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Member Benefits Program


Marcia C. Ulibarri, Account Executive  
505.797.6058  
mulibarri@nmbar.org

ABA Retirement Funds

Bill Kitts Network Program

Liberty Mutual

New Mexico Lawyer

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6501 Americas Parkway NE
Albuquerque NM  505.889.8240
1640 Old Pecos Trail, Suite C
Santa Fe NM  505.984.0097

www.waltherfamilylaw.com
# 2009 BRIDGE THE GAP

**Friday, November 20, 2009 • State Bar Center, Albuquerque**

**6.0 General, 1.0 Ethics, & 1.0 Professionalism CLE Credits**

<table>
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<tr>
<td>7:30 a.m.</td>
<td>Registration</td>
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<tr>
<td>8:00 a.m.</td>
<td><strong>Federal or State Court: Does It Matter?</strong></td>
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<td>Andrew G. Schultz, Esq., Rodey Dickson Sloan Akin &amp; Robb PA</td>
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<tr>
<td>9:00 a.m.</td>
<td><strong>BREAKOUTS</strong></td>
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<td>10:00 a.m.</td>
<td>Break</td>
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<tr>
<td>10:15 a.m.</td>
<td><strong>BREAKOUTS</strong></td>
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<td>11:15 a.m.</td>
<td><strong>Employment Law</strong></td>
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<td>Dooley Gilchrist, Esq., Davis &amp; Gilchrist PC, Albuquerque</td>
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<td></td>
<td><strong>Bankruptcy Law</strong></td>
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<td>2009 Professionalism: Attorney’s Guide to Good Lawyering for People with Disabilities (pre-recorded) (1.0 P)</td>
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<tr>
<td>12:15 p.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
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<td><strong>Special Presentation:</strong> Why Lawyers, and Especially Young Lawyers, Should Join the American Bar Association**</td>
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<tr>
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<td>Erika Anderson, Esq., Craig Orraj, Esq., Mary Torres, Esq., Charles Vigil, Esq.</td>
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**BROKEN OUTS**

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<tr>
<th>Time</th>
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<tr>
<td>1:00 p.m.</td>
<td><strong>Basics of Family Law</strong></td>
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<td>Maria Montoya Chavez, Esq., Sutin Thayer &amp; Browne PC</td>
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<td>2:00 p.m.</td>
<td><strong>Alternative Dispute Resolution from the Plaintiff’s and Defense’s Perspective</strong></td>
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<td>David P. Levin, Esq., 2nd Judicial District Court, Moderator</td>
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<td>Hon. Wendy E. York, Sheehan Sheehan &amp; Stelzner PA</td>
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<td></td>
<td>Michael H. Harbour, Esq., Madison Harbour &amp; Mroz PA (defense)</td>
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<td>Denise M. Torres, Saenz &amp; Torres, P.A., Las Cruces (plaintiff)</td>
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<tr>
<td>3:00 p.m.</td>
<td><strong>Jury Selection</strong></td>
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<td>Carlos Obrey-Espinoza, Esq., Orraj, Anderson and Obrey-Espinoza, Albuquerque</td>
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<tr>
<td>3:15 p.m.</td>
<td><strong>IOLTA 101: Handling Client Trust Account (1.0 E)</strong></td>
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<td>David M. Berlin, Esq., Duhigg, Cronin, Spring &amp; Berlin, P.A., Albuquerque</td>
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<tr>
<td>4:15 p.m.</td>
<td><strong>Do’s and Don’ts from the Bench</strong></td>
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<td>Moderator: Martha Chicoski, Orraj Anderson &amp; Obrey-Espinoza, Moderator</td>
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<td>Hon. Charles Currier, 5th Judicial District Court, Moderator</td>
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<td>Hon. Robert E. Robles, NM Court of Appeals</td>
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<td>Hon. Linda Vanzi, NM Court of Appeals</td>
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<td>Hon. Briana Zamora, Metro Court, Albuquerque</td>
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<tr>
<td>5:15 p.m.</td>
<td><strong>Adjourn and Reception (State Bar Center)</strong></td>
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**TWO WAYS TO REGISTER**

- **INTERNET:** [www.nmbarcle.org](http://www.nmbarcle.org)
- **FAX:** (505) 797-6071, Open 24 hours

Please Note: For all WEBCASTS, you must register online at [www.nmbarcle.org](http://www.nmbarcle.org)

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☐ 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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Professionalism Tip

With respect to the courts and other tribunals:

When hearings or depositions are cancelled, I will notify opposing counsel, necessary parties, and the court (or other tribunal) as early as possible.

Meetings

November

9  Taxation Section Board of Directors, noon, via teleconference
10 Appellate Practice Section Board of Directors, noon, Rodey Law Firm
12 Public Law Section Board of Directors, noon, Risk Management Division
12 Business Law Section, 4 p.m., Keleher & McLeod
13 Family Law Section Board of Directors, 9 a.m., via teleconference
16 Attorney Support Group, 7:30 a.m., 1st United Methodist Church
18 Committee on Women and the Legal Profession, noon, Lewis and Roca LLP

State Bar Workshops

November

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

December

2 Lawyer Referral for the Elderly Workshop 10–11:30 a.m., Presentation 1:30–4 p.m., Clinics Belen Senior Center, Belen
9 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
10 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

January

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

Cover: David Moss (www.davidmossart.com) is a traditional fine artist/illustrator. He earned his BFA in art studio at the UNM College of Fine Arts and his MFA in illustration at the Academy of Art University School of Illustration. He works in oil and digital media and his content includes landscapes, western themes, portraiture, and lifestyles. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
**COURT NEWS**

**N.M. Supreme Court**

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.

Don L. Daniel  
Certification, Health Law

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**Rules of Criminal Procedure for the District Courts and Uniform Jury Instructions—Criminal and Proposed Revisions to the Metropolitan Court Rules**

The Supreme Court is considering whether to adopt proposed amendments to the Rules of Criminal Procedure for the District Courts and Uniform Jury Instructions—Criminal. Comments must be received on or before Nov. 16 to be considered by the Court. For reference, see the Oct. 26 (Vol. 48, No. 43) *Bar Bulletin*.

The Metropolitan Court Rules Committee is considering whether to recommended proposed amendments to the Metropolitan Court Rules for the Supreme Court's consideration. Comments must be received on or before Nov. 23 to be considered by the Court. For reference, see the Nov. 2 (Vol. 48, No. 44) *Bar Bulletin*.

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To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

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

Note that any submitted comments may be posted on the Supreme Court’s website for public viewing.

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**Second Judicial District Court Adoption Day**

The 2nd Judicial District Court, Children’s Court Division, will celebrate National Adoption Day Nov. 21. Attorneys having an adoption pending in Bernalillo District Court with clients interested in participating in National Adoption Day should contact Nancy Sandstrom in Judge M. Monica Zamora’s office, (505) 841-7392.

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**Change in Business Hours**

The New Mexico Supreme Court authorized the 2nd Judicial District Court Clerk’s Office to change its business hours effective Nov. 23. The Clerk’s Office will be open to the public Monday through Friday from 10 a.m. to noon and 1 to 5 p.m.

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**Judicial Appointment and Judicial Transfer**

Governor Bill Richardson has announced his appointment of Judge Jacqueline Flores to fill the vacancy in Division XX at the 2nd Judicial District Court. Effective Oct. 19, Judge Flores will be assigned Criminal Court cases previously assigned to Judge Carl J. Butkus. Effective Oct. 19, Judge Butkus will be transferring from Criminal Court to the Civil Court and will be assigned cases previously assigned to Judge William F. Lang. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Nov. 9 to challenge or excuse the judges pursuant to Supreme Court Rule 1-088.1.

---

**Twelfth Judicial District Court Judicial Vacancy**

A vacancy on the 12th Judicial District Court will exist in Alamogordo as of Jan. 1, 2010 upon the retirement of the Honorable Sandra A. Grisham. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Kevin K. Washburn, chair of the 12th Judicial District Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website, http://lawschool.unm.edu/judsel/application.php, or via e-mail or fax by calling Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., Nov. 23. Applications received after that time will not be considered. The Judicial Nominating Commission will meet Dec. 11 in Alamogordo to evaluate the applicants for this position. The commission meeting is open to the public. Details regarding the time and place of the meeting will be available after the application deadline.

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**U.S. District Court, District of New Mexico Deadline Calculation Rules Change**

Effective Dec. 1, the Federal Rules for deadlines and how they are computed will change. Currently, a deadline set for 10 or

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**Judicial Records Retention and Disposition Schedules**

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

<table>
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<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
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<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in Criminal, Civil, Domestic Relations, Children's Court Cases</td>
<td>1981–1992</td>
<td>January 1, 2010</td>
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fewer days is computed by excluding weekends and holidays. With the new rules, all deadlines will be calculated using calendar days only. Three days for service will continue to be added. For more information, visit the Court’s website at www.nmcourt.fed.us.

Proposed Revisions to the Local Rules of Civil Procedure and Local Rules of Criminal Procedure

Proposed revisions to the Local Rules of Civil and Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed revisions incorporate changes to timing deadlines to maintain consistency with the national federal rules (Civil Rule 6 and Criminal Rule 45) as approved by the Supreme Court of the United States. A “redline” version (with proposed additions underlined and proposed deletions struck out) and a clean version are posted on the Court’s website at www.nmcourt.fed.us. Members of the bar may submit comments by e-mail to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk’s Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules. All comments must be received no later than Nov. 12.

STATE BAR NEWS

Attorney Support Group

- Afternoon groups meet regularly on the first Monday of the month:
  Dec. 7, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month:
  Nov. 16, 7:30 a.m.
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Editors

Board Position Vacancies

Three attorney positions and one non-attorney position will exist on the Board of Editors at the end of 2009. All positions are two-year terms from Jan. 1, 2010 to Dec. 31, 2011. The Board of Editors reviews and approves articles and letters submitted for publication in the Bar Bulletin and the New Mexico Lawyer. Applicants should have previous publishing/editing experience, be available to review articles regularly via e-mail, provide quick response, and attend quarterly board meetings in person or by teleconference. E-mail resumes by Nov. 30 to Editor Dorma Seago, dseago@nmbar.org.

Client Protection Fund Commission Appointment

The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for a three-year term. Members wishing to serve on the commission should send a letter of interest and brief resume by Nov. 20 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Elder Law and Solo and Small Firm Sections

Annual Meeting, CLE and Reception

The Motion Practice Rule and Other Ways to Irritate Your Judge (1.0 ethics CLE credit, $45), presented by Judge Alan Malott, is at 4 p.m., Nov. 20, at Seasons Restaurant, 301 Mountain Road NW, Albuquerque. The Elder Law Section and the Solo and Small Firm Section are co-sponsoring the event. The CLE is available to all members of the State Bar with an open invitation for non-members to join the sections at the event. Appetizers and a cash bar will be provided. An R.S.V.P. one week in advance is appreciated so that an accurate count of attendees can be made. Register for the CLE online at www.nmbarcle.org or fax to (505) 797-6071.

The annual meeting and reception of the Solo and Small Firm Section follows at 5 p.m. Send agenda items to Tony Horvat, thorvat@nmbar.org.

Paralegal Division Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend Digital Media in the Courtroom, presented by Mike Lewis. The program is from noon to 1 p.m., Nov. 12, 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.

Trial Practice Section

Annual Meeting and CLE

The Trial Practice Section’s annual meeting is during lunch, Nov. 19, in conjunction with Tag Team Clydesdales in the Courtroom (6.0 general CLE credits), presented by Terence MacCarthy. Send agenda items to Chair Lance Richards, richardsl@civerolo.com or (505) 842-4255. The cost of the program is $199; the fee for section members, government and legal services attorneys and paralegals is $169. Register online at www.nmbar.org or fax to (505) 797-6071. See the CLE At-a-Glance insert in the Oct. 12 (Vol. 48, No. 41) Bar Bulletin for more information.

Young Lawyers Division

Wills for Heroes – Santa Fe

Volunteers Needed

The Young Lawyers Division is seeking attorney volunteers for a Wills for Heroes event from 10 a.m. to 3 p.m., Nov. 21, at the Law Enforcement Training Academy, 4491 Cerrillos Road, Santa Fe. Attorneys will draft wills and health care powers of attorney, free of charge, for qualified first responders. No prior experience with wills or estate planning is needed. This is a great opportunity to honor first responders and provide a valuable public service at the same time. Volunteers must have their own
The Lawyers Professional Liability and Insurance Committee has assembled information to assist members regarding compliance with the amended Rule 16-104 NMRA of the Rules of Professional Conduct regarding disclosure of professional liability insurance.

Visit the committee’s website at http://www.nmbar.org/AboutSBNM/Committees/LPL/LPL.html for information on the new disclosure requirements, questions and answers, and lists of brokers and carriers. Also available is a helpful article, What Attorneys Need to Know About Professional Liability Insurance.

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**Other Bars**

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

The New Mexico Defense Lawyers Association hosts 2009 Annual Civil Rights Law Update (4.5 general, 1.0 ethics, and 1.0 professionalism CLE credits) at 8 a.m., Dec. 11, at the Jewish Community Center in Albuquerque. The featured speaker is Professor Sheldon Nahmod. Contact DLA at (505) 797-6021 or www.nmdla.org.

**KEYS to Law Practice Management**

**HOW TO DEVELOP A BASIC BUDGET, PART 3**

*By Donald D. Becker*

**Space Requirements:** While the budget looks at space as an expense, your plan should weigh in many other factors. For example, if the focus of your practice is wills and estate planning, do you want your office next to the bail bondsmen? If your focus is criminal defense, do you want clients coming to your home? Other space factors include:

- Access by your clients and any staff.
- Attorney access to resources such as other attorneys, library, postal services, banking services, duplication services, transportation and parking, etc.
- Image or marketing issues for target clientele.
- Flexibility to expand, contract, or move.
- Long- and short-term contractual obligations such as lease agreements, telephone service and listing agreements, trade fixtures/improvements, insurance costs.
- Lease versus purchase: Purchasing an office may seem attractive because of the concepts of building equity and having long-term control of your location. Be aware and beware of the hidden costs in owning your own building. For budgeting and planning purposes, it substantially reduces your flexibility to make adjustments to your plan and can create a situation where decisions are being made because of the physical structure that exists rather than the mission and goals of the law firm.

**Insurance Requirements:** There is a wide range of insurance requirements, and determining your particular needs depends on many factors. As a general rule, you’ll never be able to purchase as much as you’d like or as much as the agents would like to sell you. This means that you have to prioritize and make informed choices relying upon professionals to assist you.

- Professional errors and omissions, not currently required in New Mexico, is a good idea for protecting your clients and your future.
- A commercial package includes general liability and property damage. It’s a good idea in general, and employee dishonesty is an economical coverage that anyone with staff should have. It’s not that you don’t trust your staff—it’s that you might be wrong.
- Workers’ compensation is currently required where more than three people work. An owner can opt out but why do it? It’s very economical protection for a disability incurred by the attorney during the practice of law.
- Disability insurance is available through the American Bar Association and our own State Bar.
- Term life insurance to cover the expenses for the firm should be considered a minimum base line.
- Health insurance can be very costly and tends to continually increase above average inflation. This is a benefit that most employees will require. It’s more important than providing a retirement plan for employees.

*Editor’s Note: See the Guide to Member Benefits at www.nmbar.org for insurance programs available through the State Bar.*
Children’s Law Section

7th Annual Art and Writing Contest: “My Tools, My Future”

By Dorma Seago

The Annual Art and Writing Contest, sponsored each year by the Children’s Law Section, provides troubled teens with a positive opportunity to express their struggles, look toward the future, and celebrate artistic effort. Teens involved in Children’s Court programs in judicial districts around the state participated in the 7th annual contest, which is supported by generous contributions from the legal community and local businesses. This year, artists illustrated canvas bags with symbols of their goals and the available tools for reaching them. The medium changes each year—last year a T-shirt, the year before, tennis shoes.

First place went to Roman of Doña Ana County, whose bag was decorated with feathers, sunglasses, and balloons. “My bag symbolizes paying attention in class,” Roman explained. “The pens are for writing an essay, doing homework, making adequate grades, making things ten times better, and staying in school and not quitting.”

The second place winner and also the recipient of the Public Defender Special Category designation was Justin from San Juan County. “My bag represents the good times often being overshadowed by the bad times and things like music that helped me bounce back,” Justin wrote. “And my thoughts during the bad times like revolution or chaos. This bag really has no tools, just me expressing myself.”

Third place went to Kristan of Bernalillo County. “My bag,” Kristan explained, “shows self confidence—I can make the decisions I want; school—get a better job; money—get anything I want; God—help me out with everything.”

A reception announcing the winners and featuring a display of the entries was held Oct. 28 at Scalo in Albuquerque. Children’s Court judges, juvenile justice counselors, parents, attorneys, committee members, and members of law enforcement were there to support the contest and the artists. Presiding Judge Monica Zamora noted the number of entries.

“Since this is a voluntary activity,” Judge Zamora said, “it’s encouraging that 109 kids participated statewide. It’s a fabulous exercise for kids to be able to express themselves.”

Judge Bill Parnall, who is also on the board of the Children’s Law Section, chose this year’s theme. “These kids are in crisis and need something to get them through it,” Judge Parnall said. “Our job is to figure out a way to fill their ‘tool bag’ before they get into trouble. We at the Children’s Court try to pool our resources to accomplish that goal.”

Judge John Romero noted that volunteers always say they get more out of the contest than they put in. “I appreciate the art contest and those who make it possible,” Judge Romero said. “Art expression is often a safe way of reminding both the kids and us of what is going on in their lives. Their art always confirms for me that these are good kids who made bad choices.”

Terissa, a young artist from Farmington who won in the honorable mention category, was glad she participated. “It helped me to think about what was important to me and the things that are there to support and help me,” said Terissa.

Local artists selected this year’s winners based on use of materials, expression of theme, originality, and artistic expression. Special category awards were donated by the Soroptimist Club and the Public Defenders Office.

Contest Donors

Susan Alkema
Sandy Barnhart y Chavez
Stefanie Beninato
Kari Brandenburg
Beth Collard
Jean Conner
Judy Flynn-O’Brien
Jeffrey Kauffman
Peter Klages
Joan Kozon
Eileen Mandel
Diane Massey
Susan Page
Judge Bill Parnall
Public Defenders Office
Sanchez, Mowrer, & Desiderio
Scalo Northern Italian Grill
Soroptimist Intern’l, Duke City
Mary Ann Shaening
Walther Family Law
Kelly Waterfall
Kathleen Wright
Linda Yen

Editor’s Note: Our black and white publication does not do justice to the artists’ work. Visit the Children’s Law Section page on the State Bar’s website at www.nmbar.org to view the works in color and to see all the winning entries.
Dear Members:

The Board of Bar Commissioners has approved the following budget for calendar year 2010. The budget is available in its entirety on the State Bar website at www.nmbar.org in order to provide an opportunity for members to object to any proposed expenditure in the budget that is not related to the State Bar’s purposes of regulating the profession or improving the quality of legal services. In addition, members wishing to receive a printed copy of the budget disclosure may do so by calling (505) 797-6035 or (800) 87nmbar (876-6227). Instructions for challenging expenditures believed to be non-germane are set forth on page two of the document. The first pages of the budget provide the total expenditures by categories, while the remaining pages provide explanations and further breakouts of the expenditures by category. The total expenditures for the State Bar in 2010 are budgeted to be $2,259,795. Of this amount, approximately $665,420 is expected to be supported by non-dues revenue, and approximately $1,594,375 will be funded by dues (see chart below left). The chart on the right illustrates the total dues-supported budget broken into five main categories.

There were no material non-budgeted items in the 2008 audit. The financial condition of the State Bar is sound, and the Board of Bar Commissioners is proud of the many programs and services the State Bar provides to the membership and the public.

Sincerely,

Hans Voss
Secretary-Treasurer
State Bar of New Mexico
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<tr>
<th>Date</th>
<th>Event Description</th>
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<td>9</td>
<td>Subordinate Lawyers: Sit, Stay, Roll Over No More</td>
<td>TRT, Inc.</td>
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<td>1-800-672-6271, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>NBI, Inc.</td>
<td>6.0 G</td>
<td>1-800-930-6182, <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Advanced Social Security Medicare and Medicaid Update</td>
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<td>Paralegal Division</td>
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<td>17</td>
<td>I Was From Venus and My Lawyers Were From Mars</td>
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<td>(505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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**WRITS OF CERTIORARI**

*As Updated by the Clerk of the New Mexico Supreme Court*

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

**Effective January 5, 2009**

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**Certiorari Granted but not yet Submitted to the Court:**

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http://nmsupremecourt.nmcourts.gov.

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

Submission Date

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## Unpublished Opinions

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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 JULY 6, 2009

- To view pending proposed rule changes visit the New Mexico Supreme Court’s Web site: http://nmsupremecourt.nmcourts.gov/

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Utilizing paralegals to assist with the delivery of legal services can be an asset to attorneys in all types and sizes of law practices, including corporate and government agency practices.

**Services Provided by a Paralegal**

- **Case Management**
  - Review case to identify issues in order to develop efficient and cost-effective management of projects
  - Participate in the discussion and implementation of case strategy and focus
  - Provide input regarding inconsistencies and observations
  - Consult and assist in development of case procedures and their implementation
  - Organize and manage information for case discovery and development
  - Utilize technology to facilitate the efficient completion of projects
  - Provide specialized expertise or training
  - Prepare written procedure manuals and training aids

- **Investigation, Witnesses and Fact Gathering**
  - Interviews
  - Investigation
  - Witness preparation
  - Document review
  - Factual searches and development of fact content

- **Document Management**
  - Produce documents
  - Perform necessary services to prepare document intensive cases
  - Design, organize and implement database
  - Summarize case information into database
  - Design and generate reports
  - Assist in drafting and preparation of documents
  - Prepare summaries, including analytical observations
  - Create chronology and timelines
  - Research and analyze

- **Trial**
  - Pre-trial preparation
  - Preparation of demonstrative exhibits
  - Trial attendance and assistance with jury panel research and selection, witnesses, jury instructions and trial logistics
  - Electronic presentation of evidence
  - Post-trial juror interviews
  - Representation of clients before state or federal administrative agencies as authorized by law

The utilization of a contract paralegal is an option some law practices might choose in order to avoid having to assume long-term commitments. The type of arrangement depends on the assistance needed. Checks should be conducted to avoid potential problems with conflicts of interest.

**Benefits of Utilizing Contract Paralegals**

- Delivery of legal services in an affordable and efficient manner by paying only for billable hours
- Customization of support services to the needs of each law practice
- Limitation of potential increases in overhead costs since contract paralegals have their own offices and equipment and can be set up to access internal networks remotely
- Reduction in employee overhead costs
- Access to additional resources on large cases without making long-term commitments in hiring additional staff
- Expertise that supplements capabilities of in-house staff
- Assistance to alleviate overworked staff
- Support for times when hiring additional permanent staff is not justified
- Delegation of appropriate tasks to free attorney’s time to focus on aspects requiring the attorney’s attention and expertise

“Paralegals fill in the gaps and keep the work moving.”

—Monica Garcia, Esq., Butt Thornton & Baehr PC
Regardless of the employment arrangement, hiring a paralegal can translate into lower fees to clients, greater client satisfaction and retention, and improvement in a lawyer's quality of life. For more information on the economic benefits of paralegal utilization, visit the ABA Standing Committee web page at http://www.abanet.org/legalservices/paralegals/.

About the Author
Jeanne Adams is the founder of Jencor Associates, Inc., a contract paralegal, investigation and training services company providing services in New Mexico since 1989. She is the chair of the division’s Independent Contractor Committee.
Trends in the Paralegal Profession
What You Always Wanted to Know (About Paralegals) But Never Asked

By Kathleen F. Campbell, Marcie G. Kercher, and Deborah R. Tope

Paralegal or Legal Assistant?
Confused about the difference?
You’re not alone. Paralegals who have been in the field for a few years are well aware of this conundrum. The terms have been used synonymously for years and, until recently, it was not uncommon to hear a legal assistant or even a legal secretary addressed as a paralegal and vice versa.

During the 1960s, lawyers began to recognize that legal secretaries who desired to do more than their customary duties were perfectly capable of performing substantive work. Thus, the term—and profession—“legal assistant” was born. The American Bar Association officially endorsed the use of legal assistants in 1967 and established the first committee on paralegals in 1968.1 Two national organizations, the National Association of Legal Assistants and the National Federation of Paralegal Associations, recruited members and designed voluntary certification programs. Beginning in the mid-1990s, the term “paralegal” began to be adopted on a national basis as the preferred term. New Mexico followed suit in 2003-2004 by amending its paralegal rules. In New Mexico, the terms “paralegal” and “legal assistant” are not synonymous. The term “paralegal” identifies a highly-trained, highly-skilled legal support staff member who engages primarily in substantive work—work that the attorney otherwise would perform.

The paralegal profession has witnessed tremendous growth since the 1960s. The Department of Labor projects a 22 percent increase in the number of paralegals by 2016.2

Licensed, Certified, Certificated or Registered?
Do all of these terms have you scratching your head as to their meanings and how they apply to the world of paralegal professionals? Regulation of paralegals has been the focus of a number of state initiatives in recent years although none of those initiatives has resulted in adoption of a formal regulatory scheme. Regulation can be voluntary or mandatory and requirements vary from state to state. Our Paralegal Division is most similar to a voluntary registration program because the division itself does not have a certification program of its own; rather it bases eligibility on an applicant having demonstrated competency through other qualifying institutions. The most common forms of regulation from state to state are:

- **Licensure**: a process mandated by legislation in which an agency or branch of the government requires a person to meet predetermined qualifications before it grants permission to use a particular title and oversees or regulates the licensee thereafter
- **Certification**: administered through private organizations or public agencies and is used to acknowledge a person's skill level in specific areas such as the NALA's certified paralegal program, and the NFPA's registered paralegal program.3
- **Registration**: a process by which individuals or institutions associate with a particular entity or agency that usually requires the applicant to attest to certain eligibility criteria such as education, training, or a combination of both.

New Mexico Supreme Court Rule 20-102A defines paralegal as:

“A person who: (1) contracts with or is employed by an attorney, law firm, corporation, governmental agency or other entity; (2) performs substantive legal work under the supervision of a licensed attorney who assumes professional responsibility for the final work product; and (3) meets one or more of the education, training or work experience qualifications set forth in Rule 20-115 NMRA of these rules.”

Rule 20-115F sets forth the minimum requirement in New Mexico for calling oneself a paralegal: a high school diploma plus seven years of experience performing substantive legal work under the supervision of an attorney. Further, substantive work is defined in Rule 20-102B as:

“work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. Examples of substantive legal work performed by a paralegal include case planning, development and management; legal research and analysis; interviewing clients; fact gathering and retrieving information; drafting legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is authorized by law.”

The New Mexico rule discourages the use of the designation paralegal for persons not meeting the definition of a paralegal or to identify non-lawyer support staff unless such staff qualifies as a paralegal pursuant to the rules.

To Bill or Not to Bill
The U.S. Supreme Court has long upheld attorneys’ billing of clients for paralegal services. In Missouri v. Jenkins,4 the Court first ruled that fees charged by attorneys for paralegals were recoverable at prevailing market rates. Most recently in Richlin v. Chertoff5 the Court confirmed that that recovery is not limited to the attorney’s cost but recovery is allowed according to “the practice in the relevant
market.”6 The Court rationalized in Jenkins that a reasonable attorney’s fee cannot have been meant to compensate only work performed personally by members of the bar, but rather the term must refer to a reasonable fee for the work product of an attorney.7 Further, the Court said, “[b]y encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours ‘encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.’”8 The Court recognized that purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them.9

Unauthorized Practice of Law
An attorney may think it sounds like there is nothing a paralegal cannot do and decide to hire paralegals instead of associates to save money. True, attorneys will save money by hiring paralegals, but there is a limit to what a paralegal can do absent licensure as discussed above. A paralegal must work under the supervision of an attorney and the attorney is ultimately responsible for the paralegal’s work under New Mexico Supreme Court Rules 16–503, 20–110, and 20–112. Division members are bound by a code of ethics. Canon 3 of that code provides that a paralegal must not:

(a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law;
(b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency; and
(c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

While the Supreme Court has declined to define what constitutes the practice of law, it has indicated that drafting pleadings and other legal documents without proper supervision of a licensed attorney and allowing the non-lawyer to conduct primary interactions with clients and render legal advice may constitute the unauthorized practice of law.10 New Mexico Supreme Court Rule 20–102B exempts paralegal work performed under the supervision of a licensed attorney from the constitution of unauthorized practice of law.

Education, training and/or experience?
Many paralegals today have no formal paralegal education and began their paralegal careers as secretaries, clerks or runners. Some have received on-the-job training and worked their way through the ranks performing delegated substantive legal work. Many of those paralegals have been grandfathered into professional organizations such as the Paralegal Division, NALA and NFPA and/or gone on to sit for certification examinations or complete formal secondary education programs. Those paralegals are responsible for giving birth to the paralegal profession as it is known today by having created a niche needed by attorneys to provide more efficient legal services to their clients. The fact that organizations such as the Paralegal Division, NALA and NFPA now have educational and experience requirements for members is a tribute to the pioneers of our profession who led the way.

With the evolution of the profession, educators recognized the need to develop paralegal education programs. The AAFPE was established in 1981 with the mission of promoting higher standards in paralegal education and is now a valuable resource for educators and others wanting to investigate or evaluate a paralegal program.11 In addition, the ABA has a rigorous accreditation process for paralegal education programs. Degree-granting programs range from associates to masters. Other programs award certificates; however, those programs can be completed in a matter of weeks and do not provide the comprehensive education that is believed by some to successfully prepare one for paralegal work. Because there are no educational requirements for entering the profession, these programs offer individuals an educational choice prior to entering the field or as a means of advancing their careers once employed. There are a number of paralegal education programs in New Mexico from which an aspiring or motivated paralegal can choose. At this time, however, Central New Mexico Community College has the only ABA accredited program in the state. These programs play an instrumental role in increasing the value and interest in the paralegal profession—so much so that many employers are now requiring education as a prerequisite to hiring a paralegal.

The Paralegal Division was founded on the premise that a paralegal should meet certain levels of education and experience to successfully perform substantive legal work.12 The division’s requirements are more stringent than the rule defining a paralegal as they do not allow admission based on experience, thus promoting attainment of a higher standard. In addition, division members are required to obtain the same number of credit hours of continuing legal education as are attorneys.

Freelance, firm or in-house?
Paralegal services are available through several different types of arrangements such as employment by law firms, in-house law departments and government offices, or through independent contract paralegals also known as freelance paralegals.13 In addition, a new trend is emerging in the independent paralegal environment known as a virtual paralegal. That individual may perform paralegal services via virtual workspaces such as the Internet rather than on-site. Those arrangements all require that the paralegal work under the supervision of an attorney and not provide services directly to the public.

“Paralegals, including contract paralegals, can be invaluable. However, before delegating a project to a paralegal, an attorney needs to make sure that both the attorney and the paralegal know the attorney’s responsibilities and the legal limits on what a paralegal can and cannot do.”
—Victor E. Carlin, Esq., Moses, Dunn, Farmer & Tuthill PC

“Central New Mexico Community College has the only ABA accredited program in the state”

continued on page 10
As an in-house attorney for an insurer who hires outside counsel to defend policyholders, I often review attorneys’ bills. There are certain tasks I expect to see billed by a paralegal, an associate and a supervising attorney. From beginning to end of a litigated file, there are areas a client may view as more uniquely and appropriately billed by a paralegal, whether that paralegal is on staff or contracted for the particular case.

When a file is sent to defense counsel, I expect to see a paralegal receive the file, set up the file, organize the documents, and draft initial correspondence both to the insurer and to the client-insured. I do not expect to see a paralegal bill for time drafting an answer to the complaint or analyzing legal issues. If the litigation involves personal injury, the paralegal is likely the appropriate person to request medical records, receive those records, and summarize and organize the records. I do not expect an office with staff paralegals to bill for an associate to summarize medical records.

Discovery may be more complicated. Often there are numerous documents produced in discovery and it is particularly appropriate for a paralegal to maintain, organize and Bates-number documents, bill for time requesting documents from the client, and compile documents to be produced to another party. Even if the paralegal drafts initial discovery responses, I look for time billed by an associate and/or supervising attorney to finalize and complete discovery requests and responses. Similarly, an attorney who bills for attending, conducting or defending a deposition may have a paralegal attend if he or she anticipates substantial documents to be involved. I do not expect to see an associate billed in addition to a lead attorney for a deposition with the associate handling documents—a task I think ought to be accomplished by the paralegal.

It is a “red flag” when I see duplicative billing for a task—one or more attorneys billing for the same pleading. It appears to be duplicative billing. If the paralegal is billing for opening and forwarding mail to the attorney, it appears the paralegal is being used—and billed to the client—for secretarial work rather than paralegal work.

I do expect to see paralegal time billed for trials. The use of a paralegal to assist with compiling, preparing and handling documents, exhibits, trial notebooks and jury questionnaires seems appropriate. However, a paralegal should not draft jury instructions, draft motions, research complicated legal issues, or prepare for examination of witnesses. Paralegals should generally not appear on billings related to post-trial issues other than closing a file. Concerns can arise where paralegals appear to be conducting legal tasks just as when conducting secretarial tasks. There may be a fine line between what a paralegal rather than an associate does at trial; however, that line is important for the insurer who must have confidence that its policyholder is receiving legal representation by the assigned attorney rather than the paralegal.

If you have an insurer reviewing legal bills, be aware that the insurer does look for and evaluate attorneys’ bills with an eye to which tasks are being billed and whether those tasks are being completed efficiently and by the appropriate person; i.e., paralegal, associate or supervising attorney. Although the insurer may not question each individual billing entry, it will be obvious when a paralegal is being over, or under, utilized.

“Paralegals are an integral part of the practice of law. The practice has changed so much over the years that lawyers have to rely on them. Concomitantly, we have a duty to supervise them; but we also have a greater responsibility to train them, which is definitely a two-way street. Most successful paralegal-attorney partnerships endure because both are willing to invest the time.”

—Esteban A. Aguilar, Sr., Esq., Aguilar & Aguilar PC.
By Deborah R. Tope

In 2007, the Paralegal Division conducted a survey on paralegal compensation, utilization, and benefits in New Mexico. The following are highlights from that survey.

**29.65% of the respondents hold a four-year paralegal degree as their highest level of education.**

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<th>Most work full time and one-third report regularly working over 40 hours per week.</th>
<th>69% work in a private law firm setting; 13% work in the public sector.</th>
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<td>The average paralegal works in a firm with 2.77 attorneys for each paralegal; the median is one paralegal for every attorney.</td>
<td>The average salary was $42,521; 20% made $50,000 or more. Overall salaries had increased just over 10% since the 2004 survey.</td>
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<td><strong>84% draft pleadings; 82.3% draft discovery responses; 84% organize documents; and 84% provide case management.</strong></td>
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<td>25% reported that their services were billed at rates over $80.</td>
<td>18.6% have a national certification designation. (19 of those are division members.)</td>
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| 19.5% perform advanced legal research. | One paralegal reported earning less than $20,000 per year; one earned just under $100,000; Two earned more than $100,000 per year. |

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<th>80.5% of employers support continuing education by paying related fees; nearly one-third offer tuition reimbursement.</th>
<th>Average annual salaries in New Mexico: Santa Fe—$44,379; Albuquerque—$37,813; Las Cruces—$35,526; Roswell—$30,793.</th>
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<td>There is a general positive relationship between years of experience and average salaries when no other variable was considered. Over 25 years of experience reflected an average salary of $47,526.</td>
<td>The average salary for paralegals with national certifications was $48,000; the average salary without national certification was $41,373. With no other variables considered, paralegals with national certification earn just over 16% more than those without.</td>
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| Over three-quarters of employers provided employee health insurance to their paralegals. | Visit http://www.nmbar.org/AboutSBNM/ParalegalDivision/SalaryUtilizationSurveys.html for the complete survey results. |

Nationally, the National Association of Legal Assistants and the National Federation of Paralegal Associations conduct salary and utilization surveys approximately every two years. The surveys contain information concerning salaries, benefits, billing rates, overtime pay, raises and more. Another source for this type of information is the *Legal Assistant Today* magazine where trends in the paralegal profession are analyzed. Access to national information is also available at the website above.
Paralegals Tackle E-Discovery

By Robin Gomez and Patricia M. Marsh

Mention e-discovery to any number of litigators and you will likely get a variety of responses. E-discovery can be complicated and involves not only great attention to detail but also dedicated resources. It can, however, be successfully tackled with practice and the assistance of an experienced paralegal.

While there is no substitute for experience, the best place to start to understand e-discovery is with a review of the Federal Rules of Civil Procedure 16, 26, 33, 34, 37, 45 and 50. The recent amendments to these rules have had a profound impact on the way attorneys and paralegals handle discovery in federal court cases and case management with clients. A working familiarity with these rules is essential for the litigator and assigned paralegal.

Because failure to implement a timely litigation hold for potential evidence has been found to be gross negligence, it requires strict attention. Depending on the case, it may require a timely reminder to the opposing party that the litigation hold is in immediate effect relating to their materials. It is also critical that the attorney confers with the client(s) to ensure its importance is understood. Many attorneys make it their practice to include information regarding the litigation hold requirement with the engagement letter, enclosing a form for the client’s use, and requesting proof that it has been distributed to all pertinent client parties. This procedure provides a precaution that may be critical in the event an issue of spoliation arises. A reminder that preservation applies to inaccessible data, backup tapes, and relevant information stored offsite (i.e., home computers) should also be included. The paralegal should maintain proof of the distribution as well as redistribute the litigation hold information every six months or more often, if necessary, to ensure that all of the client’s employees are aware of the policy. The paralegal should also maintain contact with a representative of the client to field any questions that arise and refer those to the attorney when appropriate. The paralegal can play a valuable role in this process.

Other areas that are potentially problematic include the framing of e-discovery requests, the abuse of the e-discovery process through ignorance or misconduct, and discovery violations such as unintentional disclosure of confidential information. Producing and controlling confidential and privileged information is of key importance. Paralegals are well suited for this type of case management. While most documents exchanged during discovery are not filed with the court, many become exhibits to pleadings that are often made accessible to the public. Counsel has an obligation to protect the private information contained in these documents by redacting information regarding social security numbers, names of children, birth dates, financial account numbers, etc. The E-Government Act of 2002 provides specific guidelines on these and other areas of information that must be protected. A trained paralegal can assist with drafting interrogatories and requests for production of documents to avoid abuse of scanned documents as a working set on a system and making that set available for each member of the team to view and record electronic notes provides a running history of the document as the case progresses. Legal Times recently published an article providing insightful ideas to help control costs.

With the advent of the new e-discovery rules, vendors who previously limited their services to Bates-numbering and copying expanded their capabilities, and a whole new industry was created for hosting Web-based document repositories, also known as virtual workrooms or collaborative environments. If the budget allows, the virtual workroom is a good tool, particularly for those cases with parties or counsel in multiple locations. In a virtual workroom, generally a document is received from parties, assigned an identifying number, and stored in electronic form. Some vendors even maintain privileged documents that require different treatment, but this article will refer only to treatment of non-privileged documents. Each authorized person (usually attorneys and/or paralegals) is given a password, assigned appropriate security access, and can log on to the vendor’s website to view and print the needed documents. The integrity of the documents is maintained in a secure site while the amount of paper is reduced. Some systems also permit parties to download pleadings, depositions, and exhibits. These sites also permit coding and analyzing documents for use in the case. Even the drudgery of entering the objective data relating to a document can be supplanted in some cases by the use of metadata and/or Optical Character Recognition (OCR) versions of documents, which then allow automatic entry of that data. Once the database has been coded, it can be searched in the course of the litigation and is particularly useful for deposition and trial preparation to identify potential exhibits. While the attorney makes the final decision on which documents will be used, directed searches of the database by the paralegal can reduce the amount of superfluous material the attorney needs to review. In addition, paralegals generally are assigned to monitor the database and serve as the contact person with the vendor and are frequently involved in all aspects of the document review process, initially identifying relevant and privileged documents.

Whether one is using a virtual workroom for cases involving multiple parties, or solely as a tool to manage cases in-house, there are many
Paralegals Tackle E-Discovery

continued from page 9

database programs available to serve as the core of the virtual workroom by providing the means for indexing and searching the discovery documents. Summation and Concordance are two of the most popular programs and are similar in functionality. The ability to use them effectively can be acquired by savvy paralegals fairly quickly. The Microsoft Access program, on the other hand, while powerful, highly effective and equally popular, requires a fair amount of training to design and use.

Numerous sources are available for those seeking to understand the ever-evolving issues surrounding e-discovery. Free on-line newsletters provide an abundance of information ranging from software to white papers to blogs. For example, Law Technology News Daily Alert (http://www.law.com/jspl 法律科技新闻每日警报) provides insightful information and tips on e-discovery. Kroll OnTrack (http://www.krollontrack.com/newsletter-center/) is a great resource for case law updates regarding spoliation, “claw back” issues and many more topics relating directly to e-discovery.

E-discovery is a time-consuming and expensive aspect of litigation practice today. Because it is the way of the future, it is of utmost importance for attorneys and paralegals to become familiar with the rules and case law as well as state-of-the-art technology. It is also an area in which paralegals can play a significant case management role, adding value by impacting the attorney’s bottom line and increasing the client’s satisfaction.

(Endnotes)
1ACORN v. County of Nassau, No. CV 05-2301 (JFB) (WDW), 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009)
4-E-Discovery on the Cheap, Frederick Checkley III, Elizabeth Scully, and Rebecca Barnes, Legal Times, April 28, 2009, http://www.law.com/jspl/article.jsp?id=1202430286420

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Trends in the Paralegal Profession

continued from page 6


(Endnotes)
3The term “certified” means that the person took and passed a national (or state) exam, similar to the national certification programs mentioned above. A “certificated” paralegal is one who has earned a certificate in a paralegal studies program as opposed to a degree. Length of time and number of class hours distinguish certificated programs from degree programs. For example, a certificate program may be completed in a matter of weeks, while a degree program is completed over a period of several semesters. Many employers require certification at a minimum and some require an associates degree or above. A prospective paralegal employer should always check the length and substantive nature of the education listed on a resume to get a realistic picture of just what education the prospective paralegal will bring.
6Id. at 2014.
7491 U.S. 274, 288.
8Id.
9Id.
11www.aafpe.org/m_search/detail.asp.
12Division membership qualifications can be found at NMRA 24-101A.
13The DOL classifies paralegals hired as employees as nonexempt; therefore, employers are required to pay overtime for hours in excess of a 40-hour week. This has been a long-standing position of the DOL and did not change in 2004 when the DOL issued new regulations.

About the Authors
Kathleen F. Campbell, ACP, is a corporate paralegal at PNM Resources, Inc. She was chair of the Paralegal Division in 1998–1999.

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New Mexico Legal Group welcomes Jessica Roth to our family law division. Ms. Roth practices statewide in all areas of domestic relations law, including divorce, custody, child support, and complex property division. She is a skilled negotiator and trial practitioner with experience in collaborative divorce. Join us in welcoming Ms. Roth to our firm!

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We are pleased to announce the addition of

Matthew L. Campbell, Associate

Matt is Yup’ik from The Village of Gambell, St. Lawrence Island, Alaska. He obtained his bachelor’s degree from Fort Lewis College in 2004 and his JD in 2008 from the Sandra Day O’Connor College of Law at Arizona State University with a certificate in Indian Law and a Dean’s Award for academics. Matt clerked for the Honorable Judge Irvine of the Arizona Court of Appeals, Division One, August 2008-09.

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OPINION

MICHAEL D. BUSTAMANTE, JUDGE

[1] Dana Brusuelas (Defendant) appeals her conviction for possession of methamphetamine in violation of NMSA 1978, Section 30-31-23(D) (1990) (amended 2005). She raises two issues arising from the district court’s denial of her motion to suppress evidence: (1) whether law enforcement officers may conduct warrantless searches of a probationer outside the direction of a probation officer or without the probationer’s consent, and (2) whether the law enforcement agents had reasonable suspicion that Defendant was committing or had committed a crime and that her vehicle or purse contained evidence of the crime sufficient to support a warrantless search. We affirm Defendant’s conviction.

BACKGROUND AND FACTS

[2] On January 6, 2005, law enforcement agents executed a search warrant at a home in Alamogordo, New Mexico, based on a tip that methamphetamine was for sale there. The warrant covered the home, curtilage, and vehicles at the home. Defendant, who was on probation as a result of an earlier conviction, happened to be present at the home as a visitor. One of the conditions of her probation (Paragraph 9) was that she would “submit to warrantless searches of [her] person, residence and vehicle at the discretion or direction of [her] probation officer or any law enforcement officer.”

[3] Before searching the only vehicle at the scene, the agents determined that it belonged to Defendant. At some point, they also learned that she was on probation and unsuccessfully tried to reach her probation officer. Upon searching the vehicle, the agents found drug paraphernalia, which Defendant admitted was hers. Shortly after searching the vehicle, the agents searched Defendant’s purse inside the home and discovered the methamphetamine on which her conviction was based. The district court denied Defendant’s motion to suppress the evidence discovered in the searches.

[4] The district court made several relevant findings of fact and conclusions of law in connection with its denial of the motion to suppress. The court concluded that there was no probable cause to search Defendant’s purse, the search of the purse was not a search incident to arrest, the searches of Defendant’s purse and vehicle were not within the scope of the warrant being executed, Defendant was on the premises as a visitor, and the search of Defendant’s purse went beyond what was arguably necessary to check for weapons. The court concluded, however, that “[P]aragraph 9 in the Judgment and Sentence arguably necessary to check for weapons.

PROBATION SEARCH BY LAW ENFORCEMENT OFFICER

Standard of Review

[5] “The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted).

“We review factual determinations by the trial court under a substantial evidence standard” and legal questions de novo. State v. Duran, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836. “[A]ll reasonable inferences in support of the [district] court’s decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.” Jason L., 2000-NMSC-018, ¶ 10 (alterations in original) (internal quotation marks and citation omitted).

Conflicts in the evidence, even within the testimony of a witness, are to be resolved by the fact finder at trial. Id.

[6] “We review whether a court’s imposition of a condition of probation is lawful...
under an abuse of discretion standard.” State v. Baca, 2004-NMCA-049, ¶ 13, 135 N.M. 490, 90 P.3d 509. “The court has broad discretion to effect rehabilitation and may impose conditions of probation designed to protect the public against the commission of other offenses during the term, and which have as their objective the deterrence of future misconduct.” State v. Garcia, 2005-NMCA-065, ¶ 11, 137 N.M. 583, 113 P.3d 406 (internal quotation marks and citation omitted).

**Discussion**

{7} As an initial matter, the State argues that Defendant did not preserve the issue of whether Paragraph 9 was constitutionally permissible because she did not invoke a ruling on the question in district court as required by Rule 12-216(A) NMRA. We conclude that the issue was adequately preserved. First, Defendant’s motion to suppress evidence makes several assertions that implicitly argue that the “any law enforcement officer” provision in Paragraph 9 would be enforceable only if it were interpreted as requiring that certain circumstances be present, such as exigent circumstances, probable cause, or a need for an inventory search, and that, in the absence of such circumstances, the provision was not enforceable. Second, as argued in Defendant’s reply brief, if Paragraph 9 includes an unconstitutional requirement, it amounted to an illegal sentence. A challenge to an illegal sentence raises a jurisdictional question. See, e.g., State v. Shay, 2004-NMCA-077, ¶ 6, 136 N.M. 8, 94 P.3d 8. This Court may consider jurisdictional questions even if no ruling on the issue was fairly invoked in district court. Rule 12-216(B). Accordingly, we proceed to the merits of Defendant’s argument.

{8} In her motion to suppress evidence, Defendant contended that her rights were violated under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant does not argue that the New Mexico Constitution should be interpreted differently from the United States Constitution in the context of this appeal. “Thus, we assume without deciding that both constitutions afford equal protection to individuals against unreasonable seizures in this context, and we analyze the constitutionality of the seizure under one uniform standard.” State v. Ochoa, 2004-NMSC-023, ¶ 6, 135 N.M. 781, 93 P.3d 1286.

{9} “The federal and New Mexico Constitutions are not a guarantee against all searches and seizures, only unreasonable ones.” State v. Rowell, 2008-NMSC-041, ¶ 29, 144 N.M. 371, 188 P.3d 95. “Warrantless probation searches and seizures must comply with the reasonableness components of the Fourth Amendment and of Article II, Section 10, of the New Mexico Constitution.” State v. Ponce, 2004-NMCA-137, ¶ 16, 136 N.M. 614, 103 P.3d 54. “[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” Baca, 2004-NMCA-049, ¶ 26 (quoting United States v. Knights, 534 U.S. 112, 118-19 (2001)). “A search and seizure conducted without a warrant is unreasonable unless it is shown to fall within one of the exceptions to the warrant requirement.” State v. Diaz, 1996-NMCA-104, ¶ 8, 122 N.M. 384, 925 P.2d 4. “A valid consensual search has been acknowledged as an exception to the warrant requirement.” Id. ¶ 9.

{10} A condition of probation must be “reasonably related to [the probationer’s] rehabilitation.” NMSA 1978, § 31-20-6(F) (2007). “To be reasonably related, the probation condition must be relevant to the offense for which probation was granted.” State v. Gardner, 95 N.M. 171, 174, 619 P.2d 847, 850 (Ct. App. 1980).

{11} We have not previously considered whether a condition of probation allowing warrantless searches by law enforcement agents without the participation of probation officers is inherently unreasonable and thus impermissible. In State v. Gallagher, 100 N.M. 697, 699, 675 P.2d 429, 431 (Ct. App. 1984), we specifically declined to reach the question. In Gallagher, which concerned consent to searches by a probation officer, we stated, “[w]e do not reach the question in this case whether probationary search conditions may be extended to allow searches by any law enforcement officials.” Id. In the present case, although we again decline to establish a general rule, we conclude that the searches of Defendant’s vehicle and purse were reasonable under existing law.

{12} Citing Gardner, Defendant argues that warrantless searches of probationers must be conducted by or under the direction of probation officers, unless the probationer consents to the search. In Defendant’s case, the search was conducted by agents of the Otero County Narcotics Enforcement Unit and the Alamogordo Department of Public Safety. We do not interpret Gardner as narrowly as Defendant. In Gardner, a condition of the defendant’s probation was that he “shall submit to a search of his car, person or residence at anytime upon request of his probation officer.” 95 N.M. at 172, 619 P.2d at 848. Thus, language in Gardner suggesting that the search by a law enforcement officer was proper “because it was requested by the probation officer” relates to the fact that the defendant there, unlike Defendant here, had not agreed to be searched by any law enforcement officer. Id. at 175, 619 P.2d at 851.

{13} In State v. Marquart, 1997-NMCA-090, 123 N.M. 809, 945 P.2d 1027, where the central issue was whether the exclusionary rule applied in probation revocation hearings, the defendant was searched by a law enforcement officer in the course of a traffic stop. The defendant was on probation but had not agreed to warrantless searches. Holding that the exclusionary rule applied, we observed that our holding “does not prevent a court from imposing as a condition of probation that the probationer give his or her consent to reasonable warrantless searches by a probation officer to ensure compliance with the conditions of probation.” Id. ¶ 19. In limiting this observation to probation officers, we again indicated our disinclination to rule on whether consent to warrantless searches by any law enforcement officer was a permissible condition of probation, while at the same time indicating our continued approval of conditions such as the one in Gardner, which limited warrantless searches to ones involving probation officers.

{14} In Knights, the United States Supreme Court upheld a warrantless search of a probationer’s home in circumstances similar to those before us. The defendant, on probation for a drug offense, had agreed to submit to searches by any probation or law enforcement officer as a condition of his probation. 534 U.S. at 114. A detective investigating an arson observed suspicious items in a truck belonging to an individual who had just left the defendant’s home. Id. at 115. Based on these observations, the detective, aware of the condition of probation in the defendant’s probation order, returned to the defendant’s home and conducted a warrantless search, which revealed incriminating evidence. Id. In holding that the search was reasonable, the Supreme Court balanced the degree of intrusion on the defendant’s privacy against the protection of legitimate government interests. Regarding the intrusion on the defendant’s privacy, the Court stated, “[i]nherent in the very nature of probation is
that probationers do not enjoy the absolute liberty to which every citizen is entitled.” *Id.* at 119 (internal quotation marks and citation omitted). The Court also found that two government interests were served, stating, “[i]t was reasonable to conclude that the search condition [of probation] would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations.” *Id.* Balancing these considerations, the Court found that the lesser standard of reasonable suspicion, not probable cause, “satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.” *Id.* at 121. We have cited the *Knights* approach with approval.

“In New Mexico, as well, whether a search is unreasonable is determined by balancing the degree of intrusion into a probationer’s privacy against the interest of the government in promoting rehabilitation and protecting society.” *Baca*, 2004-NMCA-049, ¶ 32.

{15} Applying the above principles to the circumstances of Defendant’s case, we conclude that Paragraph 9 was consistent with our prior cases and constitutionally permissible. First, as discussed below, the presence of Defendant at a home being searched for evidence of drug sales met the standard of reasonable suspicion. *Knights*, 534 U.S. at 121; *Baca*, 2004-NMCA-049, ¶ 41. Second, Defendant agreed to the condition of probation in Paragraph 9 that required her to submit to warrantless searches by any law enforcement officer. See *Gallagher*, 100 N.M. at 699, 675 P.2d at 431 (rejecting the defendant’s argument that a choice between a consent-to-search provision and going to prison was not really a choice and thus consent was not voluntary). Third, Paragraph 9 appears to be reasonably related to Defendant’s rehabilitation. The record indicates that the offense for which Defendant was on probation was child abuse (negligently caused, no great bodily harm). The warrantless search condition appears to indirectly further the goal of preventing another incident of child abuse. We observe that the judgment and sentence in which Paragraph 9 appears contains indications that alcohol was involved, as another condition of probation required Defendant to complete a two-year inpatient program and to avoid alcohol. Requiring Defendant to submit to searches would tend to advance her rehabilitation by ensuring that she did not possess alcohol. In addition, though the probationary strictures emphasize alcohol use, they are not limited to alcohol. The requirement under Paragraph 5 that Defendant “submit to substance abuse screening and any recommendations from that screening” are broader and could cover methamphetamine or other drug use. Fourth, because the agents were aware that Defendant was on probation at the time of the searches, in the circumstances—the agents were executing a search warrant at an alleged drug home—the search was reasonably related to “[t]he general purposes of probation, under federal or New Mexico law, of rehabilitation and deterrence for community safety.” *Baca*, 2004-NMCA-049, ¶ 36. Fifth, there is no indication that the agents knew beforehand that Defendant would be present at the home, and thus the search cannot be considered “a subterfuge for criminal investigation[ ].” *Gardner*, 95 N.M. at 175 (internal quotation marks and citation omitted). The presence of these factors distinguishes the circumstances of this search from those where reasonableness is questionable or absent, such as one where a police officer stops a probationer on the street with no indication that anything criminal is afoot. We conclude that Paragraph 9 was properly applied.

{16} We acknowledge the point made by the dissent with regard to the potential difficulty raised by the likelihood that the agents here were not aware of the probation condition allowing them to conduct a warrantless search of Defendant. Had it been made below it might well be dispositive. The difficulty is that the argument was not made to the district court. We see no way to address the argument substantively in this case.

**REASONABLE SUSPICION**

**Standard of Review**

{17} We have held that “warrantless probation search cases can and must be supported by reasonable suspicion as defined in New Mexico law to be an awareness of specific articularable facts, judged objectively, that would lead a reasonable person to believe criminal activity occurred or was occurring.” *Baca*, 2004-NMCA-049, ¶ 43. “Determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.” *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

**Discussion**

{18} The district court concluded without elaboration that the searches of Defendant’s vehicle and purse were not done pursuant to the search warrant the agents were executing. Rather, the district court relied on the plain language of Paragraph 9 and Defendant’s agreement to it, and observed that the officer was aware of Defendant’s probation status. The district court’s decision letter states:

The Court finds that these searches were reasonable under the circumstances. The Court concludes that paragraph 9 in the Judgment and Sentence was intended to apply to situations exactly like this one, in which Defendant is found at a premises where law enforcement officers are conducting a search for illegal drugs. This provision is consistent with the goals and objectives of probation . . .

{19} The context of the searches of Defendant’s vehicle and purse includes the fact that a warrant was being execute pursuant to information that drugs were being sold at the home. In *State v. Williamson*, 2000-NMCA-068, 129 N.M. 387, 9 P.3d 70, the defendant’s vehicle was stopped for a traffic violation. Smelling alcohol, the officer administered the HGN test and was considering whether to conduct additional tests. *Id.* ¶ 2. At that point, a second officer told the first officer that he had found drugs on the defendant’s passenger. *Id.* ¶ 4. The first officer asked the defendant whether he also had drugs on him. The defendant consented to a search, during which the officer found drugs. *Id.* The defendant argued that there was no reasonable suspicion to support the expansion of the traffic stop into a drug investigation. *Id.* ¶ 5. We concluded that “[t]he presence of drugs in the car, even though in the passenger’s possession, was sufficient to reasonably arouse [the officer’s] suspicion that [the defendant also had drugs[,]” given the defendant’s indications of possible impairment. *Id.* ¶ 10.

{20} We consider the circumstances of the present case analogous to *Williamson*. As discussed above, the agents needed only reasonable suspicion that Defendant was involved in criminal activity, not probable cause to search. As in *Williamson*, there was an additional factor supporting reasonable suspicion beyond mere presence. The additional factor in *Williamson* was the defendant’s own possible impairment. Here, the additional factor was the agents’ knowledge that Defendant was on probation. The alleged presence of drugs in the home being searched—an allegation presumably supported by probable cause, because a court had issued the search warrant—made it reasonable for
the agents to suspect that Defendant, on probation, was somehow involved in the drug activity. “[I]t must be remembered that the very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law.” Knights, 534 U.S. at 120 (internal quotation marks and citation omitted). Accordingly, we conclude that the searches of Defendant’s vehicle and purse were based on reasonable suspicion, and thus were constitutionally permissible.

{21} Finally, Defendant argues that her purse was not on her “person” at the time it was searched, and thus was not covered by Paragraph 9’s requirement that she consent to searches of her “person.” The district court’s decision letter made no findings regarding the location of the purse at the time it was searched. Defendant’s motion to suppress does not raise this issue, although it was addressed at the hearing. Our own review of the suppression hearing transcript indicates that there was conflicting evidence on this question. Defendant herself testified that at the time the purse was searched, she was standing on a step next to the bar where her purse was, and that the purse was between one and two feet away from her. Defendant testified that she was not handcuffed, while Agent House, who searched the purse, testified that she was. Agent House testified that Defendant had told him the purse was hers. There was also some inconclusive testimony by Agent House, Agent Guthrie, and Defendant regarding whether, before the purse was searched, she would have been allowed to leave with a citation for the paraphernalia without a custodial arrest. We find no testimony definitively establishing whether the purse was ever in Defendant’s physical possession during the relevant times.

{22} At the hearing, Defendant’s counsel argued both that the purse was not on her person, and that a person has a heightened expectation of privacy in items such as purses or wallets. The State’s brief analo-
gizes purses to pockets in clothing used to carry personal effects, which presumably could be searched in a search of the “per-
son.” Defendant having cited no authority to the contrary, and having acknowledged that the purse was within one to two feet of her at one point, we conclude that the purse was sufficiently part of her person so as to come within a search pursuant to Paragraph 9.

{23} The dissent does not take direct issue with our analysis. Rather it argues that there could be no reasonable suspicion of anything absent the material found in the vehicle and the search of the vehicle was improper because it was not proper under the warrant. The dissent fails to recognize that all of the factors supporting reasonable suspicion in this case apply with equal vigor to the vehicle search. That search cannot be isolated from the rest of the case.

CONCLUSION

{24} For the reasons set forth above, we conclude that in the circumstances of her case, the condition of Defendant’s proba-
tion that she consent to searches by “any law enforcement officer” was applied consistent with federal and state constitutional principles in the searches of her vehicle and purse. We affirm Defendant’s conviction.

{25} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

I CONCUR:

ROBERT E. ROBLES, Judge
MICHAEL E. VIGIL, Judge, dissenting

Vigil, Judge (dissenting).

{26} I ultimately agree that a warrantless search of a probationer by a police officer which is undertaken pursuant to a condition of probation which authorizes that search is reasonable under the Fourth Amendment, and therefore constitutional, provided that the police officer has reasonable suspicion for the search. However, I dissent for two reasons. First, I cannot conclude that these searches were undertaken pursuant to, and under the authority of, Defendant’s condition of probation. This is because the police officers did not know that Defendant’s probation conditions allowed for warrantless searches by police officers in addition to probation officers. Secondly, I disagree with the majority’s conclusion that the searches in this case were supported by reasonable suspicion.

FACTS

{27} Defendant was visiting a house in Alamogordo, New Mexico, when officers arrived in the afternoon to execute a search warrant at the house. The officers knew that the only vehicle parked at the house belonged to Defendant, and that she was not an object of the search warrant; nevertheless, they searched her vehicle without her consent. They asserted authority to do so because the warrant included the residence, curtilage, and vehicles on the curtilage. The officers found drug paraphernalia inside Defendant’s vehicle. After being advised of the discovery and her constitutional rights, Defendant admitted she owned the drug paraphernalia and that she had smoked methamphetamine earlier in the day. Agent House then proceeded to search Defendant’s purse without her consent and cocaine was found inside the purse. While executing the search warrant, the officers became aware at some point that Defendant was on probation. The cocaine found in Defendant’s purse was the basis for the fourth degree felony charge in Count I, possession of cocaine, a controlled substance; and the drug paraphernalia was the basis for the misdeemeanor charge in Count II, possession of drug paraphernalia.

{28} Defendant’s motion to suppress the evidence discovered in the searches of her vehicle and purse was denied. Pertinent to this appeal, the district court made findings of fact and conclusions of law that:

1. Neither the search of the purse nor the search of the vehicle was within the scope of the warrant. Defendant was at the premises as a visitor;
2. There was no probable cause to search the purse;
3. The search of the purse was not a search incident to arrest;
4. The scope of the search of the purse went beyond that which would arguably be necessary to check it for weapons;
5. Defendant was on probation at the time of the searches, and the officers were aware she was on probation;
6. One condition of Defendant’s probation was, “Defendant will submit to warrantless searches of his/her person, residence and vehicle at the discretion and direction of his/her probation officer or any law enforcement officer”;
7. There was no attack on the appropriateness of the condition of probation as written and ordered, under which the authority to conduct warrantless searches is extended beyond probation officers to include law enforcement officers;
8. The officer did have a reasonable, articulable suspicion that the purse may contain evidence of a violation of law, and thus a violation of probation, although that suspicion did not rise to the level of probable cause;
9. The condition of probation allowing warrantless searches “was intended to apply to situations exactly like this one, in which Defendant is found at a premises where law enforcement officers are conducting a search for illegal drugs.”
Defendant thereupon entered into a conditional plea with the State, reserving her right to appeal the denial of her motion to suppress.

DISCUSSION

{29} Defendant did not preserve for our review whether the condition of her probation allowing a warrantless search by a police officer in addition to a probation officer is reasonably related to her rehabilitation. As the majority notes, in order to be valid, a condition of probation must be “reasonably related to the defendant’s rehabilitation,” Section 31-20-6(F), and “[t]o be reasonably related, the probation condition must be relevant to the offense for which probation was granted.” Gardner, 95 N.M. at 174, 619 P.2d at 850, discussed in the Majority Opinion at ¶ 10. However, Defendant did not present any evidence or argument to the district court that the warrantless search condition of her probation was not “reasonably related” to the offense of child abuse (no great bodily harm), the offense for which she was granted probation. Therefore, any argument concerning the lack of a reasonable relationship fails due to a lack of proof. See Baca, 2004-NMCA-049, ¶ 19 (stating that the trial court properly concluded a warrantless search condition of probation was valid where the defendant presented no evidence establishing the lack of a reasonable relationship between the probation condition and the underlying offense); Ponce, 2004-NMCA-137, ¶ 7 (stating that a defendant moving to suppress evidence has the burden to come forward with evidence to raise an issue as to an illegal search and seizure, and once she has done so, the burden shifts to the state to justify the warrantless search or seizure). I therefore assume that the warrantless search condition of Defendant’s probation is reasonably related to Defendant’s rehabilitation.

{30} However, Defendant argues on appeal that the condition of her probation which requires her to submit to warrantless searches of her person, residence, and vehicle at the discretion or direction of her probation officer or any law enforcement officer is unconstitutional. I agree with the majority that we must address Defendant’s constitutional argument, even if she did not preserve that issue in the district court. We must address this contention because if the condition is unconstitutional, it results in an illegal sentence. See Shay, 2004-NMCA-077, ¶ 6 (noting that we have allowed both the state and defendants to challenge illegal sentences for the first time on appeal based on the rationale that the district court does not have jurisdiction to impose an illegal sentence and the appellate rules allow jurisdictional issues to be raised for the first time on appeal).

{31} Defendant first argues that a probation condition, which allows for warrantless searches, is unconstitutional unless the warrantless searches are “probation searches” that are “conducted as part of the probationary process” for a probation violation. However, this argument has already been rejected by the United States Supreme Court. See Knights, 534 U.S. at 116 (rejecting the argument that a warrantless probation search condition must be conducted for “probationary” purposes and not for “investigatory” purposes or it is unconstitutional under the Fourth Amendment). Defendant does not argue that the New Mexico Constitution affords greater protection than the United States Constitution in this context, and we therefore assume that the protection afforded by both constitutions is identical. Ochoa, 2004-NMSC-023, ¶ 6.

{32} Defendant next asserts that an unconstitutional search occurs where a police officer performs a warrantless probation search and it is not “at the direction of a probation officer.” This argument was also rejected in Knights in which a police officer performed a warrantless search of the defendant’s apartment without the involvement of any probation officer, but the police officer was aware of the defendant’s probation condition allowing for a warrantless search by any probation officer or law enforcement officer.” 534 U.S. at 114-15, 117.

A. Knowledge of the Probation Condition

{33} In this case, the police officers became aware at some point that Defendant was on probation. However, there is no evidence that the police officers were aware that a term of her condition was that she would “submit to warrantless searches of [her] person, residence and vehicle at the discretion or direction of [her] probation officer or any law enforcement officer.” This is unlike Knights, in which the police officer who conducted the search of the defendant’s apartment knew of the search condition providing for a warrantless search “by any probation officer or law enforcement officer.” Id. at 114-15. Defendant argues that the search is unconstitutional and cannot be validated under the condition of probation unless the police officer knows of the probation condition at the time of the search. This presents an issue of first impression under New Mexico law.

{34} The constitutionality of a probation search conducted by a police officer who does not know of a probation condition allowing a search has been fully developed in California. In In re Martinez, 463 P.2d 734 (Cal. 1970) (in bank), the California Supreme Court held that the warrantless search of a home could not be justified as a parole search, and was therefore unconstitutional, where the police did not know of the defendant’s parole status when they conducted the search. Id. at 737-38. People v. Robles, 3 P.3d 311 (Cal. 2000) followed, in which the California Supreme Court held that the search of a home was unconstitutional even though the defendant’s brother who lived in the home was on probation and was subject to a search condition, because the police were unaware of the condition at the time of the search. Id. at 314. People v. Sanders, 73 P.3d 496 (Cal. 2003) followed, in which the police searched the home of two persons, one of whom was on parole and subject to a search condition. However, the police were unaware of the search condition at the time of the search. The California Supreme Court held that the search was unconstitutional. Id. at 498. The reasoning of these decisions was subsequently extended to searches of individuals on probation by police officers where the police officer did not know of the probation condition at the time of the search. See People v. Bowes, 13 Cal. Rptr. 3d 15, 17 (Ct. App. 2004); People v. Hoe ninghaus, 16 Cal. Rptr. 3d 258 (Ct. App. 2004). This reasoning was then extended to searches of juveniles by police officers in In re Jaime P., 146 P.3d 965, 966 (Cal. 2006), overruling In re Tyrell J., 876 P.2d 519 (Cal. 1994).

{35} The reasoning of the California courts is succinctly stated in Sanders. Unlawful police conduct is legitimized if evidence obtained during a search which would otherwise violate the Fourth Amendment is admitted into evidence merely because it was later discovered that the suspect was subject to a probation or parole search condition. Sanders, 73 P.3d at 507-08. Furthermore, such a search cannot be justified as a probation or parole search because the officer is not acting pursuant to the conditions of probation or parole. Id. at 506. The California Supreme Court further pointed out that almost without exception in evaluating alleged violations of the Fourth Amendment, the United
States Supreme Court has undertaken an objective assessment of the circumstances known to the officer at the time the search was conducted. Id. at 507.

{36} We have held that warrantless probation searches and seizures must comply with the reasonableness components of the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution. Ponce, 2004-NMCA-137, ¶ 16. In assessing reasonableness under the Fourth Amendment, our essential inquiry, involves two questions: “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” State v. Neal, 2007-NMSC-043, ¶ 18, 142 N.M. 176, 164 P.3d 57 (internal quotation marks and citations omitted) (emphasis added); State v. Robbs, 2006-NMCA-061, ¶ 12, 139 N.M. 569, 136 P.3d 570 (same). Whether reasonable suspicion to detain a person to investigate possible criminal activity is consistent with the Fourth Amendment is measured by whether the facts give rise to a reasonable suspicion at the inception of the detention. State v. Ochoa, 2008-NMSC-023, ¶¶ 17, 19, 143 N.M. 749, 182 P.3d 130; City of Roswell v. Hudson, 2007-NMCA-034, ¶ 15, 141 N.M. 261, 154 P.3d 76. Searches of high school students do not require probable cause, but school officials must have reasonable grounds for suspecting that a search will turn up evidence that the student has violated, or is violating, the law or the rules of the school. Such reasonable grounds must exist at the inception of the search. State v. Pablo R., 2006-NMCA-072, ¶ 11, 139 N.M. 744, 137 P.3d 1198.

{37} The majority contends that this issue was not preserved for our review. Majority Opinion ¶ 16. I disagree. Defendant’s written motion to suppress alleged in part that the search of her vehicle and purse were without her consent and beyond the scope of the search warrant the officers were executing for the premises she was visiting. Defendant therefore asserted that these searches violated her Fourth Amendment rights. This was sufficient to place burden on the State to justify these warrantless searches. Ponce, 2004-NMCA-137, ¶ 7 (“In the face of a defendant’s challenge to the constitutionality of a warrantless arrest or search, the State is required to present testimony or other evidence showing that the arrest or search met constitutional muster.”). At the hearing on the motion, the State asserted it would rely, in part, upon Paragraph 9 of Defendant’s condition of probation as justification for the searches, and the judgment and sentence setting forth Defendant’s conditions of probation was admitted into evidence specifically for this purpose. The State elicited from Defendant her knowledge of the Paragraph 9 condition of her probation, but it failed to introduce any evidence that the police officers who searched her vehicle and purse had any knowledge of this condition of her probation before the searches. As the authorities discussed above make clear, the State cannot rely on information discovered after a search to justify the search. While the specific context of a warrantless probation search by police officers has not heretofore been addressed, the general principle that the facts known to the officer to justify the search must be known at the inception of the search is well settled. Thus, the State was on notice that it was required to present all the facts known to the officers before they searched Defendant’s vehicle and purse which it contended justified these warrantless searches.

{38} I am unaware of any cases in New Mexico (or elsewhere) in which the constitutional validity of a search was justified by information discovered after the search was completed. Under these circumstances, the logic and reasoning of the California authorities cited above is compelling. Although the police officers in this case knew that Defendant was on probation, there is no evidence that they knew Defendant’s probation was subject to a warrantless search by police officers. We cannot assume that they had such knowledge. I therefore conclude that the search of Defendant’s automobile and her purse was unconstitutional for this reason alone.

B. No Reasonable Suspicion

{39} Defendant also argues that the officers did not possess reasonable suspicion to search either her car or her purse. I agree with Defendant on this question as well.

{40} Knights acknowledges the needs of the state to monitor the conduct of individuals on probation consistent with the Fourth Amendment and holds, “[w]hen an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.” 534 U.S. at 121. Thus, the officers were required to possess reasonable suspicion that Defendant was engaged in criminal activity when they searched her vehicle and her purse. Our own Supreme Court has recently repeated:

A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law. The test is an objective one. The subjective belief of the officer does not in itself affect the validity of the stop; it is the evidence known to the officer that counts, not the officer’s view of the governing law. We objectively examine whether the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate. We will find reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring. State v. Hubble, 2009-NMSC-014, ¶ 8, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citations omitted).

Again, the facts establishing reasonable suspicion must exist at the inception of the searches. Id. ¶ 7.

{41} The officers searched Defendant’s vehicle without her consent simply because it was parked at the house where they were executing the search warrant. The district court concluded that the search of the vehicle was not within the scope of the warrant and I agree. Furthermore, there is absolutely no evidence linking Defendant’s vehicle to any suspected criminal activity at the home where the search warrant was being executed. Any assertion of reasonable suspicion related to the vehicle fails.

{42} With regard to the purse, the district court made a finding that the officer had a reasonable articulable suspicion that the purse may contain a violation of the law. This finding was apparently based upon what was discovered in the search of the vehicle, coupled with Defendant’s admission that she owned the drug paraphernalia and that she had smoked methamphetamine earlier in the day. However, since the initial search of Defendant’s vehicle was unconstitutional, all evidence obtained as a result of that search cannot form the basis for reasonable suspicion. See State v. Harris, 116 N.M. 234, 238, 861 P.2d 275, 279 (Ct.
The only facts which remain to justify searching Defendant’s purse are: (1) Defendant was visiting a home where the officers were executing a search warrant for drugs, and (2) Defendant was on probation. The majority concludes that this constitutes sufficient reasonable suspicion to search the purse. Majority Opinion ¶¶ 19-20. Respectfully, I disagree.

If this were so, these two factors alone would constitute reasonable suspicion. Thus, mere presence where a crime is being investigated coupled with the fact of probation would negate the requirement of reasonable suspicion. Our case law is very clear that mere presence alone at a residence where a search warrant is being executed for drugs does not justify the arrest or detention of the mere visitor. State v. Graves, 119 N.M. 89, 94, 888 P.2d 971, 976 (Ct. App. 1994). In State v. Martinez, 1996-NMCA-109, ¶ 34, 122 N.M. 476, 927 P.2d 31, we specifically stated that police officers cannot detain a non-resident who is present during a drug raid on a home on the basis of his presence alone. There must be “presence plus” facts that would make detaining or searching a non-resident reasonable under the circumstances. Id. (internal quotation marks and citation omitted).

In this case, Defendant was not shown to have any connection with the drugs being sought under the search warrant; there are no facts showing that the officers had grounds to suspect such a connection; there were no circumstances presented to give rise to a reasonable suspicion that Defendant was involved in criminal activity; there was no evidence of any attempts by Defendant to flee; there was no evidence of furtive gestures or sudden movements made by Defendant towards a weapon; there was no evidence of any threats made by Defendant; there was no evidence that Defendant resisted detention; there was no evidence that Defendant would destroy evidence; and there was no evidence that Defendant was the target of the search warrant. See Graves, 119 N.M. at 94, 888 P.2d at 976 (concluding that under similar circumstances, it was not reasonable for police officers to detain a visitor of premises which were being searched pursuant to a search warrant). The evidence fails to establish reasonable suspicion that Defendant was committing or about to commit any criminal offense. Under these circumstances, there is no reasonable suspicion.

Notwithstanding the assertion of the majority to the contrary (Majority Opinion, ¶ 23), I completely disagree with the majority’s analysis of reasonable suspicion as it concerns both the vehicle and the purse. In addition, I do not engage in any analysis of whether Defendant’s purse was justified as being on her “person” as the majority does. Majority Opinion, ¶ 21.

CONCLUSION

The search of Defendant’s vehicle and purse was not justified by Defendant’s probation condition at the commencement of the search. These searches were not undertaken pursuant to, and under the authority of, Defendant’s condition of probation. Since the officers were unaware of Defendant’s condition of probation when they commenced the search, I would reverse the order of the district court denying Defendant’s motion to suppress on this basis alone. In the alternative, I respectfully submit that the evidence totally fails to demonstrate reasonable suspicion to search Defendant’s vehicle and purse. On this alternative basis, I would also reverse the order of the district court. Since the majority disagrees, I dissent.

MICHAEL E. VIGIL, Judge
OPINION

MICHAEL D. BUSTAMANTE, JUDGE

[1] Defendant Jose Javier Lopez appeals the terms of his criminal commitment imposed pursuant to NMSA 1978, Section 31-9-1.5 (1999) of the New Mexico Mental Illness and Competency Code (NMMIC). Lopez argues that his pre-commitment confinement time should have been taken into account in determining the actual duration of his criminal commitment. The ultimate question is one of statutory interpretation. Specifically, whether in enacting Section 31-9-1.5 the Legislature intended for a criminally committed offender to face longer confinement than had he been actually convicted of the underlying crime. We conclude that the Legislature did not intend such an outcome and we reverse.

BACKGROUND

[2] In August 2004 Lopez allegedly attacked his mother with a knife, stabbing her in the throat area and on her wrists. This incident resulted in Lopez’s indictment by a grand jury on the charges of attempted murder in the first degree, aggravated battery on a household member, and tampering with evidence. Proceedings on these charges were suspended pending a determination of Lopez’s competence to stand trial pursuant to NMSA 1978, Section 31-9-1.9 (1993). In October 2005 the parties stipulated that Lopez was incompetent to stand trial and “dangerous,” which resulted in his commitment to the New Mexico Behavioral Health Institute (NMBHI) for treatment to attain competency. Lopez was confined at NMBHI for a full year, after which time he remained incompetent to stand trial.

[3] In October 2006 the court scheduled an evidentiary hearing pursuant to Section 31-9-1.5. The parties stipulated that evidence supported a conviction of aggravated battery of a household member and tampering with evidence but not attempted murder. Based on these stipulations and pursuant to Section 31-9-1.5, the court committed Lopez to NMBHI for the maximum duration of three years for the third-degree felony offense of aggravated battery against a household member (great bodily harm).

[4] The parties agreed that pursuant to State v. Chorney, 2001-NMCA-050, ¶ 13, 130 N.M. 638, 29 P.3d 538, the tampering with evidence stipulation would not result in an enhancement of Lopez’s commitment period. However, the parties disagree on the effect of NMSA 1978, Section 31-20-12 (1977), “[c]redit for time prior to conviction.” Specifically, the parties dispute whether the approximately two years and two months that Lopez was confined at NMBHI prior to the Section 31-9-1.5 hearing should be credited against his three-year commitment. Lopez argues that the district court misapplied the statutes and ultimately violated his rights to equal protection and due process. We reverse on the statutory interpretation issue and do not reach Lopez’s constitutional claims.

STANDARD OF REVIEW

[5] “Because we interpret the language of Section 31-9-1.5, our review is de novo.” Chorney, 2001-NMCA-050, ¶ 4. In interpreting the NMMIC, our primary objective is to give effect to the Legislature’s intent. State v. Trujillo, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. “[I]n 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).

DISCUSSION

[6] Section 31-9-1.5(D)(1) requires that, if a court determines by clear and convincing evidence that a “dangerous” defendant committed the crime charged, the defendant must be detained in a secure “locked facility.” State v. Rotherham, 122 N.M. 246, 253, 923 P.2d 1131, 1138 (1996). Section 31-9-1.5(D)(2) requires that the period of detention not exceed the maximum sentence available had the defendant been convicted in a criminal proceeding. Id. In the event of a criminal conviction, “[a] person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.” Section 31-20-12.

[7] The district court declined to apply Section 31-20-12 to Lopez’s term of confinement, concluding that it was inapplicable for several reasons. First, the court concluded that Section 31-20-12 applies only where there has been a criminal conviction, and that Lopez’s criminal commitment was not a conviction. Further, the court concluded that it was otherwise inapplicable because commitment was not equivalent to a sentence in that it was not punishment. And finally, the court reasoned that commitment did not constitute a “sentence finally imposed” because Lopez...
could still be subject to a final sentencing, assuming that at some point he became competent to stand trial.

[8] We disagree with the approach taken by the district court and its result. The district court’s approach was to analyze the language of Section 31-20-12 and then determine its applicability to Lopez. This approach cannot be reconciled with the language of Section 31-9-1.5 or the reasons for its enactment. When a question as to a defendant’s competency is raised, all other proceedings outside of those prescribed by the NMMC must be suspended until the issue of competency is resolved. *Rotherham*, 122 N.M. at 253, 923 P.2d at 1138. Thus, the district court’s application of a criminal statute to Lopez outside the context and provisions of the NMMC was improper. *See Chorney*, 2001-NMCA-050, ¶¶ 13-14 (holding that application of a habitual offender enhancement to extend the duration of commitment was improper because it did not relate to provisions of the NMMC).

[9] Applying the plain language of the NMMC, the maximum duration of a criminal commitment is determined by the following analysis. First, the district court must presume that there has been a conviction; second, based on this presumption, the court must determine the maximum sentence that could be imposed for such a conviction. *See Rotherham*, 122 N.M. at 253, 923 P.2d at 1138 (stating that commitment under Section 31-9-1.5(D)(2) cannot exceed the maximum sentence available had there been a conviction).

[10] Here, presuming Lopez was convicted, his pre-conviction confinement at NMBHI would have been credited against his post conviction sentence in accordance with Section 31-20-12. *State v. La Badie*, 87 N.M. 391, 392, 534 P.2d 483, 484 (Ct. App. 1975). Thus, to the extent that Lopez’s pre-conviction confinement would have been credited against his sentence, so too must it be credited against the term of his criminal commitment. Any contrary conclusion would effectively treat Lopez more severely than if he had actually been convicted, which is inconsistent with the purpose of the NMMC.

[11] In a comprehensive analysis of Section 31-9-1.5, our Supreme Court recognized that the NMMC was adopted in the wake of the United States Supreme Court’s decision in *Jackson v. Indiana*, 406 U.S. 715 (1972); *Rotherham*, 122 N.M. at 252-53, 923 P.3d at 1137-38. In *Jackson*, the Court held that subjecting incompetent offenders to “a more lenient commitment standard and to a more stringent standard of release than those generally applicable” constituted a deprivation of equal protection. *Rotherham*, 122 N.M. at 256, 923 P.3d at 1141 (internal quotation marks and citation omitted). Section 31-9-1.5 imposes a more lenient commitment standard by lowering the burden of proof to clear and convincing evidence. To apply a more stringent standard argued for by the State would be to create the exact problem that the Legislature was trying to avoid. Thus, such an interpretation is contrary to the Legislature’s intent.

[12] The State argues that the district court’s approach was proper because the purpose of commitment is rehabilitative rather than punitive and, therefore, it is not analogous to a conviction as required by Section 31-20-12. We disagree because the argument relies on the flawed approach of applying Section 31-20-12 outside the context and requirements of Section 31-9-1.5(D)(2). Criminal commitment is based not only on the need for treatment, but also on an offender’s past dangerous conduct. *Rotherham*, 122 N.M. at 258, 923 P.2d at 1143. Furthermore, while the State correctly points out that we have previously stated that “[c]ommitment pursuant to Section 31-9-1.5 is not punishment,” we have also stated that it undeniably results in a loss of liberty. *State v. Spriggs-Gore*, 2003-NMCA-046, ¶¶ 21-22, 133 N.M. 479, 64 P.3d 506. The involuntary nature of commitment and the associated loss of liberty is the key aspect of commitment constituting “official confinement” equivalent to a sentence based on a conviction within the meaning of Section 31-20-12. *La Badie*, 87 N.M. at 392, 534 P.2d at 484.

**CONCLUSION**

[13] For the foregoing reasons, we reverse the district court’s denial of pre-commitment credit and remand to the district court for proceedings consistent with this opinion.

[14] IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CElia Foy Castillo, Judge

Robert E. Robles, Judge
OPINION

JONATHAN B. SUTIN, JUDGE

{1} In this action, we determine whether the New Mexico Public Regulation Commission (the Commission) has the jurisdiction to void a public utility’s sale of real property when the sale required but did not receive prior approval by the Commission pursuant to NMSA 1978, Section 62-6-12(A)(4) (1989). The district court ruled that the Commission did not have jurisdiction to void the sale transaction and prohibited it from deciding the validity of the consummated sale and its accompanying deeds. The Commission appeals and contends that the Commission had exclusive jurisdiction over the sale transaction, including making determinations that would render the sale transaction void.

{2} We hold that the Commission has exclusive jurisdiction under Section 62-6-12(A) to determine whether the sale was required to be approved. We further hold that because that issue has not been adjudicated by the Commission, because it is uncertain from a legal standpoint what will occur once this determination is made, and because the record is inadequately developed as to whether the Commission or the district court is to address whether the sale transaction is void, the issues of jurisdiction and action to void the sale transaction and deeds are premature and not ripe for our review. Accordingly, we remand this case for further proceedings.

BACKGROUND

{3} In 2004, OS Farms, Inc. (Farms) purchased 5,325 acres of land, located in Curry and Roosevelt Counties, New Mexico (the property), from New Mexico American Water Co., Inc. (American), a public water utility regulated by the Commission. After Farms and American signed a purchase agreement covering the property and Farms paid the purchase price, American executed and delivered deeds to Farms. American reserved or attempted to reserve all water rights to its own use. The deeds were recorded. We refer to this transaction involving the property as “the sale of the property.” Farms has continuously occupied and farmed the property and has paid the related property taxes.

{4} In May 2006, American filed an advice notice and proposed revised rates with the Commission pursuant to which American sought to adjust its service rates for its Clovis and Edgewood, New Mexico, service districts. A hearing examiner considered the rate-related issues, and in February 2007, issued a 114-page recommended decision, two pages of which were devoted to the sale of the property. The hearing examiner stated the following:

[American] purchased the . . . property to acquire water rights, existing irrigation wells and equipment, and potential locations for additional wells for its Clovis district. Recognizing that the land had potential value for dry-land agricultural uses, [American] decided the land should be sold, reserving the necessary easements and water rights. [American] argued that the sale would reduce utility plant investment and decrease the cost of maintaining the property. [American] asserted that, at the time, it believed that Commission approval was only required to sell regulated assets or assets deemed used and useful in its utility operations. Since dry land was not used and useful, [American] did not believe that Commission approval was required.

{5} The hearing examiner noted that Commission staff asserted that “prior
Commission approval was required for the sale of the . . . [property] . . . under . . . Section 62-6-12(A)(4).” Section 62-6-12 reads, in pertinent part, as follows:

**Acquisitions, consolidations, etc.; consent of commission.**

A. With the prior express authorization of the commission, but not otherwise:

1. Any public utility may sell, lease, rent, purchase[,] or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof; provided, however, that this paragraph shall not be construed to require authorization for transactions in the ordinary course of business.

B. Any consolidation, merger, acquisition, transaction resulting in control or exercise of control, or other transaction in contravention of this section without prior authorization of the commission shall be void and of no effect.

6. The hearing examiner found that substantial evidence supported “the conclusion that this property and its accompanying water rights were purchased to provide service to the Clovis District, and that the unauthorized sale of this property potentially affects water service in [American’s] Clovis district.” The hearing examiner also determined that “[t]he sale of the property was not in the ordinary course of business.” The hearing examiner concluded that American failed to obtain the Commission’s prior approval of the sale and that pursuant to Section 62-6-12, the sale was void and should be declared void by the Commission.

7. In June 2007, the Commission entered a final order partially adopting the hearing examiner’s recommended decision. The Commission stated:

[American] states that it entered into the sale in order to reduce its utility plant investment and decrease the cost of maintaining the property. [American] initially believed that Commission approval was not required for the sale. However, because it now appears that [Farms] may be able to appropriate limited amounts of water for [Farms’] livestock that is now on the property, [American] now agrees with Staff that prior Commission approval was required for the sale of land . . . under [Section] 62-6-12(A)(4).

The Commission declined, however, to either decide the issue of prior approval or to declare the sale void without first providing Farms with notice and an opportunity to respond. The Commission required American to file a petition for a declaratory order requesting the Commission to determine whether the sale of the property was void under Section 62-6-12(B) and to serve Farms with the petition.

8. In August 2007, American filed a petition with the Commission to declare the sale of the property void under Section 62-6-12. Farms filed a motion to intervene for the limited purpose of moving to dismiss for lack of jurisdiction. The Commission permitted Farms to intervene. In an order denying Farms’ motion to dismiss, the Commission described Farms’ contentions and American’s response as follows. Farms contended in its motion that because the Commission’s jurisdiction extended only to public utilities, the Commission had no jurisdiction over Farms or to affect Farms’ property rights. Farms argued that, under case precedent, the Commission had no power to adjudicate purely private matters between a utility and an individual and that the only action the Commission could take under American’s petition was to assess a penalty against American pursuant to NMSA 1978, Section 62-12-4 (1993), which permits penalties for failure to comply with the Public Utility Act. American responded to Farms’ motion and argued that the Commission was not attempting to assert jurisdiction over Farms and that Farms voluntarily participated by filing its motion to intervene.

9. After addressing Farms’ motion to dismiss, in an October 16, 2007, order, the Commission determined that American’s petition did not seek to assert jurisdiction over Farms but instead sought solely a Commission determination whether American violated Section 62-6-12(A)(4), which violation, according to the Commission, would render the sale void. The Commission also determined that it could assess a penalty against American for any violation of Section 62-12-4 and that “[a] Commission order penalizing [American] must be accompanied by a determination that [American] violated Section 62-6-12(A)(4) by its transfer of the . . . [p]roperty,” and further that “[a] ny such determination would, under the plain provisions of Section 62-6-12(A)(4), automatically render that transfer void as a matter of law.” Further, the Commission stated:

[Farms] finally argues that because the Commission does not have jurisdiction over [Farms], [Farms] should not be required to participate in this proceeding. [Farms] also complains that if [it] does not participate in this proceeding, it is more likely that the Commission would find the sale of the . . . [p]roperty to have violated Section 62-6-12. However, if [Farms] does participate in this proceeding in order to protect its rights, it increases the possibility that the findings of the Commission will be given more weight in a proceeding in district court.

Again, [Farms] misapprehends the nature of this proceeding. As made clear by the procedural schedule set forth below, the Commission is not requiring [Farms], or any other interested party not subject to the Commission’s jurisdiction, to participate in this proceeding. Rather, the Commission is affording all interested persons, including [Farms], the opportunity (but not the obligation) to participate in this proceeding as a party in order to protect whatever interest they may have that may be affected by the outcome of this proceeding. [Farms], and any other interested party other than [American], are free to participate or not participate in this case as they see fit. And while [Farms’] decision to participate or not may raise complex legal issues for [Farms] to consider, that fact has little or no bearing on whether the Commission has the jurisdiction to act on [American’s] [p]etition.

The Commission entered an order denying Farms’ motion to dismiss and determining that it had jurisdiction and authority to issue a declaratory order as to whether American violated Section 62-6-12(A)(4). The Commission’s order stated that “[a] ny person . . . desiring to become a party to this case and file a response to the [p]etition must first file a formal motion for leave to intervene.”

10. Before the Commission’s aforementioned October 16, 2007, order was entered, Farms, on October 9, 2007, filed an action in district court against American. On November 1, 2007, Farms filed
Supreme Court, on November 26, 2007, the Commission filed a verified petition in our Supreme Court seeking to prohibit the Commission from declaring the sale transaction void and from making findings, orders, or decisions regarding the validity, interpretation, enforceability, performance, or breaches relating to the sale contract and deeds.

In its amended complaint, Farms sought to quiet title to the property based on its purchase of the property and the recorded deeds. Farms also claimed slander of title based on American’s allegations before the Commission that the deeds were void. It further claimed damages for breach of contract based on American’s actions, including American’s threats that if Farms did not sell the property back to American, American would pursue relief before the Commission. In addition, the amended complaint included claims against American for breach of the covenant of good faith and fair dealing, malicious abuse of process, and violation of the New Mexico Unfair Practices Act.

The district court issued a peremptory writ of mandamus on November 1, 2007, requiring the Commission to show cause why a writ of mandamus should not issue. On November 14, 2007, the Commission filed a verified petition in our Supreme Court seeking a writ of prohibition or writ of superintending control to stay the district court proceeding and for further relief. The Supreme Court denied the petition on December 6, 2007.

While the matter was pending in the Supreme Court, on November 26, 2007, the Commission filed a response and motion to dismiss and requested that the peremptory writ be quashed on the ground that it should have been an alternative writ. The Commission does not raise this specific ground in the present appeal and, therefore, there is no issue on appeal as to whether this peremptory writ was defective because it was not labeled an alternative writ. The writ states that a copy of Farms’ verified petition was attached to the writ “as required by Rule 1-065[(E)] NMRA.” However, the writ in the record on appeal does not contain any attachment. Farms acknowledges that the peremptory writ was, in fact, an alternative writ. See NMSA 1978, § 44-2-6 (1884) (describing alternative and peremptory writs). The district court heard argument on November 27, 2007, and issued a letter ruling on December 6, 2007, finding “that the [Commission] does not have authority to make legal determinations as to the validity, interpretation, enforceability, performance, or breaches of contract and deed between [Farms] and [American].”

The court made a number of determinations in support of its ultimate finding. The court agreed with Farms that the Commission has jurisdiction with statutory authority to determine whether a public utility must obtain the Commission’s approval “before executing a contract,” but that once the utility enters into a contract and executes deeds, as in the present case, any dispute “relating to the construction, interpretation, and validity of the contract and deeds are matters to be determined by courts.” The court also determined that because the Commission did “not have original jurisdiction over the parties with regard to determinations of contract law” and, as well, “is not authorized under statute to make determinations as to contract law,” Farms was not required to “exhaust[] all remedies prior to seeking relief herein.”

In addition, the court relied on this Court’s decision in Summit Properties, Inc. v. Public Service Co. of New Mexico, 2005-NMCA-090, 138 N.M. 208, 118 P.3d 716, considering Summit Properties “to be on[ ]point to the issues in this matter.” The district court pointed out that Summit Properties considered the dispute by a private entity against a public utility and a city to be “of a private nature relating to the public utility’s actions” and not to be a matter of public concern, and the court held that the Commission did not have original jurisdiction over the dispute between Farms and American. The court further pointed out that in Summit Properties this Court stated the general rule to be that “jurisdiction over contract or tort claims made against a public utility usually rests with the courts.” Id. ¶ 11.

With Summit Properties in hand, the district court noted that the Commission had provided no authority “definitively assert[ing] the existence of . . . jurisdiction over private third parties subsequent to contract execution as matters relate to legal validity of the contract.” Further, the court repeated a statement made by Commission counsel that “public utility companies [that] violate . . . [Section] 62-6-12 may be subject to penalties.” The court noted that allowing the Commission to void an executed contract would “not allow a neutral third party to the contract affordable opportunities to have a legal determination made by a court of law as to the construction, interpretation[,] and validity of the contract as well as damages.” The court saw the critical fact to be that Farms and American entered into their contract before any approval process took place. The court concluded that, based on the ruling in Summit Properties and the facts of the present case, the claims against American involving the contract and deeds were within the jurisdiction of the district court.

On December 27, 2007, the district court entered a permanent writ of mandamus commanding the Commission to “[c]omply with the mandatory non-discretionary duty to refrain from making any findings, decisions, or orders as to whether the [d]eeds and [c]ontract between [Farms] . . . and [American] . . . are void” and prohibiting the Commission from “making any finding, decision, or order about the validity, interpretation, enforceability, performance, or breaches of the [c]ontract and [d]eeds.” This writ also expressly stated that it was “limited in scope, and the authority of the [Commission] to make a determination as to whether [American] should have obtained approval is not affected by this Writ.”

The Commission appeals the permanent writ of mandamus to this Court and asserts two points: (1) the writ was procedurally and legally defective because it was flawed by procedural defects and because adequate remedies exist in administrative proceedings and appeal from a Commission final order, and (2) the court erred in ruling that the Commission did not have jurisdiction.

DISCUSSION

Standard of Review

This appeal involves statutory construction. “Statutory interpretation is an issue of law, which we review de novo.” N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105.

“When construing statutes, our guiding principle is to determine and give effect to legislative intent.” Id. ¶ 20. We begin with the plain language of the statute. Id. ¶¶ 20, 21. This appeal also involves the application of law to undisputed facts, which we also review de novo. See Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, ¶ 24, 136 N.M. 630, 103 P.3d 554; Bonito Land & Livestock, Inc. v. Valencia County Bd. of Comm’rs, 1998-NMCA-127, ¶ 5, 125 N.M. 638, 964 P.2d 199.

The Constitution and Laws Relating to the Commission

The Commission is created in Article XI, Section 1 of the New Mexico Constitution, and its general duties are
stated in Article XI, Section 2. Section 2, in part, states:

The public regulation commission shall have responsibility for chartering and regulating business corporations in such manner as the [L]egislature shall provide. The commission shall have responsibility for regulating public utilities, including electric, natural gas[,] and water companies[.]

Pursuant to statute, the Commission has “general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . . , all in accordance with the provisions and subject to the reservations of the Public Utility Act, and to do all things necessary and convenient in the exercise of its power and jurisdiction.” NMSA 1978, § 62-6-4(A) (2003). As quoted earlier in this opinion, the Commission must give “prior express authorization” for a sale.

The public regulation commission cites the Public Utility Act, NMSA 1978, §§ 62-3-1 to -5 (1967, as amended through 2009), the provisions and subject to the reservations of which states that “[t]he alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it[.]” It also complains that, while the peremptory writ refers to the petition and states that it is attached as required under Rule 1-065(E), the petition was not attached to the writ, that Rule 1-065(E) has nothing to do with the remedy of mandamus, and that even if the petition had been attached to the writ, it would have been insufficient to establish the facts required to support issuance of a writ under Section 44-2-6. See Mora County Bd. of Educ. v. Valdez, 61 N.M. 361, 365, 300 P.2d 943, 945 (1956) (stating that “allegations of fact in an application for [an] alternative writ form no part of the writ and ordinarily cannot be so considered in determining the legal sufficiency of the writ”). The Commission thus argues that the permanent writ is fatally deficient. In the district court, the Commission argued that the peremptory writ should be quashed because it did not contain “facts showing the obligation of the [Commission] to perform the act,” as required in Section 44-2-6.

(23) “Al]legation[s] in [an] alternative writ should be made as in ordinary actions. Hence, the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply.” Mora County Bd. of Educ., 61 N.M. at 365, 300 P.2d at 945.

In the present case, the peremptory writ stated only that the Commission was:

1. [To] [c]omply with the manda-
yory non-discretionary duty to refrain from making any findings, decisions, or orders as to whether the [d]eeds and [c]ontract between [Farms] . . . and [American] . . . are void.

2. . . . [P]rohibited from making any finding, decision, or order about the validity, interpretation, enforceability, performance, or breaches of the [c] ontract and [d]eeds between [Farms] and [American].

3. [To] [r]eimburse [Farms’] costs for bringing this action.

The writ also stated that “[a] copy of [Farms’] [v]erified [p]etition for [i]ssuance of [p]eremptory [w]rit of [m]andamus, which is part of its [a]mended [c]omplaint against [American] is attached to this [w] rit as required by Rule 1-065(E)].” The district court heard argument on the issues raised by Farms and subsequently issued a letter decision on the issuance of the peremptory writ. This letter decision does not mention the Commission’s contention that the peremptory writ was legally insufficient, and the Commission does not indicate in its briefs on appeal the extent to which the issue was argued in the district court.

(24) For several reasons, we do not see how the Commission can complain. Although it stated it was not waiving its right to assert that the writ was defective, the Commission answered both the peremptory writ and the petition while at the same time seeking to quash the writ and dismiss the petition. The Commission fully argued the merits of the issues of jurisdiction and administrative remedies. The Commission does not show why we should not construe this full-scale response as a waiver of a claim that the writ was defective. See Mimbres Valley Irrigation Co. v. Salopek, 2006-NMCA-093, ¶ 14-15, 140 N.M. 168, 140 P.3d 1117 (stating that where a party answers the allegations of a writ that is deficient in factual statements, the party waives the defect). Further, the Commission had the opportunity to ask the court to revisit the facts and decision before issuance of the permanent writ on December 27, 2007, but appears not to have taken that opportunity. Also, there is every indication that the Commission had adequate notice of the grounds for the writ, which were essentially legal rather than factual. The hearing examiner had set out the background in her recommended decision to the Commission. In issuing its order, the Commission itself relied on what it considered to be a significant observation of the hearing examiner that explained why prior approval of the sale was necessary. In addition, no rule requires a permanent writ that follows an alternative writ to contain the recitation of facts required in Section 44-2-6. We hold that the Commission cannot successfully attack the permanent writ for legal insufficiency.

Whether the Writs Were Fatally Defective Because of the Existence of Other Adequate Remedies

(25) The Commission points out that NMSA 1978, Section 44-2-5 (1884) states that “[t]he writ shall not issue in any case where there is a plain, speedy[,] and adequate remedy in the ordinary course of law.” To show such a remedy, the Commission cites the Public Utility Act, NMSA 1978, §§ 62-3-1 to -5 (1967, as amended through 2009), for the availability of a full administrative hearing on “any relevant issues [Farms] might wish to raise” and

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allowing Farms the opportunity to request a rehearing. The Commission points out that such a hearing was already in progress when Farms first appeared before the Commission. The Commission also cites NMSA 1978, Sections 62-11-1 to -6 (1941, as amended through 2003), which provide for an appeal to the Supreme Court from a final order of the Commission. It argues that the availability of an appeal is an adequate and timely remedy, citing Birdo v. Rodriguez, 84 N.M. 207, 209, 501 P.2d 195, 197 (1972), and Montoya v. Blackhurst, 84 N.M. 91, 92, 500 P.2d 176, 177 (1972).

Farms, of course, takes issue with the Commission’s adequate-remedy argument because, as acknowledged by the Commission, the Commission cannot adjudicate Farms’ claims against American since by the Commission’s own admission it has no jurisdiction over Farms and no authority to award damages or provide other remedies on Farms’ claims. Therefore, Farms argues, it is without an adequate remedy outside of the jurisdiction of the district court.

The separate arguments of the parties have an air of two ships passing, unnoticed, in the silence of the night. The Commission’s point centers on (1) the consequences if prior approval of the sale transaction was not obtained, and (2) that Farms must exhaust jurisdiction and authority as to that issue through the Commission proceeding, and then through its statutory right to appeal the Commission’s final order directly to the Supreme Court. Farms’ point is that the Commission has no jurisdiction to address the claims Farms raises in the civil action against American and, therefore, it is not possible for Farms to pursue those claims in the administrative proceeding or appeal from the Commission’s final order. These arguments raise essential questions that have not been directly addressed by the parties and on which the record has not been adequately developed.

Neither party adequately addresses what appears to be Farms’ essential concerns if the Commission had exercised the jurisdiction it believes it has. In that event, the Commission could have determined that the sale of the property required but lacked prior approval and pronounce the sale void. This determination would then likely lead to a defense by American in a possible district court action that, based on the Commission’s determinations, Farms was precluded from asserting its pending claims for relief against American relating to the sale transaction. If successful, the defense would foreclose some or all of the claims Farms was asserting in the action. Further, neither party adequately addresses the issues whether, once a determination is made that Section 62-6-12(A) was violated, Farms’ claims asserted in the district court action can be relevant if all that remains is a ministerial act of declaring the sale transaction void and of no effect under Section 62-6-12(B), whether that is the act of the Commission or that of the court.

In regard to the failure of Farms to appeal to the Supreme Court, under Section 62-11-1, the Commission’s determination that it had jurisdiction, the Commission has not raised this specific point on appeal and does not appear to have raised this point in the district court. We therefore do not address it. In regard to the failure of Farms to pursue issues in the declaratory order proceeding that were pending before the Commission, we conclude that the question of adequate remedy is better addressed, if not necessarily subsumed, in the discussion that follows on the Commission’s jurisdiction. A Commission determination under Sections 62-6-12(A) and (B) that the sale of the property violated Subsection (A)(4) and was void under Subsection (B) because it lacked prior approval cannot reasonably be separated from an analysis of the consequences, if any, flowing from that determination on the viability of Farms’ pending civil claims for relief against American in the district court action or of other claims Farms may have to pursue for relief.

Whether the Commission Had Jurisdiction

Generally, in addressing acts of a public utility, when there is a clear demarcation between acts concerning rights of private litigants and acts affecting the public interest, New Mexico case law precludes Commission authority over the former and affirms Commission authority over the latter. Our Supreme Court made this plain in Summit Properties v. Artesia Alfalfa Growers’ Ass’n, 67 N.M. 108, 353 P.2d 62 (1960), when it stated:

The power of the commission does not extend to acts of a utility not affecting its public duties; its jurisdiction is limited to matters or controversies wherein the right of a utility and the public are involved. Its duties begin and end with conservation of the public interest, and are not concerned with individual rights of private litigants; and, ordinarily, it has no power to adjudicate purely private matters between a utility and an individual.

Id. at 117, 118, 353 P.2d at 68, 69 (internal quotation marks and citation omitted). Our decision in Summit Properties reiterates this dividing line of Commission authority. See 2005-NMCA-090, ¶¶ 10-11. It is important to note, however, that neither Southwestern Public Service nor Summit Properties involved application of Section 62-6-12.

Farms argues that, while the statute gives the Commission authority to grant or deny approval of sale transactions, and in the present case to determine whether American was required to get approval prior to the sale of the property, the Commission’s jurisdiction was limited to this approval process and the Commission had no jurisdiction or authority after the sale transaction was consummated to declare contracts and deeds void and then order disposition of the property.

Exercise of such power, Farms argues, not only affects the rights of private litigants it also infringes on the separation of powers by usurping judicial authority. See Sandel, 1999-NMSC-019, ¶ 12 (stating that a separation-of-powers conflict or infringement “occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own”).

We start with the notion that the Commission has “considerable discretion in determining the justness and reasonableness of utility rates.” Id. ¶ 15 (internal quotation marks and citation omitted). That discretion is not boundless; still, although courts may “afford a degree of deference to an agency’s interpretation of a statute the agency is charged with administering and claims the authority to modify this existing law or to create new law on its own”).

As did our Supreme Court in Sandel, we view the statute “in its entirety and with a focus on its end result,” to determine if it is apparent that the Commission has done something outside of its authority. 1999-NMSC-019, ¶ 19.

The critical question in the present case is whether the Commission’s
interpretation of its jurisdiction and statutory authority is correct within the general guidelines set out in our Supreme Court’s decisions. Farms acknowledges that the Commission has the jurisdiction and statutory authority to determine if American was required to obtain Commission approval before the sale of the property, albeit for purposes other than to declare the sale transaction void. Farms notes that the court “carefully crafted the [w]rit . . . to permit the [Commission] to carry out its duties” in that regard and that the writ only followed Summit Properties in prohibiting the Commission from determining the validity, interpretation, enforceability, or breach of the contract and whether the deeds are void. Farms states that “[t]he [w]rit . . . allows the [Commission] to determine if [American] was required to get its approval before the sale, but prohibits the [Commission] from concluding that the deeds and the contract are void.”

Farms has not asserted that the court erred in stating in the writ that “[t]his [w]rit is limited in scope, and the authority of the [Commission] to make a determination as to whether [American] should have obtained approval is not affected by this [w]rit.” Section 62-6-12(A) delegates to the Commission the responsibility and authority to make the prior-approval determination. See also NMSA 1978, § 8-8-4(A) (1998) (directing that “[t]he [C]ommission shall administer and enforce the laws with which it is charged” and that “[t]he [w]rit . . . allows the [Commission] to determine if [American] was required to get its approval before the sale, but prohibits the [Commission] from concluding that the deeds and the contract are void.”

The conundrum that Farms’ concession and court ruling creates for Farms is that once a determination is made by the Commission that approval of the sale transaction was required but not obtained before the sale was consummated, Subsection (B) of the statute appears to be a legislative declaration that the sale is automatically void. For Farms to cede to the Commission the jurisdiction and authority to decide that the sale transaction in this case required, but did not have, prior approval, opens the door to an interpretation that what is left, if anything, is only a ministerial act required under statutory mandate of declaring the sale of the property void. Farms has not contended that Subsection (B) is unconstitutional or that the Legislature intended its declaration to be debatable.

Indeed, the Commission not only argues that it can, if not must, take that ministerial step, it argues that it need not even take any step to declare as void a transaction that violates Section 62-6-12(A). In the Commission’s view, the writ is moot because “[t]he terms of [Section] 62-6-12[(B)] render transactions in violation of [Section] 62-6-12[(A)] void by operation of law—no action of the Commission is required by the statute.” To drive this home, the Commission states its argument this way: “Viz., a transaction entered into without prior approval of the Commission in violation of [Section] 62-6-12[(A)] is void . . . without any further proceedings required to accomplish this—no hearing is required, no submissions or motions must be filed, no predicate must be established, no evidence presented to establish the fact, and arguably no finding by the Commission is necessary.”

We have little doubt that if the Commission were to be prohibited from determining whether the sale required prior approval, American would assert the Section 62-6-12(A) prior-approval requirement as an affirmative defense in the pending district court action, and the court would likely have to hear and decide the prior-approval issue before getting to the merits of Farms’ claims against American. Yet this is precisely the factual issue that the Commission has jurisdiction and authority to determine and will have to wrestle with in the administrative proceeding. On that specific issue, namely, who decides whether the sale required prior approval, the Commission has exclusive jurisdiction, not only because of the legislative direction in Section 62-6-12(A), backed up by the Commission’s constitutional status and Section 8-8-4(A), but also because the Commission has the particular expertise in its regulatory capacity and duty to decide this factual issue.

Nevertheless, whether it is the district court or the Commission that decides the threshold prior-approval issue, the obvious next step is a determination of whether the sale transaction is void and of no effect under Section 62-6-12(B). The issues as to district court or Commission jurisdiction and action concerning whether the sale is void are, however, premature and not ripe for our review. Cf. State ex rel. Stratton v. Roswell Indep. Sch., 111 N.M. 495, 507, 806 P.2d 1085, 1097 (Ct. App. 1991) (requiring the question posed to the appellate court to be real and not theoretical and stating that the district court’s jurisdiction in a declaratory action is limited to cases of actual controversy).

A case presents an actual controversy “if the question posed to the court is real and not theoretical, the person raising it has a real interest in the question, and there is another person having a real interest in the question who may oppose the declaration sought.” Id. The threshold issue that must first be decided is whether the sale of the property required prior approval. That has not to our knowledge been decided. The Commission may determine that the sale transaction did not require prior approval. This Court at this time does not need to address the issues of jurisdiction and action concerning whether the sale is void or valid.

Farms presumably disagrees with this analysis because, as it argued in oral argument before this Court, it should not be forced to participate in a Commission proceeding adjudicating the merits of the prior-approval issue in order to protect its interests. Under the circumstances in this case, we must reject Farms’ argument. On the factual issue of prior approval, which calls for the expertise of the Commission, we are not persuaded that Farms cannot receive a fair hearing should Farms choose to appear on that issue. Such an administrative hearing to resolve factual issues under a statutory directive is common in administrative law. Farms has provided no reason for us to deprive the Commission of its administrative authority, as long as the administrative proceeding in which Farms is allowed to participate as an interested party is conducted fairly and in a manner that gives Farms the opportunity to present evidence, authority, and argument.
We realize that our decision on ripeness and adequacy of the record and argument may leave the district court, the Commission, Farms, and American still somewhat in limbo as to the consequences flowing from any Commission determination that the sale required prior approval. However, even if we were to assume that the Commission will determine that the sale required prior approval pursuant to Section 62-6-12(A), and to further assume that the determination is not appealed or, if appealed, is affirmed, the record before us is simply inadequate for us to get to the bottom of lingering questions. We are not prepared today to say what, if any, consequences flow from those determinations. For example, is there any basis on which Farms could resist or has a right to preclude a declaration pursuant to Section 62-6-12(B) that the sale is void? What preclusive effect, if any, will such determinations have on Farms’ pending and possible claims for relief? Will it make any difference whether it is the Commission or the court that addresses whether the sale is void or valid? Whichever makes the declaration, to what extent, if any, will Farms remain free to pursue remedies it may have against American that are not precluded because the sale is deemed void?

We thus prefer not to address whether the sale is void without a more adequate record. For the meantime, we do not consider the district court’s permanent writ to be a final order. The writ should remain in effect, but should be treated as a temporary writ, pending a Commission determination of whether the sale required prior approval, and until further consideration of issues by the district court, any appeal to or further decision of this Court, or any appeal to or decision of the Supreme Court.

CONCLUSION

We remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
CELIA FOY CASTILLO, Judge
LINDA M. VANZI, Judge
OPINION

ROBERT E. ROBLES, JUDGE

[1] Plaintiffs appeal a grant of summary judgment to Defendant, which determined that certain water rights were conveyed to Defendant by virtue of her deed even though there was no specific language in the deed granting those rights. We reverse. We note that Plaintiffs also moved for summary judgment, but, for the reasons that follow, we decline to consider their motion at this juncture and remand so the district court can consider their arguments in light of the holdings in this Opinion.

I. BACKGROUND

[2] The following facts are undisputed. In 1979, Aaron (also spelled “Aron”) Roybal and his wife, Veronica, divided a parcel of property into fifteen adjoining sections and conveyed a section to each of their children by warranty deed. Plaintiffs are three of Aaron’s children, who were each granted one of the parcels, including Ruth Roybal. All of the deeds contain restrictive language, specifying that they could only be sold to the heirs of Aaron. Specifically, each deed states that “[t]he condition of this deed is that this Unit not be sold except to one of the [h]eirs of [Aaron] Roybal.”

[3] Each deed also contains handwritten language, granting the recipient a right to water from the well located on Lot 13, the lot conveyed to Ruth. Entitlement to the well water is also confined to Aaron’s heirs. Specifically, with some variation, the deed states:

- [There is] a well [o]n [L]ot [N]o. 13 which belong[s] to Ruth. The well belong[s] to all of the heirs[.] A[ll] can use the water with the condition that all have [to] fix[] the pump and get [it] to work. One water right in the El Rancho Ditch [is] to be use[d] by every one of the heirs[.]

The deed to Ruth specifies that the owners of the various lots are entitled to the water from the well on her property.

[4] Luciano Roybal, Aaron’s son and one of the original grantees, conveyed his portion, Lot 15, to his daughter, Bernadette Lujan. Her deed also contains language limiting the sale of the land and the water rights to Aaron’s heirs. After some of the other landowner/grantees attempted to stop Bernadette from using the well, she filed a complaint for injunctive relief, Lujan v. Roybal (Lujan case), which was granted by the district court. Later, she conveyed the parcel back to Luciano, his wife, and other relatives, who then deeded the property to Margie Lujan de la Fuente (Defendant). Defendant is not Aaron’s heir.

[5] The deed to Defendant contains only general language, describing the property and its location and then specifying that the conveyance is “[s]ubject to: Reservations, restrictions, easements of record and taxes for the year 2004 and subsequent years.”

It does not contain any express grant of a right to use the water from the well on Lot 13. To the contrary, it contains no language whatsoever regarding water rights or the well on Lot 13.

[6] Defendant’s right to the well water became a source of contention, and Plaintiffs sued, seeking declaratory and injunctive relief to preclude Defendant from using the well water on Lot 13. The parties submitted cross-motions for summary judgment. Defendant claimed that Plaintiffs were barred from any relief under the doctrine of res judicata based on the Lujan case, the earlier lawsuit involving Bernadette. She also claimed that she had water rights to Lot 13 because any restriction on the transfer of those rights was an unenforceable restriction on alienation and, implicitly, because the water rights were appurtenant to the conveyance of land.

[7] Plaintiffs claimed that, based on the clear language of the earlier deeds, Defendant was not entitled to water rights because she is not Aaron’s heir. They also claimed that the deed to Defendant failed to convey any water rights.

[8] The district court granted summary judgment to Defendant, declaring that she was not Aaron’s heir.

II. STANDARD OF REVIEW

[9] “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. In ruling on a motion for summary judgment, “courts must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light...
most favorable to a trial on the merits.” Garcia-Montoya v. State Treasurer’s Office, 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084. We review an award of summary judgment de novo. Id.

III. DISCUSSION

A. Water Rights by Appurtenancy

{10} As an initial matter, we note that the district court entered no findings or conclusions, and the transcript from the summary judgment hearing was not designated as part of the record. We also note that the undisputed facts set forth in Defendant’s motion for summary judgment only concern the prior Lujan case, Defendant’s prior payments for upkeep and use of the well, and the fact that Defendant is not Aaron’s heir. Therefore, the district court’s reasoning in granting summary judgment is not entirely clear, except to the extent it can be discerned from the statement that judgment is “by virtue of the deed granting her Lot 15.” That language indicates that the district court determined that Defendant was entitled to the water from the well on Lot 13 based on her deed, even though the deed makes no mention of water rights or the well on Lot 13. This was in error.

{11} New Mexico applies the prior appropriation doctrine. In the absence of an express grant of water rights, a conveyance will only include water rights if they are appurtenant to the land. Walker v. United States, 2007-NMSC-038, ¶¶ 21-22, 142 N.M. 45, 162 P.3d 882 (noting that the central feature of the prior appropriation doctrine as it relates to appurtenance is the separate and distinct nature of ownership of a water right from ownership of land and stating that “a water right is not an automatic stick in the bundle of rights a landowner receives upon purchasing even a fee interest in land”); Hydro Res. Corp. v. Gray, 2007-NMSC-061, ¶ 23, 143 N.M. 142, 173 P.3d 749 (“Water rights that are not appurtenant to land are separate items of property and must be separately conveyed.”).

{12} In Walker, our Supreme Court held that, with the exception of water used for irrigation, water rights are not appurtenant to the conveyance of land. 2007-NMSC-038, ¶ 23; see Hydro Res. Corp., 2007-NMSC-061, ¶¶ 17-18 (recognizing that water rights will not automatically accompany a conveyance of land except for water rights, which are appurtenant to irrigated land). The holdings in Walker and Hydro Resources Corp.—Supreme Court decisions filed after the district court entered summary judgment in this matter—convince us that the failure of Defendant’s deed to specifically convey water rights must result in reversal of the district court’s conclusion that she has water rights “by virtue of [the deed]” and reversal of the order of summary judgment. Hydro Res. Corp., 2007-NMSC-061, ¶¶ 23-24 (holding that “[o] nly appurtenant water rights [i.e., irrigation rights] will be conveyed with land when the conveyance is silent on water rights”). Applying the holdings of Walker and Hydro Resources Corp. to this case requires us to conclude that, as Defendant’s deed is silent as to water rights, these rights were not conveyed with the land. Hydro Res. Corp., 2007-NMSC-061, ¶ 24.

{13} In light of the dispositional effect of these two recent Supreme Court cases, we briefly discuss the underlying facts in Walker and Hydro Resources Corp. In Walker, the plaintiffs had grazing permits over federal lands. 2007-NMSC-038, ¶ 2. When the grazing permits were cancelled, the plaintiffs sued, contending that the revocation of the grazing permits “resulted in the loss of water, forage, and grazing rights” without just compensation. Id. ¶ 5 (internal quotation marks omitted). They argued that the water rights over the land were connected to their lease of the land and, therefore, revocation of the lease denied them access to their water rights. Id. ¶¶ 9-12, 32. Our Supreme Court disagreed and held that, even though the plaintiffs were no longer permitted to graze their cattle on the subject lands, they continued to have a vested water right appurtenant to those lands, which was not severed by the loss of the grazing permit. Id. ¶¶ 33-34.

{14} In Hydro Resources Corp., the plaintiff claimed water rights to be used in connection with certain mining claims. The plaintiff’s predecessor-in-interest had leased the mining rights to the defendants’ predecessor-in-interest. 2007-NMSC-061, ¶¶ 7-9. The defendants’ predecessor-in-interest dug a number of wells on the leased premises, thus establishing appropriation by beneficial use. Id. ¶¶ 4-6. The mining lease then expired and reverted to the plaintiffs’ predecessor. Id. ¶ 7. The plaintiffs argued that the water rights also reverted because, as the water was necessary for the mining claims, they were appurtenant out of necessity and passed back automatically with the mining rights. Id. ¶ 13. The Supreme Court disagreed and reiterated that the “sole exception to the general rule that water rights are separate and distinct from the land is water used for irrigation.” Id. ¶ 18 (citation omitted).

{15} In urging this Court to affirm the order granting summary judgment, Defendant sets out provisions of the warranty deed conveying the property to Luciano and traces the history of the subsequent conveyance to Bernadette—the outcome of the Lujan case—and the reconveyance to Luciano and others. She notes that there is nothing restricting water rights in the deed from Aaron to Luciano. From the lack of any restrictive language, she concludes that “[t]he deed clearly transfers . . . the right to use the water from the well on [Lot 13]” and argues that the language stating, “the well belong[s] to all of the heirs [and] all can use the water,” is not a reservation of water rights in Aaron. Defendant then contends that, through her warranty deed, she acquired in fee simple all of the rights her predecessors-in-interest acquired through the deed from Aaron, and all of the rights her predecessors-in-interest acquired by virtue of the judgment in the Lujan case. She argues that these water rights survive despite their absence from her deed.

{16} In light of the clear holdings in Walker and Hydro Resources Corp., we disagree. Regardless of what water rights were transferred to Luciano, it is clear that the deed to Defendant does not include any language conveying water rights to her. Furthermore, as more fully discussed in analyzing Defendant’s arguments based on res judicata, she is not entitled to water rights by virtue of the judgment in the Lujan case.

{17} In urging affirmance despite the recent Supreme Court decisions, Defendant contends that the land was used for irrigation, and the use remains for irrigation because the water rights were never severed pursuant to statute. Plaintiffs vigorously dispute Defendant’s contention about prior irrigation use. Even if Defendant is correct, the district court made no findings regarding irrigation and, at best, it is a factual inquiry that can be assessed on remand. Cf. Garcia-Montoya, 2001-NMSC-003, ¶ 7 (stating that summary judgment should be denied if there is even the slightest doubt regarding whether there are any outstanding issues of material fact).

{18} Defendant also continues to question whether irrigation is the only way in which a water right becomes appurtenant and suggests that rights could become appurtenant by virtue of a court order, declaring the water right was “imbedded in her deed” such as the order in the Lujan case, and an expression of the grantor’s intent to transfer the water rights as set forth in
Luciano’s affidavit. We disagree for two reasons. First, as discussed in the analysis of Defendant’s res judicata argument which follows, the district court’s language that water rights were “imbedded in her deed” in the Lujan case was interpreting Bernadette’s deed, which expressly included water rights. Moreover, the clear language in Walker corrects any suggestion from prior case law “that uses of water other than for irrigation purposes are appurtenant to land.” 2007-NMSC-038, ¶ 42; see Hydro Res. Corp., 2007-NMSC-061, ¶ 31 (stating that “a need for water rights does not establish ownership of those rights, just as it does not result in water rights becoming appurtenant to land”).

Finally, Defendant argues that the underlying facts in Walker and Hydro Resources Corp. are sufficiently distinguishable from the facts in this case to warrant affirmance of the district court’s order granting summary judgment. She attempts to distinguish Walker and Hydro Resources Corp. because, in those cases, the grantor and the grantee or lessee of the land disputed the ownership of the water rights while, in this case, Defendant’s water rights are being challenged by “strangers to her chain of title.” We fail to see how this distinction warrants a different result. Plaintiffs have the right to use the well and the water appurtenant to that well. The well is located on the lot owned by Ruth, and the complaint specifies that Defendant’s use of the well is diminishing the flow of water and causing actual harm.

Defendant also seeks to distinguish Walker and Hydro Resources Corp. because, in those cases, none of the claimed water rights existed before the permittees or lessees applied the water to beneficial use, or filed an application with the Office of the State Engineer to develop the wells while, in this case, the well was permitted in 1957 and specifically followed the land through various transfers which followed. Defendant has failed to explain how this distinction warrants a different result given that the water rights were specifically transferred in the earlier conveyances, but not in her deed.

Lastly, Defendant argues that, in Walker and Hydro Resources Corp., none of the losing parties had previously obtained a judgment, declaring that they had an enforceable water right. We understand this argument to reference Defendant’s alternative argument that summary judgment should stand pursuant to the doctrine of res judicata. As discussed in the following section, we are unpersuaded by this argument.

B. Res Judicata

Defendant contends that the doctrine of res judicata bars Plaintiffs’ suit because the same issues were already decided in favor of Bernadette in the Lujan case. It does not appear that the district court relied on this doctrine in granting summary judgment to Defendant. However, to whatever extent the court may have relied on the doctrine of res judicata, it did so in error.

“Claim preclusion, or res judicata, precludes a subsequent action involving the same claim or cause of action.” Bank of Santa Fe v. Marcy Plaza Assocs., 2002-NMCA-014, ¶ 13, 131 N.M. 537, 40 P.3d 442. In order to bar a lawsuit under the doctrine of res judicata, four elements must be met: “(1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3) the same cause of action, and (4) the same subject matter.” Id. (alteration in original) (citation omitted). The party seeking to bar the claim has “the burden of establishing res judicata,” and we review de novo a district court’s determination that res judicata bars a party’s claim. Anaya v. City of Albuquerque, 1996-NMCA-092, ¶ 3, 122 N.M. 326, 924 P.2d 735.

We first consider whether Defendant has established identity of parties or privies and identity of capacity. In the Lujan case, Bernadette and Harold Lujan filed the complaint seeking an injunction against eight defendants, including two of the Plaintiffs in this action, Lillian Roybal Duran and Julia Roybal Manzanares. We note that Ruth Roybal, the third plaintiff in this case, was not a party in the Lujan case, although she did testify in that matter. In her claim for injunctive relief, Bernadette sought, among other things, access to the water from the well located on Lot 13. Bernadette was a predecessor-in-interest to Defendant on Lot 15 and reconveyed the lot to Luciano and others, who then conveyed it to Defendant. Therefore, we agree that Defendant is the successor-in-interest to Bernadette, one of the plaintiffs in the Lujan case.

Assuming without deciding that there was sufficient similarity between the parties to satisfy the first and second elements of res judicata, Defendant’s reliance on that doctrine still fails because the claim and subject matter in this case are not the same as the claim and subject matter litigated in the Lujan case. See Bank of Santa Fe, 2002-NMCA-014, ¶ 14 (“If the causes of action are different, res judicata is inapplicable.”). In evaluating what constitutes the same claim for purposes of res judicata, we apply the transactional approach. See Moffat v. Branch, 2005-NMCA-103, ¶ 17, 138 N.M. 224, 118 P.3d 732. Under this approach, we consider three factors: “(1) the relatedness of the facts in time, space, origin, or motivation; (2) whether, taken together, the facts form a convenient unit for trial purposes; and (3) whether the treatment of the facts as a single unit conforms to the parties’ expectations or business understanding or usage.” Bank of Santa Fe, 2002-NMCA-014, ¶ 16 (internal quotation marks omitted) (quoting Anaya, 1996-NMCA-092, ¶ 12).

In this case, applying a transactional approach leads us to conclude that the requirements for the same claim or cause of action have not been met. The claim and subject matter in both cases may at first glance appear similar because in both cases the trial court is asked to determine whether the party owning Lot 15 is entitled to access to the well water on Lot 13. However, in terms of factual relatedness, the cases do not involve the same material facts because the deeds at issue and the parties’ status are significantly different. In the Lujan case, it was not disputed that the plaintiff, Bernadette, was an heir of Aaron. Furthermore, the deed from Luciano to Bernadette includes express language granting access to the well water while, in this case, the deed is silent.

In light of the language of Bernadette’s deed and her status as Aaron’s heir, the central issue in this case—whether Defendant was entitled to water rights, even though her deed contained no mention of such rights, and even though water rights were purportedly limited to heirs—was not at issue and was never litigated in the Lujan case. Therefore, while the result sought in both lawsuits appears similar, the underlying facts are different because the respective owners of Lot 15 do not share a common identity as heirs of Aaron, and their deeds are sufficiently dissimilar that different legal theories are invoked. Based upon the foregoing, Defendant has failed to establish the third and fourth elements required for res judicata. See Silva v. State, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987) (“Where the ultimate facts necessary for the resolution of two suits are different, and the issues necessarily dispositive in the prior cause are different from those in the subsequent cause, the doctrine of res judicata is inapplicable.”).
C. Unreasonable Restraint on Alienation

[28] In order to grant summary judgment to Defendant, a non-heir, the district court had to conclude that the provision in the deed to Luciano restricting water rights to Aaron’s heirs was invalid and unenforceable as an unreasonable restraint on alienation, even though there is no language in the order so stating. Based upon our decision to reverse summary judgment due to the lack of language in summary judgment pleadings, we need not consider whether the restriction on the granting of water rights would have been enforceable if Luciano had attempted to expressly convey his water rights to Defendant in her deed. If Luciano or any of Aaron’s heirs conveys his or her parcel to a non-heir and attempts to include an express conveyance of the water rights, the question of whether the restriction on water rights is enforceable can be considered at that time. However, given that Defendant’s deed does not include water rights, we decline to consider whether the water rights restriction would have been enforceable if the deed had attempted to transfer the water rights to a non-heir by expressly conveying these rights. See generally City of Las Cruces v. El Paso Élec. Co., 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 (stating that appellate courts avoid giving advisory opinions).

D. Need for Remand

[29] Although the parties raised the issue of whether the land was used for irrigation and whether the parties complied with the statutory permitting procedures in their summary judgment pleadings, it does not appear these issues were addressed at the summary judgment hearing. We note that Plaintiffs contend that there are no issues of fact precluding this Court from evaluating their motion for summary judgment as well as the district court’s grant of summary judgment to Defendant. However, Defendant contends there are factual discrepancies concerning whether the land was formerly used for irrigation and concerning the proper file number assigned by the State Engineer to Lot 13. Given that the district court did not consider either of these issues, we are disinclined to consider Plaintiffs’ summary judgment motion at this juncture and instead remand so that the district court can first rule on these matters. See generally Garcia-Montoya, 2001-NMSC-003, ¶ 7 (noting that “[i]f there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied” (internal quotation marks and citation omitted)).

[30] In summary, it appears that the district court, not having the benefit of the Supreme Court’s opinions in Walker and Hydro Resources Corp., based its ruling on Defendant’s mistaken interpretation of the law. At this juncture, the appropriate course is to allow the district court to consider whether either party has established a case for summary judgment and, if necessary, permit the parties to develop more fully the facts that are relevant to the legal analysis established in Walker and Hydro Resources Corp. See Garcia-Montoya, 2001-NMSC-003, ¶ 48 (“On appeal, when the trial court’s grant of summary judgment is grounded upon an error of law, the case may be remanded so that the issues may be determined under the correct principles of law.”) (quoting Rummel v. Lexington Ins. Co., 1997-NMSC-041, ¶ 16, 123 N.M. 752, 945 P.2d 970).

IV. CONCLUSION

[31] For the foregoing reasons, we reverse and remand to the district court for further proceedings.

[32] IT IS SO ORDERED.

ROBERT E. ROBLES, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
TIMOTHY L. GARCIA, Judge
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Temporary Chambers Law Clerk
The U.S. District Court, District of NM, is currently recruiting for a temporary law clerk (employment dates 1/4/10 to 4/2/10). Detailed information regarding the position can be obtained from the Court’s web site at: www.nmcourt.fed.us/web/DCDCOS/dcidindex.html. Application process through OSCAR at osccourt.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO Employer.

Trial Attorney
Valencia County
The 13th Judicial District Attorney’s Office is accepting applications for an experienced, mid to senior level trial attorney for the Valencia County Office, located in Belen, NM. This position requires prosecution of criminal cases and performs complex felony work. Requires a minimum of 7 years experience in prosecuting major felony cases. Salary is dependant on experience. Send resumes to Carmen Gonzales, Human Resources Administrator, 333 Rio Rancho Blvd., Suite 201, Rio Rancho, NM 87124, or via E-Mail to: CGonzales@da.state.nm.us. Deadline: Open until position is filled.

Litigation Legal Assistant
Our busy personal injury firm is seeking a motivated and driven full time Litigation Legal Assistant. In addition to a minimum of 1 year of litigation experience, personal injury, medical or insurance experience is required. Qualified candidates will have the ability to efficiently multitask while remaining compassionate, professional and courteous. Those applying should take pride in their work, should enjoy working in a fast paced environment, should be extremely organized and should have a passion for client service. Office hours are Monday - Friday, 8 am - 5 pm with flex time available each Friday. Typical duties will include, but will not be limited to the following: Frequent verbal and written communication with clients, medical providers, attorneys and insurance companies; Thorough and accurate documentation of client files; Frequent review of medical records and insurance documents; Completion of intake interviews with potential clients; Monitoring progression of each case to ensure efficiency; Participating in ongoing internal training programs; Meeting multiple simultaneous deadlines each day. Benefits are available including health, dental, life, 401k, paid holidays and paid time off. Please submit salary requirements and three professional references along with your resume to alucer@898-bell.com

Legal Assistant/Paralegal
Extensive prior experience in civil litigation and document control/management required. Seeking professional, organized, and highly skilled individual with attention to detail. Excellent computer skills required. All inquiries confidential. Competitive benefits. Resumes, Atkinson, Thal & Baker, PC, 201 Third Street NW, Suite 1850, Albuquerque NM 87102.

Paralegal/Legal Assistant
Busy downtown personal injury firm is looking for an experienced paralegal/legal assistant. Full time position, full benefits. Must be detail oriented and enjoy working in a fast paced office. Email resumes to parajobsearch@yahoo.com. Fax resumes to 505.938.2301. No calls.
POSITIONS WANTED

Corporate/Finance/Contracts Attorney Available
Harvard Law School graduate with three years of national firm experience has relocated to Albuquerque and seeks full-time, part-time, or project work. Licensed in four states: NY, IL, MN, WI. Will take NM bar exam in February 2010. Also has MBA and experience as Harvard Law Review editor and Navy nuclear submarine officer. Please see WallerLaw.LLC.com for more information.

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Best location in town, one block or less from the federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, daily runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

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1030 sq.ft. Corner of Louisiana and Candelaria. Reception area, two offices, work room, private bathroom. 293-3776.

Law Office For Rent
Law office for rent, sharing office space with two other attorneys. Located at 8010 Menaul NE. Front door parking. Hal Simmons, 299-8999.

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Santa Fe Downtown Law Firm Has Office Space Available
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP - 347 E. Palace Ave. Rent includes receptionist; use of conference room; library, high speed internet available; free parking for staff and clients; copy machine available, security and janitorial services. The law firm is a pleasant, relaxed, non-smoking atmosphere. Client referrals possible. Please call 988-8979.

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Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Single attorney office space (office plus secretary-paralegal and small reception area if needed) available within well-improved and appointed 2695 square foot office. Includes shared reception, secretarial areas, conference room, coffee bar, and lounge with three other small attorney firms. Rent of $1175.00 includes reception coverage. One (1) year lease required. Call Ron Nelson 883-9662- Uptown Square.

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