but does not include a conditional discharge.” This definition very clearly exempts conditional discharges and only conditional discharges. The doctrine of *expressio unius est exclusio alterius*—the expression or inclusion of one thing indicates exclusion of the other—is applicable here. See *Fernandez v. Española Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 6, 138 N.M. 283, 119 P.3d 163. The statute by negative implication simply does not include dispositions similar to conditional discharges, like conditional discharges, or akin to conditional discharges. Petitioner’s argument urges for a redefining of what is already defined as a conviction by Florida and by implication in New Mexico.

18 Finally, Petitioner asserts that the district court erred in not granting injunctive relief. Because we conclude that Petitioner’s Florida disposition is a conviction for purposes of SORNA, and sex offender registration is a collateral consequence following a conviction for a sexual offense, *State v. Drukenis*, 2004-NMCA-032, ¶ 34, 135 N.M. 223, 86 P.3d 1050, and is remedial in nature, *Williams*, 2006-NMCA-092, ¶ 6, we decline to reach the issue. *Crutchfield v. N.M. Dep’t of Taxation & Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 (filed 2004) (“A reviewing court generally does not decide academic or moot questions.”)

III. CONCLUSION

19 For the reasons stated above, we affirm the district court.

20 IT IS SO ORDERED.

ROBERT E. ROBLES, Judge
WE CONCUR:
JAMES J. WECHSLER, Judge
MICHAEL E. VIGIL, Judge
OPINION

MICHAEL E. VIGIL, JUDGE

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-084

Topic Index:
Civil Procedure: Contempt
Domestic Relations: Child Custody; and Custodial Interference
Remedies: Civil Contempt

BILL J. PAPATHEOFANIS,
Petitioner-Appellee,
versus
KATHERINE ALLEN,
Respondent-Appellant.

No. 27,535 (filed: June 30, 2009)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
RAYMOND ORTIZ, District Judge

BILL J. PAPATHEOFANIS
Los Alamos, New Mexico
Pro Se Appellee

JAMES K. LEVEN
Chicago, Illinois
for Appellant

1. First Order to Show Cause (Fees)

The district court appointed a Rule 11-706 NMRA expert in the domestic relations case between Husband and Wife, and subsequently ordered Husband and Wife to each pay one-half of the $1100 outstanding balance they owed to the expert. Rule 11-706 (providing that the court may appoint an expert witness of its own selection to give evidence in the action and apportion the cost among the parties). After the expert notified the district court by letter that she had not received payment from either party, the district court on its own motion issued an order to show cause why Husband and Wife should not be held in contempt for violating the order to pay the expert’s fees.

2. Second Order to Show Cause (Periods of Responsibility)

The district court also entered an order which established Husband’s periods of responsibility with Child. On December 22, 2006, Husband filed a motion for an order to show cause why Wife should not be held in contempt for violating the court order scheduling Husband’s periods of responsibility with Child. Husband alleged that Wife had denied Husband his periods of responsibility with Child on November 30, 2006, December 3, 2006, and December 21, 2006 and, in bad faith, claimed that weather conditions excused her failure to comply. On December 28, 2006, the district court issued an order to show cause. On January 9, 2007, Husband filed an amended motion for an order to show cause in which he alleged that Wife also denied Husband’s periods of responsibility with Child on December 22, 2006, and December 28, 2006.

3. Hearing on Orders to Show Cause

Wife filed a response on January 30, 2007, denying the allegations on the basis that she had been unable to comply with the order due to bad weather conditions and she supplied supporting evidence of the weather conditions. The evidence consisted of a weather report indicating snow on November 30, 2006; a newspaper article from December 1, 2006 referring to snowy and icy conditions on November 30, 2006, and stating that schools and courts were closed; a weather report indicating snow on December 3, 2006; a weather report indicating snow on December 19, 2006; an online newspaper article from December 21, 2006, referring to snowy conditions on December 20, 2006; a note from a court clerk stating that the court was closed for the entire day on November 30, 2006, December 20, 2006, and December 21, 2006 and for half the day on December 22, 2006, and December 29, 2006; and a weather report indicating fog and snow on December 28, 2006.

4. Hearing on Orders to Show Cause

On January 30, 2007, the district court held a hearing on both orders to show cause. On the first order to show cause, Husband’s attorney informed the court that Husband had paid his portion of the fees owed. The district court held Wife in contempt for failure to pay her share of the fee, ordered Wife to pay a $250 fine, but allowed Wife to purge the contempt if she made full payment to the expert by February 28, 2007.

5. Hearing on Orders to Show Cause

On the second order to show cause, Husband’s attorney asserted that Wife had refused Husband’s periods of responsibility with Child on November 30, December 3, December 20, December 21, December 22, December 23, December 28, December 29, December 31, and January 14. Husband conceded to the inclement conditions on December 21 and December 29. Wife’s attorney objected to the district court that Husband’s attorney had “added dates today that are not mentioned in either of her order[s]” and that “there’s no way that I could prepare or even talk to [Wife] with respect to other dates that [Husband’s attorney] has mentioned today.” After hearing testimony from Wife, Husband, and Child’s guardian ad litem, the district court orally ruled that Husband had engaged in intentional contemptuous conduct by failing to provide Child for Husband’s periods of responsibility on December 23, December 31, and January 14. None of these three dates were included in either written motion filed by Husband. The district court imposed a sanction of twenty-four hours in jail, with the sentence suspended pending strict compliance with the district court order. The district court also ordered Wife to pay Husband’s attorney fees in the amount of $750. The written order, which was subsequently filed, added December 22, 2006, a date which was set forth in Husband’s amended motion as an additional date of noncompliance. Wife appeals.

DISCUSSION

Wife argues that the first order of contempt was improper because: (1) the district court lacks authority to sua sponte issue an
order to show cause for civil contempt, and (2) the contempt power of the district court cannot be used to enforce ordinary civil judgments. Regarding the second order of contempt, Wife contends: (1) she was not provided with notice of all of the dates of the alleged noncompliance for which she was found in contempt, and (2) Husband failed to establish that Wife was able to comply with the order and willfully failed to comply. For the reasons explained below, we do not address Wife’s last issue.

1. First Order of Contempt (Fees)

To properly classify a contempt proceeding as civil or criminal, we look to the purpose for which the district court exercised its contempt power. See In re Klecan, 93 N.M. 637, 638, 603 P.2d 1094, 1095 (1979). Because the district court in this case issued the first order of contempt for the purpose of compelling Wife’s obedience with the order of the court requiring payment of the expert’s fees, this contempt proceeding was civil in nature. Id. (stating that civil contempt proceedings are “instituted to preserve and enforce the rights of private parties to suits and to compel obedience to the orders, writs, mandates and decrees of the court”).

A. Authority to Sua Sponte Issue

First Order to Show Cause

[10] Wife argues that the district court did not have authority to sua sponte issue the order to show cause why Wife should not be held in civil contempt for failure to pay the expert’s fees. Wife cites State ex rel Agee v. Chapman, 922 S.W.2d 516, 519 (Tenn. Ct. App. 1995), for the proposition that a court cannot order sanctions for civil contempt on its own motion. The court in Chapman recognized a limit for a court on its own motion to impose a civil contempt sanction against a party litigant:

“[T]he general rule seems to be that, since the sanction [to enforce the private right] is imposed for a party’s benefit, the party has the power to waive that benefit. If a party does not seek to hold the opposing party in contempt, the court cannot impose civil sanctions on its own motion.” Id. In the present case, the district court did not initiate the contempt proceeding for the benefit of a party litigant. Rather, the order to show cause was issued for the purpose of determining whether the court order to pay the Rule 11-706 expert’s fees was violated.

11 Rule 11-706 provides the district court with authority to appoint “an independent expert unaligned with either party to assist the court in determining significant issues in the proceeding.” In re Sanders, 108 N.M. 434, 439-40, 773 P.2d 1241, 1246-47 (Ct. App. 1989), and bestows upon the district court “broad discretion . . . in apportioning among the parties the costs of an expert witness appointed by the court.” In re Adoption of Staley, 117 N.M. 199, 205, 870 P.2d 161, 167 (Ct. App. 1994). Furthermore, “[t]his judicial power inherently includes the right, and the responsibility, to secure the payment of court-appointed experts particularly in the face of limited financial resources.” Philibar v. Philibar, 1999-NMCA-063, ¶ 10, 127 N.M. 341, 980 P.2d 1075. Because the court appoints the Rule 11-706 expert, and it is charged with the responsibility of securing the expert’s payment, it follows that the court must also be empowered to enforce its order sua sponte because in doing so, it is not enforcing the right of any party. We hold that the district court has inherent authority to sua sponte issue an order to show cause why a party should not be held in civil contempt for failing to comply with a court order to pay the fees of a Rule 11-706 expert. Hall v. Hall, 485 So. 2d 747, 750 (Ala. Civ. App. 1986) (recognizing inherent power of courts to institute contempt proceedings as a method of coercing compliance with court order); In the Interest of S.L.T., 180 So. 2d 374, 378 (Fla. Dist. Ct. App. 1965) (recognizing power of court to institute indirect contempt proceedings on its own motion); Ex parte Ray, 192 S.W.2d 225 (Ark. 1946) (same).

B. Authority to Order Contempt for Failure to Pay Fees

[12] Wife also argues that the district court erred in holding her in contempt for failure to pay the expert’s fees, asserting that a court cannot use its contempt power to enforce ordinary civil judgments. Wife relies on Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App. 1992), in which we stated:

Husband generally contends that the use of contempt powers is not permissible to secure compliance with an ordinary civil judgment such as the property division judgment, and that wife should stand in no different shoes from any other general creditor of husband. We agree with husband that contempt may not be used to enforce ordinary civil judgments. In the domestic relations context, a party may not be held in contempt for failure to pay a debt arising out of the property division, but may be held in contempt for failure to pay a debt arising out of an award of support or maintenance. Id. at 387, 838 P.2d at 1004.

13] Wife’s reliance on Hall is misplaced. The district court did not use its civil contempt power to enforce a civil money judgment. Instead, the district court invoked and exercised its civil contempt power to enforce its own order that Wife pay her share of the Rule 11-706 expert witness fees. Therefore, we hold that the district court appropriately exercised its contempt power when it issued the order of contempt for failure to pay the Rule 11-706 expert’s fees.

14] Because the district court had authority to sua sponte issue the order to show cause why Wife should not be held in contempt for failure to pay the Rule 11-706 expert’s fees and to find her in contempt for her failure to pay the fees, we affirm the district court’s first order of contempt.

2. Second Order of Contempt (Periods of Responsibility)

[15] The purpose of the second contempt order was to compel Wife’s compliance with the court order scheduling Husband’s periods of responsibility with Child. As such, the second order of contempt was also civil in nature. See In re Klecan, 93 N.M. at 638, 603 P.2d at 1095. The contempt was also indirect because the alleged contemptuous acts, failure to abide by the order scheduling Husband’s periods of responsibility, took place outside the presence of the court. Id. at 639, 603 P.2d at 1096 (stating that “[d]irect contempts are contemptuous acts committed in the presence of the court, while indirect, or constructive contempts, are such acts committed outside the presence of the court”). Therefore, the second order of contempt is
classified as an indirect civil contempt.

A. Lack of Notice

Wife argues that the district court violated her right to due process because neither Husband’s initial motion or amended order to show cause provided notice of the dates for which the district court actually held her in contempt.

In cases of indirect civil contempt, due process requires that a party be given notice of the charges. See Ex parte Fullen, 17 N.M. 394, 403-05, 128 P. 64, 66-67 (1912) (reversing an order of indirect civil contempt on the grounds that the party held in contempt did not receive notice of one of the specific charges upon which the contempt order was based); First Midwest Bank/Danville v. Hoagland, 613 N.E.2d 277, 286 (Ill. App. Ct. 1993) (stating that in indirect civil contempt proceedings due process requires notice of the charges, “an adequate description of the facts upon which the contempt charge is based,” and that notice must be provided “within a reasonable time in advance of the hearing”).

Husband’s initial motion and amended motion for an order to show cause provided Wife with notice to defend the allegation that she failed to comply with the court order scheduling Husband’s periods of responsibility on the following dates: November 30, 2006, December 3, 2006, and December 21, 2006, December 22, 2006, and December 28, 2006. The record also reflects that Wife prepared a response providing defenses for those specific dates. It is undisputed that Wife was not given notice, prior to the hearing, that she was also charged with failing to comply on December 23, 2006, December 31, 2006, and January 14, 2007, and that the district court found Wife in contempt for failing to comply on those dates.

Because Wife was not provided with notice of all of the alleged dates of noncompliance prior to the hearing on the order to show cause, her due process right to notice was violated. We therefore hold that the district court erred when it held Wife in contempt for failing to comply with the court order scheduling Husband’s periods of responsibility with Child. We reverse the second order of contempt.

B. Failure to Prove Ability to Comply and Willful Noncompliance

Because we reverse the second order of contempt on the above basis, we do not address Wife’s argument that Husband failed to prove Wife was able to comply with the order and willfully failed to comply.

CONCLUSION

For the above reasons, we affirm the first order of contempt concerning the payment of the Rule 11-706 expert witness fees and reverse the second order of contempt concerning Husband’s periods of responsibility with Child.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
ROBERT E. ROBLES, Judge
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