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Special Insert:
  CLE-At-Sea

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NEW MEXICO TRIAL LAWYERS’ FOUNDATION
THE "LAST CHANCE" SEMINAR
THE BEST OF THE BEST
Video Highlights of Top Rated Speakers
plus
Professionalism Option

5.0 CLE CREDITS
INCLUDING 2.7 GENERAL, 1.0 ETHICS PLUS 1.3 PROFESSIONALISM CREDIT OPTION

DECEMBER 18, 2009

ALBUQUERQUE
UNM Continuing Education Conference Center
1634 University Blvd. NE
G&H Classrooms

SANTA FE
Ghost Ranch in Santa Fe
401 Old Taos Highway
Perea Room

Program Schedule

8:00 a.m.  Check-In/Registration
8:30 a.m.  Ethical Scenarios
            Lawyer Panel
9:30 a.m.  Insurance Roundup
            Maureen Sanders, Esq.
10:30 a.m. Coming Attractions - Pending Cases
            Lee Hunt, Esq.
11:00 a.m. Governmental Torts
            Jolene Youngers, Esq.
11:30 a.m. Lessons from Tafoya v. Rael
            Bruce E. Thompson, Esq.
12:15 p.m. Adjourn

Additional Option
1:15 p.m.  Current Professional Scenarios
Professional scenarios presented to the audience for solutions and discussion with the panel.
            Lawyer Panel
2:05 p.m.  Professionalism Recognized - New Mexico Lawyers Recognized for Professional Conduct
            Update on the NM Supreme Court’s Efforts on Professionalism & Ethics
            Chief Justice Edward L. Chávez
            New Mexico Supreme Court
2:35 p.m.  Adjourn

In Practice:  □  Less than 5 years  □  5-10 years  □  Over 10 years

Name
NM Bar ID No.
Firm
Mailing Address
City/State/Zip:
Phone:
Fax:
E-mail

Please return to:  New Mexico Trial Lawyers’ Foundation
                  P.O. Box 301, Albuquerque, NM 87103-0301

Location:  □ Albuquerque  □ Santa Fe

Tuition (After December 11, 2009 increases by $10)
I am an NMTLA Member and want to register for the:
□ Program Only (8:30 a.m. - 12:15 p.m.) ................................................. $70.00
□ Program PLUS Professionalism Option (8:30 a.m. - 2:35 p.m.) .......... $100.00
□ Professionalism Option Only (1:15 p.m. - 2:35 p.m.) ....................... $50.00
I am an NON NMTLA Member and want to register for the:
□ Program Only (8:30 a.m. - 12:15 p.m.) ................................................. $95.00
□ Program PLUS Professionalism Option (8:30 a.m. - 2:35 p.m.) .......... $135.00
□ Professionalism Option Only (1:15 p.m. - 2:35 p.m.) ....................... $60.00
I am an JUDGE and want to register for the:
□ Program Only (8:30 a.m. - 12:15 p.m.) ................................................. $25.00
□ Program PLUS Professionalism Option (8:30 a.m. - 2:35 p.m.) .......... $25.00
□ Professionalism Option Only (1:15 p.m. - 2:35 p.m.) ....................... $25.00
I am an JUDICIAL CLERK and want to register for the:
□ Program Only (8:30 a.m. - 12:15 p.m.) ................................................. $25.00
□ Program PLUS Professionalism Option (8:30 a.m. - 2:35 p.m.) .......... $25.00
□ Professionalism Option Only (1:15 p.m. - 2:35 p.m.) ....................... $25.00
I am an APPELLATE LAW CLERK and want to register for the:
□ Program Only (8:30 a.m. - 12:15 p.m.) ................................................. $25.00
□ Program PLUS Professionalism Option (8:30 a.m. - 2:35 p.m.) .......... $25.00
□ Professionalism Option Only (1:15 p.m. - 2:35 p.m.) ....................... $25.00

Payment □ Check Enclosed □ Visa □ MasterCard □ Amex
To register with a credit card complete registration form including credit card information and fax form to 243-6099 or call 243-6003.

Card No. ________________________________________________________
Exp. Date: ____________________________ CVC Code: __________________
Billing Address: __________________________________________________
_____________________________________________Zip ________________
Signature ________________________________________________________
(cardholder signature required)

Program Chairs
Kristina Bogardus - Albuquerque  Peter White - Santa Fe

Payment □ Check Enclosed □ Visa □ MasterCard □ Amex
To register with a credit card complete registration form including credit card information and fax form to 243-6099 or call 243-6003.

Card No. ________________________________________________________
Exp. Date: ____________________________ CVC Code: __________________
Billing Address: __________________________________________________
_____________________________________________Zip ________________
Signature ________________________________________________________
(cardholder signature required)

In Practice:  □  Less than 5 years  □  5-10 years  □  Over 10 years

Name
NM Bar ID No.
Firm
Mailing Address
City/State/Zip:
Phone:
Fax:
E-mail
Let us host your next video conference

AVAILABLE JANUARY 4, 2010

The State Bar of New Mexico will now offer video conferencing to members

• Reduce travel expenses
• Save valuable time
• Conference sites in Albuquerque, Las Cruces, Roswell
• Member cost – $35 per hour, per location

Recording of depositions will be available at additional charges. Room rental fees apply and after hour fees may apply.

For more information or to schedule your next video conference, contact Tony Horvat at 505.797.6033 or email thorvat@nmbar.org
TWO WAYS TO REGISTER

INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, 24 hour access

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

With respect to the courts and other tribunals:
I will be respectful toward and candid with the court.

Meetings

December

7
Attorney Support Group, 5:30 p.m., First United Methodist Church
8
Appellate Practice Section Board of Directors, noon, Rodey Law Firm
9
BBC Finance Committee Meeting, 9 a.m., BBC Meeting, 10 a.m., Supreme Court Building, Santa Fe
9
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
10
Intellectual Property Section Board of Directors, noon, Rodey Law Firm
10
Technology Committee, 4 p.m., State Bar Center
12
Young Lawyers Division Board of Directors, 10 a.m., State Bar Center

State Bar Workshops

December

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

February

24
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

March

24
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

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

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below.

Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic cases</td>
<td>1981–1992</td>
<td>January 1, 2010</td>
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<tr>
<td>(505) 827-4687</td>
<td>Relations, children’s court cases</td>
<td></td>
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<tr>
<td>9th Judicial District Court</td>
<td>Evidence and exhibits including poster boards filed in the following case types:</td>
<td>2005–2008</td>
<td>January 15, 2010</td>
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<td>- Competency/Mental Health</td>
<td>1991–2008</td>
<td>January 15, 2010</td>
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<tr>
<td></td>
<td>- Adoption; Sequestered Incapacitated (SI)</td>
<td>1978–2008</td>
<td>January 15, 2010</td>
</tr>
<tr>
<td></td>
<td>- Domestic</td>
<td>1950–2008</td>
<td>January 15, 2010</td>
</tr>
<tr>
<td></td>
<td>- Tapes filed in criminal, civil, children’s court, domestic, competency/moral health, adoption and probate cases</td>
<td>1970–2008</td>
<td>January 15, 2010</td>
</tr>
<tr>
<td></td>
<td>- Tapes filed in the following case types:</td>
<td></td>
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</tbody>
</table>
II, the Hon. Michael E. Vigil, Division IV, and the Hon. Daniel A. Sanchez, Division VII, will be reassigned to the Hon. Sheri A. Raphaelson, Division V. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 4, 2010 to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

**Twelfth Judicial District Court Nominating Commission**

Four applications have been received in the Judicial Selection Office as of 5 p.m., Nov. 23, for the judicial vacancy on the 12th Judicial District Court due to the retirement of the Honorable Sandra A. Grisham. The District Judicial Nominating Commission will meet at 9:30 a.m., Dec. 11, at the Otero County Courthouse, 1000 New York Avenue, Alamogordo, to evaluate the applicants for this position. The meeting is open to the public. Those wishing to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are:

- William H. Brogan
- Mandy K. Denson
- Dominic E. Dutton
- David I. Rupp

**Bernalillo County Probate Court Holiday Closures**

The holiday schedule for the Bernalillo County Probate Court is as follows:

- Dec. 24–25: Closed
- Dec. 28–30: Open
- Dec. 31-Jan. 3, 2010: Closed

Anyone who needs to file a probate case during the time the court is closed should contact the 2nd Judicial District Court, (505) 841-7451 or (505) 841-7425, regarding its holiday hours.

**U.S. District Court, District of New Mexico Holiday Court Closure**

The U. S. District Court for the District of New Mexico will be closed Dec. 24. Visit the Court’s website at www.nmcourt.fed.us for additional information.

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**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:
  - Dec. 21, 7:30 a.m.

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

**Board of Bar Commissioners**

**Meeting Agenda**

1. Approval of Sept. 11 meeting minutes
2. Finance Committee report
3. Acceptance of October financials
4. Executive Committee report
5. Executive session
6. Committee on Diversity in the Legal Profession Update report and recommendations
7. Approval of Governmental Affairs Bylaws
8. Bylaws and Policies Committee report and recommendations
9. Appointment to Client Protection Fund Commission
10. Approval of Public Legal Education Commission Resolution
11. 2010 BBC meeting schedule
12. Request for Executive Committee to Discuss BBC meeting agendas
13. Elect new secretary-treasurer
14. UPL Task Force report
15. Disciplinary Board report
16. President’s report
17. President-Elect’s report
18. Bar Commissioner and Division (SLD, YLD and PD) reports
19. Executive Director report
20. State Bar Newsletter and department reports
21. Presentation of Outgoing Commissioner plaques
22. New business

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**Immigrants Pro Bono: Considerations for the Multicultural Client (1.0 professionalism CLE credits) Dec. 16 at the State Bar Center, Christina Rosado-Maher, Rebecca Kitson, and Iris Calderon will be the featured speakers. Register online at www.nmbarcle.org or fax to (505) 797-6071. The section’s annual meeting will immediately follow the CLE.**

**NREEL Section Winter CLE Program and Annual Meeting**

The Winter CLE Program of the Natural Resources, Energy and Environmental Law Section is Dec. 18 at the State Bar Center. Energy Production in New Mexico—Developments, Liability and Damages (4.5 general, 1.0 ethics, and 1.0 professionalism CLE credits) will address issues such as developments, liability and damages; case law developments, regulatory initiatives and trends; ethics questions facing section members; and going beyond what regulators require. Lunch will be provided during which the NREEL annual business meeting will be conducted. Register online at www.nmbarcle.org or fax to (505) 797-6071.
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.

**Paralegal Division**

**4th Annual Paralegal Institute**

Join the Paralegal Division for the 4th Annual Paralegal Institute (5.0 general and 1.0 ethics CLE credits) from 8 to 4 p.m., Dec. 11, at the State Bar Center. Topics will include ethics, PowerPoint for trial, medical records and HIPAA, technology tips, fact-finding investigation tips and techniques, collection of judgments, identity theft issues, and structured settlements. The program is also available via live webcast. Register for the webcast in advance using code “PARA09.” See the CLE-at-a-Glance insert in the Nov. 23 (Vol. 48, No. 47) Bar Bulletin for more information.

**Young Lawyers Division Holiday Reception**

The Young Lawyers Division cordially invites the wonderful attorney and paralegal program volunteers to a holiday reception to recognize their generous contributions to YLD community service projects over the years. The reception will be from 5:30 to 7:30 p.m., Dec. 11, at Zinc Wine Bar Bistro, 3009 Central Ave., Albuquerque. In the spirit of the holiday season, each guest is invited to bring one unwrapped gift for a child 12 years and under for Toys for Tots. R.S.V.P. by Dec. 8 to Martha Chicoski, mary.martha.chicoski@farmers.com.

**Other News**

**New Mexico Aging and Long Term Services Department Volunteers Needed**

Santa Fe has the best job search support center in the state for persons 50+. The 50+ Employment Connection needs volunteers to contact Santa Fe businesses to develop job opportunities. Call Sondra Match (505) 474-3800, ext 1007, or (505) 231-2129.
Hats Off

The Indian Law Section of the State Bar of New Mexico would like to thank all participants of its Fall Mixer held on November 5th.

Welcome New Section Members
Justin Jackson
Dion Killshback

The Indian Law Section appreciates the door prizes donated by
American Indian Law Center, Inc.
Aurora Publishing, Inc.
Justin Ray Jackson
DECEMBER

7 2009 Business Law Institute
VR, State Bar Center
Center for Legal Education of NMSBF
5.5 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

7 An Attorney’s Guide to Good Lawyering for People With Disabilities
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

7 Digital Media in the Courtroom
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

7 Drafting Documents That Any Client Might Appreciate
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

7 Ethics Risks Practicing Law
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbarcle.org

7 Immigrant Rights in New Mexico
VR, State Bar Center
Center for Legal Education of NMSBF
5.5 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

7 LLCs: From Formation to Special Uses
Albuquerque
NBI, Inc.
6.6 G
1-800-930-6182
www.nbi-sems.com

7 Malpractice in an Uncertain Economy
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

7 Need to Tame or Train the Billable Beast?
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

7 2009 Bridge the Gap
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G, 1.0 E, 1.0 P
(505) 797-6020
www.nmbarcle.org

7 24th Annual Bankruptcy Year-in-Review
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G, 1.0 P
(505) 797-6020
www.nmbarcle.org

7 Art of Representing Children
Albuquerque
NBI, Inc.
5.0 G, 1.0 E
(800) 930-6182
www.nbi-sems.com

8 Compensation Issues in LLCs
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

8 Road and Access Law
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

8 Subordinate Lawyers: Sit, Stay, Roll Over No More
Telephone Seminar
TRT, Inc.
1.0 E, 1.0 P
1-800-672-6253
www.trtcle.com

9 Cybersleuth’s Guide to the Internet
State Bar Center
Center for Legal Education of NMSBF
6.0 G
(505) 797-6020
www.nmbarcle.org

9 Ethics of Billing
Santa Fe
Paralegal Division, Santa Fe
1.0 E
(505) 986-2502

9 Handling Real Estate Transactions With Confidence
Albuquerque
NBI, Inc.
5.6 G, 1.0 E
(800) 930-6182
www.nbi-sems.com

10 How to Do Your First Personal Injury Case and a Defense Perspective
State Bar Center
Center for Legal Education of NMSBF
4.0 G, 1.0 E, 1.0 P
(505) 797-6020
www.nmbarcle.org
10 Post-Mortem Estate Planning
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

11 2009 Annual Civil Rights Law Update
Albuquerque
N.M. Defense Lawyers Association
4.5 G, 1.0 E, and 1.0 P
(505) 797-6021
www.nmnlaw.org.

11 4th Annual Paralegal Institute
State Bar Center
Center for Legal Education of NMSBF
5.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

11 Ethics of Client Selection
Teleseminar
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbarcle.org

11 Guardianship and Conservatorship in New Mexico
Albuquerque
Medical Educational Services PDN
4.2 G, 1.0 E, 1.0 P
(715) 836-9900

11 Professionalism, Ethics, and More
Las Cruces
New Mexico Criminal Defense Lawyers Association
2.0 G, 1.0 E, 1.0 P
(505) 992-0050, info@nmcdla.org or www.nmcdla.org

14 An Attorney’s Guide to Good Lawyering for People With Disabilities
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

14 Fast and Free Online Research for Your Legal Practice
Albuquerque
NBI, Inc.
5.0 G, 1.0 E
1-800-930-6182
www.nbi-sems.com

14 Genetic Testing
VR, State Bar Center
Center for Legal Education of NMSBF
3.2 G
(505) 797-6020
www.nmbarcle.org

14 Procurement Code Institute
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

14 Tag Team Trial Clydesdales in the Courtroom with Terrence MacCarthy and Dale Cobb
VR, State Bar Center
Center for Legal Education of NMSBF
6.5 G
(505) 797-6020
www.nmbarcle.org

15 2009 Real Property Institute
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

15 Ethics of Asset Protection Planning
Teleseminar
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

15 Probate Process From Start to Finish
Albuquerque
NBI, Inc.
5.5 G, 1.0 E
(800) 930-6182
www.nbi-sems.com

15 Cybersleuth’s Guide to the Internet
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G
(505) 797-6020
www.nmbarcle.org

15 Ethos of Asset Protection Planning
Teleseminar
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbarcle.org

15 I Was From Venus and My Lawyers Were From Mars
VR, State Bar Center
Center for Legal Education of NMSBF
2.0 E, 1.0 P
(505) 797-6020
www.nmbarcle.org

16 6th Annual Elder Law Seminar
VR, State Bar Center
Center for Legal Education of NMSBF
2.9 G, 1.0 P
(505) 797-6020
www.nmbarcle.org

16 Forensic Accounting 101
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

16 How to Represent Immigrants Pro Bon
State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

16 Medicare Set Asides
VR, State Bar Center
Center for Legal Education of NMSBF
2.7 G
(505) 797-6020
www.nmbarcle.org

17 Collection Law and Bankruptcy Law
Las Cruces
NBI, Inc.
6.0 G
(800) 930-6182
www.nbi-sems.com

17 Ethics Workout: Mental Aerobics for Solving Ethics Problems
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

17 “Know-How”: Fundamentals of Protecting Your Client’s Trade Secrets
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org
## 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 December 7, 2009**

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

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Description</th>
<th>Date Filed</th>
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<tr>
<td>NO. 32,085</td>
<td>Brown v. Heredia (COA 28,501)</td>
<td>11/30/09</td>
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<tr>
<td>NO. 32,084</td>
<td>State v. Adrian N. (COA 28,623)</td>
<td>11/10/09</td>
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<tr>
<td>NO. 32,083</td>
<td>Smith v. Enmush, Inc. (COA 28,449)</td>
<td>11/10/09</td>
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<td>NO. 32,082</td>
<td>Farmington v. Dickerson (COA 29,540)</td>
<td>11/10/09</td>
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<td>NO. 32,078</td>
<td>State v. Valero (COA 29,158)</td>
<td>11/10/09</td>
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<td>NO. 32,076</td>
<td>State v. Rodriguez (COA 29,345)</td>
<td>11/10/09</td>
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<td>NO. 32,075</td>
<td>State v. Harvey (COA 29,563)</td>
<td>11/10/09</td>
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<td>NO. 32,071</td>
<td>State v. Wilson (COA 28,138)</td>
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<td>NO. 32,070</td>
<td>State v. Borunda (COA 28,372)</td>
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<td>NO. 32,069</td>
<td>State v. Martinez (COA 28,665)</td>
<td>11/10/09</td>
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<td>NO. 32,066</td>
<td>State v. Alderete (COA 28,325)</td>
<td>11/10/09</td>
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<td>NO. 32,064</td>
<td>Cordova v. Cordova (COA 28,208)</td>
<td>11/10/09</td>
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<tr>
<td>NO. 32,063</td>
<td>Jordan v. Allstate Insurance Co. (COA 28,638)</td>
<td>11/10/09</td>
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### Certiorari Granted but not yet Submitted to the Court:

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### Writs of Certiorari

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http://nmsupremecourt.nmcourts.gov.

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

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**Petition for Writ of Certiorari Denied:**

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Slip Opinions for Published Opinions may be read on the Court's website: [http://coa.nmcourts.gov/documents/index.htm](http://coa.nmcourts.gov/documents/index.htm)
## Clerk’s Certificate of Name, Address, and/or Telephone Changes

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<tr>
<th>Name</th>
<th>Address</th>
<th>Phone Numbers</th>
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<tbody>
<tr>
<td>Vidalia Chavez</td>
<td>Office of the Public Defender, 505 Marquette Avenue, NW, Ste. 120, Albuquerque, NM</td>
<td>505-841-6954, 505-841-6953 (telecopier)</td>
</tr>
<tr>
<td>Alexander B. Ching</td>
<td>Ching Law Firm, 1601 N. Turner, Ste. 212, Hobbs, NM</td>
<td>505-397-0829, 505-397-0839 (telecopier) <a href="mailto:abching@abching.com">abching@abching.com</a></td>
</tr>
<tr>
<td>Claude David Convisser</td>
<td>PO Box 6397, Santa Fe, NM</td>
<td>505-899-9743, <a href="mailto:cdcconvisser@erols.com">cdcconvisser@erols.com</a></td>
</tr>
<tr>
<td>Thomas J. Cruse</td>
<td>555 Oppenheimer Drive, Ste. 103, Los Alamos, NM</td>
<td>505-681-2209, 505-629-1350 (telecopier) <a href="mailto:tjcruise@gmail.com">tjcruise@gmail.com</a></td>
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<tr>
<td>Gabrielle Lynn Dorian</td>
<td>formerly known as Gabrielle Linda Roybal, 7909 Rio Grande Blvd., NW, Los Ranchos, NM</td>
<td>505-881-7727 (telecopier) <a href="mailto:dgrady@dradylaw.com">dgrady@dradylaw.com</a></td>
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<tr>
<td>Annette Nikki Borchardt</td>
<td>Luebben Johnson &amp; Barnhouse LLP, 7424 Fourth Street, NW, Los Ranchos de Albuquerque, NM</td>
<td>505-842-6123 Ext. 108, 505-842-6124 (telecopier) <a href="mailto:nborchardt@luebbenlaw.com">nborchardt@luebbenlaw.com</a></td>
</tr>
<tr>
<td>A. Nathaniel Chakeres</td>
<td>U.S. Department of Justice Environment &amp; Natural Resources Division, PO Box 7611, Washington, DC</td>
<td>202-616-6537, 202-514-8395 (telecopier) <a href="mailto:Aristde.Chakeres@usdoj.gov">Aristde.Chakeres@usdoj.gov</a></td>
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<tr>
<td>Vidalia Chavez</td>
<td>formerly known as Vidalia Chavez-Encinias, Office of the Public Defender, 505 Marquette Avenue, NW, Ste. 120, Albuquerque, NM</td>
<td>505-841-6954, 505-841-6953 (telecopier) <a href="mailto:Vidalia.Chavez@state.nm.us">Vidalia.Chavez@state.nm.us</a></td>
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<tr>
<td>John L. Frogge</td>
<td>18 Camerada Road, Santa Fe, NM</td>
<td>505-466-1793, <a href="mailto:johnfrogge@yahoo.com">johnfrogge@yahoo.com</a></td>
</tr>
<tr>
<td>Edward Michael Gallegos</td>
<td>PO Box 83, Lindrith, NM</td>
<td>505-820-0083, <a href="mailto:eddyg7@msn.com">eddyg7@msn.com</a></td>
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<tr>
<td>Larry Gomez</td>
<td>38 Clarence’s Road, Los Lunas, NM</td>
<td>505-764-0012 (telecopier) <a href="mailto:lgsadmin@hsfinlaw.com">lgsadmin@hsfinlaw.com</a></td>
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<tr>
<td>David H. Gorman</td>
<td>David H. Gorman PC, 505 West Yankie Street, Silver City, NM</td>
<td>505-814-7720, 505-814-7727 (telecopier) <a href="mailto:dgrady@dradylaw.com">dgrady@dradylaw.com</a></td>
</tr>
<tr>
<td>James Allen Hayes</td>
<td>Arrieta Law Firm, 1024 South Main Street, Las Cruces, NM</td>
<td>505-523-4567, 505-523-4568 (telecopier) <a href="mailto:allenhayes@yahoo.com">allenhayes@yahoo.com</a></td>
</tr>
<tr>
<td>Frederick H. Hennighausen</td>
<td>Hennighausen &amp; Olsen LLP, PO Box 1415, Albuquerque, NM</td>
<td>505-243-0733, 505-244-1834 (telecopier) <a href="mailto:rkitchen@lawit.com">rkitchen@lawit.com</a></td>
</tr>
<tr>
<td>Elizabeth Honce</td>
<td>1207 1/2 Iron, SW, Albuquerque, NM</td>
<td>505-410-3861, <a href="mailto:ehoncelawyer@yahoo.com">ehoncelawyer@yahoo.com</a></td>
</tr>
<tr>
<td>Tommy D. Hughes</td>
<td>Hughes Law, L.L.C., PO Box 1610, Albuquerque, NM</td>
<td>505-842-6700, 505-764-0012 (telecopier)</td>
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<td>Alvin F. Jones</td>
<td>Hennighausen &amp; Olsen LLP, PO Box 21162, Albuquerque, NM</td>
<td>505-814-7720, 505-814-7727 (telecopier) <a href="mailto:jones@hsfinlaw.com">jones@hsfinlaw.com</a></td>
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<td>Salim A. Khayoumi</td>
<td>PO Box 21162, Albuquerque, NM</td>
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<td>Rebecca Kitson</td>
<td>Lawit &amp; Kitson, 7424 Fourth Street, NW, Los Ranchos de Albuquerque, NM</td>
<td>505-814-7720, 505-814-7727 (telecopier) <a href="mailto:jones@hsfinlaw.com">jones@hsfinlaw.com</a></td>
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<tr>
<td>Christina T. Kracher</td>
<td>3317 3rd Avenue North, Billings, MT</td>
<td>406-259-8611, <a href="mailto:ckracher@elkriverlaw.com">ckracher@elkriverlaw.com</a></td>
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<td>Phil Kreibiel</td>
<td>Keleher &amp; McLeod, P.A., PO Drawer AA, 201 Third Street, NW, Ste. 1200, Albuquerque, NM</td>
<td>505-346-4646, 505-346-1370 (telecopier) <a href="mailto:pk@keleher-law.com">pk@keleher-law.com</a></td>
</tr>
</tbody>
</table>
**Clerk’s Certificates**

<table>
<thead>
<tr>
<th>Clerk’s Name</th>
<th>Address</th>
<th>Phone Numbers</th>
<th>Email Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stephen Eric Lane</td>
<td>The Law Office of Stephen E. Lane</td>
<td>505-998-6600 505-998-6603 (teletypewriter)</td>
<td><a href="mailto:stephen@lanelawoffice.com">stephen@lanelawoffice.com</a></td>
</tr>
<tr>
<td>Eric Lewis Laurence</td>
<td>Lewis &amp; Roca LLP</td>
<td>505-764-5448 505-764-5470 (teletypewriter)</td>
<td><a href="mailto:ELaurence@LRLaw.com">ELaurence@LRLaw.com</a></td>
</tr>
<tr>
<td>John W. Lawit</td>
<td>Lawit &amp; Kitson</td>
<td>505-243-0733 505-244-1834 (teletypewriter)</td>
<td><a href="mailto:jlawit@lrlawoffice.com">jlawit@lrlawoffice.com</a></td>
</tr>
<tr>
<td>Kirk F. Lechtenberger</td>
<td>Kirk F. Lechtenberger PC</td>
<td>214-871-1804 214-871-3033 (teletypewriter)</td>
<td><a href="mailto:kklechten@sbcglobal.net">kklechten@sbcglobal.net</a></td>
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<tr>
<td>Jeffrey T. Lucky</td>
<td>Lucky, Enriquez, Piacenti &amp; Smigiel PC</td>
<td>505-832-7200 505-832-7333 (teletypewriter)</td>
<td><a href="mailto:jlucky@rvmjfirm.com">jlucky@rvmjfirm.com</a></td>
</tr>
<tr>
<td>Robert J. McCrea</td>
<td>Hennighausen &amp; Olsen LLP</td>
<td>505-624-2463 505-624-2878 (teletypewriter)</td>
<td><a href="mailto:bmccrea@h2olawyers.com">bmccrea@h2olawyers.com</a></td>
</tr>
<tr>
<td>Regina Marie Ries</td>
<td>Sharon W. Grossenbach, Attorneys at Law</td>
<td>303-571-0077 303-571-4227 (teletypewriter)</td>
<td><a href="mailto:gina@grossenbach.com">gina@grossenbach.com</a></td>
</tr>
<tr>
<td>Anthony F. Medeiros</td>
<td>N.M. Public Regulation Commission</td>
<td>505-827-6961 505-827-6915 (teletypewriter)</td>
<td><a href="mailto:Anthony.Medeiros@state.nm.us">Anthony.Medeiros@state.nm.us</a></td>
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<tr>
<td>Erin O’Connell</td>
<td>Garcia &amp; Vargas, L.L.C.</td>
<td>505-242-1487 (teletypewriter)</td>
<td><a href="mailto:erin@garcia-vargas.com">erin@garcia-vargas.com</a></td>
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<tr>
<td>Arnold J. Olsen</td>
<td>Hennighausen &amp; Olsen LLP</td>
<td>505-624-2463 505-624-2878 (teletypewriter)</td>
<td><a href="mailto:ajolsen@h2olawyers.com">ajolsen@h2olawyers.com</a></td>
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<tr>
<td>Marco P. Serna</td>
<td>N.M. General Risk Management Division</td>
<td>505-827-0231 505-827-0593 (teletypewriter)</td>
<td><a href="mailto:marco.serna@state.nm.us">marco.serna@state.nm.us</a></td>
</tr>
<tr>
<td>Minal Krish Patni</td>
<td>formerly known as Minal P. Unruh</td>
<td>505-841-5486 505-222-4535 (teletypewriter)</td>
<td><a href="mailto:MUnruh@da2nd.state.nm.us">MUnruh@da2nd.state.nm.us</a></td>
</tr>
<tr>
<td>Laura A. Talamantes</td>
<td>The Law Office of Felipe D.J. Millan</td>
<td>619-531-0190 619-531-0193 (teletypewriter)</td>
<td><a href="mailto:lauratalamantes@sbcglobal.net">lauratalamantes@sbcglobal.net</a></td>
</tr>
</tbody>
</table>

**Hon. Drew D. Tatum**
Drew D. Tatum
Ninth Judicial District Court
109 W. First Street, Ste. 202
Portales, NM 88130
575-359-6922
575-356-4930 (teletypewriter)

**Hon. Robert L. Thompson**
Robert L. Thompson (ret.)
PO Box 91435
Albuquerque, NM 87199-1435

**Gabriel J. Villegas**
Hennighausen & Olsen LLP
PO Box 1415
505-624-2463 505-624-2878 (teletypewriter)
gvillegas@h2olawyers.com

**Kenneth B. Wilson**
Hennighausen & Olsen LLP
PO Box 1415
505-624-2463 505-624-2878 (teletypewriter)
kwilson@h2olawyers.com

**Hon. Zachary T. Taylor**
Zachary T. Taylor
Hinkle, Hensley, Shanor & Martin LLP
218 Montezuma Street
Santa Fe, NM 87501
505-982-4554 505-982-8623 (teletypewriter)
ztaylor@hinklelawfirm.com
Clerk’s Certificates

Clerk’s Certificate of Admission

On October 29, 2009:
Widu Gashaw Abate
1409 Girard Blvd., NE, Apt. U
Albuquerque, NM 87106
617-372-3924

On October 29, 2009:
Jack Mkhitarian
1008 Fifth Street, NW
Albuquerque, NM 87102
505-243-7843

On November 4, 2009:
Cheyenne Kiernan
2301 W. Pacific Avenue, #402
Spokane, WA 99201
509-768-0839
cheyennekiernan@gmail.com

On November 2, 2009:
Nicholas M. Layland
1111 Garner Circle
Ames, IA 50010
515-450-5080
heynicklayland@gmail.com

On November 6, 2009:
Cody Dan Luther
Guevara Baumann Coldwell & Reedman LLP
4171 North Mesa, Ste. B201
El Paso, TX 79902
915-544-6646
915-544-8305 (telecopier)

Clerk’s Certificate of Change to Inactive Status

Effective October 14, 2009:
Michael Fitzpatrick
220 Ninth Street, NW
Albuquerque, NM 87102-3026

Effective November 2, 2009:
Javier Espinoza Garcia
The Law Office of Javier Espinoza PC
719 S. Flores Street, Ste. 100
San Antonio, TX 78204-1350

Effective October 12, 2009:
Leigh A. Kenny
137 Hillside Avenue
Kentfield, CA 94904-2517

Effective October 4, 2009:
Karen Marlene Foster
60 Camino Torcido Loop
Santa Fe, NM 87507-4342

Clerk’s Certificate of Withdrawal

Effective October 26, 2009:
David A. Stafford
PO Box 518
Raton, NM 87740-0518

Effective October 19, 2009:
Jefferson D. Reynolds
724 Epson Downs Court
Richmond, VA 23229-6253

Effective October 30, 2009:
Lynn C. Eby
801 Tyler Road, NW
Albuquerque, NM 87107-6248

Effective October 12, 2009:
Leigh A. Kenny
137 Hillside Avenue
Kentfield, CA 94904-2517

Effective October 10, 2009:
L. Edward Glass
PO Box 1700
Corrales, NM 87048-1700

In Memoriam

As of November 1, 2009:
Richard G. Bean
115 W. 12th Street
Roswell, NM 88201

As of September 26, 2998:
Stephen W. Bowen
7908 Woodhaven Drive, NE
Albuquerque, NM 87190

As of November 10, 2009:
Hon. Kenneth G. Brown (ret.)
PO Box 785
Bernalillo, NM 87004-0785

As of November 4, 2009:
Hon. Gene E. Franchini (ret.)
4901 Laurene, NW
Albuquerque, NM 87120

As of August 2, 2009:
Jefferson D. Reynolds
724 Epson Downs Court
Richmond, VA 23229-6253

As of October 24, 2009:
Brian E. Jennings
620 Roma Avenue, NW
Albuquerque, NM 87102

As of August 31, 2009:
Hon. Herb Kraus (ret.)
PO Box 26092
Albuquerque, NM 87125-6092

As of November 10, 2009:
Arthur J. Losee
PO Drawer 239
Artesia, NM 88210-0239

As of November 9, 2009:
Frank E. Marek, Jr.
10347 Longmont Drive
Houston, TX 77042
# 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 November 30, 2009**

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

## Pending Proposed Rule Changes

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<tr>
<th>Rule</th>
<th>Proposed Change</th>
<th>Comment Deadline</th>
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<tbody>
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<td>1-079</td>
<td>Public inspection and sealing of court records (Rules of Civil Procedure for the District Courts)</td>
<td>12/07/09</td>
</tr>
<tr>
<td>2-112</td>
<td>Public inspection and sealing of court records (Rules of Civil Procedure for the Magistrate Courts)</td>
<td>12/07/09</td>
</tr>
<tr>
<td>3-112</td>
<td>Public inspection and sealing of court records (Rules of Civil Procedure for the Metropolitan Courts)</td>
<td>12/07/09</td>
</tr>
<tr>
<td>5-123</td>
<td>Public inspection and sealing of court records (Rules of Criminal Procedure for the District Courts)</td>
<td>12/07/09</td>
</tr>
<tr>
<td>6-114</td>
<td>Public inspection and sealing of court records (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>12/07/09</td>
</tr>
<tr>
<td>7-113</td>
<td>Public inspection and sealing of court records (Rules of Criminal Procedure for the Metropolitan Courts)</td>
<td>12/07/09</td>
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<tr>
<td>8-112</td>
<td>Public inspection and sealing of court records (Rules of Procedure for the Municipal Courts)</td>
<td>12/07/09</td>
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<tr>
<td>10-166</td>
<td>Public inspection and sealing of court records (Children’s Court Rules and Forms)</td>
<td>12/07/09</td>
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<tr>
<td>12-314</td>
<td>Public inspection and sealing of court records (Rules of Appellate Procedure)</td>
<td>02/07/09</td>
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<td>7-504</td>
<td>Discovery; cases within metropolitan court trial jurisdiction (Rules of Criminal Procedure for the Metropolitan Courts)</td>
<td>07/27/09</td>
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<tr>
<td>5-704</td>
<td>Death penalty; sentencing (Criminal forms)</td>
<td>07/27/09</td>
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<tr>
<td>5-605</td>
<td>Jury trial (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>14-121</td>
<td>Individual voir dire; death penalty cases; single jury used. (UJI Criminal)</td>
<td>07/27/09</td>
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<td>14-121A</td>
<td>Individual voir dire; death penalty cases; two juries used. (UJI Criminal)</td>
<td>07/27/09</td>
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<td>5-302A</td>
<td>Grand jury proceedings (Rules of Criminal Procedure for the District Courts)</td>
<td>07/27/09</td>
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<td>9-218</td>
<td>Target notice (Criminal forms)</td>
<td>07/27/09</td>
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<td>9-219</td>
<td>Grand jury evidence alert letter (Criminal forms)</td>
<td>07/27/09</td>
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<tr>
<td>1-096</td>
<td>Challenge of nominating petition (Rules of Civil Procedure for the District Courts)</td>
<td>07/27/09</td>
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<tr>
<td>4-102</td>
<td>Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
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<tr>
<td>4-103</td>
<td>Notice of excusal (Civil forms)</td>
<td>07/27/09</td>
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<tr>
<td>4-104</td>
<td>Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
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<tr>
<td>4-102A</td>
<td>Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
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<td>4-103A</td>
<td>Notice of excusal (Civil forms)</td>
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<tr>
<td>4-104A</td>
<td>Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
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## Recently Approved Rule Changes

### Since Release of 2009 NMRA

#### Rules of Civil Procedure for the District Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Proposed Change</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-016</td>
<td>Pretrial conferences; scheduling; management.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-026</td>
<td>General provisions governing discovery.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-033</td>
<td>Interrogatories to parties.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-034</td>
<td>Production of documents and things and entry upon land for inspection and other purposes.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-037</td>
<td>Failure to make discovery; sanctions.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-038</td>
<td>Jury trial in civil actions.</td>
<td>12/15/09</td>
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<tr>
<td>1-045</td>
<td>Subpoena.</td>
<td>05/15/09</td>
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<tr>
<td>1-045</td>
<td>Subpoena.</td>
<td>05/15/09</td>
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<tr>
<td>1-045.1</td>
<td>Interstate subpoenas.</td>
<td>05/15/09</td>
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<tr>
<td>1-071.1</td>
<td>Statutory stream adjudication suits; service and joinder of water rights claimants; responses.</td>
<td>04/08/09</td>
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<td>1-071.2</td>
<td>Statutory stream adjudication suits; stream system issues and expedited inter partes proceedings.</td>
<td>04/08/09</td>
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<td>1-071.3</td>
<td>Statutory stream adjudication suits; annual joint working session.</td>
<td>04/08/09</td>
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<td>1-071.4</td>
<td>Statutory stream adjudication suits; ex parte contacts; general problems of administration.</td>
<td>04/08/09</td>
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<td>1-071.5</td>
<td>Statutory stream adjudication suits; excusal or recusal of a water judge.</td>
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### Rule-Making Activity

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>1-074</td>
<td>Administrative appeals; statutory review by district court of administrative decisions or orders.</td>
<td>12/15/08</td>
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<tr>
<td>1-075</td>
<td>Constitutional review by district court of administrative decisions and orders.</td>
<td>12/15/08</td>
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<tr>
<td>1-088</td>
<td>Designation by judge.</td>
<td>04/08/09</td>
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<tr>
<td>1-096</td>
<td>Challenge of nominating petition.</td>
<td>11/10/09</td>
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<tr>
<td>1-096.1</td>
<td>Review of election recall petitions.</td>
<td>09/04/09</td>
</tr>
<tr>
<td>1-125</td>
<td>Domestic Relations Mediation Act programs.</td>
<td>05/18/09</td>
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### Rules of Civil Procedure for the Magistrate Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>2-802</td>
<td>Garnishment.</td>
<td>12/31/08</td>
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### Rules of Civil Procedure for the Metropolitan Courts

<table>
<thead>
<tr>
<th>Rule</th>
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<tbody>
<tr>
<td>3-202</td>
<td>Summons.</td>
<td>11/16/09</td>
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### Civil Forms

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<tr>
<th>Rule</th>
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<tbody>
<tr>
<td>4-104B</td>
<td>Notice of assignment.</td>
<td>11/16/09</td>
</tr>
<tr>
<td>4-221</td>
<td>Certificate of service.</td>
<td>11/16/09</td>
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<tr>
<td>4-221A</td>
<td>Party’s certificate of service.</td>
<td>11/16/09</td>
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<td>4-225</td>
<td>Court’s certificate of service.</td>
<td>11/16/09</td>
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<tr>
<td>4-505A</td>
<td>Subpoena for production or inspection.</td>
<td>10/12/09</td>
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<tr>
<td>4-805</td>
<td>Application for writ of garnishment.</td>
<td>09/04/09</td>
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<tr>
<td>4-805B</td>
<td>Application for writ of garnishment.</td>
<td>09/04/09</td>
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<tr>
<td>4-803</td>
<td>Claim of exemptions on execution.</td>
<td>05/06/09</td>
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<td>4-805B</td>
<td>Application for writ of garnishment.</td>
<td>12/31/08</td>
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<tr>
<td>4-808A</td>
<td>Notice of right to claim exemptions from execution.</td>
<td>10/12/09</td>
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### Rules of Criminal Procedure for the District Courts

<table>
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<tr>
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<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>5-104</td>
<td>Time.</td>
<td>05/06/09</td>
</tr>
<tr>
<td>5-121</td>
<td>Orders; preparation and entry.</td>
<td>05/06/09</td>
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<tr>
<td>5-207</td>
<td>Withdrawn.</td>
<td>04/06/09</td>
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<td>5-604</td>
<td>Time of commencement of trial.</td>
<td>11/24/08</td>
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<td>5-604</td>
<td>Time of commencement of trial.</td>
<td>09/01/09</td>
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<tr>
<td>5-614</td>
<td>Motion for new trial.</td>
<td>05/06/09</td>
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<tr>
<td>5-704</td>
<td>Death penalty; sentencing.</td>
<td>05/06/09</td>
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<tr>
<td>5-801</td>
<td>Modification of sentence.</td>
<td>05/06/09</td>
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<tr>
<td>5-802</td>
<td>Habeas corpus.</td>
<td>05/06/09</td>
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### Rules of Criminal Procedure for the Magistrate Courts

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

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

### Rules of Procedure for the Municipal Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
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</thead>
<tbody>
<tr>
<td>8-103</td>
<td>Rules; forms; fees.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-109A</td>
<td>Audio and audio-visual appearances of defendant.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-111</td>
<td>Non-attorney prosecutions.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-201</td>
<td>Commencement of action.</td>
<td>12/31/08</td>
</tr>
<tr>
<td>8-401</td>
<td>Bail.</td>
<td>12/31/08</td>
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<tr>
<td>8-403</td>
<td>Revocation of Release.</td>
<td>12/31/08</td>
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<tr>
<td>8-501</td>
<td>Arraignment; first appearance.</td>
<td>12/31/08</td>
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<tr>
<td>8-502</td>
<td>Pleas.</td>
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### Criminal Forms

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<td>LR2-504</td>
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<td>LR2-Form T</td>
<td>Court clinic referral order.</td>
<td>05/18/09</td>
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</table>
Welcome to 7th Annual CLE at SEA

7-Day Alaskan Explorer Cruise
Holland America ms Zaandam • June 11-18, 2010
Departing from Seattle’s Puget Sound

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Complete and return this form to: Good Mood Cruises, 12231 Academy NE, #301-305, Albuquerque, NM 87111-3962
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Street______________________________________________________________ City/State/Zip ______________________________
Phone ________________________________   Fax ________________________________ E-Mail _____________________________

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_________________________       _________________________        _________________________       _________________________
Legal Name   Nickname   (for name badge)
_________________________       _________________________        _________________________       _________________________
Legal Name   Nickname   (for name badge)
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❏ Category E Ocean view stateroom $1049.00 + 126.33 tx

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2010 CLE at SEA
7-Day Alaskan Explorer
“CLE at SEA - One of the most enjoyable CLE experiences ever!”

ITINERARY

<table>
<thead>
<tr>
<th>DAY</th>
<th>PORT / ACTIVITY</th>
<th>ARRIVE</th>
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<td>Seattle, cruising Puget Sound</td>
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<td>Sat, June 12</td>
<td>at sea</td>
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<td>Sun, June 13</td>
<td>cruising Stephen’s Passage (Juneau)</td>
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<td>Sitka, Alaska</td>
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<td>Wed, June 16</td>
<td>Ketchikan, Alaska</td>
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<td>Victoria, British Columbia</td>
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<td>Midnight</td>
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<td>Seattle, WA</td>
<td>7:00 a.m.</td>
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SHIP FACTS

- Ship Registry: The Netherlands
- Length: 781 feet
- Beam: 105.8
- Maximum Speed: 23 knots
- Passenger Capacity: 1432
- Crew: 615
- Gross Tonnage: 61,396

Consistently among the highest rated cruise lines
(Conde Nast Traveler Readers’ Choice Awards; Travel + Leisure World’s Best Awards)
IN THE MATTER OF THE AMENDMENTS OF RULE 18-202 NMRA OF THE MINIMUM CONTINUING LEGAL EDUCATION RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Minimum Continuing Legal Education Board to amend Rule 18-202 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 18-202 NMRA of the Minimum Continuing Legal Education hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 18-202 NMRA of the Minimum Continuing Legal Education Rules shall be effective November 18, 2009;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rule 18-202 NMRA of the Minimum Continuing Legal Education Rules by publishing the same in the Bar Bulletin and NMRA and posting the same on the New Mexico Compilation Commission web site www.nmcompcomm.us/nmrules.

IT IS SO ORDERED.

Witness, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 18th day of November, 2008.

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

A. Inactive members. An inactive member of the state bar shall be exempt from continuing legal education and reporting requirements of these rules.

B. Extensions and waivers.
(1) Upon petition and a finding by the board of special circumstances constituting undue hardship, the board may provide an extension of time to complete the credit requirements of these rules.

(2) Upon a finding by the board of special circumstances constituting undue hardship and with approval by the Supreme Court, the board may grant a waiver to an active licensed member from the credit requirements of these rules.

C. U.S. military active duty. An active licensed member of the state bar who is in the armed services of the United States and who serves one hundred eighty (180) days or more in any year on full-time active duty is exempt from the minimum education requirements of Rule 18-201 NMRA during such year. In order to be eligible for this exemption, the member must provide to the board a certification of the military service and dates.

[As amended, effective January 1, 1990; as amended by Supreme Court Order No. 06-8300-33, effective January 1, 2007; by Supreme Court Order No. 09-8300-041, effective November 18, 2009.]
Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-125

Topic Index:
Appeal and Error: Harmless Error; and Remand
Civil Procedure: Limitation of Actions
Evidence: Hearsay Evidence
Statutes: Interpretation
Workers’ Compensation: Attorney Fees; Course of Employment; and Intoxication

DALE NELSON,
Worker-Appellee/Cross-Appellant,
versus
HOMIER DISTRIBUTING CO., INC., Employer,
and
CENTURY SURETY COMPANY,
Insurer-Appellant/Cross-Appellee.
No. 27,543 (filed: September 8, 2009)

APPEAL FROM THE WORKERS’ COMPENSATION ADMINISTRATION
NED S. FULLER and HELEN L. STIRLING, Workers’ Compensation Judges

CHRIS LUCERO, JR.
Albuquerque, New Mexico
for Worker-Appellee/Cross-Appellant

GREGORY D. STEINMAN
MADISON, HARBOUR & MROZ, P.A.
Albuquerque, New Mexico
for Insurer/Appellant/Cross-Appellee

PAUL L. CIVEROLO
PAUL L. CIVEROLO, L.L.P.
Albuquerque, New Mexico
for Employer/Cross-Appellee

Opinion

RODERICK T. KENNEDY, JUDGE

Century Surety Co. (Insurer) appeals and Dale Nelson (Worker) cross-appeals the Workers’ Compensation Administration’s (WCA) decision awarding benefits to Worker. We affirm the WCA’s decision and remand for further proceedings regarding Worker’s motions for attorney fees and interest.

Homier Distributing Co., Inc. (Employer) is a company that travels to various locations to put on shows selling tools and other items. On June 18, 2000, Employer was closing a show in Farmington in preparation for an upcoming show in Santa Fe. Worker alleges that on that date he was hired by Employer to drive a truck from Farmington to Santa Fe and back. Employer denies that it hired Worker or instructed him to drive the truck. Worker asserts that he was told to drive the truck to a gas station, fill it with fuel, and return to Employer’s temporary location at a Farmington mall. Worker asserts that he did as instructed and that upon returning to the mall, he noticed a problem with the truck’s lights and decided to ask a forklift driver what to do about fixing them. Worker stepped onto the forklift, but the driver apparently did not notice he was there and began driving off. Worker fell and was dragged some distance across the parking lot, suffering serious injuries. Subsequent tests indicated that Worker had alcohol and cocaine in his system at the time of the accident. Employer denied workers’ compensation benefits to Worker. Worker filed a claim with the WCA about twenty months after the accident.

The issues were bifurcated for trial. The first trial, held on November 10, 2003, before Judge Ned Fuller, was limited to the issues of who, if anyone, was Worker’s employer, and whether Employer’s defenses of notice, statute of limitations, and intoxication were applicable. Judge Fuller ruled that Worker was an employee of Employer and that Worker’s claim was not barred by the statute of limitations because the statute was tolled when Employer failed to file a report of the accident in New Mexico. Judge Fuller also found that “Worker’s judgment and physical reaction [time] were impaired by alcohol and cocaine,” but concluded that the effect of this impairment on Worker’s entitlement to benefits was reserved for the second part of the bifurcated proceedings.

Judge Helen Stirling presided over the second portion of the bifurcated trial on May 5, 2006. Among her findings of fact were that “alcohol and cocaine [were] contributing causes of Worker’s accident and resulting injuries.” She declined to reduce Worker’s benefits by ten percent pursuant to NMSA 1978, Section 52-1-12.1 (2001), because there was no indication in the evidence “that the test and testing procedures conformed to the federal department of transportation procedures for transportation workplace drug and alcohol testing programs and the test [was] performed by a laboratory certified to do the testing by the federal department transportation,” as required by that statute.

Insurer raises five issues: (1) the statute of limitations barred Worker’s claim for indemnity benefits; (2) Worker’s intoxication and drug consumption barred his claims; (3) Judge Stirling, the second workers’ compensation judge (WCJ), erred in reconsidering the findings and conclusions of Judge Fuller, the first WCJ; (4) Judge Fuller erred in admitting a gas
station receipt without authentication or foundation; and (5) Judge Fuller erred in denying Employer’s motion for directed verdict.

[6] Worker cross-appeals, raising two issues: (1) whether Judge Stirling incorrectly calculated Worker’s average weekly wage and weekly compensation rate; and (2) whether Judge Stirling erred in denying Worker’s motion that his medical bills are required to be paid by Employer or Insurer, whether or not Worker is entitled to compensation, and whether Judge Stirling improperly refused to award pre- and post-judgment interest and attorney fees.

**STATUTE OF LIMITATIONS**

[7] Whether an action is barred by the applicable statute of limitations is a question of law that we review de novo. See, e.g., McNell v. Rice Eng’g & Operating, Inc., 2006-NMCA-015, ¶ 26, 139 N.M. 48, 128 P.3d 476 (filed 2005).

[8] Employer is headquartered in Indiana and does not maintain an office in New Mexico. Employer filed a first report of injury with the Indiana WCA on June 20, 2000, two days after the date of Worker’s injury, but did not file one in New Mexico. Worker did not file his claim for workers’ compensation until February 22, 2002, about nineteen months after Employer denied his claim for benefits on July 17, 2000.

[9] New Mexico’s Workers’ Compensation Act (Act) requires employers to report accidents to the director of the WCA:

> It is the duty of every employer of labor in this state subject to the provisions of the [Act] or the employer’s workers’ compensation insurance carrier to make a written report to the director of all accidental injuries or occupational diseases that occur to any of his employees during the course of their employment and that result in lost time of an employee of more than seven days. . . . Such reports shall be made within ten days after such accidental injury.[7]

NMSA 1978, § 52-1-58(A) (1990). The Act further provides, in reference to the required accident report:

> No claim for compensation under the [Act], as it now provides or as it may hereafter be amended, shall be barred prior to the filing of such report or within thirty days thereaf-
We are not persuaded by Insurer’s argument that the report filed in Indiana substantially complied with Section 52-1-58(A). The language of the section plainly requires filing with “the director,” defined as the director of the WCA. See NMSA 1978, § 52-1-11(B) (2003). Further, nothing in the record indicates that the New Mexico WCA learned of Worker’s injury as a result of the Indiana filing.

Solely because neither Employer nor Insurer timely filed the report required by Section 52-1-58(A), Worker’s claim was not barred by the statute of limitations. See § 52-1-59.

**EFFECT OF ALCOHOL AND DRUGS**

Insurer’s contention that Worker’s alleged intoxication barred his claim requires us to review the evidence upon which Judge Stirling relied. “When reviewing for sufficiency of the evidence of a workers’ compensation order, the court reviews the record as a whole in order to be satisfied that the evidence demonstrates the decision is reasonable.” Barela v. ABF Freight Sys., 116 N.M. 574, 579, 865 P.2d 1218, 1223 (Ct. App. 1993). “Under whole record review, the court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence. Nat’l Council on Comp. Ins. v. N.M. State Corp. Comm’n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (citations omitted).

The Act provides that “[n]o compensation shall become due or payable from any employer under the terms of the [Act] in event such injury was occasioned by the intoxication of such worker.” NMSA 1978, § 52-1-11 (1989). The Act also provides: No compensation is payable from any employer under the provisions of the [Act] if the injury to the person claiming compensation was occasioned solely by the person being under the influence of a depressant, stimulant or hallucinogenic drug as defined in the New Mexico Drug, Device and Cosmetic Act . . . or under the influence of a narcotic drug as defined in the Controlled Substances Act.[] NMSA 1978, § 52-1-12 (1989).

Judge Fuller’s findings of fact indicated, “[t]ests revealed that some time after the accident Worker had a blood alcohol content level of .079 and had a high amount of cocaine in his system,” and “Worker’s judgment and physical reaction were impaired by . . . cocaine.” Judge Fuller specifically reserved the question of “whether Worker’s injury was occasioned by his intoxication or whether the intoxication was simply a contributing factor” for the second part of the proceedings, apparently due to incomplete discovery.

In the second part of the proceedings, Judge Stirling found that “Worker’s accident was not occasioned by alcohol” and that “Worker’s accident was not occasioned solely by drug influence.” Judge Stirling made detailed findings regarding Worker’s consumption of alcohol and cocaine and the effects thereof. There was evidence that Worker’s blood alcohol content forty minutes after the accident was .079, and expert testimony extrapolating from this that it was .092 at the time of the accident. This suggested that Worker had consumed more than the two beers he acknowledged having at lunch before the accident. Judge Stirling explained her conclusion that the accident was nonetheless not occasioned by alcohol, noting that Worker was not driving the fork lift and thus there was no clear nexus between his impairment and the injury. Also, whatever impairment existed had not been sufficient to prevent Worker from accomplishing other tasks before the accident, including driving the truck to the gas station and back, completing paperwork, inspecting the truck, and discovering the defective lights. Regarding the cocaine, Judge Stirling noted that although Worker acknowledged ingesting three lines of cocaine sixty-six hours before the accident, there was no evidence as to the amount in his system at the time of the accident. We conclude that substantial evidence supported the findings that Worker’s injury was not occasioned by intoxication or occasioned solely by his being under the influence of drugs.

Judge Stirling concluded that although Worker’s injuries were not occasioned by either alcohol or cocaine, both were contributing causes. The Act provides for a ten percent reduction in compensatory benefits where alcohol or drugs are contributing causes of an injury:

The compensation otherwise payable to [a] worker pursuant to [the Act] shall be reduced ten percent in cases in which the injury to or death of a worker is not occasioned by the intoxication of the worker as stated in Section 52-1-11. . . or occasioned solely by drug influence as described in Section 52-1-12. . ., but voluntary intoxication or being under the influence of a depressant, stimulant or hallucinogenic drug . . . is a contributing cause to the injury or death. Section 52-1-12.1. However, this section limits the evidence that may be considered in evaluating drugs or alcohol as a contributing cause:

Test results used as evidence of intoxication or drug influence shall not be considered in making a determination of intoxication or drug influence unless the test and testing procedures conform to the federal department of transportation “procedures for transportation workplace drug and alcohol testing programs” and the test is performed by a laboratory certified to do the testing by the federal department of transportation.

Id.

Judge Stirling found that although she had no doubt that the alcohol and cocaine were contributing causes of the accident, there was no evidence that the tests used as evidence met the standards set forth in the last sentence of Section 52-1-12.1. Accordingly, Worker was granted full benefits.

We observe that Worker was tested for alcohol and drugs shortly after the accident on June 18, 2000, but Section 52-1-12.1 did not become effective until July 1, 2001. Thus, at the time the tests were given, there was no statutory requirement that they meet any particular standard. A question thus arises as to whether Section 52-1-12.1 operates retroactively. “New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary.” Howell v. Heim, 118 N.M. 500, 506, 882 P.2d 541, 547 (1994). “Although the presumption of prospectivity appears straightforward, confusion often arises as to what retroactivity means in particular contexts.” Gadsden Fed’n of Teachers v. Bd. of Educ., 1966-NMCA-069, ¶ 14, 122 N.M. 98, 920 P.2d 1052. The general rule is that “[a] statute . . . is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions.” Id. (internal quotation marks and citation omitted).

The present circumstances give rise to two possibilities, both of which lead to an outcome consistent with Judge Stirling’s decision not to reduce Worker’s benefits. If Section 52-1-12.1 is given no retroactive
effect at all, and the applicable law is that which was in effect on the date of the accident, then the only issue is whether benefits are barred in their entirety by Sections 52-1-11 and 52-1-12. Judge Stirling ruled that benefits were not barred under those two sections, as discussed above. If Section 52-1-12.1 is given retroactive effect—such that someone injured before its effective date but whose claim is filed with the WCA after its effective date is subject to its provisions—then the drug and alcohol tests must meet the standards specified in Section 52-1-12.1. Judge Stirling ruled that no evidence showed the tests met the standards. Thus, regardless of whether or how retroactivity is applied, Worker’s benefits would not be reduced by ten percent.

{24} We are not persuaded by Insurer’s argument that because Worker did not object to the tests at trial, Judge Stirling erred in disregarding them. The language of Section 52-1-12.1 is mandatory: tests “shall not be considered” unless they conform to the specified standards. See NMSA 1978, § 12-2A-4 (1997); see also Montano v. Los Alamos County, 1996-NMCA-108, ¶ 5, 122 N.M. 454, 926 P.2d 307 (stating that “the words ‘shall’ and ‘will’ are mandatory and ‘may’ is permissive or directory”) (citation omitted). For these reasons, we conclude that Judge Stirling did not err in ruling that Worker was entitled to full benefits.

CONSISTENCY OF RULINGS OF FIRST AND SECOND JUDGES

{25} Insurer argues that in the second part of the proceedings Judge Stirling improperly reconsidered and reversed certain findings of Judge Fuller from the first part of the proceedings. Judge Fuller included the following conclusion of law in his compensation order filed on December 5, 2003: “All remaining issues including whether Worker’s injury was occasioned by his intoxication or whether the intoxication was simply a contributing factor are bifurcated and will be resolved at a future hearing.” The pretrial order for the second part of the proceedings listed among the contested issues “[w]hether all [W]orker’s workers’ compensation benefits and medical will be barred altogether because of his intoxication and/or drug use, or whether any workers’ compensation benefits are reduced by [ten percent].” Insurer argues that Judge Fuller’s conclusion of law and pretrial order limited Judge Stirling to a choice between denying benefits altogether or reducing benefits by ten percent. As discussed above, Judge Stirling granted Worker benefits without reduction.

{26} We agree that Judge Fuller’s conclusion of law and pretrial order establish that some degree of impairment existed, given the blood tests at the hospital and Worker’s admissions of drinking alcohol and using cocaine. The only remaining issue was therefore the effect of this fact on Worker’s benefits. We disagree that Judge Stirling was limited to the options of denying benefits altogether or reducing benefits by ten percent. With regard to the portion of the pretrial order quoted above, for example, Judge Stirling had the option of answering “no” to both the question of whether benefits should be denied and the question of whether benefits should be reduced by ten percent.

{27} We also disagree with Insurer’s basic proposition that Judge Fuller’s conclusions and the pretrial order precluded Judge Stirling from ruling as she did. A court “has the inherent authority to reconsider its interlocutory orders, and it is not the duty of the [court] to perpetuate error when it realizes it has mistakenly ruled.” Tabet Lumber Co. v. Romero, 117 N.M. 429, 431, 872 P.2d 847, 849 (1994) (internal quotation marks and citation omitted). In the case cited by Insurer, Gregson v. Gregson, 739 So. 2d 1266, 1267 (Fla. Dist. Ct. App. 1999), the court stated, “The general rule is that a successor judge cannot review, modify, or reverse on the merits and on the same facts the final orders of a predecessor, unless there exists some special circumstances such as mistake or fraud upon the court.” (Internal quotation marks and citation omitted.) In the present case, Judge Fuller’s conclusion was not a final order, as further proceedings were required to dispose of the case. Judge Stirling, who took further evidence regarding Worker’s alleged intoxication and determined that there was no evidence that the tests relied upon met the standards set forth in Section 52-1-12.1, would have perpetuated error had she limited herself to the two options that Insurer claims were the only ones available.

{28} For these reasons, we conclude that Judge Stirling’s grant of full benefits to Worker was not precluded by Judge Fuller’s earlier rulings.

ADMISSION OF GAS RECEIPT

{29} Insurer argues that Judge Fuller improperly admitted a copy of a gas station receipt into evidence. We review for abuse of discretion:

Admission or exclusion of evidence is a matter within the discretion of the [district] court and the court’s determination will not be disturbed on appeal in the absence of a clear abuse of that discretion. An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. A [district] court abuses its discretion by its ruling only if we can characterize it as clearly untenable or not justified by reason.


{30} Worker testified that after he got out of the hospital he returned to the gas station where he had fueled the truck just before the accident and obtained a photocopy of the receipt he had signed. The receipt presumably was admitted to support Worker’s contention that Employer had in fact hired him and directed him to perform the task of fueling the truck. No one from the gas station testified regarding the authenticity of the receipt.

{31} Insurer argues that admission of the receipt copy was error for three interrelated reasons: (1) there was no adequate foundation for admitting the document; (2) the document admitted was a copy, not the original; and (3) the document was hearsay not admissible under any exception.

{32} We agree with Insurer that the receipt was hearsay not admissible under any exception. The receipt was hearsay because it contained a statement offered in court to prove the truth of the matter asserted. See Rule 11-801(C) NMRA. The receipt, bearing Worker’s signature, purported to state that he was at the gas station and bought fuel on the date indicated. See, e.g., People v. Maki, 704 P.2d 743, 750-51 (Cal. 1985) (en banc) (holding that car rental and hotel receipts admitted to show defendant had violated probation by traveling out of area were hearsay not admissible under any exception, but also holding that the admission of such improper evidence did not violate the confrontation clause under the circumstances). The receipt does not qualify as a record of regularly conducted activity under Rule 11-803(F) NMRA because of the complete absence
of “the testimony of the custodian or other qualified witness” as required by that rule. While Worker was not qualified to testify as to the regular practice of the business, his testimony was consistent with the information purportedly conveyed by the receipt.

{33} We next consider the effect of the improper admission of the receipt. “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]” Rule 11-103(A) NMRA. “[W]e deem it noteworthy that this was a bench trial, and the general rule pertaining to that type of trial appears to give a judge more flexibility in making admissibility determinations than in jury trials.” Tartaglia v. Hodges, 2000-NMCA-080, ¶ 30, 129 N.M. 497, 10 P.3d 176. “We presume that a judge is able to properly weigh the evidence, and thus the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision.” State v. Hernandez, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d 1156.

{34} While Judge Fuller noted Worker’s testimony regarding the receipt in his findings, he also cited additional evidence that led him to conclude that an employment relationship existed. As discussed below, the evidence of employment included Worker’s testimony regarding the circumstances of his hiring, a notation on a fax regarding hiring of a replacement for Worker, and the report of the accident that Employer filed with the Indiana WCA. Accordingly, the circumstances do not support a conclusion that Judge Fuller “must have relied upon the improper evidence in rendering a decision.” Id.

**DENIAL OF MOTION FOR DIRECTED VERDICT**

{35} Insurer argues that Judge Fuller erred in denying Employer’s motion for directed verdict, finding the existence of an employment relationship between Worker and Employer, and finding that Worker was in the course and scope of his employment at the time of the accident.

“This being a nonjury trial, the motion for a directed verdict was, in effect, a motion to dismiss under [Rule 1-041(B) NMRA].” Garcia v. Am. Furniture Co., 101 N.M. 785, 787, 689 P.2d 934, 936 (Ct. App. 1984). “In ruling on a Rule 1-041(B) motion, . . . the trial judge acts as a fact finder who weighs the evidence and passes judgment on whether the plaintiff has proved the necessary facts to warrant the relief asked.” Padilla v. RRA, Inc., 1997-NMCA-104, ¶ 17, 124 N.M. 111, 946 P.2d 1122 (internal quotations marks and citation omitted). We again review the whole record for evidence sufficient for a reasonable mind to accept as adequate to support the decision. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 128, 767 P.2d 363, 367 (Ct. App. 1988), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

{36} Insurer argues that Judge Fuller was, in effect, a “fact finder who weighs the evidence and passes judgment on whether the plaintiff has proved the necessary facts to warrant the relief asked.” Padilla v. RRA, Inc., 1997-NMCA-104, ¶ 17, 124 N.M. 111, 946 P.2d 1122 (internal quotations marks and citation omitted). We again review the whole record for evidence sufficient for a reasonable mind to accept as adequate to support the decision. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 128, 767 P.2d 363, 367 (Ct. App. 1988), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148.

{37} Judge Fuller also had evidence before him that the accident took place in Worker’s employment to seek information on his testimony was consistent with the information purportedly conveyed by the receipt. “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]” Rule 11-103(A) NMRA. “[W]e deem it noteworthy that this was a bench trial, and the general rule pertaining to that type of trial appears to give a judge more flexibility in making admissibility determinations than in jury trials.” Tartaglia v. Hodges, 2000-NMCA-080, ¶ 30, 129 N.M. 497, 10 P.3d 176. “We presume that a judge is able to properly weigh the evidence, and thus the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision.” State v. Hernandez, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d 1156.

{38} Accordingly, we conclude that Judge Fuller did not err in denying Employer’s motion for directed verdict.

**CALCULATION OF AVERAGE WEEKLY WAGE**

{39} Judge Stirling found that “[t]he only concrete evidence of a rate of pay for Worker is that provided on the accident report filed in Indiana.” Based on the rate of fifty cents per driven mile stated in this report, the judge calculated that Worker would have earned $210 had he driven from Farmington to Santa Fe and back, and she used this figure as his average weekly wage.

{40} “[A]verage weekly wage” is defined as “the weekly wage earned by the worker at the time of the worker’s injury[.]” NMSA 1978, § 52-1-20(A) (1990). Section 51-1-20 sets forth several methods for calculating a worker’s average weekly wage. Worker argues that Judge Stirling should have used Section 52-1-20(B)(3), which provides:

[I]f the hourly rate of earnings of the worker cannot be ascertained, or if the pay has not been designated for the work required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other workers in like employment for the past twenty-six weeks[.]”

In his proposed findings of fact submitted to Judge Stirling, Worker used New Mexico Department of Labor statistics to arrive at a proposed average weekly wage of $425.67.

{41} Judge Stirling’s order does not specify which section of the statute she used in arriving at $210. Given the unusual factual setting of Worker’s employment, which does not readily fall under any of the other methods set forth in Section 52-1-20, it appears that she used the statute’s fallback provision:

[I]n any case where the foregoing methods of computing the average weekly wage of the employee by reason of the nature of the employment or the fact that the injured employee has been ill or in business for himself or where for any other reason the methods will not fairly compute the average weekly wage, in each particular case, computation of the average weekly wage of the employee in such other manner
and by such other method as will be based upon the facts presented fairly determine such employee’s average weekly wage.[] Section 52-1-20(C).

{42} We are not persuaded that Section 52-1-20(B)(3) would provide the correct method, as Worker argues, in the present unusual circumstances. Given Worker’s single day of employment, there is no basis for comparing Worker’s job with any “similar services performed by other workers in like employment” under Section 52-1-20(B)(3)’s methodology. Further, Worker has not proposed any means of correlating a weekly or hourly rate with a per-mile rate under the statutory framework, nor is any apparent to us.

{43} We agree with Judge Stirling’s characterization of the average weekly wage issue as “murky.” In brief, the factual setting indicates that Worker was injured on the first day of employment and was not expected to be employed more than one day. We first conclude that the evidence, in the form of the accident report filed in Indiana, supported Judge Stirling’s conclusion that Worker would have been paid $210 for the trip to Santa Fe. As he only expected to work that one day, the $210 would also have been his wages for the week. Using the statutory definition of average weekly wage—“the weekly wage earned by the worker at the time of . . . [his] injury”—it was reasonable for Judge Stirling to use the $210 figure, even though no mathematical averaging was necessary to arrive at that figure. Section 52-1-20(A).

PAYMENT OF MEDICAL BILLS AND INTEREST

{44} Our decision affirming the award of benefits to Worker without reduction disposes of Worker’s issue regarding payment of his medical bills.

{45} Worker also argues that Judge Stirling should have awarded pre- and post-judgment interest and attorney fees. He claims that Judge Stirling did not rule on his motions for interest and fees because she believed she had lost jurisdiction over the case after the parties filed notices of appeal, while Insurer claims that the judge did not rule because Insurer had moved to stay further proceedings pending appeal and had posted a bond to secure the compensation order. In either event, Judge Stirling ruled on neither the amount of attorney fees nor on the issue of pre- and post-judgment interest. Accordingly, we remand to the Workers’ Compensation Administration for further proceedings on those matters.

CONCLUSION

{46} For the reasons stated above, we affirm the award of full benefits to Worker and remand for consideration of his motions for attorney fees and interest.

{47} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge
Whether the district court erred by granting the entry of a final decree, the proceedings pending divorce proceeding dies prior to (1993) provides that when one party to a divorce proceedings are to continue. [3] Husband and Wife were married for twenty-three years and had one child together. In 2003, Husband was diagnosed with brain cancer. In early 2007, Husband became upset regarding his marital relationship and expressed his desire to initiate divorce proceedings against Wife. Husband then signed a letter of acknowledgment stating his desire to have Son, acting as attorney-in-fact, assist him in initiating divorce proceedings against Wife. On February 7, 2007, Husband filed a petition for divorce. Shortly thereafter, Wife filed a motion to dismiss Husband’s petition for dissolution of marriage stating that Husband lacked the competency to file for divorce. Husband died in May 2007 before any rulings were issued in the pending divorce proceedings.

[4] In the probate proceeding following Husband’s death, Son filed an application for informal appointment as personal representative of Husband’s estate. Wife subsequently filed a counter application for formal appointment as personal representative. She also filed a joint motion for summary judgment and motion to dismiss the petition for dissolution of marriage. In her motions, Wife asserted that the district court was required to appoint her as personal representative to administer Husband’s estate pursuant to Husband’s Will and Trust. Son then filed a counter motion for summary judgment requesting that the district court appoint him, as a matter of law, as personal representative to complete the divorce proceedings pursuant to Section 40-4-20(B). The district court issued an order that appointed Wife as personal representative of Husband’s estate, admitted the Will to probate, validated the Trust, and found that Section 40-4-20(B) did not revoke, invalidate, or affect the Will and Trust in the probate proceedings. This appeal followed.

DISCUSSION
Appointment of Personal Representative

[5] We must address whether Wife was properly appointed to serve as the personal representative of Husband’s estate. We review the district court’s statutory interpretation and conclusions of law de novo. See Bell v. Estate of Bell, 2008-NMCA-045, ¶1 11, 143 N.M. 716, 181 P.3d 708 (reviewing statutory interpretation de novo); Alverson v. Harris, 1997-NMCA-024, ¶6, 123 N.M. 153, 935 P.2d 1165 (filed 1996) (reviewing de novo whether the district court correctly applied the law to the facts).

BACKGROUND

[3] Husband and Wife were married for twenty-three years and had one child together. In 2003, Husband was diagnosed with brain cancer. In early 2007, Husband...
Karpien v. Karpien, 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165. In Karpien, the husband and wife were involved in divorce proceedings when the wife died intestate. Id. ¶ 1. Following the wife’s death, the district court appointed the wife’s parents as personal representatives of her estate. Id. ¶ 2. On appeal, the husband asserted that when one party to a pending divorce proceeding dies, the Uniform Probate Code (Probate Code) prevails over Section 40-4-20(B), effectively abating the divorce proceedings so that the surviving spouse is not prevented from receiving an inheritance. Karpien, 2009-NMCA-043, ¶¶ 8, 10-11. Relying on Section 40-4-20(B), we rejected this argument. Karpien, 2009-NMCA-043, ¶¶ 8-11. Section 40-4-20(B) provides:

[If a party to the action dies during the pendency of the action, but prior to the entry of a [final] decree granting dissolution of marriage, separation, annulment or determination of paternity, the proceedings for the determination, division and distribution of marital property rights and debts . . . shall not abate. The court shall conclude the proceedings as if both parties had survived.]

(Emphasis added.) Therefore, we held that in order to give effect to both Section 40-4-20(B) and the Probate Code, the divorce proceedings must continue until conclusion before the district court could address any limitations imposed by the Probate Code. Karpien, 2009-NMCA-043, ¶¶ 8-11.

[7] In the present case, in order for the divorce proceedings to continue in accordance with Section 40-4-20(B), a proper personal representative must be appointed to represent Husband’s estate in the continuation of the proceedings. NMSA 1978, § 45-3-703(E) (1975) (“[A] personal representative . . . has the same standing to sue and be sued . . . as his deceased had immediately prior to death.”); Rule 1-025(A) NMRA (“If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.”). It is clear there is an inherent conflict of interest in having Wife serve as personal representative of Husband’s estate. As personal representative, Wife would be obligated to represent Husband, who is the opposing party in their divorce proceedings. Wife cannot adequately represent the adverse interests of Husband while contemporaneously protecting her own interests. Moreover, Wife’s repeated efforts to dismiss the pending divorce proceedings filed by Husband exemplify the inherent conflict in this case. To ignore this inherent conflict would result in an absurdity. Therefore, the district court erred by appointing Wife as personal representative of Husband’s estate since the pending divorce proceedings must continue.

[8] Wife counters that regardless of the pending divorce proceedings, the district court was correct in appointing her as personal representative of Husband’s estate pursuant to NMSA 1978, Section 45-3-203(A)(1) (1975). Section 45-3-203(A)(1) provides that “a person nominated by a power conferred in a will” has priority for appointment as personal representative. Wife contends that the Will was not revoked when Husband filed the petition for divorce and thus the district court was required, as a matter of law, to appoint her as personal representative of Husband’s estate. It is premature at this stage of the probate proceedings to address Wife’s argument regarding the validity of Husband’s Will. The outcome of the pending divorce proceedings will determine whether the Husband’s will is valid and whether Wife is eligible for appointment as personal representative of Husband’s estate. Once Wife’s status as a surviving spouse has been determined in the divorce proceedings, the district court will then apply the Probate Code to administer Husband’s estate. The following summary judgment analysis will clarify this issue in more detail.

Summary Judgment

[9] We must address whether the district court erred when it granted Wife’s motion for partial summary judgment, admitted the Will to probate, and validated the Trust. Our recent decision in Karpien highlighted the interrelationship between Section 40-4-20(B) and the Probate Code. We must now review these additional issues of statutory construction de novo. See Karpien, 2009-NMCA-043, ¶ 3. This case is procedurally unique from Karpien. Based on Wife’s motion to dismiss, it remains unclear whether the divorce proceeding will ultimately continue to conclusion. Consistent with the district court’s rulings, we will analyze the Probate Code issues under the assumption that the divorce proceedings will continue pursuant to Section 40-4-20(B).

[10] In Karpien, we evaluated the relationship between Section 40-4-20(B) and the Probate Code, and we were able to harmonize the statutes so that each provision was given effect. Karpien, 2009-NMCA-043, ¶¶ 4-12, 18 (“We have an obligation to read and construe statutes [that] appear to conflict, . . . if possible, to give effect to each.” (alterations in original) (quoting NMSA 1978, § 12-2A-10(A) (1997))). Section 40-4-20(B) requires that “marital property rights and debts shall not abate and shall be concluded as if both parties had survived.” Karpien, 2009-NMCA-043, ¶ 9 (internal quotation marks omitted). As a result of the conclusion of the divorce proceedings and the entry of a judgment or decree terminating all property rights pursuant to Section 40-4-20(B), we determined that the husband was “precluded from being considered a ‘surviving spouse’ for purposes of inheritance or allowances under probate law.” Karpien, 2009-NMCA-043, ¶ 10 (construing the definition of a surviving spouse under NMSA 1978, Section 45-2-802(B)(3) (1995)). As a result, the husband was not a surviving spouse and could not inherit from the wife under the Probate Code. This Court refused to “interpret the relevant [provisions of the Probate Code] to effectively repeal the provisions of Section 40-4-20(B).” Karpien, 2009-NMCA-043, ¶ 11.

The present case requires us to expand upon the analysis set forth in Karpien and to address how previously executed governing instruments, specifically the Will and Trust, are affected by the entry of a judgment or decree terminating all property rights pursuant to Section 40-4-20(B). See N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d 991 (filed 2006), (stating that statutes must be read in pari materia so as to “facilitate[] the operation of the statute[s] and the achievement of [their] goals”). In determining how to proceed when a party to a pending divorce dies testate, we must analyze NMSA 1978, Section 45-2-804 (1995), which controls the effect of a divorce upon any previously executed governing instruments. See § 45-2-804(A)(4) (defining a governing instrument as an “instrument executed by the divorced individual before the divorce or annulment of his marriage to his former spouse”). In addition, NMSA 1978, Section 45-2-508 (1993) recognizes that the change of circumstances set forth in Section 45-2-804 are sufficient to revoke a will or any part of it. The district court accepted Wife’s argument that only a final decree of divorce meets the required definition to revoke a governing instrument under the Probate Code. The district court concluded that because a judgment or decree dividing marital property and debts entered pursuant
to Section 40-4-20(B) did not amount to a “decree of divorce” it did not affect the surviving party’s right to property pursuant to a probated will. We disagree with this interpretation of the Probate Code. A judgment or decree terminating all property rights pursuant to Section 40-4-20(B) meets the definition of a divorce pursuant to Section 45-2-804(A)(2) and is sufficient to revoke governing estate planning instruments pursuant to Section 45-2-804(B)(1)(a).

{12} Divorce or annulment under Section 45-2-804(A)(2) is defined as “any divorce or annulment or any dissolution or declaration of invalidity of a marriage that would exclude the spouse as a surviving spouse [under] Section 45-2-802[.]” (Emphasis added.) Pursuant to Section 45-2-802(B)(3), “an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights, including a property division judgment entered pursuant to the provisions of Section 40-4-20” does not constitute a surviving spouse. (Emphasis added.) Thus, a judgment or decree issued pursuant to Section 40-4-20(B) excludes the surviving party from being defined as a surviving spouse under Section 45-2-802. See Karpian, 2009-NMCA-043, ¶ 10. The determination that a party is not a surviving spouse is then applied pursuant to Section 45-2-804(A)(2) to define the term “divorce.” The Section 40-4-20(B) proceeding ultimately determines whether the parties are defined to be divorced under Section 45-2-804. Consequently, a surviving wife in a divorce proceeding would be precluded from receiving any distribution as a surviving spouse under the deceased husband’s governing instruments.

{13} Under Section 45-2-802(B)(3), Wife will be precluded as a surviving spouse if there is a judgment or decree entered that terminates all marital property rights pursuant to Section 45-4-20(B). In addition, such a judgment or decree would serve to revoke all governing instruments pursuant to Section 45-2-804(B)(1)(a). If Husband’s Will and Trust are revoked, Wife will have no interest in Husband’s estate as a surviving spouse. Based on the facts of this case, the district court erred by prematurely adjudicating the validity of the Will and Trust and by prematurely admitting the Will to probate prior to the completion of the pending divorce proceedings.

{14} Wife presents other arguments as to why we should affirm the district court’s decision to admit the Will to probate and to appoint her as personal representative of Husband’s estate. Relying on our Supreme Court’s decision in Romine v. Romine, 100 N.M. 403, 671 P.2d 651 (1983), Wife argues that the pending divorce proceedings should be dismissed because Husband’s death dissolved the marital relationship and stripped the district court of jurisdiction to terminate the marriage. Wife’s reliance on Romine is misplaced. In Romine, our Supreme Court held that “the [husband’s] death dissolved the marital relationship, rendering the questions presented in [the wife’s] suit moot[,] . . . leaving the court without jurisdiction.” Id. at 404, 671 P.2d at 652. The determination in Romine was consistent with the recognized common-law rule that death effectuated an abatement of the divorce proceedings. In 1993, “[t]he New Mexico Legislature . . . made a clear break from the majority of jurisdictions by enacting Section 40-4-20(B).” Karpian, 2009-NMCA-043, ¶ 7. Therefore, Romine has been superseded by the Legislature’s enactment of Section 40-4-20(B), which now requires that the divorce proceedings continue to conclusion “as if both parties had survived.” See Karpian, 2009-NMCA-043, ¶ 5. We further reject Wife’s remaining arguments because they are contrary to the legislative intent that divorce proceedings continue to their conclusion under Section 40-4-20(B) and contradict our holding in Karpian.

CONCLUSION

{15} Based on the inherent conflict that exists if Wife serves as personal representative of Husband’s estate, we reverse the appointment of Wife as personal representative of Husband’s estate and remand to the district court to appoint a substitute personal representative or other administrator to complete the pending divorce proceedings. We further reverse the district court’s premature decision to grant Wife’s motion for partial summary judgment, to admit the Will to probate, and to validate the Trust.

{16} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge
OPINION

CELIA FOY CASTILLO, JUDGE

[1] Defendant appeals his convictions for possession of a controlled substance, driving while under the influence (DWI), and possession of drug paraphernalia (current convictions), as well as the enhancement of his sentence based on prior convictions for DWI. We hold that Defendant’s Fourth Amendment and speedy trial rights were not violated and that his current convictions were supported by substantial evidence. As to his prior DWI convictions, however, we hold that there was insufficient evidence presented and reverse on this issue. Accordingly, we affirm Defendant’s current convictions but remand for resentencing consistent with this opinion.

I. BACKGROUND

[2] At approximately 2:45 a.m. on May 8, 2006, Officer Cullison of the Clovis Police Department initiated a traffic stop after observing Defendant towing a trailer missing a tail light and a license plate. When he approached, Officer Cullison noticed that Defendant was very nervous and that his responses were inconsistent. At that point, Officer Cullison ran a check on Defendant’s driver’s license and discovered that Defendant’s license had been revoked, thereby subjecting him to immediate arrest. Accordingly, Officer Cullison took him into custody.

[3] Officer Borders, who had arrived when Officer Cullison took Defendant into custody, conducted an inventory of Defendant’s car. In the center console of the vehicle, Officer Borders discovered a cell phone case containing a glass pipe wrapped in a napkin. In the pipe was a white powdery residue. Because it was immediately apparent to the officers that the pipe was used for the consumption of narcotics, it was taken as evidence.

[4] Officer Cullison then took Defendant to the Curry County Detention Center, administered a series of field sobriety tests, and concluded that Defendant was under the influence. A subsequent blood test revealed the presence of methamphetamine. The State’s toxicologist testified that the level of methamphetamine in Defendant’s blood was sufficient to result in impairment.

[5] Defendant was tried and convicted of DWI, possession of a controlled substance, and possession of drug paraphernalia. This appeal followed.

II. DISCUSSION

[6] Defendant raises four issues on appeal. He challenges (1) the denial of his motion to suppress evidence that was seized from his vehicle, (2) the denial of his motion to dismiss the charges on speedy trial grounds, (3) the sufficiency of the evidence to support his possessory convictions, and (4) the sufficiency of the evidence to establish that he has six prior convictions for DWI. We address each argument in turn.

A. Motion to Suppress

[7] “In reviewing a trial court’s denial of a motion to suppress, we observe the distinction between factual determinations[,] which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review.” State v. Nieto, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (second alteration in original) (internal quotation marks and citation omitted). “We view the facts in the manner most favorable to the prevailing party and defer to the district court’s findings if substantial evidence exists to support those findings.” State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

[8] On the morning of trial, Defendant orally moved to suppress the pipe seized from the vehicle. In response, the State first observed that the motion was untimely and, second, asserted that the pipe was obtained in the course of a valid inventory search of the vehicle. Defendant contended that even if the police were permitted to conduct an inventory search, the seizure was improper because a warrant was required before the pipe could be seized. The State countered that the seizure was permissible under the plain view doctrine. The district court found the State’s argument to be persuasive and denied the motion.

[9] “Under Article II, Section 10 of our New Mexico Constitution, a warrantless
search of a vehicle or warrantless seizure of an object from within a vehicle requires a particularized showing of exigent circumstances or some other recognized exception to the warrant requirement." State v. Bomboy, 2007-NMCA-081, ¶ 4, 141 N.M. 853, 161 P.3d 898, rev’d on other grounds, 2008-NMSC-029, 144 N.M. 151, 184 P.3d 1045. In this case, we conclude that the search of the vehicle and the subsequent seizure of the pipe from within the center console were supported by established exceptions to the warrant requirement. We begin with the search.

{10} Defendant’s car was towed and impounded subsequent to his arrest and, as the officers testified below, standard practice entails an inventory of the contents of such vehicles. Taking an inventory of vehicle contents before towing and impoundment is a well-recognized exception to the warrant requirement. See generally State v. Ruffino, 94 N.M. 500, 501-02, 612 P.2d 1311, 1312-13 (1980) (identifying inventory searches as an exception to warrant requirements and observing the widespread recognition of the doctrine); State v. Nysus, 2001-NMCA-102, ¶ 26, 131 N.M. 338, 35 P.3d 993 (“Inventory searches are well established as an exception to the warrant requirement of the Fourth Amendment.”).

{11} “[T]he scope of a permissible inventory search is broad[.]” State v. Shaw, 115 N.M. 174, 177, 848 P.2d 1101, 1104 (Ct. App. 1993). “[I]tems need not be in plain sight to be subject to an inventory search.” Ruffino, 94 N.M. at 502, 612 P.2d at 1313. To the contrary, the opening of compartments and closed containers is generally permissible. See State v. Boswell, 111 N.M. 240, 242, 804 P.2d 1059, 1061 (1991) (“Containers found in a lawfully[?] impounded vehicle properly may be inventoried.”); Shaw, 115 N.M. at 177, 848 P.2d at 1004 (observing that an inventory search “may permit . . . that every item or container . . . be opened and searched”). Consequently, the opening of the center console and the cell phone case does not require an independent legal justification. See State v. Vigil, 86 N.M. 388, 391, 524 P.2d 1004, 1007 (Ct. App. 1974) (holding that where “the initial intrusion into a vehicle which is lawfully in police custody is justified, an inventory of the contents of closed containers is also justified”). We thus turn to consider the seizure of the pipe and napkin.

{12} Once the pipe was discovered in the course of the inventory, the plain view exception to the warrant requirement supported its seizure.

Under the plain view exception to the warrant requirement, items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that the officer had probable cause to believe that the article seized was evidence of a crime. State v. Ochoa, 2004-NMSC-023, ¶ 9, 135 N.M. 781, 93 P.3d 1286. In this case, Officers Borders and Cullison testified that they immediately recognized the pipe and white powdery residue as associated with the smoking of narcotics. See id., ¶ 13 (“An officer’s experience and training, considered within the context of the incident, may permit the officer to identify drug paraphernalia or drug packaging[,]”). Because the pipe was clearly contraband, it could properly be seized pursuant to the plain view doctrine, and no warrant was required. See State v. Foreman, 97 N.M. 583, 584-85, 642 P.2d 186, 187-88 (Ct. App. 1982) (observing that contraband which is discovered in the course of an inventory search may be seized pursuant to the plain view doctrine without a warrant). {13} Relying on State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1 and Ruffino, Defendant argues that the plain view doctrine cannot support the seizure of the pipe. This Court addressed the first part of Defendant’s contention in Bomboy, a case in which we explained that the plain view doctrine is inadequate to support the seizure of contraband from the inside of a vehicle only when an officer lacks a valid basis for searching the vehicle. 2007-NMCA-081, ¶ 6. Unless a valid exception is recognized, we require the issuance of a valid warrant prior to the search of a vehicle in New Mexico. Gomez, 1997-NMSC-006, ¶ 36-40. In Gomez, the exigent circumstances exception was recognized as the valid exception relied upon for the warrantless search of the defendant’s vehicle. Id., ¶ 41-43. In the present case, the inventory doctrine provided a valid basis for the warrantless entry of the vehicle, and therefore the subsequent warrantless seizure of the pipe pursuant to the plain view doctrine meets the requirement of Gomez. See Bomboy, 2007-NMCA-081, ¶ 6. Defendant’s reliance on Ruffino is similarly misplaced. Although Ruffino contains language suggesting that a warrant “should normally be obtained” before evidence is seized in the course of an inventory search, 94 N.M. at 502, 612 P.2d at 1313, this Court has not required a warrant if the evidence in question is patently contraband. See Foreman, 97 N.M. at 584-85, 642 P.2d at 187-88 (distinguishing Ruffino because the evidence in that case was “not necessarily criminal in nature”). In this case, the officers immediately recognized the pipe and residue as contraband and, therefore, no warrant was required. See Foreman, 97 N.M. at 584-85, 642 P.2d at 187-88. (concluding that no warrant was required in order to seize drugs, drug paraphernalia, and a weapon that were discovered in the course of an inventory search). Accordingly, we reject Defendant’s assertion that the warrantless seizure of the pipe was impermissible.

{14} In his briefs on appeal, Defendant seeks to expand his arguments. Specifically, Defendant now contends that the inventory search was invalid because the officers failed to articulate sufficiently clear policies and procedures governing such activities and because the scope of the search exceeded the legitimate purposes of the inventory. Defendant does not provide us with any citation to the record indicating that he made this argument to the district court. See Rule 12-213(A)(4) NMRA (requiring a party to include “a statement explaining how the issue was preserved in the court below”). Although the State has not relied on Defendant’s failure to preserve the arguments that he makes on appeal, it is well established that “[w]here defendants have failed to comply with [Rule 12-213], . . . an appellate court may decline to address such contention on appeal.” State v. Nozie, 2009-NMSC-018, ¶ 15, 146 N.M. 142, 207 P.3d 1119 (second and third alterations in original) (internal quotation marks and citation omitted). Our review of the record revealed no argument by Defendant questioning whether the officers acted within an established policy or whether the search exceeded the scope of an inventory. See State v. Boergadine, 2005-NMCA-028, ¶ 30, 137 N.M. 92, 107 P.3d 532 (“Without an appropriate cite to the record, we do not comb the record to find whether an issue was properly preserved.”).

{15} Before trial, Defendant challenged the search by arguing that it could not be considered a search incident to arrest, and he challenged the seizure based on Officer Borders’ failure to obtain a warrant. During trial, Defendant cross-examined the officers regarding their training, but he did not renew his earlier motion to suppress at that
time. Nor did he raise the issue regarding the policy or the scope of the search in his motion for a directed verdict. Defendant did not alert the district court at any time to his current arguments and, as a result, the district court did not consider these arguments as the basis for its ruling on suppression. 

See State v. Elliott, 2001-NMCA-108, ¶ 21, 131 N.M. 390, 37 P.3d 107 (“Our case law is clear that in order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon.”).

[16] The preservation rule “serves many purposes: it provides the lower court an opportunity to correct any mistake, it provides the opposing party a fair opportunity to show why the court should rule in its favor, and it creates a record from which this Court may make informed decisions.” State v. Janzen, 2007-NMCA-134, ¶ 11, 142 N.M. 638, 168 P.3d 768 (internal quotation marks and citation omitted). Defendant did not provide the district court or the State with an opportunity to address these arguments, either at the suppression hearing or later, during cross-examination. Consequently, we are without a proper record and decline to address Defendant’s unpreserved arguments.

[17] Because the search was a proper inventory search and because the seizure is justified by the plain view doctrine, we uphold the denial of Defendant’s motion to suppress and turn to consider whether his Sixth Amendment speedy trial right was violated.

B. Speedy Trial Motion

[18] When reviewing a district court’s denial of a motion to dismiss on speedy trial grounds, we give deference to the court’s factual findings. State v. Urban, 2004-NMSC-007, ¶ 11, 135 N.M. 279, 87 P.3d 1061. Weighing and balancing the various factors is a legal determination that we review de novo. See id.

[19] To briefly summarize the relevant time frame, Defendant was arrested on May 6, 2006, and a criminal complaint was filed in magistrate court on May 10, 2006. This complaint was dismissed when the State decided to pursue felony charges in district court. A criminal information was filed in district court on September 15, 2006. Defendant was ultimately tried and convicted on June 28, 2007. Defendant contends that the delay between the arrest and the trial was impermissibly long and that his convictions should be overturned on speedy trial grounds.

[20] When evaluating a speedy trial claim, the Court must consider the following factors: (1) the length of the delay, (2) the reasons given for the delay, (3) the defendant’s assertion of the right to a speedy trial, and (4) prejudice to the defendant. Id. We begin by considering the length of the delay.

1. Length of Delay

[21] “Initially, the length of delay must cross a threshold to establish a presumption of prejudice and to trigger further inquiry into the other factors.” Id.; see State v. Garza, 2009-NMSC-038, ¶ 21, 146 N.M. 499, 212 P.3d 387 (“[A] presumptively prejudicial length of delay is simply a triggering mechanism[].”). Our Supreme Court has recently reevaluated and increased the length of delay that must ensue in order to trigger the remaining factors. See Garza, 2009-NMSC-038, ¶ 48 (adopting a one-year threshold for simple cases, a fifteen-month threshold for cases of intermediate complexity, and an eighteen-month threshold for complex cases). The Garza Court made clear, however, that the new thresholds apply only to those cases where the defendant’s motion to dismiss on speedy trial grounds was filed “on or after August 13, 2007.” Id. ¶ 50. Defendant filed his motion on April 13, 2007. Therefore, we apply the pre-Garza standard in order to determine whether the delay surpassed the threshold and whether further analysis is necessary. See id.

Under the law at the time that the motion to dismiss was filed, a delay of nine months was sufficient to establish a presumption of prejudice in a simple case. Salander v. State, 111 N.M. 422, 428, 806 P.2d 562, 568 (1991).

[22] In the present case, the parties disagree about when Defendant’s speedy trial right attached to the charges. The State argues—without argument or citation to authority—that Defendant’s right attached when the criminal information was filed in district court on September 15, 2006. Defendant simply states that he was incarcerated for fourteen months, counting from arrest to trial, and that he was incarcerated for nine and a half months, counting from district court indictment to trial. He does not argue which is the proper time frame. The question of when the Sixth Amendment speedy trial right attached to the magistrate court misdemeanor charges that were dismissed, refiled, and elevated to felony charges has not been adequately briefed. Because the delay is greater than nine months by either calculation, thus triggering the remainder of the speedy trial analysis, we do not decide when Defendant’s right attached. See State v. Nozie, 2009-NMSC-018, ¶ 15, 146 N.M. 142, 207 P.3d 1119 (“When a criminal conviction is being challenged, counsel should properly present [the reviewing] court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure.” (alteration in original) (internal quotation marks and citation omitted)). Further, by either calculation, the delay was only minimally over the presumptively prejudicial period and, as a result, “this factor will not have a large practical effect on the balancing.” State v. White, 118 N.M. 225, 226, 880 P.2d 322, 323 (Ct. App. 1994); see Garza, 2009-NMSC-038, ¶ 24 (“The greater the delay the more heavily it will potentially weigh against the [s]tate.”). We now turn to the remaining factors.

2. Reasons for Delay

[23] Under the second factor, we consider the reasons for the delay by dividing the period of delay into segments. The first period of delay is from Defendant’s arrest on May 6, 2006, until Defendant’s arraignment on October 2, 2006. The second period is from the arraignment until the first trial date on March 28, 2007. The third period of delay is between March 29, 2007, when the trial was reset and May 2, 2007, when a new attorney entered an appearance for Defendant. The last period of delay is between May 3, 2007, and June 28, 2007, the ultimate trial date.

[24] The first five-month period of delay is attributable to several factors. Defendant was first charged in magistrate court and those charges were eventually dismissed. The State then refiled slightly different charges in district court, and Defendant was indicted on those charges on September 15, 2006. There was a four-day delay caused when the Department of Corrections failed to transport Defendant for his arraignment or preliminary hearing originally scheduled for September 28, 2006; the arraignment took place on October 2, 2006. Defendant does not argue that the State acted in bad faith during this period. We therefore weigh this period slightly against the State. See Garza, 2009-NMSC-038, ¶ 28 (stating that “the State’s discretion to dismiss a criminal case in magistrate court and reinstate charges in district court does not justify the delay”); see also State v. O’Neal, 2009-NMCA-020, ¶ 20, 145 N.M. 604, 203 P.3d 135 (filed 2008) (“We allocate the reasons for the delay to each side and determine
the weight attributable to each reason, with
the knowledge that the [s]tate has the duty
to make a good faith and diligent effort
to bring a defendant to trial."). During the
next five-month period, the case proceeded
with customary promptness, and we hold
this period against neither party. See Mad-
dox, 2008-NMSC-062, ¶ 27 (weighing the
period in which a case proceeded “with
customary promptness” against neither
party).

{25} On March 28, 2007, the scheduled
trial was vacated because the trial judge
was not feeling well. The next day a new
trial was set for April 27, 2007. This pe-
riod of delay weighs neutrally and does
not count against either party. See White,
118 N.M. at 226, 880 P.2d at 323 (holding
that illness and recovery of a judge does
not weigh against either side); cf. State v.
Kerby, 2001-NMCA-019, ¶¶ 11, 14, 130
N.M. 454, 25 P.3d 904 (holding that illness
beyond control of either party constitutes
a valid reason for delay for speedy trial
purposes).

{26} The last period of delay resulted
from the need to vacate the second, April
27, 2007, trial setting, which the parties
agree resulted from a late-discovered con-
flict regarding Defendant’s representation
by the public defender department. A new
trial date was set for June 28, 2007. This
period of approximately two months must
weigh against Defendant. See White, 118
N.M. at 226, 880 P.2d at 323 (observing
that delays caused by the defendant’s re-
ceipt of new counsel were attributable to
the defendant). Thus, approximately five
months weigh slightly against the State, six
months are neutral, and two months weigh
against Defendant.

3. Assertion of the Right

{27} Defendant timely asserted his right
to a speedy trial by filing a pro se motion
on April 13, 2007. Although the assertion
“was not especially vigorous,” there is no
indication that Defendant acquiesced to the
delay. Garza, 2009-NMSC-038, ¶ 34. Thus,
the third factor weighs against the State.
See State v. Marquez, 2001-NMCA-062, ¶
22, 130 N.M. 651, 29 P.3d 1052 (holding
that the defendant’s motion to dismiss and
objection to extension constituted meaning-
ful assertions of the right to a speedy trial,
such that the third factor weighed slightly
against the State).

4. Prejudice

{28} Turning to the fourth and final
factor, “[w]e examine the three types of
prejudice that Barker held relevant to the
speedy trial analysis: (1) oppressive pretrial
incarceration; (2) anxiety and concern of
the accused; and (3) the possibility of
impairment to the defense.” State v. Stock,
2006-NMCA-140, ¶ 34, 140 N.M. 676, 147
P.3d 885 (internal quotation marks and
citation omitted). Defendant has not argued
that the defense was impained and because
Defendant was incarcerated due to a parole
violation, the pending charges cannot be
said to have resulted in oppressive pretrial
incarceration. See State v. Maddox, 2008-
NMSC-062, ¶ 32, 145 N.M. 242, 195 P.3d
1254 (holding that the defendant was not
subject to pretrial incarceration because
he was already incarcerated on different
charges); Urban, 2004-NMSC-007, ¶ 17
(“In this case, [the defendant] was incarcer-
ated on other charges and thus, despite the
delay, was not subject to oppressive pretrial
incarceration.”).

{29} In addition, Defendant’s claim of
undue anxiety or concern is little more
than a bare assertion, to which we accord
no weight. See State v. Brown, 2003-
NMCA-110, ¶ 19, 134 N.M. 356, 76 P.3d
1113 (rejecting a claim of prejudice where
there was no showing of undue anxiety or
concern that was greater than that of anyone
whose liberty had been curtailed). Finally,
 Defendant contends that the delay may
have deprived him of the opportunity to
serve sentences concurrently. Our Supreme
Court has recently decided, however, that
such a claim is merely speculative. See
Maddox, 2008-NMSC-062, ¶ 35 (reject-
ing a similar argument on grounds that “it
is speculative as to how the district court
may choose to exercise its discretion in
sentencing”). Accordingly, Defendant has
not established cognizable prejudice. See
Garza, 2009-NMSC-038, ¶ 37.

5. Balancing the Factors

{30} In summary, the length of the delay,
the reasons for delay, and the assertion of
the right factors weigh in Defendant’s favor.
Nevertheless, the total length of the delay
was only minimally beyond the presumptive
threshold. See id. ¶ 24 (explaining that when the length of delay
is not extraordinary, it does not weigh
heavily in a defendant’s favor). Three
months of the delay were not attributable
to the State, the remaining ten months of
delay weighed only slightly against the
State, and Defendant did not establish that
he suffered cognizable prejudice. Under
these circumstances, we conclude that
Defendant’s right to a speedy trial was not
violated. See id. ¶ 40 (balancing the factors
and concluding that there was no speedy
trial violation when the defendant failed to
show prejudice and the remaining factors
did not weigh heavily in the defendant’s
favor).

C. Sufficiency of the Evidence

{31} Defendant challenges the sufficien-
cy of the evidence to support his convic-
tions for possession of methamphetamine
and possession of drug paraphernalia. In
addition, Defendant argues that the State
failed to provide sufficient evidence to es-
ablish that he had prior DWI convictions.
We begin by considering the evidence
supporting the current convictions.

1. Evidence Supporting the Current
Constitutions

{32} When reviewing a challenge to the
sufficiency of the evidence to support a
conviction, we must determine “whether
substantial evidence of either a direct or
circumstantial nature exists to support a
verdict of guilt beyond a reasonable doubt
with respect to every element essential to
a conviction.” State v. Sutphin, 107 N.M.
126, 131, 753 P.2d 1314, 1319 (1988). “A
reviewing court must view the evidence in
the light most favorable to the state, resolv-
ing all conflicts therein and indulging all
permissible inferences therefrom in favor
of the verdict.” Id. “This Court does not
weigh the evidence and may not substitute
its judgment for that of the fact finder so
long as there is sufficient evidence to sup-
port the verdict.” Id.

{33} To prove the crime of methamphet-
amine possession, the State was required
to demonstrate (1) that Defendant had meth-
amphetamine in his possession, (2) that
Defendant knew or believed it to be meth-
amphetamine, and (3) that this happened
in New Mexico on May 8, 2006. See NMSA
1978, § 30-31-23(D) (2005). With respect
to the possession of drug paraphernalia
charge, the State must have established
(1) that Defendant used or possessed drug
paraphernalia; (2) that Defendant had the
intent to plant, propagate, cultivate, grow,
harvest, manufacture, compound, convert,
produce, process, prepare, test, analyze,
pack, repack, ingest, inhale or otherwise
introduce into the human body, a controlled
substance; and (3) that this happened in
New Mexico on or about the 8th day of
May 2006. See NMSA 1978, § 30-31-25.1

{34} The State called several witnesses
to establish the date on which the pertinent
events occurred. The officers testified
that they found a pipe containing a white
powdery substance in the vehicle that
Defendant was driving—in a cell phone
case that was located in the center console.
Subsequent forensic testing revealed that the substance was methamphetamine. We conclude that the circumstantial evidence was sufficient to establish that Defendant possessed or constructively possessed the methamphetamine and the pipe. See State v. Barber, 2004-NMSC-019, ¶ 27, 135 N.M. 621, 92 P.3d 633 (“Proof of possession in controlled substances cases may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting [the] defendant with the crime.”). Similarly, the jury could have inferred from the evidence that Defendant knew that the substance was methamphetamine and that he intended to use the pipe to inhale or otherwise introduce methamphetamine into the human body—particularly in light of the evidence that his blood test revealed a significant quantity of methamphetamine in Defendant’s system. See State v. Montoya, 77 N.M. 129, 131, 419 P.2d 970, 971 (1966) (“Knowledge, like intent, is personal in its nature and may not be susceptible of proof by direct evidence. It may, however, be inferred from occurrences and circumstances.”).

Defendant contends that the circumstantial evidence should not be regarded as sufficient to establish possession and intent because the vehicle might theoretically have been accessible to others. See State v. Phillips, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 421 (“When the accused does not have exclusive control over the premises where the drugs are found, the mere presence of the contraband is not enough to support an inference of constructive possession.”). The record, however, contains no evidence whatsoever to support Defendant’s speculation about non-exclusivity. To the contrary, the only evidence presented suggested exclusivity: Defendant was the registered owner of the vehicle as well as the only occupant. Accordingly, we reject Defendant’s assertion that there was insufficient evidence to support the verdicts.

2. Evidence Supporting the Prior Convictions

Defendant was the registered owner of the vehicle as well as the only occupant. Accordingly, we reject Defendant’s assertion that there was insufficient evidence to support the verdicts.

Below, the State filed an information alleging that Defendant had eight prior convictions for DWI. The document indicated that certified copies of the abstracts of record and/or judgments and sentences associated with those prior convictions were attached as exhibits. The exhibits, however, were never filed on record. When the prosecutor discovered the oversight at the sentencing hearing, he presented a document that he appears to have had on hand. Because the document was not designated as an exhibit, it is not available for our review. The transcript of the sentencing hearing, however, provides reasonably clear information about its nature and content. The document is described as a copy of a prior judgment and sentence, which was filed in the same judicial district in 2004. This judgment and sentence reflected the district court’s determination that at that time in 2004 Defendant had admitted to at least six prior convictions for DWI as a part of a plea agreement.

Defendant argued that the State had failed to make a prima facie showing with respect to any prior convictions for DWI. Defendant pointed out that the State generally presents entries of appearance and/or waivers of counsel, as well as judgments and sentences for each claimed prior conviction, and he argued that without such documents, the court could only sentence him for a first DWI offense.

After hearing Defendant’s position, the district court asked whether the State would like a continuance in order to gather the documents that it had intended to present. Defendant promptly objected to the suggestion, contending that there had already been significant delays and urging the court to impose the lighter sentence in view of the State’s “lack of preparation.”

In response, the prosecutor observed that in this context, proof of prior convictions rather than sentences is required and that the State’s burden is merely to make a prima facie showing. In light of these considerations, the prosecutor contended that the document previously submitted was sufficient to meet the State’s initial burden. To the extent that additional information might be desired, the prosecutor suggested that the court could take judicial notice of its own records that would reflect Defendant’s prior convictions for DWI within the district. Ultimately, however, the prosecutor offered to supply the missing exhibits at a future date, if that was desired by the court.

Rather than continuing the proceedings, the court indicated that it was “going to take appropriate judicial notice that . . . the court found . . . [D]efendant ha[d] at least six prior DWI convictions . . . Therefore . . . this current DWI is in addition to that.” On appeal Defendant challenges this ruling, renewing his argument that the State failed to make a prima facie showing of any prior DWI convictions. We agree with Defendant.

There appears to be relatively little authority in New Mexico specifically addressing the prosecution’s burden of making a prima facie showing with respect to prior DWI convictions. The statute relating to prior convictions for DWI does not require the district court to make any findings—it simply mandates that “[u] pon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and . . . shall be sentenced to a term of imprisonment of eighteen months, six months of which shall not be suspended, deferred or taken under advise-ment.” NMSA 1978, § 66-8-102(G) (2005)(amended 2008). Indeed, we are aware of no authority which conclusively establishes what sort of evidence must be presented in order to make a prima facie showing of the existence of prior DWI convictions.

In State v. Sedillo, 2001-NMCA-001, ¶ 1, 130 N.M. 98, 18 P.3d 1051, the state presented three documents to establish a prior DWI offense: a complaint filed with the metropolitan court that included a handwritten notation of a guilty plea with a judge’s signature, a signed waiver of counsel form, and a computer printout indicating that the defendant had pled guilty to DWI, first offense. Id. ¶ 4. After rejecting a series of evidentiary challenges to the documents, id. ¶¶ 7-9, the Sedillo Court held that the handwritten notes were sufficient to satisfy the state’s burden. Id. ¶ 10. Despite the degree of informality that the Sedillo Court was willing to accept, we are unpersuaded that the document discussed by the parties in the present case—a single, uncertified judgment and sentence, which relied on plea agreement admissions of other convictions—is sufficient to establish a prior DWI conviction, particularly because the document is not in the record...
and the only indication of its contents is presented through argument of counsel. See *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 ("It is our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence."). The records of prior convictions must be properly admitted into the record and available for review on appeal, unless such proof is stipulated to or otherwise waived by Defendant.

We are further unpersuaded that the trial court’s willingness to review court records in order to locate Defendant’s previous convictions would satisfy the State’s burden of proof to establish the fact of those convictions. In order for a defendant’s sentence to be enhanced under Section 66-8-102(G), “[t]he [s]tate bears the initial burden of establishing a prima facie case of a defendant’s previous [DWI] convictions.” *State v. Pacheco*, 2008-NMCA-059, ¶ 6, 144 N.M. 61, 183 P.3d 946 (internal quotation marks and citation omitted). Thus, the State bore the “ultimate burden of persuasion on the validity of prior convictions in this context.” *Id.* (internal quotation marks and citation omitted); *State v. Gonzales*, 1997-NMSC-050, ¶ 14, 124 N.M. 171, 947 P.2d 128 (“The [s]tate had the burden of persuasion; that is, the [s]tate was required to show the validity of the prior convictions.”). The State’s failure in the present case to meet that burden cannot be overcome by the trial court’s willingness to check its own records. Accordingly, we reverse the enhancement of Defendant’s sentence under Section 66-8-102(G) and remand for resentencing.

III. CONCLUSION

For the foregoing reasons, we affirm Defendant’s current convictions, but we reverse Defendant’s sentence and remand for resentencing in conformity with this opinion.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
TIMOTHY L. GARCIA, Judge
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Bar Bulletin - December 7, 2009 - Volume 48, No. 49  41
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