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First Snow by Margaret Letzkus (see page 5)
Weems Art Gallery, Albuquerque

www.nmbar.org
DISCIPLINARY ADMINISTRATIVE ADJUDICATIONS
IN NEW MEXICO

Friday, March 12, 2010 • State Bar Center, Albuquerque
4.7 General & 2.2 Ethics CLE Credits

☐ Standard Fee $209  ☐ Government, Legal Services Attorney, Paralegal $179

Presenter: Willard (Bill) H. Davis, Jr., Administrative Law Judge (retired)

8:00 a.m.  Registration
8:30 a.m.  Introductory Remarks
8:40 a.m.  Administrative Agency Formal Hearings
9:00 a.m.  Procedural Due Process
10:00 a.m. Break
10:15 a.m. Noon
1:00 p.m.  The Impartial Decision Maker (1.7 E)
2:00 p.m.  Hearing Officer Duties and Powers, Role, and Immunity
2:30 p.m.  Proof Issues
2:45 p.m.  Ex Parte Communications and Pro Se Parties
3:00 p.m.  Break
3:15 p.m.  Popular Defenses Debunked
4:00 p.m.  Telephonic Hearings and Review on Appeal
4:20 p.m.  A Model Code of Ethics (0.5 E)
4:50 p.m.  Q & A
5:00 p.m.  Adjourn

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

Name ____________________________  NM Bar # ____________________________

Street __________________________________________________________________________________________________________

City/State/Zip _____________________________________________________________________________________________________

Phone ___________________________  Fax ___________________________

E-mail __________________________________________________________________________________________________________

☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________  Make check payable to: CLE

Credit Card # ___________________________  Exp. Date ____________  CVV# ___________________________

Authorized Signature ________________________________________________________________
TAX CONSIDERATIONS IN ESTATE PLANNING
Thursday-Friday, March 18-19, 2010 • State Bar Center, Albuquerque
13.0 General & 1.0 Ethics CLE Credits
☐ Standard Fee $359  ☐ Government, Legal Services Attorney, Paralegal $329

DAY ONE
7:30 a.m.  Registration
7:55 a.m.  Introductory Remarks
Eric Burton, Esq., LLM, JD, MBA
Hurley, Toevs, Styles, Hamblin, & Pantin, P.A.

8:00 a.m.  Estate Tax
James H. Bozarth, Esq., Hinkle Hensley Shanor & Martin LLP
Ruth Ann Castellano-Piatt, CPA, REDW
Susan Shank

Introduction & Overview (General Concepts)
Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (Gross Estate, Part 5, Recapitulation, & Part 2, Line 1)
Schedule A - Real Estate ($2021, $2033)
Schedule B - Stocks and Bonds ($2031, $2033)
Schedule C - Mortgages, Notes, and Cash ($2031, $2033)
Schedule D - Insurance on the Decedent's Life ($2042)
Schedule E - Jointly Owned Property ($2040)
Schedule F - Other Miscellaneous Property ($2043, $2044)
Schedule G - Transfers During Decedent’s Life ($52035, 2036, 2037, 2038)
Schedule H - Powers of Appointment ($2041)
Schedule I - Annuities ($2039)
Valuation - $2031, $2032, $2032A
Valuation – Chapter 14
Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (Deductions, Part 5, Recapitulation, & Part 2, Line 2)
Schedule J - Funeral Expenses ($2053)
Schedule K - Debts of the Decedent ($2053)
Schedule L - Mortgages and Liens ($2053)
Schedule M - Net Losses During Administration
Schedule N - Expenses Incurred in Administering Property Not Subject to Claims
Schedule M - Bequests, etc., to Surviving Spouse ($2056)
Schedule O - Charitable, Public, and Similar Gifts and Bequests ($2055)

10:30 a.m.  Break
10:45 a.m.  Estate Tax (continued)
Susie Shank

Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (Part 2)
Line 7 – Credit for Gift Taxes Paid ($2012)
Line 9 – Unified Credit ($2011)

1:00 p.m.  Estate Tax (continued)
Ruth Castellano-Piatt, CPA, REDW

Estate Tax (continued)
Lunch (provided at the State Bar Center)

Estate Tax Payment Provisions ($6161, $6163, $6166, $303)
Gift Tax

3:15 p.m.  Break
3:30 p.m.  Generation Skipping Transfer Tax
Evan S. Hobbs, Esq., Law Office of Evan S. Hobbs PC

4:30 p.m.  Adjourn

DAY TWO
8:30 a.m.  Inter Vivos Gifting
John Lieuwen, Esq., John N. Lieuwen & Associates PA
Personal Residence Planning
Grantor Retained Trusts
Charitable Remainder and Charitable Lead Trusts
Family Limited Partnerships
Sale Transactions (SCINs & Installment Sales to IDGTs)
Net Gifts

Break
Irrevocable Life Insurance Trusts
Ed Hymson, PhD, LLM, JD, Research Fellow, State Bar of New Mexico

11:30 a.m.  Income Tax Considerations in Estate Planning
Nell Graham Sale, Esq., Pregenzer Baysinger Wideman & Sale PC

Lunch (provided at the State Bar Center)
Income Tax Considerations in Estate Planning (continued)
Nell Graham Sale, Esq.

12:15 p.m.  Adjourn

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

Name ___________________________________________________________________ NM Bar # _________________________________

Street __________________________________________________________________________________________________________

City/State/Zip _____________________________________________________________________________________________________

Phone ____________________________________________________ Fax  ____________________________________________________

☒ Purchase Order (Must be attached to be registered)  ☒ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ________________________________________________________________ Exp. Date ________________ CVV# ________________

Authorized Signature _______________________________________________________________________________________________
You’re Invited!

What: State Bar of New Mexico’s 124th Birthday
Where: State Bar Center
When: 4 p.m., February 26

The State Bar is proud of the tremendous dedication and service that our membership has given to the legal profession and the public. We hope you will join us for this important celebration.

Stephen S. Shanor, President
Joe Conte, Executive Director

The State Bar will recognize the longest serving judge, the youngest active member and attorneys celebrating 25 and 50 years of service to our profession.

R.S.V.P. to
(505) 797-6000
or sbnm@nmbar.org
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 Professionalism Tip

 With respect to parties, lawyers, jurors and witnesses:
 I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications.

 Meetings

 February

 15 Attorney Support Group, 7:30 a.m., First United Methodist Church

 16 Solo and Small Firm Section Board of Directors, 11:30 a.m., Section at noon, State Bar Center

 17 Law Practice Management Committee, noon, State Bar Center

 18 ADR Committee, noon, 2nd Judicial District Court

 18 Elder Law Section Board of Directors, noon, State Bar Center

 18 Public Law Section Board of Directors, noon, Risk Management Division

 State Bar Workshops

 February

 17 Lawyer Referral for the Elderly Workshop 9–10:15 a.m., Presentation 1:30–4:00 p.m., Clinics

 Meadowlark Senior Center, Rio Rancho

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

 24 Lawyer Referral for the Elderly Workshop 10–11:15 a.m., Presentation 1:30–4:00 p.m., Clinics

 San Jose Senior Center, Carlsbad

 25 Lawyer Referral for the Elderly Workshop 10:15–11:30 a.m., Presentation 1:30–4:00 p.m., Clinics

 Roswell Joy Center, Roswell

 Cover Art: Margaret Letzkus has been recognized as a colorist throughout her career as a painter. She feels that energy is the most important element in a piece and accomplishes this with color, composition, impact, and perhaps an element of surprise. Her works range from abstract to whimsical and are in numerous collections throughout the world. Letzkus (www.margaret-letzkus.com) lives and works in Rio Rancho. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.

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NOTICES

Court News
N.M. Supreme Court
Access to Justice Commission Notice of Meeting

The goals of the Access to Justice Commission include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness through communication and message development, encouraging more pro bono work by attorneys, and improving training and technology. The next meeting of the commission is from noon to 4 p.m., Feb. 26, at the State Bar Center. All interested parties are welcome to attend. Further information is available on the State Bar’s website, www.nmbar.org.

Committee Vacancies
Metropolitan Court Rules Committee:
One vacancy exists on the Metropolitan Court Rules Committee created by the resignation of an assistant public defender whose primary practice is in the Metropolitan Court. The Court would like to fill the vacancy with a similar attorney; however, those whose practice is primarily in Metropolitan Court are invited to apply. Deadline for submissions is Feb. 19.

UJI Criminal Committee:
One vacancy exists on the UJI Criminal Committee. The vacancy is created by the resignation of an attorney whose primary practice is criminal defense. The Court would like to fill the vacancy with a similar attorney in order to maintain membership balance. Deadline for submissions is Feb. 26.

Attorneys interested in volunteering time on these committees may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848.

Second Judicial District Court Judicial Vacancy

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of March 1 upon the retirement of the Honorable Geraldine E. Rivera. Chief Judge Ted Baca has indicated he intends to assign the vacancy to the Civil Division. Kevin K. Washburn, chair of the Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website at http://lawschool.unm.edu/judsel/application.php, or via e-mail by calling Sandra Baumam, (505) 277-4700. The deadline for applications is 5 p.m., March 8. Applications received after that date will not be considered. The District Judicial Nominating Commission will meet at 9 a.m., March 26, at the County Courthouse, 400 Lomas NW, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public.

Twelfth Judicial District Court Mass Judge Reassignment

Effective January 12, all 12th Judicial District Court cases (Otero and Lincoln counties) previously assigned to Division IV will be reassigned to the Honorable David I. Rupp, appointed to Division IV due to the retirement of the Honorable Sandra A. Grisham. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Feb 15 to challenge or excuse the newly assigned judge pursuant to Rule 1-088.

Thirteenth Judicial District Court E-Filing Training

The 13th Judicial District Court will require mandatory e-filing in all civil cases beginning July 1. Until then, as e-filing goes live in each of the three counties comprising the district (Cibola began e-filing Nov. 17, 2009; Sandoval began e-filing Jan. 25; and Valencia begins e-filing March 2010), e-filing will be voluntary and free but requires registering with the service provider. E-filing training will be held at noon, March 18, at the Valencia County Courthouse. Anyone wishing to utilize e-filing must sign up with the service provider, WIZNET, and become a registered user. As a registered user, the person or firm signs a subscriber agreement and receives a user ID and password to access the e-filing system. Beginning July 1, WIZNET will charge e-filing fees to each registered user when utilizing the system. The fees shall be determined by statute. To access the e-filing system, go to www.13districtcourt.com and select “E-FILE.” You can read the user guide, participate in an Internet training session and register with WIZNET to set up an account. Contact Gregory T. Ireland, (505) 865-4291, ext. 2104 for further information.

U.S. District Court for the District of New Mexico Change of Address Las Cruces Courthouse

Effective March 16, the address for the U.S. District Court located in Las Cruces will change to 100 N. Church Street, Las Cruces, NM 88001.

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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<td>Exhibits in criminal, civil, domestic relations, and adoptions</td>
<td>1978–1993</td>
<td>March 2</td>
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STATE BAR NEWS

Attorney Support Group

- Afternoon groups meet regularly on the first Monday of the month:
  March 1, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month:
  Feb. 15, 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.

Bankruptcy Law Section
Annual Meeting and CLE

The Bankruptcy Law Section will hold its annual meeting during the lunch break, March 5, at the 25th Annual Bankruptcy Year in Review at the State Bar Center. Register online at www.nmbarcle.org or fax to (505) 797-6071. See the CLE-At-a-Glance insert in the Jan. 25 (Vol 49, No. 4) Bar Bulletin for more information. Send agenda items to Chair Michelle Ostrye, mko@suntinfirm.com.

Public Law Section
Annual Public Lawyer Award

The Public Law Section is currently accepting nominations for the Public Lawyer of the Year Award, which will be presented April 30. Visit www.nmbar.org/About Us/Sections/PublicLaw/Lawyer Awards to view previous recipients and award criteria. Send nominations by 5 p.m., March 5, to Doug Meiklejohn, dmeiklejohn@nmelc.org, or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe, NM 87505-4074. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Young Lawyers Division
2010 Summer Fellowships

The Young Lawyers Division is currently accepting applications for its 2010 Summer Fellowships. For the summer of 2010, YLD will award two fellowships to law students who are interested in working in unpaid legal positions with public interest entities or in governmental agencies. The fellowship awards are intended to provide law students the opportunity to work in positions that might otherwise be possible because the positions are unpaid. The fellowship awards, depending on the circumstances of the position, may be up to $3,000 for the summer. In order to be considered for the fellowships, applicants must submit the following materials: (1) a letter of interest that details the student’s interest in public interest law or the government sector; (2) a resume; and (3) a written offer of employment for an unpaid legal position with a public interest entity or governmental entity for the summer of 2010. Applications should be submitted to: J. Brent Moore, YLD Summer Fellowship Coordinator N.M. Public Regulation Commission PO Box 1269 Santa Fe, NM 87504-1269 Applications must be postmarked by March 31. Direct questions to Moore at (505) 827-4645.

Albuquerque Thunderbirds Night

Join the Young Lawyers Division Feb. 26 for a night at the Albuquerque Thunderbirds (local NBA Development League team). A limited number of discounted court side seats ($50 value) are available. The first 20 YLD members to respond may purchase tickets for $25 each, and the first 15 law school students to respond may purchase tickets for $15 each. Dinner is included. This is a great opportunity to network with current and future division members as well as meet the incoming 2010 YLD board of directors. The event is sponsored in part by Jackson Lewis LLP. RSVP by Feb. 19 to Martha Chicoski, mary.martha.chicoski@farmers.com.

MEMBER BENEFIT OF THE WEEK

Ethics Advisory Opinions

Visit the State Bar advisory opinion archive and topical index at http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html for assistance in interpreting the New Mexico Rules of Professional Conduct.

Questions about one’s own conduct should be sent to the State Bar Ethics Advisory Committee through the State Bar’s general counsel, rspinello@nmbar.org.

Ethics Helpline: 1-800-326-8155.

1. call (505) 842-1151 or (505) 243-2615;
2. fax to (505) 842-0287; or
3. mail to PO Box 40, Albuquerque, NM 87103.

UNM

School of Law
Spring Library Hours to May 15

Building and Circulation

Monday–Thursday  8 a.m.–11 p.m.
Friday  8 a.m.–6 p.m.
Saturday  9 a.m.–6 p.m.
Sunday  9 a.m.–11 p.m.

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

OTHER BARS

Albuquerque Bar Association
Member Luncheon

The Albuquerque Bar Association’s Member Luncheon will be held at noon, March 2, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The CLE program (2.0 general CLE credits) will immediately follow from 1:15 to 3:15 p.m. Ruth Pregenzer and Marcy Baysinger of Pregenzer Baysinger Wideman & Sale PC will present Fiduciary Litigation.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $85 members/$115 non-members with reservations; CLE only: $60 members/$80 non-members.

Register for lunch by noon, Feb. 25. To register:
1. log onto www.abqbar.org;
2. e-mail abqbar@abqbar.org;
3. call (505) 842-1151 or (505) 243-2615;
4. fax to (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.

OTHER NEWS

Domestic Violence Resource Center
Fulfill Pro Bono Hours

To help victims of domestic violence in New Mexico and to fulfill those pro bono hours without leaving your office, join the staff of Domestic Violence Resource Center (formerly Resources, Inc.) for an informational brown-bag lunch from noon–1 p.m., March 3, at 625 Silver SW, Silver Square Building, Albuquerque, first floor conference room. DVRC, a nonprofit agency, is in need of attorney volunteers for
its state-wide, toll-free legal helpline. The helpline can be forwarded to any phone number, training takes less than one hour, and you do not need to be a family law practitioner. Beverages and light dessert will be provided. There is no charge and no obligation. Contact Leisa Richards, DVRC legal director, (505) 242-2089 or lrichards@resourcesinc.org, to reserve a space.

**William S. Dixon First Amendment Freedom Award Nominations**

The New Mexico Foundation for Open Government is accepting nominations for the 2010 William S. Dixon First Amendment Freedom Award. Submission letters should discuss how the person has advanced the cause of open government and/or First Amendment rights in New Mexico. Awards are given in the areas of law, government, business, education and journalism. Send nominations by Feb. 15 to NM-FOG at info@nmfog.org or 115 Gold Ave. SW, Suite 201, Albuquerque, NM, 87102. For more information, call (888) 843-9121 or visit www.nmfog.org.

**Practice by Non-Admitted Attorneys Before State Courts**

Attorneys who are authorized to practice law before the highest court of record in any state, territory or country and who wish to appear before a New Mexico court in a civil matter should consult Rule 24-106 NMRA. Rules, instructions, and the latest updated registration certificate are available on the State Bar website at www.nmbar.org (click on Attorneys/Members/Pro Hac Vice). Direct questions regarding this process to the Office of General Counsel, (505) 797-6050.

**Update Contact Information By March 1**

State Bar staff is updating information for the 2010–11 Bench & Bar Directory. Address changes will be accepted through March 1. Publication is not guaranteed for information submitted after that date. To verify your contact information, go to www.nmbar.org, Find an Attorney, and search by name. Click on Contact Us to submit changes online; mail changes to Address Changes, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019; or e-mail to address@nmbar.org. Pursuant to Rule 17-202 (A) NMRA, the address of record will be published. If the street address is different from the address of record, you may request that the street address not be disclosed to the public.

**Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.**

**NOW accepting ad space reservations for the 2010-2011 BENCH & BAR DIRECTORY**

Contact Marcia C. Ulibarri 505.797.6058 mulibarri@nmbar.org
KEYS to Law Practice Management

To the adage "you can't be too rich or too thin" add "or too secure" when it comes to safeguarding the contents of your computer. Attorneys should be aware that as digital information replaces paper, it is not so much the risk of fire or flood that is a concern, but the rather common, yet ignored, hard drive failure. Likewise, a malcontent breaking into the lawyer’s office is still an issue, but hacking, online fraud, and the unattended laptop are also risks. Complacency is not an option. Attorneys should focus on reaching the goal where client information is protected and readily available to both client and lawyer, no matter their respective locations.

The ubiquity of computers means that when attorneys consider catastrophic failure affecting their practice, they will most likely think of irreparable hard drive failure. Second on the list will be the damage caused by natural phenomena, such as tornadoes if the attorney lives in an area where those are common. Lightning storms and blackouts can affect electronics as can flooding, which we saw in Louisiana following Hurricane Katrina. And, as if acts of God were not enough, attorneys also have to contend with burglars and hackers.

Decide What and How to Back Up

The most basic step after purchasing deadbolts, insurance, and a fire/waterproof safe is to back up your digital files. The frequency of the backups depends on how the computer is used. Although I use the computer daily to create new files, these do not necessarily alter old ones. Therefore, my backups only occur based on the importance of the new files created. For example, a memo about a case will require me to create a backup, but the copy of an interesting webpage or a PDF of an e-mail from a committee would not.

I do not recommend solely backing up to an online database. Aside from the cost factor, it is best and even prudent to have copies of files within easy reach. Weekly, you should make a copy on DVD of the My Documents folder and/or any other folders where files are kept and store the copy to an external hard drive. A duplicate of the DVD should be stored in a secure location. A complete system backup should be made monthly. If you normally store papers in banker’s boxes, you should include a DVD backup with the box.

Manual backup software, such as Deep Burner, works well depending on the number of files. For larger projects, consider a dedicated system such as Webroot Secure Backup or Acronis True Image. Be aware of how the system stores the files as they should be accessible even when the program that created them is not available. A comparison of backup software can be found at http://en.wikipedia.org/wiki/Comparison_of_backup_software (last visited Dec. 12, 2009). The list categorizes the types of software within two groups: open source and proprietary. As a general rule of thumb, open source is low cost or free but the software may have fewer features or prove difficult to navigate. While proprietary software is more expensive, the cost can be affected by where the attorney shops and the available license plans. It is important to note that manual backups can take time which, to an attorney, is perhaps a cost too high. Automated backups are possible, but it will still be necessary to test the validity of the backup files.

The external hard drive used to back up information should be portable, such as those available from Western Digital. I use a Western Digital 500 GB hard drive shaped like a book that can be carried in a briefcase. As it is not “tied” to any computer, I can carry it with me along with my laptop if I need to work from another location. If you receive the ABA’s GP Solo or Law Practice magazines, you may have read about RAID (“redundant array of independent disks”) servers where three to five disks are combined into a single unit. Based on the software used, copies of the data are stored and replicated among the various drives. Be advised, however, that this is not a true backup system. As with the external hard drive, the data can still be affected by viruses or human error.

Don’t Sacrifice Security

A number of legal publications discuss the benefits of online backups. Usually the articles note that such systems can be of great use to attorneys because data can be accessed anywhere and remain stored in a safe location with limited access. In considering online backups, you should make a careful study of what is offered and pay particular attention to the way data are transferred between the office computer and the storage site as well as the extent of security available at the site. Don’t forget to take into account where the data are stored as geographical location is important. As attorneys, we have a duty to keep client information confidential. When we place digital client files into the control of a third party, along with the security of our files we need to be assured of the trustworthiness of the recipient. Remember also that these online storage sites are businesses and thus could suffer bankruptcies or other failures.

The benefit of backing up an entire system is that if the hard disk becomes irreparably damaged, you will be able to resume work with as little downtime as possible. Online systems and software-as-service sites such as Google are useful, but depending on other parties in confidential legal matters is not safe. A copy of your entire system kept up to date and easily transferable to a new computer would be best. A number of programs allow you to create images of the hard drive. I like Paragon or Acronis True Image because they create a bare metal restore. Bare metal as defined by Wikipedia, the font of all knowledge, is a way of imaging the hard drive down to the “bare metal” without regard to software or operating system.

Because of the necessity of keeping information confidential, you should do all you can to maintain the security of your computer system and to ensure that you can continue working no matter what disaster may strike. Keep in mind that, even with the latest technology in digital and non-digital security measures, trouble can still rear its ugly head. We cannot plan for every eventuality, but some planning will help. And remember that too much security never hurt anyone.
John P. Salazar was elected by the at-large membership to fill a two-year term on the board of directors of the Federal Home Loan Bank of Dallas. An attorney with the Rodey Law Firm, his professional experience and current practice are in real estate, land use and development law. Salazar completed his undergraduate studies at the University of New Mexico and received his law degree at Stanford Law School.

Lucas N. Frank has opened The Hassett Law Firm’s new office in Albuquerque. Frank’s practice focuses on civil litigation with an emphasis on insurance disputes ranging from insurance agent E&O defense to bad faith litigation. He also represents individuals in a variety of personal injury matters.

Best Lawyers has named Luis G. Stelzner as the “Albuquerque Best Lawyers Alternative Dispute Resolution Lawyer of the Year” for 2010. Best Lawyers compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. Only a single lawyer in each specialty in each community is being honored as the “Lawyer of the Year.”

The Albuquerque Bar Association has elected five new members to its board of directors. They are David Buchholtz, a shareholder in the Albuquerque office of Brownstein Hyatt Farber and Schreck; Zachary Ives, a partner at Goldberg & Ives PA; James Reist, a shareholder at Bannerman & Williams PA; Christopher Saucedo, co-founder of Silva & Saucedo PC; and Whitney Warner, founding partner with Moody & Warner PC.

Virginia R. Dugan, Jon A. Feder, and David H. Kelsey, attorneys and shareholders practicing divorce and family law with Atkinson & Kelsey PA, have been designated “2010 Southwest Super Lawyers” by Super Lawyers magazines.

Native Santa Fean Geno Zamora is the new city attorney under an appointment by Mayor David Coss. He replaces recently retired City Attorney Frank Katz. Zamora was the general counsel for the New Mexico Economic Development Department and previously served as assistant attorney general to Tom Udall and chief counsel to Governor Bill Richardson. Zamora received his law degree from the University of Arizona and graduated from the Georgetown University School of Business.

Catherine T. Goldberg, a partner and shareholder at Rodey, Dickason, Sloan, Akin & Robb PA, has been elected to the board of directors for Albuquerque Economic Development.

Thomas C. Montoya was appointed to the board of the New Mexico Crime Victims Reparation Commission for a second four-year term. Montoya is an attorney and shareholder with Atkinson & Kelsey PA, practicing divorce and family law.

Perry E. Bendicksen III, a shareholder at the law firm of Brownstein Hyatt Farber Schreck, was recently named “Albuquerque Mergers and Acquisitions Lawyer of the Year for 2010” by Best Lawyers. Only a single lawyer is honored with this distinction each year in each specialty and community. Bendicksen’s practice focuses on private equity, venture capital, corporate finance and mergers and acquisitions.

Deena Buchanan Beard has joined the Will Ferguson & Associates Law Firm. Buchanan Beard has extensive experience in business litigation, employment law, consumer rights, class action litigation and personal injury law. She has a bachelor’s degree with honors from the University of Pittsburgh and a law degree with honors from Georgetown University.

Monica C. Ewing and David G. Gordon have joined Sutin Thayer & Browne. Ewing received her law degree and her undergraduate degree cum laude from UNM. She practices primarily in the areas of commercial litigation, creditors’ rights and intellectual property. Gordon received his law degree magna cum laude and his undergraduate degree cum laude from UNM. Gordon practices primarily in the areas of business law, including general corporate law, commercial real estate transactions, mergers and acquisitions, and commercial contracts.
Jennifer L. Stone and Sandra L. Beerle were elected to the board of directors of the Rodey Law Firm. Stone’s practice concentrates on the representation of hospitals, insurers, medical groups, healthcare professionals and other healthcare entities. She received her law degree cum laude from the UNM School of Law. Beerle practices in the firm’s Litigation Department with a focus in litigating professional and managed care liability claims on behalf of hospitals, skilled nursing facilities, physicians, nursing staff and other healthcare professionals. Her experience also includes general negligence and personal injury defense. She received her law degree cum laude from the UNM School of Law.

Robert Castille died Dec. 12, 2009 in Santa Fe. Thanks to excellent available medical care, the prayers, love and support of family and friends, and to his own indomitable spirit, Castille was able to battle brain cancer for nearly seventeen months. He was brave, good natured, and appreciative throughout his illness. Castille was born Nov. 11, 1944 on a farm in St. Landry Parish, Louisiana. He was the sixth of ten children in a Cajun family. His New Mexican-influenced Cajun cooking (he added green chile to all foods), story-telling, and joie de vivre were legendary. As a young teenager he entered the Christian Brothers, a Catholic religious order dedicated to teaching. He was sent to the College of Santa Fe for his education and then became a teacher at St. Michaels High School in Santa Fe. He met Sister Ellen Cain, also a teacher and a nun in the Loretto Order. They later left their religious orders, fell in love, and married. Shortly after leaving the Christian Brothers and now eligible for the draft, he joined the Air Force and became a pilot. He flew 300 combat hours over Vietnam in a C-7, a cargo plane. He returned to New Mexico with a strengthened commitment to education. He earned a master’s degree in educational counseling, and moved to Los Alamos where he taught and counseled middle and high school students. He became the assistant principal of the Los Alamos High School. Castille ran for the State House of Representatives and was chair of the Democratic Party of Los Alamos. He coached and umpired baseball for years. In 1980, he went to law school at UNM. From 1983 to 2006, he represented school districts and other governmental entities, large and small businesses and regular people in litigation and day-to-day counseling throughout New Mexico. Along the way he won the respect of adversaries and the love of those who worked with him—all while setting the standard for generosity, kindness, and professionalism. As stated by one of his former partners, “For those lawyers who knew him and loved him, he was the lawyer and the man we all aspire to be.” He served as a member of the State Bar Board of Bar Commissioners. Castille and Ellen retired to the southern Oregon coast in 2006. They were embraced by new friends and loved hiking magnificent Oregon trails and beaches. He became actively involved in the Curry County (Oregon) League of Women Voters and wholeheartedly supported Ellen’s volunteer work as a Curry County CASA (court-appointed special advocate for abused and neglected children). He was diagnosed with glioblastoma multiforme brain cancer in August 2008 and returned to Santa Fe where he was welcomed by family and friends with yellow balloons and ribbons and much love and support. Castille was predeceased by his parents, Robert and Genevieve Castille; and his siblings: Raymond Castille, Sadie LeBlanc, and Sylvia Roeloffs. He treasured and is treasured by his wife of nearly forty years, Ellen; his sons, Dan and Steve; his daughters-in-law, Stacey and Laura; grandchildren: Jakob, Samuel, Ginny, Molly, and Jacky; his sisters: Shirley Bourdier (Ivan) and Louise Joffrion (Virgil); his brothers: Carl (Barbara), James, Patrick, Gerald, and Frank (Yvette); his brothers and sisters-in-law: Pat and Lois Cain, Dan and Diane Cain, Joan Boles, Kurt Roeloffs and Virginia Thompson, Cheryl Castille, and Walter LeBlanc; and by many, many other family members and friends who so generously gave of themselves in uncountable ways as they journeyed with him throughout his illness. Even Castille did not have sufficient words to express his gratitude for all the kindnesses shown him, but profoundly grateful he was.

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Lawyer Substance Abuse Addictions: Causes and Results
Teleconference
TRT, Inc.
1.0 E, 1.0 P
1-800-672-6253
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Legal Ethics Classics Revisited (3 hour)
Santa Fe
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Retaliation Claims in Employment Law
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Paralegal Division
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Best Practices and Ethics in Adult Guardianship Law
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TRT, Inc.
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1-800-672-6253
www.trtcle.com
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(Submission = date of oral argument or briefs-only submission)

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Dated January 15, 2010

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### Clerk's Certificates

<table>
<thead>
<tr>
<th>Name</th>
<th>Address 1</th>
<th>Address 2</th>
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<tbody>
<tr>
<td>Alexander K. Russell</td>
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<td>Carmela D. Starace</td>
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http://nmsupremecourt.nmcourts.gov.
Clerk’s Certificate of Change to Inactive Status

Effective January 4, 2010:
Marlo Aragon
1861 Georgia Street, NE
Albuquerque, NM 87110-5902

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Clerk’s Certificate of Name, Address, and/or Telephone Changes

Effective January 12, 2010, the following judges and attorneys have a new physical address and are at the address immediately following:

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Hon. Michael D. Bustamante
(505-841-4650)
Hon. Jonathan B. Sutin
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Hon. Roderick T. Kennedy
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Hon. Michael E. Vigil
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Hon. Robert Eugene Robles
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### 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 February 1, 2010**

- 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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<th>Proposed Rule Changes</th>
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<td>12-213 Briefs (Rules of Appellate Procedure)</td>
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<td>12-214 Oral argument (Rules of Appellate Procedure)</td>
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<td>12-305 Form of papers prepared by parties (Rules of Appellate Procedure)</td>
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<td>15-103 Qualifications (Rules Governing Admission to the Bar)</td>
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### Recently Approved Rule Changes Since Release of 2010 NMRA:

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

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**UJI Criminal**

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Cassandra LaPietra and Christopher Titone (Defendants) were each indicted on two counts of intentional or negligent child abuse resulting in great bodily harm, contrary to NMSA 1978, Section 30-6-1(D)(1), (2) (2005) (amended 2009).

Both Defendants filed pretrial motions to dismiss, pursuant to Rule 5-601 NMRA and State v. Foulenfont, alleging that the facts of the case were undisputed and that, as a purely legal issue, there was a lack of substantial evidence that could prove the identity of the perpetrator who caused the injuries to the children.

On October 3, 2007, the district court held a hearing on the Foulenfont motions. The record reveals that the district court reviewed transcripts of witness interviews and heard objections from the State that this particular case was not appropriate for a Foulenfont motion because the district court should not examine the sufficiency of the evidence when the State is relying on circumstantial evidence to prove the identity of the perpetrator. For the purposes of the Foulenfont motions, Defendants stipulated that the children were abused. However, Defendants urged that there was a lack of evidence showing that they were the ones that committed the abuse. The district court, after reviewing a “voluminous amount of case law” and a “voluminous amount of factual material presented to it by the parties,” granted the motions to dismiss the indictments with “some trepidation and hesitation.”

II. DISCUSSION

The contours of the district court’s power to conduct a pretrial hearing on a motion to dismiss charges brought under Rule 5-601 is a legal question reviewed under a de novo standard. See State v. Roman, 1998-NMCA-132, ¶ 8, 125 N.M. 688, 964 P.2d 852.

The State argues that the district court erred in deciding the merits of the case before trial. In dismissing the indictments, the court stated that “[t]he present
motions seek dismissal of the indictments based upon insufficiency of evidence, specifically an absence of evidence on the essential element of identity.” The State argues that a determination of who hurt the children is a question of fact that should be decided by a jury and that a pretrial attack on the sufficiency of evidence under the guise of a Foulennen motion does not avoid the prohibitions of NMSA 1978, Section 31-6-11(A) (2003). We agree.

{7} Judicial authority to rule on pretrial motions in criminal matters is outlined in Rule 5-601. According to Rule 5-601(B), “[a]ny defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.” See State v. Gomez, 2003-NMSC-012, ¶ 8, 133 N.M. 763, 70 P.3d 753 (stating that where a motion involves factual matters that are not capable of resolution without a trial on the merits, Rule 5-601(B) requires the question to be submitted to the fact finder). In Foulennen, we stated that it was proper for a district court to decide purely legal matters and dismiss a case when appropriate before trial. 119 N.M. at 790, 895 P.2d at 1331. Questions of fact, however, are the unique purview of the jury and, as such, should be decided by the jury alone. Id. at 789-90, 895 P.2d at 1330-31; see State v. Hughey, 2007-NMSC-036, ¶ 11, 142 N.M. 83, 163 P.3d 470 (“This Court has held that where a motion involves factual matters that are not capable of resolution without a trial on the merits, the trial court lacks the authority to grant the motion prior to trial.”); see also State v. Masters, 99 N.M. 58, 59, 653 P.2d 889, 890 (Ct. App. 1982) (holding that factual questions were not to be decided in advance of trial); State v. Mares, 92 N.M. 687, 688-90, 594 P.2d 347, 348-50 (Ct. App. 1979) (concluding that the facts of a crime cannot be determined prior to trial).

{8} Defendants frame the issue as a legal question that asks whether the State had any evidence that would justify a jury trial. They state that “[a] complete lack of evidence does not require the impermissible weighing or determining of evidence, and can be properly determined as a matter of law based on undisputed . . . facts.” Defendants agree, for the sake of their motions, that the State could prove a prima facie case that the children suffered abuse, but argue there is no evidence that Defendants caused the injuries. We interpret this argument to be that Defendants are not attacking the sufficiency of the evidence, but instead are arguing that there was a complete lack of evidence regarding the first element of the offense—that Defendants caused the children to be placed in a situation that endangered their life or health. See UJI 14-602 NMRA; UJI 14-603 NMRA. In effect, Defendants are arguing that the grand jury was mistaken in finding probable cause to indict and further, that the district court was correct in reviewing the grand jury’s determination of the facts pretrial. We disagree with Defendants for two reasons.

{9} First, the question of who committed the abuse should be decided by the jury. The argument that Defendants make is essentially advocating how to characterize the pretrial transcripts of witness interviews that were given to the district court. The State argues that the transcripts did show circumstantial evidence of who the perpetrator of the abuse was, and that a pretrial determination would prevent the State from gathering further evidence and would take the question away from the jury. Defendants argue that the transcripts show a complete absence of any evidence that indicates who committed the abuse. Defendants’ argument, while stipulating to what is known at the pretrial juncture, amounts to a disagreement with the State as to what a reasonable jury could conclude.

{10} This situation is different from Foulennen. In that case, the defendant and the state agreed to the fact that the defendant had climbed over a fence. The question was whether the fence constituted a “structure” for purposes of the burglary statute, an issue that was a pure matter of law (statutory construction). 119 N.M. at 790, 895 P.2d at 1331 (internal quotation marks omitted). However, the question of whether someone climbed over a fence and the question of whether a fence is a “structure” for purposes of the burglary statute are fundamentally different questions. The former is a question of fact—an element of the offense—and can be determined by circumstantial, as well as direct, evidence. Similarly, asking who committed child abuse after hearing testimony and reviewing evidence involves no questions of law or pure legal issues.

Other New Mexico cases have acknowledged this distinction as well. When an issue involves a specific determination or finding, especially when it is an element of the offense, it is a question that is within the unique purview of the jury. See Hughey, 2007-NMSC-036, ¶ 14 (holding that the question of whether a defendant had a blood alcohol content outside of the legal limits at the time of a car accident when blood was drawn four hours after the accident was a question for the jury in light of conflicting expert testimony); State v. Fernandez, 2007-NMCA-091, ¶ 7-11, 142 N.M. 231, 164 P.3d 112 (concluding that it is well-settled law that a jury determines whether an object is used as a “deadly weapon” because it is a fact-specific inquiry and requires case-by-case determination); Mares, 92 N.M. at 688-90, 594 P.2d at 348-50 (stating that the question of whether a law enforcement officer was acting lawfully when he shot a man was a question of fact for the jury).

{11} The evidence contained in the transcripts can be viewed in a variety of ways, one of which would allow a jury to conclude that either Defendant or both Defendants committed the abuse, allowed the abuse to happen, or knew, or should have known, that the abuse was occurring. Thus, the question is not solely about who caused the abuse, but also encompasses other questions of who knew what and when. This is a matter for the jury that can only be resolved after seeing and hearing all the evidence, and it would be inappropriate for this Court to speculate because it is not clear what evidence would be presented or how it would be developed at trial. While the district court may have thought the State had a weak case, the district court did not have the opportunity to observe testimony of witnesses under oath, judge their credibility, weigh the evidence, and hear opposing arguments after the close of evidence. Aside from being impossible to tell what a jury might conclude given so many variables, “[i]t is the role of the factfinder to judge the credibility of witnesses and determine the weight of evidence.” Hughey, 2007-NMSC-036, ¶ 16.

{12} Second, by reviewing all the facts pretrial, the district court stepped into the role of second-guessing the probable cause determination made by the grand jury. Under our legal system, the elected district attorney decides which cases to prosecute and, so long as there is a showing of probable cause to believe the accused has committed a prohibited offense defined by statute, a court should not dismiss a case because it views the merits of the case differently than the grand jury. See State v. Brule, 1999-NMSC-026, ¶ 14, 127 N.M. 368, 981 P.2d 782.

{13} Looking behind the grand jury’s probable cause determination is an
impermissible incursion on the fact finder’s role. The district court stated in its order dismissing the indictments that sufficiency of the evidence was a legal issue, and the court was within its power to address it. The order further stated that the district court was not satisfied that the circumstantial evidence would allow a reasonable jury to conclude that Defendants inflicted the injuries on the children. Thus, the jury would have to speculate as to who the perpetrator was. This was error. District courts are simply not permitted to re-evaluate the sufficiency of the evidence behind an indictment prior to trial. See Jones v. Murdoch, 2009-NMSC-002, ¶ 19, 145 N.M. 473, 200 P.3d 523 (“[A] request for post-indictment relief would necessarily challenge the sufficiency of the evidence upon which the grand jury’s indictment is based. As such, the target-turned-defendant must establish bad faith on the part of the prosecutor as a prerequisite to obtaining a dismissal of the indictment.”); State v. Romero, 2006-NMCA-105, ¶ 5, 140 N.M. 281, 142 P.3d 362 (“[W]e conclude that (1) the 2003 version of Section 31-6-11(A) is directory and for the guidance of the grand jury, and (2) the Legislature has not authorized judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith.”).

Section 31-6-11(A) provides that “[t]he sufficiency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.” (Emphasis added.) See State v. Esquibel, 90 N.M. 117, 118, 560 P.2d 181, 182 (Ct. App. 1977) (“This [C]ourt will not review the sufficiency of the evidence before the grand jury.”). We note that there has been no claim in this case that the State has acted improperly in any way. Without a showing of bad faith on the part of the prosecuting attorney, attacking an indictment pretrial, but post-indictment, is prohibited. See Maldonado v. State, 93 N.M. 670, 671-72, 605 P.2d 363, 364-65 (1979) (explaining that there are compelling reasons for not going behind an indictment and inquiring into the evidence, including “the need for both judicial economy and secrecy of grand jury proceedings”); Romero, 2006-NMCA-105, ¶ 9 (noting that opening indictments for challenge would slow investigations, extend litigation, frustrate public desire for efficient justice, and intrude on the constitutionally independent offices of the prosecutor and the grand jury); Masters, 99 N.M. at 60, 653 P.2d at 891 (“New Mexico law prohibits district court review of the sufficiency of the evidence to indict.”).

Citing State v. Leon, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986), Defendants insist that, as a matter of law, there is no evidence to convict. In Leal, this Court determined that no evidence was presented to the jury that the parent was even present when the abuse occurred, and thus a conviction for permitting child abuse could not stand. Id. at 509, 723 P.2d at 980. Leal, however, involved the sufficiency of evidence after trial, not before. It is impossible to say what evidence will come out at trial, who will testify, how the jury will judge their credibility, and whether what is presented will be sufficient to sustain a conviction if a conviction even occurs.

We are likewise unswayed by Defendants’ reliance on State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, overruled on other grounds by State v. Myers, 2009-NMSC-016, ¶ 32, 146 N.M. 128, 207 P.3d 1105. Defendants argue that Rendleman stands for the proposition that pretrial dismissal is a useful device where an element of a crime is lacking. This is not entirely accurate. Rendleman concerned an exception to the general rule limiting judicial pretrial fact finding, which allows a district court, in the face of a constitutional free speech defense, to conduct an independent review of photographs and dismiss charges that alleged sexual exploitation of children where, on the undisputed face of the materials before the court, a jury could not find beyond a reasonable doubt that the material met the elements of the offense as defined by the Sexual Exploitation of Children Act, NMSA 1978, Sections 30-6A-1 to -4 (1984, as amended through 2007). Rendleman, 2003-NMCA-016, ¶¶ 30-37. There are no allegations of sexual exploitation and Defendants have not asserted a free speech defense in this case. To the extent that Defendants urge this Court to extend a similar exception to this case, we decline to do so.

III. CONCLUSION

The order dismissing the indictment is reversed. The cause is remanded with instructions to reinstate the case on the trial docket.

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

CELIA FOY CASTILLO, Judge

WE CONCUR:

ROBERT E. ROBLES, Judge
Opinion

TIMOTHY L. GARCIA, JUDGE

Defendant was convicted of four counts of first degree criminal sexual penetration of a minor under the age of thirteen (CSPM) in violation of NMSA 1978, Section 30-9-11(C)(1) (2001) (amended 2007), and two counts of third degree criminal sexual contact of a minor under the age of thirteen (CSCM) in violation of NMSA 1978, Section 30-9-13(A)(1) (2001) (amended 2003). Defendant appeals, arguing (1) that his right to due process was violated by the lengthy charging period and by the fact that the charges were not sufficiently specific to provide him with adequate notice and an opportunity to defend himself, (2) that the district court erred in admitting certain hearsay testimony, (3) that the district court improperly instructed the jury on several matters, and (4) that prosecutorial misconduct deprived him of a fair trial. We conclude that the lack of specific factual information in the indictment and the evidence introduced at trial constitute a violation of Defendant’s right to due process as to two of the convictions of CSPM. Therefore, we reverse Defendant’s convictions for one count of vaginal CSPM and one count of anal CSPM. We conclude that no other reversible errors occurred at trial, and we affirm Defendant’s remaining convictions.

BACKGROUND

After Defendant’s seven-year-old niece, L.T., told family members that Defendant had molested her, Defendant was charged with two counts of first degree CSPM for vaginal penetration, two counts of first degree CSPM for anal penetration, one count of CSCM for touching L.T.’s genitalia, and one count of CSCM for forcing L.T. to touch his genitalia.

Defendant was alleged to have had regular access to L.T. when she had overnight visits with her father, who is Defendant’s brother, and when she had weekly visits at her paternal grandparents’ home. Originally, the charging period for each count of the indictment began on January 24, 2002 and ran through December 31, 2004. The charges were based on L.T.’s statements that Defendant had vaginal intercourse with her “lots of times,” had anal intercourse with her “about [three] times,” touched her genitalia with his hand “about [ten] times,” and made her touch his penis “about [four] times.” Defendant moved for a bill of particulars, and the State narrowed the time frame to the period beginning September 30, 2002 and ending December 26, 2004—a period of twenty-seven months. Despite the more limited time frame, Defendant moved to dismiss, arguing that both the length of the charging period and the lack of factual specificity in the charges violated his right to due process. Eventually, after the State conducted further interviews with L.T., the district court issued an order clarifying that the factual bases for the charges were four specific incidents that the parties referred to as the “Hooter’s incident,” the “Rash incident,” the “Mouth-Covering incident,” and the “Last Time or Christmastime incident.” Two other specific incidents previously identified by L.T.—the “First Time incident” and the “Camping incident”—were not identified as charging offenses in this case, since the First Time incident was outside of the stated charging period and the Camping incident occurred outside of Bernalillo County. The district court’s order indicated L.T. did not specify the type of act that occurred during each of the four charged incidents and the State’s theory was that there were progressive acts of CSCM and CSPM that occurred at each incident. The district court noted that “since specific incidents have been identified, it would be appropriate for the State to elicit evidence or
testimony about [D]efendant’s acts, number of acts and/or combination of acts which are alleged to have been committed during these specified incidents."

4. At trial, L.T. described the Hooter’s incident as an act of CSCM based on her testimony that Defendant “touched” her “private parts” with his “whole hand.” L.T. testified that the Mouth-Covering incident involved Defendant “touch[ing]” her. L.T. did not testify about a specific incident that gave her a rash, although she did testify that Defendant’s acts of touching her with his hand, touching her with his penis, and rubbing his penis against her butt generally made her feel like she either had or might get a rash. As to the Christmastime incident, L.T.’s testimony indicated that Defendant did something to her that she did not like, but she did not specify what the act was. L.T. did not indicate that any of the four specific incidents began with an act of CSCM and progressed to an act of CSPM, as had been previously posited by the State. Therefore, there was no evidence at trial that any of the four specific incidents designated in the district court’s order involved an act of CSPM.

5. The prosecution did elicit testimony at trial from L.T. that Defendant engaged in a non-specific course of conduct involving both vaginal and anal CSPM. L.T. testified that Defendant would “touch” her “private” with his “private” and that when he did this “[i]t just keeps going up and up and it hurts real bad” and that this happened “[l]ots of times.” L.T. also stated that “sometimes [Defendant] would stick [his private] inside . . . my butt” and that he did this “more than one time.” Several other witnesses testified about statements L.T. had made to them regarding the abuse, but this testimony did not add any information about the specific incidents of abuse.

6. The jury found Defendant guilty on all six charges. Defendant appeals.

DISCUSSION

The Length of the Charging Period in the Indictment and the Bill of Particulars

7. Defendant argues that the extended charging period violated his right to due process. We review this legal argument de novo. See N.M. Bd. of Veterinary Med. v. Riegger, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947 (“We review questions of constitutional law and constitutional rights, such as due process protections, de novo.”).

8. In State v. Baldonado, 1998-NMCA-040, ¶ 26, 124 N.M. 745, 955 P.2d 214, this Court explained that we assess the constitutionality of the length of a charging period by balancing whether the state reasonably narrowed the time frame of the indictment against any prejudice the defendant has suffered as a result of the time frame chosen by the state. We provided a list of nine nonexclusive factors to be used in applying this test. These are:

1. The age and intelligence of the victim and other witnesses, and their ability to particularize the date and time of the alleged offense;
2. The surrounding circumstances, including whether a continuing course of conduct is alleged, as opposed to a relatively few, discrete or isolated events;
3. The extent to which the defendant had frequent, unsupervised access to the victim;
4. The nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately;
5. The length of the alleged period of time in relation to the number of individual criminal acts alleged;
6. The length of time asserted in the indictment;
7. The passage of time between the period alleged for the crime and the time the abuse was asserted and/or the time [the] defendant was arrested and/or indicted;
8. The extent and thoroughness of the [s]tate’s efforts to narrow the time frame; and
9. Whether the defendant can assert a plausible alibi defense.

Id. ¶ 27. Although we stated that the two-year charging period in Baldonado “approach[ed]” the outer edges of constitutional propriety, we declined to hold that it was too long as a matter of law because “[i]t is possible that a two-year period, or larger, may be the most narrow time frame the prosecutor can be required to muster in an appropriate case.” Id. ¶ 23.

9. In this case, the charging period was originally thirty-five months. After Defendant moved for a bill of particulars, the district court directed the State to attempt to narrow the charging period. After meeting with L.T. and her mother, the State narrowed the charging period to approximately twenty-seven months. The State made additional efforts to narrow the time frame even further. The State amended the bill of particulars to add details about the first time and the last time the abuse occurred but ultimately concluded that “[t]he State believes L.T. was molested on a continuous basis between the time frame of September 30, 2002 through December 20, 2004. Even though the State can narrow down the overnight visits [that L.T. had with her father], the State believes several acts of sexual abuse occurred during the day at her grandparent’s [s’] home.”

10. Defendant moved to dismiss pursuant to Baldonado. The district court issued a detailed order denying Defendant’s motion. The district court weighed the reasonableness of the State’s efforts to narrow the charging period against the potential prejudice to Defendant caused by the State’s twenty-seven-month time frame. In doing so, it focused on most of the Baldonado factors. The district court noted that: (1) the crimes were alleged to have occurred while L.T. was between the ages of five and seven, and although L.T. was apparently of sound intelligence for her age, it was clear from the multiple interviews with L.T. that she did not have the capacity to provide more particular dates or time periods for the alleged incidents; (2) the alleged incidents occurred on a continuous basis and were not just a few isolated events; (3) although the extent to which Defendant had frequent and unsupervised access to L.T. was disputed, it was not disputed that he was often present in the same residence as L.T. during the daytime and overnight; (4) the nature of the charged offenses was such that they did not occur in the presence of other witnesses, and because L.T. suffered no physical injury in this case, the alleged offenses were not of the sort that was likely to be discovered immediately; and (5) according to L.T.’s statements that Defendant had vaginal intercourse with her “lots of times,” had anal intercourse with her “about three times,” touched her genitalia with his hand “about ten times,” and made her touch his penis “about four times,” L.T. was abused a total of seventeen times. If each incident of abuse occurred at separate times, then the events occurred approximately once every 1.64 months. If the events occurred in combination, then they occurred less frequently.

11. The district court noted other Baldonado factors as well. The length of time in the indictment was originally three years but had been narrowed to approximately twenty-eight months. The State engaged in a thorough attempt to narrow the time frame, and it appeared that L.T. was unable to identify more specific dates or otherwise further reduce the charging period. There were no other available means by which the State could obtain information about when the events occurred. Defendant’s
claim of prejudice was based on his proposed alibi defense, but his evidence of an alibi—such as bank records, cell phone records, employment records, and vacation records—would all require extremely narrow time frames such as specific dates in order to be effective. Given L.T.’s limited capabilities and the evidence about how often Defendant might have had access to L.T., the State’s evidence did not lend itself to an alibi defense. In weighing these factors, the district court found that the State could not reasonably have provided greater specificity in the charging period and that Defendant failed to demonstrate that he was prejudiced by the lengthy indictment period more than any other defendant in a child sex abuse case “because in almost all such cases the young child does not have the capacity to specify particular dates and times of the alleged sexual abuse.”

{12} Although the revised charging period was lengthy, we agree with the district court’s conclusion that the State demonstrated it had done everything it reasonably could have done to narrow the charging period and that Defendant was not unduly prejudiced. See State v. Ervin, 2002-NMCA-012, ¶ 13, 131 N.M. 640, 41 P.3d 908 (filed 2001) (indicating that the burden is on the state to establish that it could not have provided greater specificity as to the time of the alleged offenses). After Defendant moved for a bill of particulars, the State re-interviewed L.T. and her mother, and interviewed L.T.’s father in an effort to obtain more specific dates. As a result of these interviews, the State was able to reduce the original charging period by eight months, to approximately twenty-seven months. The State then consulted with a forensic interviewer in order to develop more appropriate questions to ask L.T. at another interview. However, at the subsequent interview, L.T. was still unable to provide details that would have permitted the State to narrow the charging period. As L.T. was the only witness to the crimes, we cannot see how the State could have found additional information that would have narrowed the time period further. Defendant suggests that the State should have examined school records and medical records, and followed up with other witnesses such as L.T.’s grandparents and other relatives. Defendant does not explain, however, how such avenues of investigation would have produced a narrower time frame. L.T. was the only person present when Defendant committed the offenses, and there was no evidence that her grades went down at the time of the offenses or that she obtained medical treatment as a consequence of the offenses. Therefore, we do not agree that the State was required to pursue these sources of information.

{13} Defendant also claims that the State should have limited the charging period to the specific visitation days scheduled at L.T.’s father’s home and at her paternal grandparents’ home. Although we note that the State did provide guidance in an attachment to its bill of particulars as to when some of the visits occurred between September 30, 2004 and December 26, 2004, this information was obtained from L.T.’s mother, and she did not have records of other visitation dates. In light of the fact that the abuse was alleged to have occurred on an ongoing basis for more than two years prior to these specific dates, the State would not be required to limit the charging period to these specific dates. In addition, witnesses testified that both the overnight weekend visits with L.T.’s father and the weekday visits with her grandparents did not occur on a fixed schedule but changed regularly. Therefore, it appears that the State could not have reconstructed the visitation schedule to arrive at more particular dates within the charging period.

{14} Defendant asserts that the prejudice he suffered as a result of the lengthy charging period was “real and substantial.” Applying three of the Baldonado factors, he argues that the charging period is facially unreasonable, that the charges were for a few discrete incidents within that lengthy period, and that if the period had been shorter he could have used his employment records, school records, bank records, and phone records to provide an alibi defense. See Baldonado, 1998-NMCA-040, ¶ 27. We conclude that the charging period was not unreasonable under Baldonado.

{15} First, Defendant’s argument that the charges arise from a few discrete incidents is not accurate or persuasive. The district court’s order specifically stated that the two CSCM charges were not for specific incidents but were for a continuing pattern of conduct. As we discuss later in this opinion, the evidence submitted regarding the CSPM charges also described an ongoing pattern of conduct, not a few discrete incidents. Therefore, this Baldonado factor does not weigh in Defendant’s favor.

{16} Second, Defendant’s desire to present an alibi defense is one of the factors to consider. Id. ¶ 29. The State is not required to “rely only on evidence that lends itself to an alibi defense.” Id. (internal quotation marks and citation omitted). Furthermore, Defendant is unable to adequately demonstrate on appeal that he was deprived of the ability to present an alibi defense. Defendant asserts that he possessed relevant records covering the entire charging period. However, at trial, he introduced only a sample of such records that he characterized as “representative.” These representative records have not been designated as part of the record for review on appeal. See Rule 12-212 NMRA (governing the designation of exhibits on appeal). Because neither the actual nor the representative records are before us, Defendant is unable to show this Court that he would have been able to establish a plausible alibi defense for any of the time periods he was around L.T. Without these records, we cannot review the district court’s determination that Defendant was not prejudiced by the failure to shorten the charging period to fit his alibi defense. See Baldonado, 1998-NMCA-040, ¶ 32 (noting that the defendant, who had regular access to the victim, was likely not prejudiced by the two-year charging period in part because even “if the district court determines that, say, a one-month or three-month period would have been adequate, then it is unclear that [the defendant] could have had any evidence available to establish his absence from [the place where the victim was] during that entire period of time”); State v. Wilcox, 808 P.2d 1028, 1033-34 (Utah 1991) (noting that a defendant who had regular contact with the victim was not prejudiced by the length of the charging period because “[t]his is not a situation in which the lack of specificity compromise[d] the defense, as it would if [the defendant] had contact with the child only once or twice, so that specific dates and times were critical”).

{17} While one of the Baldonado factors for measuring prejudice is the length of the charging period, 1998-NMCA-040, ¶ 27, a fair reading of Baldonado indicates that a long charging period does not itself constitute prejudice. Id. ¶ 23 (declining to adopt a rule that a certain period of time is a per se violation of due process, since it is possible that a lengthy period is “the most narrow time frame the prosecutor can be required to muster”); see Ervin, 2002-NMCA-012, ¶ 10, 21 (rejecting an argument that there should be a presumption that extended charging periods violate due process and accepting a time frame limited to when the defendant had ongoing access to the child). The analysis of prejudice is both predicated upon, and distinct from, a conclusion that
the charging period is overly broad. See Baldonado, 1998-NMCA-040, ¶ 32. {18} In this case, the State’s efforts at narrowing the charging period were prompted by the seriousness with which the district court took its responsibility to diligently protect the due process rights of Defendant. See Ervin, 2002-NMCA-012, ¶ 7. The district court was required to make additional efforts to ensure that it was “satisfied that [relevant] sources of information had been exhausted,” prior to making its determination of whether the State had made reasonable efforts to narrow the time frame. Baldonado, 1998-NMCA-040, ¶ 28 (internal quotation marks and citation omitted). We agree that the district court struck a proper balance in weighing the reasonableness of the State’s extensive efforts against the potential prejudice to Defendant arising from the lengthy charging period. Given the specific facts in this case, the revised twenty-seven-month charging period did not violate Defendant’s right to due process.

The Lack of Factual Specificity in the Charges and in the Evidence at Trial

{19} Defendant argues that his due process rights were also violated because of the “State’s failure to allege sufficient facts to provide [Defendant] with notice as to [the] specific acts [with which] he was charged.” After the State filed its bill of particulars and after the district court required the State to make additional efforts to link the charges to specific events, the district court determined that the four counts of CSPM were intended to charge distinct events that each occurred “more than once” during the charging period, whereas the two counts of CSCM were intended to “charge continuing acts of . . . Defendant throughout the charging period.” The district court concluded that the charging techniques were permissible pursuant to State v. Altigibers, 109 N.M. 453, 466, 786 P.2d 680, 693 (Ct. App. 1989), which provides the State with the discretion to charge a single count for an ongoing pattern of conduct, to charge separate counts for each incident that occurred within that pattern of conduct, or to select a few of the incidents to charge. The district court ordered that during trial all the CSPM acts should be linked in some way to the four specific incidents identified in the May 12, 2006 order entered prior to trial. At trial, however, L.T. only testified about acts of CSCM, which involved Defendant’s touching her, during the four specific incidents. All her testimony about vaginal CSPM, anal CSPM, and CSCM during which Defendant made L.T. touch his penis was described through non-specific testimony elicited as an ongoing pattern of conduct. L.T. described typical patterns of each of these types of abuse and then stated that the abuse occurred more than once or lots of times.

{20} Defendant relies primarily on State v. Dominguez, 2008-NMCA-029, 143 N.M. 549, 178 P.3d 834 (filed 2007), cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 672, and State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974), in support of his argument that the lack of factual specificity in the charging documents and the evidence requires a reversal of his convictions for all six charges. Like Baldonado, Dominguez addressed a due process violation for the state’s failure to provide adequate notice of the charges and to provide the defendant with an adequate basis on which to defend himself. 2008-NMCA-029, ¶ 1. However, Dominguez differs from Baldonado, since it was not the length of the ten-week charging period that was at issue but rather the failure of the state to provide any identifying characteristics that would differentiate one charged count from another and protect the defendant from the possibility of double jeopardy. Dominguez, 2008-NMCA-029, ¶¶ 6, 10. We review Defendant’s additional due process claim under Dominguez de novo. See id. ¶ 5.

{21} In Dominguez, this Court affirmed the dismissal of those indistinguishable counts of an indictment that were based on the victim’s statements that the same type of abusive behaviors were repeated over a period of time. Id. ¶¶ 7, 10-11. The state was able to proceed with prosecution of those acts for which it was able to provide a factually distinct basis. Id. ¶¶ 10-11. As to the five dismissed charges, this Court held that it would have violated the defendant’s due process rights to have to defend against the five carbon-copy counts when the state was unable to provide facts that would distinguish any one of the incidents from another. Id. Relying on the Sixth Circuit Court of Appeals reasoning in Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005), we stated that the indictment was defective because it “provided the defendant with little ability to defend himself since the counts were not anchored to particular offenses.” Dominguez, 2008-NMCA-029, ¶ 8 (internal quotation marks and citation omitted). “[I]t would have been impossible for the jury to conclude that the defendant was guilty of some of the offenses, but not others . . . because the criminal counts were not connected to distinguishable incidents.” Id. (internal quotation marks and citation omitted). Therefore, Dominguez stands for the proposition that even if a charging period is constitutionally appropriate under Baldonado, the charges may still violate a defendant’s right to due process and double jeopardy when they are factually indistinguishable.

{22} In the present case, Defendant’s Dominguez argument is somewhat misapplied. In Dominguez, all of the charges were exactly the same in that each charged an act of CSCM by the same means, on the same victim, and within the same date range. See id. ¶ 2. Here, all of the charges in the indictment were for acts that occurred with the same victim and within the same date range. However, the remaining characteristics were different. It is clear that the one count of CSCM for Defendant’s act of touching L.T.’s vulva is different from the second count of CSCM that is based on Defendant forcing L.T. to touch his genitalia. Furthermore, the charges of vaginal CSPM and anal CSPM are distinguishable from one another because they are factually distinct acts. Therefore, Defendant’s Dominguez argument would apply only to the two indistinguishable counts of vaginal CSPM in the indictment and the two indistinguishable counts of anal CSPM in the indictment.

{23} The State argues that the two counts of vaginal CSPM are in fact distinguishable because Count 1 for vaginal CSPM was intended to be a single count for a pattern of conduct of penetrating L.T.’s vulva and Count 2 for vaginal CSPM was intended to be a single count for a pattern of penetrating L.T.’s vaginal canal. This argument is not supported by the indictments, the evidence at trial, or by the record. In particular, such a distinction cannot be made where the jury instructions were the same for both Count 1 and Count 2. These instructions permitted the jury to find Defendant guilty if he “caused the insertion to any extent, of a penis into the vagina and/or vulva” of L.T.

{24} We agree with Defendant that, as in Dominguez, the two undifferentiated counts of vaginal CSPM and the two undifferentiated counts of anal CSPM ultimately violated Defendant’s right to due process. Although the State factually alleged that these CSPM charges arose out of one of the four distinguishable incidents, the evidence at trial did not support this allegation. At trial, L.T. only described a pattern of vaginal CSPM and a pattern of anal CSPM and then said that each happened lots of times, without relating any act to a specific incident. As a result, due process will only permit Defendant to be convicted of a single count of vaginal CSPM.
and a single count of anal CSPM for each pattern of conduct. See Valentine, 395 F.3d at 637 (holding that due process permitted the affirmance of single convictions for a pattern of conduct of each type of sexual abuse charged, but that the convictions for the remaining indistinguishable counts as to each type must be vacated); see also State v. Gardner, 2003-NMCA-107, ¶ 28, 134 N.M. 294, 76 P.3d 47 (holding that allegations of the two victims supported a single count of CSCM against each victim for a pattern of conduct when they described “a continuing course of conduct under circumstances where [the defendant] . . . had frequent but unpredictable access to [the victims] such that the alleged contact occurred continuously and randomly”). We therefore reverse one of Defendant’s convictions for vaginal CSPM and one of Defendant’s convictions for anal CSPM. There was no due process violation in the single remaining count of vaginal CSPM and the single remaining count of anal CSPM based upon the evidence presented at trial establishing a pattern of CSPM conduct during the charging period for which Defendant had notice and an opportunity to defend. See Valentine, 395 F.3d at 637. [25] This case is also different from Dominguez because in Dominguez, the district court dismissed several of the charges prior to trial due to the state’s inability to differentiate the indistinguishable charges in its bill of particulars. Here, the State argues that any insufficiency in the indictment was cured by the district court’s later order that the counts were supported by the four particular incidents and the fact that the district court indicated that each incident included at least one act of CSCM and one act of CSPM. However, at trial, the testimony established that only acts of CSCM occurred at the Hooter’s incident and the Mouth-Covering incident. The State did not elicit testimony specifying what happened during the Christmas time incident or describing a particular occurrence that could be identified as the Rash incident. Therefore, any adequate notice of the four CSPM charges that may have been satisfied by the State’s bill of particulars and the district court’s order was undermined by the evidence at trial. The State’s evidence was only sufficient to prove one undifferentiated count of vaginal CSPM and one undifferentiated count of anal CSPM. Ultimately, it is the evidence admitted at trial that must be re-evaluated by the district court to determine whether a criminal charge is sufficient to satisfy the due process requirements under Dominguez. [26] Finally, Defendant asserts that Foster requires reversal of all six of his convictions. In Foster, the defendant was indicted for one count of sodomy that was alleged to have occurred “[o]n or about August, 1973.” 87 N.M. at 157, 530 P.2d at 951 (internal quotation marks omitted). At trial, the victim testified that one act of sodomy by fellatio happened toward the end of August, that a second such act occurred about a week after that, and that a third act occurred about a month later. Id. The victim’s guardian also testified about the third act. Id. The defendant was convicted of the single count of sodomy, and on appeal, this Court held that the defendant was denied his right to fair notice of the crime charged so as to be able to prepare his defense. Id. at 157-58, 530 P.2d at 951-52. The evidence established three distinct acts of sodomy, and it was unclear from the charges whether the defendant was being tried and ultimately convicted by the jury of the first, second, or third act. We held that the “[f]ailure to charge the defendant with a specific act or specific acts violate[d] his right to be informed of the charges against him and denie[d] him due process of law” under the Sixth and Fourteenth Amendments of the Federal Constitution. Id. at 157, 530 P.2d at 951. [27] As with Defendant’s Dominguez argument, Defendant’s contention under Foster is somewhat unclear. Defendant asserts generally that he is entitled to sufficient notice of the crimes charged in order to prepare a defense. Like the defendant in Foster, Defendant asserts that he “now sits in prison, entirely unable to determine for which acts he has been convicted,” and that he would not be able to “plead prior jeopardy in a subsequent trial.” See id. at 157-58, 530 P.2d at 951-52. However, Defendant does not provide any analysis of how he believes the ruling in Foster specifically applies to his convictions. As we explain below, we conclude that Foster does not require reversal of any of Defendant’s convictions. [28] Defendant was on notice that the two acts of CSCM were charged as continuing patterns of conduct based on multiple events within the specific charging period, and that the four acts of CSPM were based on multiple events within the same charging period. See State v. Salazar, 1997-NMCA-043, ¶ 11, 123 N.M. 347, 940 P.2d 195 (distinguishing Foster because the defendant had notice of a specific date on which the crime was alleged to have occurred and was aware of the evidence that he had two different guns on school property, even though he was charged with only one offense of unlawfully carrying a gun on school grounds). Therefore, Foster is distinguishable regarding its application to the charging period in this case. [29] Furthermore, since Foster, we have repeatedly affirmed the principle that multiple incidents may be charged as a single count. See, e.g., Altgilbers, 109 N.M. at 465, 786 P.2d at 692 (explaining that the state may charge one count for multiple acts); State v. Gurule, 90 N.M. 87, 91-92, 559 P.2d 1214, 1218-19 (Ct. App. 1977) (holding that when the defendant was aware of seventeen specific incidents in which he was alleged to have unlawfully caused payments to be made from public funds, there was no due process violation under Foster, since the defendant was aware that any one of these acts could have formed the basis of the single count in the indictment). We have also held that a general pattern of criminal conduct may be charged as a single count when the state does not have specific evidence that would clearly distinguish the multiple acts. Gardner, 2003-NMCA-107, ¶¶ 28, 33, 38 (recognizing that evidence of a general pattern of conduct as to two separate victims supported two counts of CSCM). [30] This Court has held that when the state chooses to use a broad charging period, it will not be able to use any incidents of the same type of acts as those charged within that charging period as the basis for a subsequent prosecution. State v. Martinez, 2007-NMCA-160, ¶ 14, 143 N.M. 96, 173 P.3d 18 (holding that when the state charged the defendant with five counts of CSPM within a four-month period, the defendant’s plea acted as a bar to prosecution for other similar acts occurring during that time period), cert. denied, 2007-NMCERT-011, 143 N.M. 156, 173 P.3d 763; Altgilbers, 109 N.M. at 468, 786 P.2d at 695 (“Because of the scope of the indictment in this case, the state would not be permitted in the future to charge [the] defendant with any sexual offenses involving his two children during the time encompassed by the counts in the indictment.”). Therefore, a defendant is put on notice that a number of different acts within the charging period may form the basis of the alleged counts against him. A defendant’s distinguishable charges may be based on various distinct incidents or may be based on a general allegation of wrongful conduct that continually occurred. In this case, Defendant was put on notice of the distinct incidents alleged and that the charges were based on a continuing course of conduct. Where notice of the distinguishable charges complied with
these requirements for the defined charging period, Foster does not require reversal of Defendant’s convictions.

The Nurse’s Hearsay Testimony About the Child’s Statements

[31] At trial, Rosella Vialpando, a nurse who examined L.T., testified about statements L.T. had made to her. Nurse Vialpando testified that L.T. told her that Defendant touched her more than one time with his private, that he touched her butt with his private, and that he made her touch his private with her hands. The district court determined that the statements were admissible under Rule 11-803(D) NMRA as an exception to the hearsay rule. Relying on State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929 (filed 2007), cert. denied, 2007-NMJCERT-012, 143 N.M. 213, 175 P.3d 307, Defendant argues that the district court erred in admitting L.T.’s statements to Nurse Vialpando under Rule 11-803(D), which provides an exception to the rule against hearsay when statements are made for the purpose of medical diagnosis or treatment. The State argues that we need not consider Defendant’s argument and asserts that the statements were not hearsay and were properly admitted, not for the purpose of proving that L.T. was in fact abused in the manner she described to Nurse Vialpando, but in order to explain why Nurse Vialpando performed the sort of examination that she did. See State v. Paiz, 2006-NMCA-144, ¶ 40, 140 N.M. 815, 149 P.3d 579 (holding that statements made to a physician were not hearsay because they were not offered to prove the content of the statements, but to explain the context of the examination). We review the admission of this evidence for an abuse of discretion. See State v. Sanchez, 2008-NMSC-066, ¶ 12, 145 N.M. 311, 198 P.3d 337.

[32] We must first determine whether the right for any reason doctrine applies to Nurse Vialpando’s statements. The district court did not accept the State’s argument that Nurse Vialpando’s statements were not hearsay. This Court may affirm on a basis not relied upon by the district court if doing so would be fair to the appellant. State v. Gallegos, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828 (stating that an appellate court will affirm a district court’s decision if it is right for any reason, so long as it is not unfair to the appellant). In this case, it is unfair to Defendant if this Court relies on the State’s new argument supporting affirmance. When evidence is introduced for a limited purpose, a party may request an instruction that the jury only consider the evidence for that purpose. See Rule 11-105 NMRA (“When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”). Defendant did not have the opportunity to request a limiting instruction. The district court’s ruling was based on an assumption that the testimony was in fact hearsay and offered for the truth of the matter asserted. It would be unfair to now apply the right for any reason doctrine when Defendant was deprived of his opportunity to request a limiting instruction at trial. The record supports this determination. In its closing argument, the State relied upon the truth of L.T.’s statements that were made to Nurse Vialpando during the examination to establish substantive evidence of penetration. Accordingly, we decline to affirm on this basis, and we will assume that the statements were in fact hearsay in order to consider whether the district court erred in admitting the testimony pursuant to Rule 11-803(D).

[33] Rule 11-803(D) provides that “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof in so far as reasonably pertinent to diagnosis or treatment” are not excluded by the rule against hearsay, even if the declarant is available as a witness. In Ortega, this Court held that statements made to a Sexual Assault Nurse Examiner (SANE nurse) do not fall within the exception provided under Rule 11-803(D) because the role of a SANE nurse is primarily to collect evidence for law enforcement purposes and not primarily to diagnose or treat medical conditions. Ortega, 2008-NMCA-001, ¶¶ 16-27. In State v. Mendez, 2009-NMCA-060, ¶¶ 1-3, 146 N.M. 409, 211 P.3d 206, 2009-NMJCERT-006, __ N.M. __, 215 P.3d 43, we applied Ortega in a situation where the victim was available to testify and the defendant’s confrontation rights were not at issue.

[34] In Mendez, as in Ortega, this Court relied heavily on facts indicating that the purpose of a SANE examination was to collect evidence for use in prosecuting the alleged perpetrator. We noted that the SANE examination occurred after the child had already been taken to a pediatric nurse for an examination, that a police officer was present for the interview portion of the SANE examination, that the victim’s mother was presented with a form authorizing the release of the results of the examination to the state police, and that the victim’s mother signed a form in which she acknowledged that a SANE examination is not a routine medical examination and that the SANE nurse could not be held responsible for identifying, diagnosing, or treating new or existing medical problems. Mendez, 2009-NMCA-060, ¶¶ 23-27.

[35] The present case is distinguishable from the factual circumstances in Mendez. The evidence does not suggest that the examination was a SANE examination performed primarily for law enforcement purposes. Nurse Vialpando testified that she is a family nurse practitioner and that as such she does “pretty much what a primary care doctor does.” She stated that she is trained to assess, diagnose, and treat acute and chronic illnesses. Nurse Vialpando stated that she works at a pediatric specialty clinic at the University of New Mexico called Para Los Niños and that the clinic sees children and adolescents who have been brought in because of a concern about sexual abuse. She stated that in this case, L.T.’s mother brought L.T. in for the examination. Nurse Vialpando talked to L.T. about why she was there, listened to L.T.’s description of what happened, and then performed an examination of L.T.’s genital and anal areas.

[36] In this case, unlike the circumstances in Mendez, there was no evidence that L.T. had already had a pediatric examination prior to her examination at Para Los Niños. Unlike Mendez, there was no testimony that law enforcement instigated, was present for, or was otherwise involved with L.T.’s examination. Although Nurse Vialpando stated that she was obligated to report suspicion of sexual or physical abuse to the state Children, Youth and Families Department (CYFD), she indicated that this is a mandatory obligation imposed by law upon all teachers, doctors, nurses, and others who work with children. See NMSA 1978, § 32A-4-3(A) (2005) (placing a duty on “[e]very person . . . who knows or has a reasonable suspicion that a child is an abused or neglected child [to] report the matter immediately” to the police, CYFD, or other authorities). Nurse Vialpando testified that when she teaches at a nurse practitioner program, she informs students “how to access law enforcement.” A comment indicating that a health care provider might fulfill her statutory duty to report evidence of a crime against a child to the police does not alone transform that health care practitioner’s medical examination into a forensic investigation. Defendant points
out that Nurse Vialpando testified that when a person has reported being sexually abused within the prior seventy-two hours, Nurse Vialpando will perform a rape kit to swab for physical evidence and that this kit is then sent to law enforcement. While we agree with Defendant that providing this evidence to the police is not part of either the diagnosis or treatment of any medical disorder, there was no evidence in this case that Nurse Vialpando performed a rape kit or that she provided other evidence to the police. We are unwilling to conclude that because Nurse Vialpando sometimes provides evidence to the police after an examination, L.T.’s pediatric examination was for forensic law enforcement purposes rather than medical purposes. As the evidence presented does not indicate that this examination falls within the law enforcement parameters announced in *Mendez* and *Ortega*, we hold that the district court did not err in admitting Nurse Vialpando’s testimony under Rule 11-803(D).

**The Judge’s Statement in Response to a Juror’s Question About Facts Not in Evidence**

\(37\) Prior to trial, Defendant filed a motion seeking a psychological evaluation of L.T. The district court denied Defendant’s motion. At trial, Defendant presented expert testimony about false reporting of child sexual abuse and about the need to psychologically evaluate a child who makes a claim of abuse in order to minimize the possibility of such false reporting. A juror submitted a written question to the court, asking whether L.T. had ever been psychologically evaluated. The district court informed the jury that “since June 6, 2006, any issues related to testing and/or evaluations if any have been subject to the jurisdiction of the court.” The court instructed the jury “not to speculate regarding the existence or nonexistence of testing and/or evaluations.” Defendant contends that his convictions should be reversed because the district court’s statement constituted an improper instruction to the jury.

\(38\) Although Defendant relies on authority stating that reversal is required when a district court incorrectly instructs the jury on the elements of an offense, we conclude that these authorities are inapplicable. In fact, Defendant does not challenge the district court’s statement of the law at all. Instead, he argues that the instruction was factually incorrect because it was not true that all issues relating to testing and evaluations of L.T. were subject to the district court’s prior order. Defendant points out that the order only prevented Defendant from having L.T. evaluated and that the State would have been free to evaluate L.T. if it had wished. We do not agree with Defendant. The district court’s statement did not communicate anything to the jury about whether either party was permitted to or forbidden from interviewing L.T. However, to the extent that the district court’s statement could be considered a statement of fact about which parties were controlled by its pretrial order, Defendant has cited no authority that the district court’s incorrect factual statement warrants an automatic reversal. We therefore assume that no such authority exists.

**The Jury Instructions on Criminal Sexual Penetration**

\(39\) Defendant’s second argument asserts that the district court’s response to the jury question and accompanying instruction implied that the court had determined that L.T. did not need to be psychologically evaluated. We disagree. In context, the district court simply instructed the jurors that they should not speculate about whether any evaluation had or had not been performed. This instruction informed jurors that they should not speculate since there was no evidence presented one way or the other. As this is a correct statement of the law, see UJI 14-101 NMRA (stating that jurors “must decide the case solely upon the evidence received in court”), we hold that the district court did not err in so instructing the jury.

\(40\) After the close of evidence, Defendant submitted a proposed jury instruction on the elements of CSPM. For the two counts of anal CSPM, Defendant’s proposed instruction stated that the State must prove beyond a reasonable doubt that Defendant caused L.T. to engage in “anal intercourse,” in addition to the other elements of CSPM. For the two counts of vaginal CSPM, Defendant’s proposed instruction stated that the State must prove beyond a reasonable doubt that Defendant caused L.T. to engage in “sexual intercourse,” in addition to the other elements of CSPM. The district court rejected Defendant’s proposed instructions and instead instructed the jury that as to anal CSPM, the State must prove beyond a reasonable doubt that Defendant “caused the insertion to any extent, of a penis into the anus” of L.T. As to vaginal CSPM, the district court instructed the jury that the State must prove beyond a reasonable doubt that Defendant “caused the insertion to any extent, of a penis into the vagina and/or vulva” of L.T. Defendant argues that these instructions were reversible error because they did not follow New Mexico’s Uniform Jury Instructions (UJIs) and because the instructions on vaginal CSPM permitted the jury to convict him for acts that only constituted vaginal CSCM. We review the validity of jury instructions de novo. *State v. McClennen*, 2008-NMCA-130, ¶ 5, 144 N.M. 878, 192 P.3d 1255.

\(41\) The general use note to the criminal UJIs provides that “when a uniform instruction is provided for the elements of a crime... the uniform instruction must be used without substantive modification or substitution.” UJI-Criminal General Use Note NMRA. It also provides that when there are alternative instructions, “only the alternative supported by the evidence in the case may be used.” Id. Defendant contends that the instructions given by the district court were erroneous because the district court did not use the correct version of the instruction where two alternatives were provided in UJI 14-957 NMRA. Therefore, we must determine whether it was error under the general use note to the criminal UJIs to give the “caused the insertion, to any extent, of an object” alternative when the “sexual intercourse” and “anal intercourse” alternatives were more narrowly tailored to the charges in this case. The UJIs at issue are intended to reflect the law criminalizing sexual penetration of a minor as provided in Section 30-9-11. Therefore, we look to that statute to inform our determination of which of UJI 14-957’s two alternatives should have been given. *See State v. Marshall*, 2004-NMCA-104, ¶¶ 7-10, 136 N.M. 240, 96 P.3d 801 (reviewing the statutory scheme
to determine whether the defendant was entitled to his tendered jury instruction). [42] The first alternative instruction for the conduct that constitutes CSPM in UJI 14-957 is that the defendant “caused ___ (name of victim) to engage in ___.” Id. (footnotes omitted). The notes to the instruction indicate that the second blank is to be filled in with one of the following acts: “sexual intercourse,” ‘anal intercourse,’ ‘cunnilingus’ or ‘fellatio.’” Id. The notes in UJI 14-957 indicate that the applicable definition of the relevant act from UJI 14-982 NMRA must be given after the instruction. In UJI 14-982, the definition of “[s]exual intercourse” is “the penetration of the vagina, the female sex organ, by the penis, the male sex organ, to any extent.” The definition of “[a]nal intercourse” is “the penetration of the anus by the penis to any extent.” Id.

[43] The second alternative instruction for the conduct that constitutes CSPM in UJI 14-957 is that the defendant “caused the insertion, to any extent, of ___ into the ___ of ___ (name of victim).” (Footnotes omitted.) The notes indicate that the first blank should be filled in with “the object used.” Id. The second blank should be filled in with either “vagina,” “penis,” or “anus,” and the applicable definition from UJI 14-981 NMRA must be given after the instruction. UJI 14-957. In UJI 14-981, the definition of “vagina” is “the canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus.” The definition of “anus” is “the opening to the rectum.” Id.

[44] We agree with Defendant that the district court erred in submitting the second alternative “insertion, to any extent” instructions to the jury for the four counts of CSPM in this case. The use notes to UJI 14-957’s second alternative indicate that the “object” used to accomplish the penetration should be listed in the instruction. In this case, the “object” that was used was Defendant’s penis. We agree with Defendant that an “object” would be something other than a penis as that term is used in Section 30-9-11(A). Section 30-9-11(A) indicates that CSPM may be committed by “the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.” Sexual intercourse is generally understood to mean the insertion of a penis into the genital openings of a female. See UJI 14-982. Anal intercourse is generally understood to mean the insertion of a penis into the anal opening of another. See id. As such, intercourse involving a penis is already identified under the statutorily defined categories listed in Section 30-9-11(A) before the additional category of “any object” is identified. Where Section 30-9-11(A) lists an additional, alternative means of committing CSPM by including “the causing of penetration, to any extent and with any object, of the genital or anal openings of another,” the Legislature did not mean to include conduct involving the insertion of a penis which is already described as the same two acts under the definitions set forth in UJI 14-982. Such an interpretation would render superfluous the two key defined terms of “sexual intercourse” and “anal intercourse.” See State v. Rivera, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939 (filed 2003) (“A statute must be construed so that no part of the statute is rendered surplusage or superfluous.” (internal quotation marks and citation omitted)). Therefore, the second alternative in UJI 14-957 should not have been used because it was not supported by evidence that L.T.’s genital or anal openings were penetrated by an “object” other than a penis as that term is properly used in Section 30-9-11(A). See UJI-Criminal General Use Note. The district court should have instructed the jury on “sexual intercourse” and “anal intercourse” under the first alternative in UJI 14-957 and then provided the appropriate definitions under UJI 14-982.

[45] We do not agree with Defendant that the district court’s error in selecting from UJI 14-957’s two alternatives requires automatic reversal. This Court reviews jury instructions as a whole to determine whether they provide a correct statement of the law. See State v. Laney, 2003-NMCA-144, ¶ 38, 134 N.M. 648, 81 P.3d 591 (“A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law.”).

[46] The instruction that was given on anal intercourse stated that the jury should find Defendant guilty if the State proved beyond a reasonable doubt that Defendant “caused the insertion to any extent, of a penis into the anus of” L.T. As this instruction conveys the same definition and meaning in the instruction that should have been given—that Defendant caused L.T. to engage in anal intercourse and that anal intercourse is defined as penetration of the anus by the penis to any extent—we conclude that this instruction accurately presented the applicable law. See UJI 14-957; UJI 14-982. Therefore, we hold that any error in the alternate instruction given on anal intercourse was not reversible error.

[47] We also conclude that the erroneous instructions on vaginal CSPM did not constitute reversible error. Those instructions stated that the jury should find Defendant guilty of CSPM if it determined that Defendant “caused the insertion to any extent of, a penis into the vagina and/or vulva” of L.T. Defendant argues that permitting the jury to convict him for CSPM for penetration of the vulva was reversible error because the vulva includes the external parts of the female genitalia and merely penetrating into these external parts, rather than into the vaginal canal itself, constitutes CSCM rather than CSPM. Defendant’s argument relies on the assertion that the term “sexual intercourse” in Section 30-9-11(A) does not include penetration of the vulva, and he contends that even if a penis were an “object” under the terms of the statute, statutory penetration of the “genital . . . opening” of another” includes only the vaginal canal and not the vulva. The State, on the other hand, claims that the UJIs confirm that “the vagina includes the vulva,” and, therefore, penetration of the vulva constitutes “sexual intercourse” under Section 30-9-11(A).

[48] Although our appellate courts have indirectly recognized that penetration of the vulva is a basis for a CSPM conviction, the State has not pointed us to any New Mexico authority expressly deciding that penetration of a vulva with a penis constitutes “sexual intercourse” for the purposes of CSPM as set forth under Section 30-9-11(A). Cf. State v. Brown, 100 N.M. 726, 729, 676 P.2d 253, 256 (1984) (stating that “[a]ny amount of penetration” with a penis “is sufficient to complete the crime [of CSP]” but failing to explain what part of the female genitalia must be penetrated); State v. Ervin, 2008-NMCA-016, ¶¶ 33-36, 143 N.M. 493, 177 P.3d 1067 (filed 2007) (indicating that penetration of the vulva with a tongue is sufficient evidence of CSPM under the definition of cunnilingus), cert. denied, 2008-NMCERT-001, __ N.M. __ P.3d __; State v. Massengill, 2003-NMCA-024, ¶¶ 36, 41-42, 133 N.M. 263, 62 P.3d 354 (filed 2002) (reviewing, for sufficiency of the evidence, a conviction for CSPM based on an instruction to the jury that the defendant “caused the insertion, to any extent, of a finger into the vulva and/or vagina of [the child]”) (internal quotation marks and citation omitted); State v. Gomez, 2001-NMCA-080, ¶¶ 23-26, 131 N.M. 118, 33 P.3d 669 (reviewing jury instructions for CSCM and CSPM based on both touching
the exterior of and penetration of the vulva, apparently with a finger). The New Mexico Supreme Court recognized that our CSP statutes were intended to codify the common law crime of rape when it established the prohibition against the action of any person causing another to intentionally engage in unlawful “sexual intercourse.” See State v. Keyonnie, 91 N.M. 146, 147-48, 571 P.2d 413, 414-15 (1977) (stating that the statutory offense of CSP was derived from the essential elements of the common law crime of rape). The common law definition of rape recognizes that penetration of the vulva to any extent constitutes rape. See, e.g., Commw. v. Nylander, 532 N.E.2d 1223, 1225 (Mass. App. Ct. 1989) (stating that the common law definition of rape required only a “minimum degree of penetration,” which included penetration of the vulva).

[49] Other state courts have also held that references to “sexual intercourse” or “vaginal intercourse” in their CSP statutes are intended to include penetration of the vulva, based on the conclusion that their statutes were intended to reflect the common law crime of rape. See, e.g., State v. Albert, 750 A.2d 1037, 1043-45 (Conn. 2000) (holding that under Connecticut’s CSP statute, the term “sexual intercourse” includes penetration of the labia majora, based on the traditional common law definition of rape); Wilson v. State, 752 A.2d 1250, 1255 (Md. Ct. Spec. App. 2000) (“The use of the term ‘vaginal intercourse’ by [the Maryland statutory scheme] does not require any penetration, even slight penetration, into the literal vaginal canal itself. The penetration required remains simply the vulvar penetration that has always been required to prove common law rape.”); see also James L. Rigelhaupt, Jr., Annotation, What Constitutes Penetration in Prosecution for Rape or Statutory Rape, 76 A.L.R.3d 163 § 3, 178-83 (1977) (listing cases which recognize that penetration of the vulva constitutes rape). We find these authorities persuasive, and conclude that the term “sexual intercourse” in Section 30-9-11(A) is intended to codify the common law definitions of rape which includes penetration of the vulva even when the vaginal canal is not penetrated.

[50] We note that our interpretation of the term “sexual intercourse” is consistent with the other related provisions in Section 30-9-11(A). See Smith v. Ariz. Pub. Serv. Co., 2003-NMCA-097, ¶ 5, 134 N.M. 202, 75 P.3d 418 (stating that an appellate court will interpret the provisions of a statute in light of other provisions of the act in order to produce a “harmonious whole”). The language of the final provision in Section 30-9-11(A) prohibits the “penetration, to any extent and with any object, of the genital or anal openings of another.” We rely on the ordinary meaning of the terms “genital” and “opening,” in support of our interpretation of this statutory language. See State v. Ogden, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994) (“The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary.”). The term “genital opening” includes the vulva. Albert, 750 A.2d at 1045-46. We agree with the detailed analysis of these terms in Albert and conclude that, based upon the common and ordinary definitions of the words “genital” and “opening,” the vulva constitutes a genital opening under Section 30-9-11(A).

[51] In light of the historical recognition defining the common law crime of rape and a proper construction of all of the terms of Section 30-9-11(A), we determine that penetration of the vulva constitutes “sexual intercourse” under the New Mexico statute. The instruction given by the district court accurately reflected the statutory law by stating that the jury could find that Defendant committed CSPM if his penis penetrated either L.T.’s vulva or vagina to any extent. Any error in the mistaken alternative instruction given by the district court was harmless and did not constitute reversible error.

[52] We note, however, that our UJIs do not clearly state that penetration of the vulva constitutes CSP. UJI 14-982 provides that “[s]exual intercourse means the penetration of the vagina, the female sex organ, by the penis, the male sex organ, to any extent.” The committee commentary states that the definition of sexual intercourse is the legal definition of that element of rape. Id. By referring to the common-law crime of rape, the commentary suggests that the word “vagina” is meant in the broader sense of the female genitalia as opposed to just the vaginal canal. UJI 14-981 defines “vagina” specifically as the “canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus” and goes on to separately define the “vulva” as “the external parts of the female organ of sexual intercourse including the major and minor lips, the clitoris and the opening of the vagina.” The language that the vagina extends “from the vulva” could be read two ways. It could be interpreted to mean that the vagina extends from the beginning of the vulva, thereby including the vulva within the definition of “vagina.” Or, it could be interpreted to mean that the vagina begins where the vulva ends, thereby excluding the vulva and, as such, defining “vagina” as the lower vaginal canal to the neck of the uterus. This second reading of UJI 14-982 in conjunction with UJI 14-981 would suggest that the uniform jury instructions are in conflict with the statutory definition of sexual intercourse, since they suggest that sexual intercourse requires penetration of the vaginal canal and is not achieved by penetration of the vulva alone. As a service to the bar, we believe that UJI 14-982 would accurately reflect the law if it is modified to provide that “sexual intercourse means penetration of the vulva or vagina, the female sex organ, by the penis, the male sex organ, to any extent.” Cf. State v. Mantelli, 2002-NMCA-033, ¶ 48, 131 N.M. 692, 42 P.3d 272 (noting that this Court may call into question the correctness of UJIs that have not been addressed in an opinion of our Supreme Court and making a suggestion for an appropriate modification of a UJI). Alternatively, modifying the definition of vagina in UJI 14-981 as “extending from the beginning of the vulva to the neck of the uterus” would effectuate the same clarification. Id.

The Jury Instructions on Unanimity

[53] Defendant contends that the district court’s instruction on unanimity was insufficient to actually ensure that the jury was unanimous. Defendant cites no legal authority in support of this argument in his brief in chief, and we therefore decline to address this argument. See Rule 12-213(A) (4) NMRA (requiring the brief in chief to contain “an argument which, with respect to each issue presented, shall contain a statement of the applicable standard of review, [and] the contentions of the appellant . . . with citations to authorities”); In re Adoption of Doe, 100 N.M. at 765, 676 P.2d at 1330 (stating that “[i]ssues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal,” and that an appellate court will not do basic legal research for counsel).

The Prosecutor’s Conduct

[54] At trial, the prosecutor made several statements that Defendant contends constituted misconduct warranting reversal. When an issue of prosecutorial misconduct is preserved by an objection at trial, we review the district court’s ruling for an abuse of discretion. State v. Allen, 2000-NMSC-
records into evidence, the prosecutor stated, couple days ago." Defendant objected, and

error. Id. Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” Id. (internal quotation marks and citations omitted).

On cross-examination of Defendant’s mother, in an attempt to establish that she was biased in Defendant’s favor, the prosecutor asked whether Defendant’s mother and father were paying his attorney’s fees. Defendant objected on grounds of relevance and moved for a mistrial. The district court denied the request for a mistrial and, in the presence of the jury, directed the prosecutor to withdraw the question. The prosecutor did so, and asked whether Defendant’s mother would be willing to help her son in a time of need. Defendant asserts that the question improperly commented on his invocation of his constitutional right to counsel and that the question “implied to the jury that [Defendant] had obtained high cost representation necessitated by his guilt.”

We disagree. In context, it is clear that the question was intended to suggest bias and that the question was not one involving post-arrest conduct that might give rise to an inference that Defendant believed he was guilty because he invoked his right to counsel. Cf. id. ¶ 32 (noting that when a defendant invokes his right to counsel when questioned by the police, testimony about the invocation of that right may deprive a defendant of a fair trial in the same manner as a comment on a defendant’s invocation of his right to remain silent). The district court did not abuse its discretion in requiring the prosecutor to withdraw the question and ask the witness in another manner about any bias she may have for her son.

Defendant also asserts that the prosecutor improperly attacked the integrity of defense counsel when she implied that defense counsel was concealing evidence. The prosecutor prefaced a question to Defendant’s expert with “[i]sn’t it true you told me before when I had a chance to interview you for five minutes in the hall a couple days ago.” Defendant objected, and the district court sustained the objection. Later, when moving Defendant’s school records into evidence, the prosecutor stated, “They’re from [defense counsel]. [The jury] can decide for themselves if they’re complete or not.” Defendant objected, not to the admission of the documents, but to the prosecutor’s comment, which he contended shifted the burden of proof by suggesting that Defendant was required to provide complete records to establish his innocence. The district court did not rule on the objection and admitted the documents into evidence. Defendant did not ask that the jury be instructed about the burden of proof at that time. The district court did not abuse its discretion by sustaining Defendant’s objection to the prosecutor’s statement about her interview with Defendant’s expert. In addition, the district court was not obligated to provide relief that Defendant did not seek in response to the prosecutor’s comment about interviewing Defendant’s expert or about the school records.

Defendant asserts that two other statements by the prosecutor improperly appealed to the passions of the jury. The first was during cross-examination of L.T.’s father. The State asked whether L.T.’s father remembered that during a pretrial interview he failed to tell the State that he knew of Defendant’s penis piercing. L.T.’s father responded, “What I remember the most about this interview is that you were a witch . . . [y]ou acted like I was the one on trial.” The State began to respond by saying, “I’m just trying to defend your daughter[.]” Defendant objected, stating, “Your honor . . . it’s argument.” The district court instructed L.T.’s father that he should just answer the questions asked, and not make unsolicited statements. Defendant made no further objection. While we do not believe that the State should have suggested that its role is to “defend” an alleged victim during the trial, it does not appear that Defendant preserved an objection on this basis, and we cannot conclude that the statement deprived Defendant of a fair trial.

The second statement that Defendant argues improperly appealed to the passions of the jury was when the State asked Defendant a question that began with the hypothetical: “Assuming for a minute you did sexually abuse [L.T.].” Defendant objected, and the district court sustained the objection. The district court did not abuse its discretion in sustaining the objection, and Defendant sought no other relief. Again, we cannot conclude that this partial question, which was properly rejected by the district court, deprived Defendant of a fair trial.

Although we conclude that none of these statements by the prosecutor alone warrants reversal, Defendant contends that the cumulative effect of the prosecutor’s conduct was to deprive him of a fair trial. Defendant relies on State v. Ashley, 1997-NMSC-049, ¶¶ 13, 15-21, 124 N.M. 1, 946 P.2d 205, in which the New Mexico Supreme Court held that the defendant was deprived of a fair trial by the cumulative effect of the prosecutor’s improper introduction of evidence that the defendant had a criminal history that extended over forty years; the prosecutor’s attack on the defendant’s character that pointed out to the jury that he had left his wife and child destitute and forced them to go on food stamps—welfare benefits for which the prosecutor suggested that the jurors, as taxpayers would have to pay; and the prosecutor’s improper eliciting of a law enforcement officer’s opinion on the ultimate question of the defendant’s guilt. Ashley does not support Defendant’s argument. There, the defendant was accused of bigamy, and the only issue in the case was whether he knew that his divorce from his first wife had never been finalized. Id. ¶ 4. The prosecutor’s conduct was clearly egregious and prejudiced the defendant in a case in which the only question to be decided was one that depended in part on whether the jury believed that the defendant was the sort of person who would willfully ignore one legal relationship in forming another. See id. ¶¶ 4, 21. Here, the prosecutor’s comments were more isolated and did not involve the introduction of significant improper evidence that should have swayed the jury on the essential issues in the case. We conclude that the prosecutor’s improper conduct did not deprive Defendant of a fair trial.

CONCLUSION

We hold that the two factually indistinguishable counts of vaginal CSPM and the two factually indistinguishable counts of anal CSPM violated Defendant’s constitutional right to due process. Accordingly, we reverse Defendant’s conviction for one count of vaginal CSPM and one count of anal CSPM. We remand to the district court with instructions to dismiss these two convictions and to amend Defendant’s judgment and sentence to accurately reflect the dismissal of these two counts of CSPM. As we are not persuaded by Defendant’s remaining claims of error, his remaining convictions are affirmed.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

JAMES J. WECHSLER, Judge
CERTIORARI GRANTED, JANUARY 25, 2010, NO. 32,130

From the New Mexico Court of Appeals

Opinion Number: 2010-NMCA-011

Topic Index:
Criminal Law: Worthless Check Offenses
Criminal Procedure: Elements of Offense
Employment Law: Compensation and Commissions
Indian Law: Tribal and State Authority and Jurisdiction; and Tribal Court Jurisdiction
Jurisdiction: Personal; Subject Matter; and Venue

STATUTES: Interpretation

STATE OF NEW MEXICO,
Plaintiff-Appellee,
VERSUS
DEBBIE CRUZ,
Defendant-Appellant.
No. 27,292 (filed: October 27, 2009)

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

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OPINION

CYNTHIA A. FRY, CHIEF JUDGE

[1] Defendant appeals from a conditional discharge order following jury convictions for four counts of issuing a worthless check over $25. See NMSA 1978, § 30-36-4 (1963). She initially raised four issues on appeal and added a fifth issue regarding ineffective assistance of counsel in her reply brief. We discuss Defendant's claims of error as to lack of jurisdiction and improper venue and affirm on those issues. However, we reverse the convictions on the worthless check charges because the evidence was insufficient to prove all of the elements necessary under Section 30-36-4. Based upon our decision to reverse, we do not address Defendant's remaining issues.

BACKGROUND

[2] Defendant was the president of DGM Construction, Inc. (DGM), a construction corporation based in Albuquerque, New Mexico. As president of DGM, Defendant paid the company's bills and signed the checks for all employees after those checks were prepared by an independent bookkeeping service.

DISCUSSION

Subject Matter Jurisdiction

[3] In June 2002, DGM performed work as a subcontractor at Zuni High School on the Zuni Indian Reservation in McKinley County (the Zuni project). George Mulvaney was the construction superintendent for DGM, and his duties included supervising the Zuni project construction site and reporting employees' hours to the independent bookkeepers. The bookkeepers prepared the payroll checks based on the hours reported by either Defendant or Mulvaney and submitted the prepared checks to Defendant, who then signed them. Defendant would then meet Mulvaney either in Albuquerque or halfway between Albuquerque and the Zuni Indian Reservation and give the checks to Mulvaney to forward to the employees.

[4] Leo Eracho, Vicki Kallestewa, and Benjamin Kallestewa (the laborers/payees), all enrolled members of the Zuni Tribe, were employed by DGM to work on the Zuni project. They were paid every Friday for work they performed during the week ending the previous Friday. They received the checks identified as State's Exhibits 1, 2, and 3, dated June 21 and June 27, 2002, in return for their labor.

[5] The three laborers/payees customarily went to Joe Milo's Trading Company (Milo's), a business located twenty miles south of Gallup, New Mexico, every Friday to cash their checks. Joe Milosevich, the owner of Milo's, cashed the checks identified as State's Exhibits 1, 2, and 3 for the laborers/payees. He then deposited the checks in his own account but was denied payment due to insufficient funds. Milosevich resubmitted the checks twice, only to have them returned for insufficient funds. He deposited the checks a third time, but they were returned because the account was closed.

[6] Milosevich then sent a certified letter to Defendant regarding the dishonored checks at the address listed on the checks, but the letter was returned as unclaimed. Milosevich testified that his attorney attempted to contact DGM, but to no avail.

[7] Based upon the dishonored checks issued to the laborers/payees which remained unpaid by Defendant, the State charged Defendant with four counts of issuing worthless checks in violation of Section 30-36-4. A jury convicted Defendant of all four counts, and the district court entered an order for conditional discharge. This appeal followed.

[8] Defendant claims that the district court erred in denying her motion to dismiss for lack of jurisdiction. She contends that because the laborers/payees were all members of the Zuni Tribe performing work on Zuni land and because the checks were delivered to the laborers/payees on Zuni land, New Mexico courts do not have jurisdiction over the criminal prosecution.

[9] On the question of whether a New Mexico court has criminal jurisdiction to prosecute Defendant, we review whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party. State v. Frank, 2002-NMSC-026, ¶ 10, 132 N.M. 544, 52 P.3d 404. We defer to the district court's findings of fact if they are supported by substantial evidence and review questions of law de novo. Id.; see State v. Dick, 1999-NMCA-062, ¶ 6, 127 N.M. 382, 981 P.2d 796.

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Defendant contends that the district court lacked criminal jurisdiction over her because the alleged crimes were committed against Indians in Indian country. It is undisputed that Defendant is not a member of an Indian tribe; however, she notes that Mulvaney delivered the checks to the laborers/payees on Indian land and argues that, because the crimes occurred on Indian land, prosecution is within the jurisdiction of the tribal court. See generally Dick, 1999-NMCA-062, ¶ 7 (recognizing the general principle that a state has no jurisdiction over crimes committed by or against an Indian in “Indian country” (internal quotation marks and citation omitted)).

We disagree because the evidence does not establish that all of the elements of the crime took place on Indian land. See State v. Clark, 2000-NMCA-052, ¶¶ 5-7, 129 N.M. 194, 3 P.3d 689 (holding that the district court had jurisdiction to try a Native American defendant for the crimes of larceny and conspiracy when the crimes were initiated within Indian country but continued outside the boundaries of Indian country into New Mexico). Milo’s is located in McKinley County. In addition, the checks were initially signed by Defendant in Albuquerque and delivered to Mulvaney at some point approximately halfway between Albuquerque and the construction site on the Zuni Indian Reservation. This evidence shows that at least some of the elements of the crimes took place in either Bernalillo County or McKinley County in locations that were not in Indian country. Therefore, New Mexico had jurisdiction to prosecute Defendant for these crimes.

Defendant contends that the district court arguably exceeded its authority in taking judicial notice of the fact that Milo’s was in McKinley County and, therefore, there is a question as to whether the laborers/payees cashed their checks on Indian land. We disagree. Milosevich testified, without contradiction, that he ran the trading post located approximately twenty miles south of Gallup. Furthermore, Benjamin Kallestewa testified that he and the other laborers/payees cashed their checks at Milo’s because it cost less than cashing them on the Zuni Indian Reservation.

The district court was authorized to take judicial notice of a generally known location in the absence of some evidence suggesting otherwise. See Rule 11-201(B)(1), (2) NMRA (stating that a trial court may take judicial notice of facts “not subject to reasonable dispute” that are either “generally known within the community,” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”); Trujillo v. Dimas, 61 N.M. 235, 244-245, 297 P.2d 1060, 1066 (1956) (observing that a court may take judicial notice of geographical facts which are provable by reference to maps); cf. State v. Tooke, 81 N.M. 618, 619, 471 P.2d 188, 189 (Ct. App. 1970) (“New Mexico allows its courts to take judicial notice of boundaries of the state and counties therein.”), overruled on other grounds by State v. Ruffins, 109 N.M. 668, 789 P.2d 616 (1990). Furthermore, even if Milo’s is on Indian land, Defendant engaged in other activities that contributed to the crimes while not on Indian land, including signing the checks and delivering them to Mulvaneys. Therefore, jurisdiction was proper in the New Mexico court. See Clark, 2000-NMCA-052, ¶¶ 5-7.

Finally, even though Milosevich cashed the checks for the laborers/payees, his testimony indicates that he did not seek reimbursement from them after the checks were dishonored and, therefore, he was the ultimate victim of Defendant’s wrongful acts. See UJI 14-1670 NMRA (requiring that the defendant intended to deceive someone by use of the worthless check but containing no requirement that the person injured be the person deceived by the defendant). Because there is no indication that Milosevich is Native American, New Mexico had jurisdiction to prosecute these crimes even if they occurred on Indian land. See generally State v. Warner, 71 N.M. 418, 422, 379 P.2d 66, 69 (1963) (concluding that “New Mexico [s]tate [c]ourts have jurisdiction over criminal offenses committed on an Indian reservation within this state, by non-Indians, which are not against an Indian nor involving Indian property”).

Based upon the foregoing, the New Mexico district court had jurisdiction over Defendant for these offenses.

Defendant claims that venue was improper in McKinley County because none of the material elements of the crimes occurred there. “A motion to dismiss for improper venue involves questions of law that we review de novo.” Gardiner v. Galles Chevrolet Co., 2007-NMSC-052, ¶ 4, 142 N.M. 544, 168 P.3d 116; State v. Roybal, 2006-NMCA-043, ¶ 25, 139 N.M. 341, 132 P.3d 598.

We initially note that affirmation of the district court’s refusal to dismiss for improper venue is justified based on untimeliness alone. Defendant entered a waiver of arraignment on January 27, 2006. She alerted the trial court that venue might be an issue, but did not move to dismiss for lack of proper venue until July 17, 2006, the day before trial was to commence. Pursuant to the Rules of Criminal Procedure, Defendant must file a motion to dismiss for improper venue within ninety days of arraignment. See Rule 5-601(D) NMRA. Her failure to file a motion challenging venue for almost six months after waiving arraignment provides justification for the district court’s finding that Defendant waived her objection to improper venue. See Rule 5-601(D); see also State v. Lopez, 84 N.M. 805, 807-08, 508 P.2d 1292, 1294-95 (1973) (recognizing that an objection to venue may be waived if not brought in a timely fashion).

Even if Defendant’s motion had been timely, we agree with the district court that the motion was not well taken. A “trial may be had in any county in which a material element of the crime was committed.” NMSA 1978, § 30-1-14 (1963). Furthermore, venue “may be established by a mere preponderance of the evidence.” Royal, 2006-NMCA-043, ¶ 19. Therefore, venue was proper in McKinley County as long as a preponderance of the evidence showed that a material element of the crime was committed there. See State v. Wise, 90 N.M. 659, 662, 567 P.2d 970, 973 (Ct. App.1977) (rejecting as “frivolous” the defendant’s contention that the state failed to prove that any material element of the crime of receiving stolen property occurred in Bernalillo County because there was “an abundance of evidence [showing that the ‘receiving’ occurred [there]”).

In this case, the evidence showed that the laborers/payees were hired, provided their services, and paid in McKinley County. Moreover, the ultimate victim, Milosevich, cashed the checks for the laborers/payees in McKinley County where he operated his business. Because these elements of the crime were committed in McKinley County, venue was proper there.

Defendant argues that every action allegedly committed by her took place in Bernalillo County because the evidence showed that Defendant worked in DGM’s office in Albuquerque and signed the checks there. Defendant also notes the lack of evidence indicating that she was ever present in McKinley County during the relevant time period.

We are not persuaded that venue was improper in McKinley County merely
because many of the acts leading to Defendant’s convictions occurred outside that county. Defendant cites Marsh v. State, 95 N.M. 224, 620 P.2d 878 (1980), in support of her claim that venue was improper. In Marsh, our Supreme Court held that venue was proper, but not appropriate, in Valencia County because the charges of possession and conspiracy were based on the defendant’s conduct in flying over Valencia County en route to McKinley County where 479 pounds of marijuana were unloaded. Id. at 225, 620 P.2d at 879. The Court held that venue was more appropriate in McKinley County because there was a more substantial nexus between the criminal acts and that county. Id. at 227, 620 P.2d at 881. We disagree and note that this Court rejected a similar argument in Roybal, 2006-NMCA-043, ¶¶ 30-32.

In Roybal, the district court dismissed the trafficking charges filed against the defendant in Santa Fe County because even though the officer began pursuing the defendant in Santa Fe County, the car was actually stopped and searched in Rio Arriba County. Id. ¶¶ 1, 26. The defendant argued that venue was improper in Santa Fe County because the majority of the criminal actions occurred in Rio Arriba County and claimed that, “when a crime is committed in multiple counties, Marsh mandates” prosecution in the county that has the most “significant contacts with the alleged criminal acts of [the d]efendant.” Id. ¶ 30 (quoting Marsh, 95 N.M. at 227, 620 P.2d at 881). This Court disagreed and observed that “there is no specific language in the [venue] statute requiring the chosen venue to be the county with the most significant contacts or the more substantial nexus with the criminal acts of [the d]efendant.” Roybal, 2006-NMCA-043, ¶ 31 (internal quotation marks and citation omitted).

The Roybal Court distinguished the result in Marsh because in Marsh: (1) the Supreme Court was exercising its power of supervening control, which the Court of Appeals does not have, see N.M. Const. art. VI, § 3; (2) there were policy concerns regarding the need to avoid possible conflicts with a judge; (3) any contact with Valencia County was merely incidental because the airplane carrying marijuana merely passed over Valencia County on its way to McKinley County, where all of the criminal activity occurred; and (4) any prosecution in Valencia County would be remote from the location of the defendant and the witnesses. Roybal, 2006-NMCA-043, ¶ 32; see Marsh, 95 N.M. at 226-27, 620 P.2d at 880-81. Based on these distinctions and the language of the venue statute itself, this Court in Roybal held that “venue was established by a preponderance of the evidence in Santa Fe County, [and] the [district] court erred in dismissing the charges.” 2006-NMCA-043, ¶ 32.

The underlying facts of this case, similar to those in Roybal, exhibit a greater nexus between the alleged criminal activity and the chosen county than what was presented in Marsh. As previously discussed, the laborers/payees performed services on behalf of DGM in McKinley County, they were paid in McKinley County, and they negotiated the checks for cash at Milo’s in McKinley County. Furthermore, the evidence belies Defendant’s claim that McKinley County was an inconvenient forum for key witnesses for the State because both Milosevich and the laborers/payees were apparently located in McKinley County. Therefore, the district court did not err in denying Defendant’s motion to dismiss for improper venue.

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support her convictions. Specifically, she contends that there was insufficient evidence to establish a “contemporaneous transaction” between the labor performed and the issuance of and attempts to cash the checks. She also contends the evidence was insufficient to show that she had the requisite intent to commit the crimes because the State failed to establish that she knew that funds were insufficient to pay the checks. Because we agree with Defendant’s first contention, we reverse and need not consider whether there was sufficient evidence regarding Defendant’s intent.

In general, when reviewing a challenge to the sufficiency of the evidence, we review the evidence introduced at trial to 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). We view the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all inferences in favor of the verdict. See State v. Apodaca, 118 N.M. 762, 765-66, 887 P.2d 756, 759-60 (1994).

“Although framed as a challenge to the sufficiency of evidence, [the d]efendant’s argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain a conviction” for issuing worthless checks. State v. Barragan, 2001-NMCA-086, ¶ 24, 131 N.M. 281, 34 P.3d 1157. Issues of statutory interpretation and construction are questions of law subject to de novo review. Id.

Defendant was charged with four counts of issuing worthless checks over $25 or more pursuant to Section 30-36-4 of the Worthless Check Act, NMSA 1978, §§ 30-36-1 to -10 (1963, as amended through 1984). Section 30-36-4 provides that

[i]t is unlawful for a person to issue in exchange for anything of value, with intent to defraud, any check . . . knowing at the time of the issuing that the offender has insufficient funds in or credit with the bank . . . for the payment of such check . . . in full upon its presentation.


In keeping with the requirement that Defendant issue the check “in exchange for anything of value,” the jury was instructed that the State had to prove beyond a reasonable doubt that Defendant issued checks to the laborers/payees and the laborers/payees “gave service” for the checks. See UJI 14-1670 (requiring the State to prove that the recipient of the check gave money or something which had value in exchange for the check); State v. Smith, 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct. App. 1986) (“Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured.”). Before trial and again after the State put on its case in chief, Defendant moved for a directed verdict, arguing that the evidence showing that the checks were issued to the laborers/payees as wages for the work they performed did not qualify as checks issued “in exchange for anything of value” as required under the statute. She argued below and contends on appeal that
the evidence was insufficient to establish that the checks were issued in exchange for something of value because it failed to show that the checks were delivered as part of a “contemporaneous transaction” with the services provided. We agree.

{31} It is well established that a check given in payment for an antecedent or pre-existing debt is not covered by the Worthless Check Act. See Platt, 114 N.M. at 722-23, 845 P.2d at 816-17 (recognizing that under what is sometimes called the “pre-existing debt rule,” someone who issues a worthless or subsequently dishonored check in satisfaction of an antecedent or pre-existing debt will not be liable under the Worthless Check Act and holding that the defendant was not liable under the statute when he issued a worthless check for payment of a pre-existing debt); cf. State v. Tanner, 22 N.M. 493, 495, 164 P. 821, 822 (1917) (interpreting the predecessor to the Worthless Check Act and recognizing that the defendant issued the check under false pretenses when he did not possess adequate funds and the check was issued “to induce the person to whom it is made to part with something of value” (internal quotation marks and citation omitted)). The lack of criminal liability is predicated on the fact that even though the check has been dishonored, the debt remains unpaid and, therefore, the issuer did not receive anything of value in exchange for the check. See § 30-36-4 (requiring that the check be issued “in exchange for [something] of value”); Davis, 26 N.M. at 525, 194 P. at 882 (recognizing that something of value must have been received by the defendant in exchange for the check or that otherwise there “can be no intent to defraud, which is the gist of the offense” and recognizing that nothing of value is received at the time a check is issued in payment on an account because the debt is only satisfied if the check is honored).

{32} The holdings in Davis, Tanner, and Platt support the conclusion that payment of a pre-existing debt with a worthless check is not covered by the Worthless Check Act. However, they do not directly address the question of whether payment of wages earned is payment of a pre-existing debt, i.e., whether the laborers/payees provided services in exchange for the dishonored checks. As previously discussed, the laborers/payees were paid every Friday for work they performed during the week ending the previous Friday. Therefore, unless the payment of wages over a week after those wages were earned constitutes payment in exchange for the services rendered, the checks will be considered payment of an antecedent or pre-existing debt and thus not encompassed within the Worthless Check Act.

{33} New Mexico appellate courts have never considered whether the payment of wages that have already been earned constitutes a payment on a pre-existing or antecedent debt or whether it can be considered a “contemporaneous transaction.” In support of her contention, Defendant alerts this Court to the cases cited in the Platt opinion and other cases standing for the proposition that criminal statutes concerning worthless checks do not cover situations in which the check is written after the goods have already been obtained or the services rendered. She also notes, correctly, that the State’s answer brief fails to address the issue of whether a contemporaneous transaction occurred in this case. Moreover, the State has failed to cite any case law in support of its assertion that the evidence was sufficient to satisfy the elements of Section 30-36-4. Cf. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (observing that if a party cites no authority to support an argument, we may assume no such authority exists). Instead, it merely asserts in a conclusory fashion that the evidence was sufficient for the jury to find that Defendant issued the checks to the laborers/payees in exchange for their services.

{34} We first consider the cases cited in the Platt decision. See 114 N.M. at 723, 845 P.2d at 817. Although none of those cases specifically address checks issued in payment for wages, they suggest that conviction requires testimony or evidence that the recipient of the check gave value or rendered performance specifically in reliance on the check; it is not enough that performance was based on a promise to pay. See, e.g., Ledford v. State, 362 S.E.2d 133, 134 (Ga. Ct. App. 1987) (recognizing that “the payee must give up something of value in reliance on the check in question” (internal quotation marks and citation omitted)).

{35} For example, in Parker v. State, 484 So. 2d 1033, 1034-37 (Miss. 1986) (per curiam), the payee was asked at trial whether, at the time he delivered the furniture to the defendant, he was relying on the defendant’s credit or promise to pay at a later date, or whether the payee was relying on the check when delivering the furniture. Id. at 1035. The payee responded that he was “relying on the check” and stated that he would not have delivered two loads of furniture on Friday and one load on Saturday had he not received the check. Id. Based on this testimony, the court affirmed the defendant’s conviction for false pretenses by delivery of a bad check. Id. at 1036 (recognizing that “[i]f a creditor-debtor relationship is created by the transaction, a conviction of false pretenses may not stand [but] if the [s]tate proves that a seller parts with something of value on the belief that the check is good at that particular time, a conviction of false pretenses may be upheld”); see Hoyt v. Hoffman, 416 P.2d 232, 233 (Ne. 1966) (reversing the defendant’s conviction because the worthless check was issued in payment of an overdue account and conviction would be inconsistent with the purpose of Nevada’s Worthless Check Act, which is “to charge a defendant who obtains a benefit as a result of the check”); Perry v. State, 594 P.2d 782, 784 (Okla. Crim. App. 1979) (holding that it was a question of fact for the jury whether the defendant could be criminally liable for issuing a worthless check because the payee performed services for the defendant “upon [the] inducement of being paid by check” or whether the services were performed under a credit agreement).

{36} In cases from other jurisdictions construing similar statutes where payment of wages are concerned, courts have held that the defendant/employer cannot be held liable under statutes similar to New Mexico’s Worthless Check Act because the wages constitute a pre-existing debt. See, e.g., State v. Sinclair, 337 A.2d 703, 707-11 (Md. 1975) (holding that the defendant could not be liable under Maryland’s worthless check statute when he issued a check to a discharged employee representing payment to him for services rendered because the defendant did not obtain anything of value based upon the employee’s reliance on the check); State v. Cote, 62 Ohio Misc. 2d 202, 203-04 (Mun. Ct. 1991) (holding that when an employer issues a check to an employee for wages earned, the employer has made payment on a pre-existing debt and therefore the employer has not obtained any benefit nor has the employee suffered a detriment from the dishonored check and thus the employer cannot be convicted under Ohio’s Worthless Check Act).

{37} For example, in Hindman v. State, 378 So. 2d 663, 664 (Miss. 1980), the payee agreed to act as mistress of ceremonies for
a bridal show in exchange for $300. The payee did the promised work and, at the end of the performance, the defendant paid the promised $300. *Id.* When the check later bounced, the defendant was charged with and convicted of fraud by worthless check. *Id.* The conviction was overturned on appeal because the evidence failed to show that the payee’s performance was induced by reliance on the check. *Id.* at 665 (stating that reliance on the validity of the check "must have been the efficient inducement which moved the party receiving it to part with something of value, including valuable services"). Because performance had already been completed before the check issued, the check was not the inducement by means of which the services were obtained; instead, the check was given to pay a debt that the defendant had already incurred, and "the transaction d[id] not come within the definition of the crime proscribed." *Id.*

Based on the foregoing, we conclude that Defendant did not receive anything of value in exchange for issuing the checks, and the laborers/payees did not give their labor in exchange for the check. Instead, the checks were issued in satisfaction of the debt already owed to the laborers/payees by virtue of their work; in essence, the checks were to satisfy a pre-existing debt, and acceptance of the check did not discharge the company’s debt to the employees for wages. Therefore, even viewing the evidence introduced at trial in the light most favorable to conviction, Defendant cannot be liable under the Worthless Check Act.

Even though reversal is warranted based on the facts of this case, our opinion should not be interpreted to mean that a defendant who issues a worthless check after receiving goods or services can never be guilty of violating the Worthless Check Act. See Platt, 114 N.M. at 722-23, 845 P.2d at 816-17 (holding that in certain circumstances a defendant can be liable under the Worthless Check Act even though the check is issued after the goods have been delivered); Ledford, 362 S.E.2d at 134 (affirming the defendant’s conviction for issuing a worthless check based upon evidence showing that the goods were given on April 17 and payment was made on April 18 because the exchange constituted a “single contemporaneous transaction” (internal quotation marks and citation omitted)). In *Platt*, the evidence showed that the defendant had paid for flooring materials and services on the day the materials were installed and delivered, January 2. 114 N.M. at 722, 845 P.2d at 816. However, that check bounced and the defendant issued another check on January 16. *Id.* After this check was also dishonored, the defendant was convicted under the Worthless Check Act based upon the latter, January 16 check. *Id.* The defendant argued that he could not be liable under the Worthless Check Act because the check was to pay a pre-existing debt; the flooring had been installed on January 2, and yet the check was not written until January 16. *Id.* at 722-23, 845 P.2d at 816-17. This Court disagreed and held that even though some of the goods and services were delivered before the check was issued, the facts showed that the “parties intended to have a cash transaction,” and there was no evidence indicating that the payee “intended to extend credit to [the] defendant.” *Id.* at 723, 845 P.2d at 817.

*Platt* does not warrant affirmance in this case because in *Platt* the recipients of the check sought payment on the very day they provided services. *Id.* at 722, 845 P.2d at 816. A second check was issued on January 16 after the first one was dishonored, but there is nothing to suggest that the recipients ever agreed to a delay before being compensated for their work. In contrast, the laborers/payees in this case worked for a week with the expectation that they would have to wait another week before being paid for their labor. Therefore, the work was performed in exchange for a promise to pay, not for the checks themselves. Defendant did not receive anything of value in exchange for the checks, and she cannot be liable under the Worthless Check Act for her actions in this case.

For the foregoing reasons, we reverse Defendant’s convictions and remand for proceedings consistent with this opinion.

For the foregoing reasons, we reverse Defendant’s convictions and remand for proceedings consistent with this opinion.

***CONCLUSION***

For the foregoing reasons, we reverse Defendant’s convictions and remand for proceedings consistent with this opinion.

IT IS SO ORDERED.

CYNTHIA A. FRY, Chief Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

ROBERT E. ROBLES, Judge
The primary issue in this appeal is whether an undisclosed principal has standing to enforce New Mexico’s Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2009), for all records relating to a news documentary program by the name of “The Water Haulers,” that aired on KNME-TV in Albuquerque, New Mexico. The request was served on KNME-TV, the Board of Education of Albuquerque Public Schools, the Regents of the University of New Mexico, John D’Antonio as the New Mexico State Engineer, the Office of the State Engineer, the Interstate Stream Commission, and the Office of the Governor of New Mexico (collectively Defendants). Some of the requested records were produced by certain Defendants.

Dissatisfied with the responses to the inspection request, the Marshall law firm filed suit on behalf of San Juan Agricultural Water Users Association (the Association), joined by Electors Concerned About Animas Water (Electors) and Steve Cone (collectively Plaintiffs) under the IPRA to enforce the inspection request. It nowhere alleged that Marshall or the Marshall law firm had ever requested access to records as attorney for or agent of any Plaintiff. Nor does the complaint allege that any Plaintiff requested access to documents. The complaint only gave notice that Marshall or the Marshall law firm had requested documents, Defendants failed to produce documents as requested, and Plaintiffs were entitled to damages. Defendants moved to dismiss under Rule 1-012(B)(1) and (6) NMRA on the ground that none of the Plaintiffs was the “person” in the IPRA that requested the records because the IPRA did not provide Plaintiffs with a cause of action against Defendants. See § 14-2-1(A) (“Every person has a right to inspect public records of this state.”); § 14-2-8(A) (“Any person wishing to inspect public records may submit an oral or written request to the custodian.”); § 14-2-12(A)(2) (“An action to enforce the IPRA [may] be brought by . . . a person whose written request has been denied.”). Responding to the motion to dismiss, Marshall submitted an affidavit in which he stated that the Marshall law firm was acting as attorney for the Association when the law firm requested the records.

1 Plaintiffs’ complaint sets out many allegations that go to the merits of the concerns that Plaintiffs have about Defendants’ actions related to “The Water Haulers.” Plaintiffs dedicated several pages on this in their brief in chief. In oral argument, Plaintiffs attempted to argue the public importance of the matter to which the records request was related, but conceded that the details and public importance of Plaintiffs’ underlying concerns about “The Water Haulers” were not relevant to the issues before this Court.
with prejudice. The court dismissed the Association’s claim because the Association was not the person that made the requests for records, having failed to disclose itself as the requester, having failed to disclose its name, address, and telephone number at the time the request was made as required under Section 14-2-8. The court dismissed the claims of Electors and Cone because they had not made any request for records.

On appeal, Plaintiffs assert that the court erred in four respects. First, by violating case precedent, uniform jury instructions, and statute by refusing to apply the common law of agency in favor of compliance with the IPRA. Second, by ruling that, when requesting the records, the Marshall law firm was required to disclose its principal. Third, by ruling in a manner that is contrary to the express purpose and policies of the IPRA. Fourth, by violating Rule 1-015(A) NMRA by refusing to allow the complaint to be amended to add the Marshall law firm as an additional plaintiff.

The New Mexico Foundation for Open Government (NMFOG) filed a brief as Amicus Curiae in support of Plaintiffs. NMFOG’s primary concerns are the same as those expressed by Plaintiffs, namely, that requiring the identity of the undisclosed principal can divulge the motives behind the request in violation of the IPRA, and not to apply agency principles, will discourage the press and public from making requests “on behalf of their organizations.”

We hold that the district court did not err in any regard. Plaintiffs lacked standing to bring the action, and the court did not err in dismissing the action with prejudice. We discuss the first three issues on appeal together under the subject of standing and then turn to the fourth issue, that of amendment.

DISCUSSION

I. Standard of Review

All issues raised are ones of law involving statutory interpretation and application of law to facts, and we review the issues de novo. See Sonic Indus. v. State, 2006-NMSC-038, ¶ 7, 140 N.M. 212, 141 P.3d 1266 (stating that “interpretation of phrases within a statute is a question of law that is reviewed de novo”); N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (“[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo.”) (internal quotation marks and citation omitted); Hise v. City of Albuquerque, 2003-NMCA-015, ¶ 8, 133 N.M. 133, 61 P.3d 842 (filed 2002) (stating that when the issue involves misapplication of law to facts, our review is de novo).

II. Standing

The issue at hand is essentially one of the standing aspects of jurisdiction, because the issue the parties address is whether there exists any legal permission or authority for Plaintiffs to sue under the IPRA. See ACLU of N.M. v. City of Albuquerque, 2008-NMSC-045, ¶ 9 n.1, 144 N.M. 471, 188 P.3d 1222 (“When a statute creates a cause of action and designates who may sue, the issue of standing becomes intertwined with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.”) (internal quotation marks and citation omitted).

Plaintiffs’ arguments stem primarily from their view of the purposes and policies of the IPRA and from their views that (1) there is not and should not be any prohibition against an agent acting on behalf of an undisclosed principal at the IPRA request stage, and (2) there is not and should not be any prohibition against an undisclosed principal filing an IPRA enforcement action after records requested by the undisclosed principal’s agent are not supplied. Defendants’ arguments to the contrary essentially stem from the language of the IPRA and from federal case law on standing that has developed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2002) (amended 2007).

A. The Language of the IPRA

The request procedure under Section 14-2-8(A) and (C) of the IPRA is triggered when a written request for public records is submitted, and the person seeking to access the records provides its, his, or her name, address, and telephone number. The enforcement procedure under Section 14-2-12(A)(2) permits an action by “a person whose written request has been denied.” Other than the person whose written request has been denied, only the state’s attorney general or the district attorney in the county of jurisdiction is permitted to bring an enforcement action. Section 14-2-12(A)(1). Under Section 14-2-8(C), “[n]o person requesting records shall be required to state the reason for inspecting the records.”

The “requester” or the “person requesting” records is given the right to pursue relief under the IPRA. See § 14-2-10 (“The requester may deem the request denied and may pursue the remedies available pursuant to the [IPRA] if the custodian does not permit the records to be inspected in a reasonable period of time.”); § 14-2-11(A) (authorizing “[t]he person requesting the public records [t]o pursue the remedies provided in the [IPRA] if the custodian does not timely permit inspection); § 14-2-11(B), (C) (requiring the custodian to provide the requester with a written explanation of the denial of a request, and permitting the requester to seek damages if this is not done). Further, Section 14-2-12(D) permits recovery of “damages, costs and reasonable attorney[ ] fees to any person whose written request has been denied and is successful” in an enforcement action. Plaintiffs present several arguable rationales to support their view that the foregoing language does not preclude an undisclosed principal from suing when its agent’s request is unfulfilled. We set those rationales out.

B. Plaintiffs’ Various Arguments

1. Plaintiffs’ Argument on Agency

Starting from the undisputed facts that the Association was the Marshall law firm’s client and the law firm was acting as the Association’s agent, Plaintiffs argue that the common law of agency is the controlling avenue for decision. Plaintiffs cite numerous authorities for the entrenched proposition that a person can use an agent, including an attorney, for any lawful purpose to act for the principal or client. Plaintiffs rely particularly on cases holding that a person can use an agent to act under a statute even where the agent is not the person specifically identified in the statute. See Turley v. State, 96 N.M. 579, 581, 633 P.2d 687, 689 (1981) (holding that a statute exempting a landowner from an excavation permit requirement must be interpreted to permit the landowner to use an employee or agent to accomplish the task), overruled on other grounds by U.S. Brewers Ass’n v. Dir. of N.M. Dept’ of Alcoholic Beverage Control, 100 N.M. 216, 668 P.2d 1093 (1983); Coldwater Cattle Co. v. Portales Valley Project, Inc., 78 N.M. 41, 45, 428 P.2d 15, 19 (1967) (holding that agents of owners of water rights could file and prosecute applications on behalf of owners for a supplemental well).

Plaintiffs argue that the Legislature intended the IPRA to incorporate or accommodate the common law of agency. Plaintiffs assert that NMSA 1978, Section 38-1-3 (1875) establishes that intent. Section 38-1-3 provides that “[i]n all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.” In addition, Plaintiffs claim that “statutes are generally written with the assumption that the
statutes will be read in conjunction with the common law, and supplemented and interpreted in accordance with the common law.” Plaintiffs rely on several cases to support their claim. See *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (filed 2007) (“The Legislature’s continuing silence on the issue . . . is further evidence that it was both aware of and approved of the existing case law which long ago established the appropriate standards of proof.”); *Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (“A statute will be interpreted as supplanting the common law only if there is an explicit indication that the [L]egislature so intended.”); *State v. Bryant*, 99 N.M. 149, 150, 655 P.2d 161, 162 (Ct. App. 1982) (“A statute designed to effect a change from that which existed under the common law must be strictly construed; it must speak in clear and unequivocal terms and the presumption is that no change is intended unless the statute is explicit.”). Thus, according to Plaintiffs, common law rules are operative unless the Legislature decides otherwise, and it was unnecessary for the Legislature to “write a treatise on the law of agency into [the] IPRA” in order to assure that the common law of agency would apply to IPRA records requests and enforcement proceedings.

2. Plaintiffs’ Argument Based on Provisions of the IPRA

{14} Plaintiffs argue that the court’s ruling violates Section 14-2-8(C)’s proscription against requiring the person who requests records to state the reason for inspecting the records. The purpose of this proscription, Plaintiffs argue, is to further the purpose of the IPRA of open access to public records without having to “encounter[] the kind of obstruction and hyper-technical arguments that have been interposed by [Defendants] in this case.” Plaintiffs assert that to require a law firm that requests records to identify its client would place an impermissible chill and deterrence on the right of the public to request records, and would be tantamount to forcing a law firm to disclose why it is requesting the records, because to divulge the identity of a client is to divulge the purpose for the inquiry, thus violating the Section 14-2-8(C) proscription.

{15} The main concern of Plaintiffs is that unless anonymous inquiries can be made, the various persons who want to investigate a particular state agency, but who must also deal with that agency, will face intimidation, retaliation, and delay, or can have their lives or businesses otherwise made difficult by the agency once the agency knows who wants the records. Plaintiffs describe how, in their view, disclosure of the identity of a client can give rise to “arbitrary and unchecked power” over the client, by citing *Herrington v. State ex rel. Office of State Engineer*, 2006-NMSC-014, ¶ 6, 139 N.M. 368, 133 P.3d 258, which involved an agency that failed for eighteen years to set a hearing on an application.

{16} Plaintiffs extend their concerns of intimidation and retaliation to those who are whistle-blowers inside a government agency or have contractual relationships with an agency. Plaintiffs argue that anonymity is essential for a person, who for good reason, suspects wrongdoing by an employer but is afraid to inquire for fear of retaliation. Plaintiffs refer, for example, to companies that suspect that a state agency has colluded with a successful bidder. In addition, Plaintiffs express concerns about agencies that “hobble the news media” in order to unearth public agency wrongdoing, because knowing that a news organization is requesting records “sets off alarm bells.”

{17} In addition, Plaintiffs assert that Section 14-2-6(C) in defining “person to include artificial or unnatural persons such as corporations and partnerships, which can act only through agents, would make no sense if it were not clear that the IPRA “necessarily assumes and relies upon the concepts of agency, even though they are not expressly stated in the statute.”

{18} Lastly, Plaintiffs assert that the contact information required by Section 14-2-8(C) has no meaning or purpose other than “to facilitate the production of documents by the public agency.” Thus, Plaintiffs argue, any reliance on that language by the district court or Defendants to support a view that anonymity cannot exist for a records request or even enforcement is misguided. All the agency needs to know, Plaintiffs contend, is the name and address of the person requesting the records.

3. Plaintiffs’ Argument on the IPRA Purposes and Policies

{19} In support of their position that they are entitled to bring the present action, Plaintiffs argue that the district court’s ruling contravenes the explicit statutory purpose of the IPRA, which is contained in Section 14-2-5. Section 14-2-5 states:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the [L]egislature in enacting the [IPRA] is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.

It is the further intent of the [L]egislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees.

{20} Plaintiffs also contend that the court’s ruling is contrary to the common law and constitutional law that favor the gathering of information about the government and the dissemination of that information to the public. See *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 796-97, 568 P.2d 1236, 1242-43 (1977) (stating that the public’s right to inspection is favored and denial of that right is the exception).

4. Plaintiffs’ Argument Against Application of FOIA Case Law


{22} In particular, Plaintiffs point out that the FOIA does not contain the provision that is in the IPRA that the requester cannot be required to state the reason for the request. In that regard, however, Defendants point out that the FOIA has been construed in a manner that indicates that inquiry into the reasons for an FOIA request is not allowed. See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (“[A]s a general rule, when documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information.”); *Burka*, 142 F.3d at 1290-91 (holding that a party had standing to bring the FOIA suit when his request was denied and that “he was not required to
demonstrate that he had any particular need for the information”). In arguing that the FOIA cases are not to be followed, Plaintiffs also point to limitations on federal judicial decision making that circumscribe what those courts can address, including limited Article III jurisdiction and limited federal government powers under our system of federalism. Plaintiffs also argue and cite authority for the view that federal decisions construing a federal statute and making limited use of the common law are not binding on New Mexico courts. Finally, NMFOG cites several state court cases that did not follow FOIA case law.  

C. The Legislature, Not This Court, Must Supply Standing to Undisclosed Principals  

[23] This discussion applies solely to the Association, because it was the only Plaintiff that was an undisclosed principal of the Marshall law firm. There is no issue raised in this case as to whether a person who is acting as an agent for a disclosed principal can obtain records under the IPRA. Defendants in fact concede that under the IPRA such an agent can request public records. The only issue before us is whether an undisclosed principal can, as a plaintiff in an enforcement action, enforce a denial of records requested by its agent. Plaintiffs’ arguments are plausible, but they do not persuade us to grant the Association standing.  

[24] Plaintiffs and NMFOG argue that every citizen has a fundamental right to inspect public records of this state. See Alarid, 90 N.M. at 797, 568 P.2d at 1243. But we see nothing in the district court’s ruling that violates that mandate or the IPRA’s policy in Section 14-2-5 that “all persons are entitled to the greatest possible information.” The Association had that right had it made the request.  

[25] Plaintiffs assume that state agencies will not or are not prone to act in good faith. This assumption lacks foundation. Furthermore, the list of hypothetical concerns of Plaintiffs and NMFOG underlying the position that undisclosed principals can sue to enforce the IPRA are not supported in any evidence or cited authority that assists in persuading us that Plaintiffs’ rationales should prevail. Moreover, we see nothing in the IPRA that indicates the Legislature intended the IPRA to permit actions by undisclosed principals because of concerns of intimidation, retaliation, or other tactics of recipients of requests for information, or because Section 14-2-8(C) proscribes any requirement that the requester state the purpose for the request. That the legislation forbids a public agency to inquiere into the purpose for an inspection request does not require the conclusion that the Legislature contemplated or intended that an undisclosed principal could sue to enforce the IPRA when an agent is denied access to records. In addition, we have trouble reading into the IPRA a common-law-agency concept that requires a conclusion, based on Plaintiffs’ concerns, that an undisclosed principal has a right to bring an enforcement action when that undisclosed principal is not, in fact, the “person” who made the written request for inspection of public records and did not supply a name, address, and telephone number. The IPRA in fact, in its language, indicates an intention to the contrary.  

[26] In two sentences in the same subsection of the IPRA, the Legislature first required the written request of the person requesting to inspect records to provide the requester’s name, address, and telephone number, and then stated that no person requesting records could be required to state the reason for inspecting the records. Section 14-2-8(C). It is that same requester who deems the request denied and is entitled to pursue remedies. Section 14-2-10. It is that same requester who is to be given a written explanation of a request denial and who is permitted to seek damages if the explanation is not timely given. Section 14-2-11(B), (C). And it is that same requester, whose written request has been denied, who can bring an action to enforce the IPRA and to recover damages, costs, and reasonable attorney fees. Section 14-2-12(A)(2), (D). If the Legislature had intended the requester to be either an undisclosed principal or its agent, the Legislature certainly knew how to articulate the statutory language to accommodate that. See State ex rel. Citizens for Quality Educ. v. Gallagher, 102 N.M. 516, 519, 697 P.2d 935, 938 (1985) (noting that, had it intended to do so, the Legislature could have included language prohibiting withdrawal of signatures on a recall petition, but did not do so); State v. Johnson, 2008-NMCA-106, ¶ 12, 144 N.M. 629, 190 P.3d 350 (noting that “[t]he Legislature could have chosen to expand the definition of a school employee, but it did not” and that “we will not rewrite or add words to a statute” (internal quotation marks and citation omitted)).  

[27] Based on the silence in the IPRA relating to specific concerns of chilling, intimidation, and retaliation, and based also on the structure and use of language in the IPRA, it is reasonable to conclude, and we do conclude, that the Legislature anticipated or intended that the person who is permitted to sue has to be the person who made the written request for inspection and who disclosed his, her, or its name, address, and telephone number. It may well be that some public officials concerned with what a records inspection may show will overstep their bounds from time to time by untimely response or denial. However, the Legislature anticipated this because the IPRA expressly provides that requesters can seek relief from certain inaction or denial. See §§ 14-2-10, -11 (pursuit of remedies provided in the IPRA); § 14-2-11(C)(2) (damages not to exceed $100 per day); § 14-2-12(B) (writ of mandamus or injunction or other appropriate remedy); § 14-2-12(D) (damages, costs, and reasonable attorney fees).  

[28] In regard to the FOIA, it concededly is written differently than the IPRA. We note that the standing-related rulings in federal decisions under the FOIA are favorable to Defendants’ position in the present case. However, in our view FOIA cases lack the helpful analysis we would like to see for our issue. Nevertheless, those cases disfavor opening enforcement to undisclosed principals and indicate to us that we should exercise caution in judicial interpretation in the circumstances here and leave change or clarification to the Legislature.  

[29] As for Electors and Cone, even were we to hold in favor of the Association, we would affirm the district court’s dismissal of Electors and Cone. Neither the Marshall law firm nor Marshall acted as agent for any of these undisclosed individuals. Further, none of these individuals made a written request for inspection of public records, and the IPRA provides no basis on which they have standing to pursue claims in this action. Plaintiffs nowhere in their oral and written arguments asserted that Electors or Cone had standing or any right to relief in this action. Nor do Plaintiffs argue that the court erred in dismissing Electors’ and Cone’s claims. We hold the court did not err in dismissing the claims of Electors and Cone.  

[30] We note that, in oral argument, Plaintiffs’ counsel stated that the sole appellant is the Association. The record, however, reflects that Plaintiffs’ notice of appeal was filed by all Plaintiffs as appellants. The title of Plaintiffs’ docketing statement refers only to the Association, but the document itself refers to “Plaintiffs,” and the appellate briefs also refer to and list in the caption several “Plaintiffs.” It is not disputed that, at the time they filed their complaint, Electors
and Cone had not requested access to documents, they were not clients of the Marshall law firm at the time of its request, and they had not asked the Marshall law firm to request access on their behalf. Yet, Plaintiffs’ complaint alleges that Electors and Cone were deprived of their right to inspect the records and that they were damaged by Defendants’ actions and refusal to produce records. The IPRA is quite clear that only the person who requests records can bring an action for damages for a failure to grant access to the records. It appears to us that the joinder of Electors and Cone as Plaintiffs seeking damages in this action lacked any colorable basis. We admonish counsel to be more careful in litigation practice and procedure.

As in conclusion, we hold that the district court did not err in dismissing Plaintiffs’ action. We have no doubt that we should leave the issue in the hands of the legislative process for any desired correction. We leave to the Legislature whether it is necessary to add statutory language to grant further protections against possible chilling, intimidation, and retaliation by specifically allowing undisclosed principals to enforce the IPRA.

Plaintiffs are attempting to accomplish through litigation and appellate review that which needs legislative consideration and direction.

One last note. We think it is significant that upon being met with a motion to dismiss, and then with an order of dismissal, the Association, already known to be the real party in interest, could have but did not make a request to access records. Furthermore, the Marshall law firm could have sought either to join the lawsuit as a plaintiff or file its own action under Section 14-2-12. It did not do so. Had the Association made a request, by this time it may well have received the records it wanted. Had the Marshall law firm joined or sued, by this time it may well have gotten beyond the jurisdictional hurdle presented in this appeal and may have obtained relief in the district court. Plaintiffs’ pursuit of this appeal indicates to us that their primary goal is to test the issues and establish law in the appellate courts through interpretation and application of the IPRA. Plaintiffs of course have every right to take that approach. Nevertheless, one must question the wisdom of choosing litigation over the practical aspect of working out the correct and effective ways of accessing the requested records.

III. Amendment Issue

We agree with Defendants that Plaintiffs cannot complain that they were deprived of a right to amend. There exists only one reference in the record to amending the complaint. It is the following statement by Plaintiffs’ counsel in the course of arguing that the district court should deny Defendants’ motion to dismiss.

What happens if scenario wise you grant this motion? What happens is the case doesn’t go away. There is just a whole bunch of other maneuvering expense for the taxpayers and the Plaintiff[s], that is, if the [c]ourt were to say that, well, first of all, I don’t know, is it me or my firm that supposedly would have to join the action? I don’t know, but let’s suppose my firm does, this case is not going to go away if the [c]ourt were to dismiss this action. We would simply amend to add either me or my firm as an additional Plaintiff.

Or let’s assume that’s a reasonable possibility, I’m not committing to what we might do, but let’s suppose that happens, then we get the next set of obstacles, that is, do they try to depose me?

This falls far short of a request to amend. It states nothing more than at some point Plaintiffs may request to amend or may not. We see nothing in the record that constitutes a request of the district court to amend, and we see nothing that placed any duty on the court to grant Plaintiffs leave to amend in the court’s dismissal order.

Furthermore, nothing in the record indicates that Plaintiffs requested the court to amend its order to grant leave to file an amended complaint. Not only do we see no duty on the part of the district court under these circumstances to have placed leave to amend language in the order, we hold that Plaintiffs failed to preserve this issue for appeal. See Chapel v. Nevitt, 2009-NMCA-017, ¶ 53, 145 N.M. 674, 203 P.3d 889 (stating that “[w]here error is alleged in connection with the entry of a judgment or order, . . . the remedy is by motion to vacate the judgment” and that “issues not raised in the district court cannot be raised for the first time on appeal”); Muse v. Muse, 2009-NMCA-003, ¶ 59, 145 N.M. 451, 200 P.3d 104 (filed 2008) (“To the extent that the [h]usband felt deprived of due process by entry of an order without advance notice and an opportunity to object, he should have attacked the entry of the orders at the time and then, on appeal, claimed error.”).

Plaintiffs nevertheless contend that they need not move to amend or otherwise seek leave to amend, relying on Rule 1-015(A), which states that leave to amend shall be freely given. They cite authority for the views that pleadings are a means to assist in addressing the merits of cases and that amendments are to cure defective pleadings as well as to add new parties. To further argue that an objection was not required, they cite Rule 12-216(A) NMRA, which states that “formal exceptions are not required” and that “if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.”

We are not persuaded by these rebuttal arguments. Plaintiffs point to no authority that applies to the circumstances here, that is, where Plaintiffs are undecided whether they will seek to amend and they never advise the district court that they wish to amend either before or after the dismissal order.

Finally, Plaintiffs cite three New Mexico decisions to argue that a plaintiff may amend before a responsive pleading is filed and that an order entered granting a motion to dismiss cannot remove that right. See Malone v. Swift Fresh Meats Co., 91 N.M. 359, 361-62, 574 P.2d 283, 285-86 (1978); Martinez v. Research Park, Inc., 75 N.M. 672, 679-80, 410 P.2d 200, 205 (1965), overruled on other grounds by Lakeview Invs., Inc. v. Alamogordo Lake Vill., Inc., 86 N.M. 151, 520 P.2d 1096 (1974); Buhler v. Marrujo, 86 N.M. 399, 402, 524 P.2d 1015, 1018 (Ct. App. 1974), overruled on other grounds by Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982). The holdings in these cases do not call for a different result in the present case. Plaintiffs would likely have been entitled to amend under the foregoing cases had they sought leave to do so.

CONCLUSION

We affirm. Under the IPRA, the Association, as the undisclosed principal of the person who made the written request for inspection of public records, lacked standing to sue under Section 14-2-12(A). Electors and Cone lacked standing because they did not make any written inspection request. The court did not err in entering a dismissal order with prejudice.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge
OPINION

JONATHAN B. SUTIN, JUDGE

This case involves the division of retirement benefits between Benae Francine Gilmore (Wife) and Edwin James Gilmore (Husband) under a State of New Mexico defined benefits plan. A California court granted the parties’ divorce through a default judgment in 1994 and issued a qualified domestic relations order (the QDRO) in 2006 awarding Wife a portion of the benefits under a formula that was based on the time-rule method of calculating Wife’s community share. After the California court set aside its 1994 judgment as to all its provisions except the portion dissolving the marriage and also set aside the QDRO in its entirety for lack of personal jurisdiction, Wife sought to divide the retirement benefits in New Mexico pursuant to NMSA 1978, Section 40-4-20 (1993), which allows post-divorce division of undivided community assets.

The failure to divide or distribute property on the entry of a decree of dissolution of marriage or of separation shall not affect the property rights of either the husband or wife, and either may subsequently institute and prosecute a suit for division and distribution or with reference to any other matter pertaining thereto that could have been litigated in the original proceeding for dissolution of marriage or separation.

1 The parties and the district court in this case treat these motions as instituting a suit as indicated in Section 40-4-20. For this reason, we refer to this process as “Wife’s action” in this opinion even though it was initiated by a motion.
In his September 2007 response to Wife’s motions, Husband challenged subject matter jurisdiction and raised the affirmative defenses of res judicata, laches, statute of limitations, estoppel, waiver, forfeiture, federal preemption, and public policy. Husband also counterclaimed that the QDRO was obtained under false allegations and requested the court to order Wife to pay him back the money she received under the QDRO and also to pay Husband’s attorney fees. The district court heard the matter on October 2, 2007.

At the October 2007 hearing, Wife testified about the prior legal proceedings in California that (1) Husband was mailed a copy of the divorce decree, (2) even when she had rejected Husband’s lump-sum settlement offers it was never her intent to waive her rights to the retirement, and (3) she had worked and helped Husband get started. Husband testified that he had offered Wife a lump-sum payment and that, although he could pay it over time, he did not have the ability to pay a lump sum at the time of the October 2007 hearing. He also testified that Wife was entitled to benefits based on what Husband was earning at the time of the divorce and that he was entitled to benefits based on his post-divorce earnings increases.

On December 13, 2007, the district court entered orders denying Husband’s affirmative defenses and counterclaims and dividing the PERA benefits. The court determined that it had subject matter jurisdiction to divide the PERA benefits under Section 40-4-20. Further, the court found, for the purpose of calculating arrearages due, that Wife had an interest in Husband’s PERA benefits “based on the . . . number of years credited service during the marriage, the total number of years of credited service, and the qualifying salary levels under the PERA statute.” Accordingly, the court calculated that Wife was entitled to a community share of $1025.90 per month based on one half of Husband’s gross monthly pension payments of $4351.66 times the ratio of time of credited service during the marriage (9.66 years) divided by the total time of credited service (20.5 years). The court granted Wife a judgment “by the total time of credited service (20.5 years). The court granted Wife a judgment by the first of each month ‘in the amount of the arrearages to be determined by [the] PERA, with the monthly amount of the arrearages to be determined by [the] PERA in conformity with their policies and formulas.’”

The district court rejected Husband’s affirmative defenses of laches, estoppel, waiver, and forfeiture because Wife “pursued her claim in California and New Mexico and [Husband] has not been prejudiced.” With respect to Husband’s res judicata defense, the court found that “no valid order from California or any other state has divided the PERA retirement.” With regard to Husband’s statute of limitations defense, the court found that Wife’s “claim lies within the statute of limitations period required by New Mexico law.” The court denied Husband’s public policy argument because the public policy of New Mexico is that “community assets should be divided.” Finally, the court denied Husband’s counterclaims for the amounts paid to Wife under the QDRO and for attorney fees. Husband filed a motion to reconsider and a brief in support of that motion. On March 6, 2008, the court set the motion for hearing, and on March 11, 2008, after the motion to reconsider was automatically denied by operation of law, Husband appealed. On appeal, Husband argued that the district court erred by concluding it had subject matter jurisdiction and failing to apply the statute of limitations to bar Wife’s claim; by not allowing him to make a lump-sum payment to Wife; by denying Husband’s affirmative defenses of laches, equitable estoppel, and waiver by acquiescence; and by not valuing his retirement benefits as of the time of the divorce, thereby improperly apportioning to Wife post-divorce benefits increases that he contends were his separate property.

**DISCUSSION**

A. Subject Matter Jurisdiction

Husband contends that the district court lacked subject matter jurisdiction for two reasons. First, Husband argues that Section 40-4-20 applies to undivided assets and, therefore, the statute cannot confer jurisdiction in the present case because the PERA benefits were previously divided in the California divorce and were actually distributed based on the QDRO. Second, Husband relies on Lewis v. Lewis, 106 N.M. 105, 111, 739 P.2d 974, 980 (Ct. App. 1987), and argues that it holds that undivided community property divided pursuant to Section 40-4-20 must be divided in an action other than the original divorce action. Husband further argues that because he had initiated a divorce action seeking division of assets in New Mexico in 1994, Wife’s present action “cannot be considered independent.” We view these arguments as raising pure legal issues that we review de novo. Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, ¶ 24, 136 N.M. 630, 103 P.3d 554.

Husband specifically shows that the California decree of divorce of 1994 included a provision that divided the PERA benefits and awarded Wife one half of Husband’s PERA benefits with the City of Deming. Furthermore, Husband shows that the same California court later issued the QDRO. Even though the provision of the California decree dividing the retirement and the QDRO were subsequently set aside, Husband reasons that Wife “sought to and did divide [Husband’s] PERA retirement benefit.” Husband also points to his earlier New Mexico proceeding in which he sought to divide assets and debts. Thus, Husband argues, the district court in the present case erred in determining that it had subject matter jurisdiction because the PERA benefits were already divided. We are not persuaded and conclude that the district court had subject matter jurisdiction to hear this case under Section 40-4-20.

As to Husband’s argument that the PERA benefits were not an undivided asset, the California court recognized its own lack of personal jurisdiction to divide the benefits and set aside all the provisions of its 1994 default judgment, except the portion dissolving the marriage. It also set aside the QDRO in its entirety. The California court ordered dividing the PERA benefits was without force or effect since that court lacked jurisdiction to make any division. See Ortiz v. Shaw, 2008-NMCA-136, ¶ 17, 145 N.M. 58, 193 P.3d 605 (stating that a default judgment where a district court lacks personal jurisdiction in an in personam action is void). The PERA benefits were therefore an undivided asset when Wife sought to divide them in the 2007 New Mexico action.

Husband’s argument that Wife’s action is not an independent action is also without merit. Citing Zarges v. Zarges, 79 N.M. 494, 445 P.2d 97 (1968), the Lewis Court concluded that “property divided pursuant to Section 40-4-20 must be divided in an independent action.” Lewis, 106 N.M. at 111, 739 P.2d at 980 (emphasis omitted). In Zarges, our Supreme Court dealt with a situation in which the wife, instead of filing a complaint to start a different lawsuit under the equivalent of Section 40-4-20, sought to reopen the divorce action to divide community property.
twenty months after the action was finalized. Zarges, 79 N.M. at 494-97, 445 P.2d at 97-100. In reversing the district court’s decision to divide the community property under these circumstances, the Court noted that to allow the wife to “breathe new life into” the divorce action where the district court had exhausted its jurisdiction would require “that we either relax our holdings concerning termination of jurisdiction . . . or that we disregard the rules and statutes applicable to commencement of actions.” Id. at 496-97, 445 at 99-100. We determine that the present case is an independent action under Section 40-4-20. This matter is an altogether different case than the California divorce and Husband’s 1994 New Mexico divorce proceeding.

B. Statute of Limitations

{13} Husband contends that the district court erred in concluding that Wife’s action was not barred by the four-year statute of limitations in NMSA 1978, Section 37-1-4 (1880). Where facts relevant to a statute of limitations are undisputed, the standard of review is whether the court correctly applied the law to the undisputed facts. State v. Kerby, 2007-NMSC-014, ¶ 11, 141 N.M. 413, 156 P.3d 704; Jaramillo v. Gonzales, 2002-NMCA-072, ¶ 8, 132 N.M. 459, 50 P.3d 554 (noting that “[w]e review de novo whether a particular statute of limitations applies”). We review questions of law de novo. Kerby, 2007-NMSC-014, ¶ 11.

{14} Husband argues that the relevant date to commence a lawsuit to divide retirement benefits for statute of limitation purposes is the date of divorce regardless of vesting or maturation because, as stated in several New Mexico cases, the right to divide retirement benefits arises at the time of divorce. See, e.g., Copeland v. Copeland, 91 N.M. 409, 412-13, 575 P.2d 99, 102-03 (1978) (holding that vested retirement rights earned during the marriage are a community asset subject to division at time of divorce, even though the husband has not yet retired); see also Ruggles v. Ruggles, 116 N.M. 52, 58, 860 P.2d 182, 188 (1993) (“In Hurley [v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980), overruled on other grounds by Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981),] we simply reaffirmed the Copeland principle that a spouse is entitled to his or her community share of that portion of a retirement plan which is vested but unmatured as of the date of divorce.”). We reject Husband’s argument.

{15} There are two types of divorces. A unified divorce is where “property division judgments [are] simultaneous with the divorce decree.” Lewis, 106 N.M. at 109-10, 739 P.2d at 978-79. A bifurcated divorce is “where a partial decree of divorce is entered before the division of community property.” Id. at 110, 739 P.2d at 979. The cases that Husband cites to support his argument that community property is to be divided according to its value on the date of divorce involve unified divorce situations. See id. at 109-10, 739 P.2d at 978-79. Upon entry of a partial decree in a bifurcated divorce, the undivided community property automatically changes from community property to property that the parties hold as tenants in common. See id. at 109, 739 P.2d at 978; see also Jones v. Tate, 68 N.M. 258, 262, 360 P.2d 920, 923 (1961) (“[U]pon the divorce of the parties[,] all community property not divided between them did not remain community property but became property which they held as tenants in common.”). In re Miller’s Estate, 44 N.M. 214, 220, 100 P.2d 908, 912 (1940) (recognizing that marital status ends simultaneously upon the signing of a divorce decree and stating that “[t]he community property becomes their property as though it had been held by them as tenants in common”). Under Plaatje v. Plaatje, the four-year statute of limitations in Section 37-1-4 applies to actions seeking to divide undivided community property after the divorce. Plaatje, 95 N.M. 789, 790, 626 P.2d 1286, 1287 (1981) (holding that the four-year statute of limitations of Section 37-1-4 applies to suits to divide personal property brought under Section 40-4-20). However, we have identified two circumstances in which the four-year statute of limitations will not apply to a division of undivided assets under Section 40-4-20, namely, when the asset consists of retirement benefits and when the asset is real property. See Plaatje, 95 N.M. at 790-91, 626 P.2d at 1287-88 (concluding that the wife was not barred by the four-year statute of limitations from maintaining an action against the husband for her share of retirement benefits); Martinez v. Martinez, 2004-NMCA-007, ¶ 18, 135 N.M. 11, 83 P.3d 298 (filed 2003) (concluding that the four-year statute of limitations does not apply to divisions of undivided real property under Section 40-4-20).

{16} The reason these two types of property held by the parties as tenants in common are not subject to the four-year statute of limitations in Section 37-1-4 is because the parties have special protections under the law with regard to these types of property. In regard to real property, the Martinez Court noted that “[s]ince a cause of action for partition is a continuing one while the cotenancy exists, there generally is no limitations period for bringing a petition for partition.” 2004-NMCA-007, ¶ 18 (alteration in original) (internal quotation marks and citation omitted). The Martinez Court concluded that because “[t]here is nothing about the bare holding of title that should equate to the accrual of a cause of action that triggers a time limitation on the right to seek partition[,] . . . [and the wife] would be subject to a limitations period only if her cotenant did ‘something which amounts to an ouster,’” the four-year statute of limitations did not apply to the wife’s action seeking accounting and partition of real property. Id. ¶ 19 (citation omitted). In regard to retirement benefit plans, this type of property is different than other types of personal property because the employee spouse receives the benefits in monthly installments. Plaatje, 95 N.M. at 790-91, 626 P.2d at 1287-88. The Plaatje Court concluded that a cause of action accrues when the installment becomes due and thus the statutory time limitation upon the non-employee spouse’s “right to sue for her portion of each installment commences to run from the time each installment comes due.” Id.

{17} Husband argues that Plaatje is distinguishable because in that case the husband’s retirement benefits were not divided in the original divorce action, and the first time the wife asserted any claim was five years later. In the case at hand, as Husband points out, Wife asserted her claim in her California dissolution action. Husband argues that the California court having set aside the portions of the decree dividing the retirement and the QDRO is irrelevant to a determination regarding the statute of limitations. Husband’s argument is unclear, but it appears to be that Wife had four years to domesticate the decree in New Mexico or send it to the PERA administrator to secure her claim. We are not persuaded.

{18} Because the California division was void, it did not effectively divide the PERA benefits. See Ortiz, 2008-NMCA-136, ¶ 17 (recognizing that a default judgment where a district court lacks personal jurisdiction in an in personam action is void). Wife’s action under Section 40-4-20 to divide the undivided retirement is the proper way to seek division of the benefits in this bifurcated divorce. Because the action was instituted when Husband received the monthly installments, the
cause of action accrued when each installment became due. See Berry v. Meadows, 103 N.M. 761, 769-70, 713 P.2d 1017, 1025-26 (Ct. App. 1986) (citing Plaatje to conclude that “[t]he right to receive each monthly installment accrued when each installment became due; thus, [the] wife’s right to recover her portion of each installment commences to run from the time each installment is payable”). Following the reasoning of Plaatje, we conclude that because Husband’s PERA benefits are paid in monthly installments, Wife’s right to bring an action under Section 40-4-20 to divide the undivided PERA benefits received by Husband accrued, for statute of limitations purposes, with each installment when that installment was due, rather than at the time of the divorce. Thus, Wife’s action was not barred by the statute of limitations.

C. Equitable Division of Other Assets

{19} Next, Husband claims that the district court erred in not rendering an equitable division of the entire marital estate. However, Husband never moved the court for a division of undivided community property and debts under Section 40-4-20 for either real or personal property. The basis for Husband’s argument appears to arise from exchanges in the October 2007 hearing. At the hearing, Husband’s attorney asked Wife if she had filed bankruptcy, and Wife’s attorney objected as to the relevancy of the question. In his brief in chief, Husband argues that his attorney’s response to that objection was that the question was relevant because “the avoidance or discharge of marital debts by [Wife] in any bankruptcy proceeding is relevant and material to a determination of the marital estate and in determining the property kept by and debts assumed by the parties and in the absence of such evidence, no equitable division of the marital estate, including an equitable division of the community interest in [Husband’s] PERA retirement benefits could be rendered by the [district court].” Thus, Husband concludes, the court’s sustaining of the objection “further prohibited [him] from pursuing questions regarding the community debts and assets of the parties.” A review of the October 2007 hearing reveals that the exchange went specifically as follows.

Mr. Kretek: Okay. Have you ever filed a bankruptcy, Ms. Rochin? Wife: Yes, I did . . .

Mr. McDaniel: Objection, relevancy.

Mr. Kretek: Your honor it’s relevant, she didn’t claim [the retirement benefits] as an asset and now she is claiming it is something she never intended to give up.

Mr. McDaniel: That would not constitute waiver under law in any case your honor.

Mr. McDaniel: Your honor that, that’s irrelevant it wouldn’t count, it . . . definitely relates to any of these so called affirmative defenses, it wouldn’t as a matter of law constitute a waiver in any case.

Court: Objection sustained.

Mr. Kretek: Okay. That’s all I have your honor.

This exchange came up in a “waiver of rights” context as suggested by Husband’s counsel’s response to Wife’s counsel’s objection. Husband’s counsel is essentially indicating that Wife’s answer would show she intended to give up the retirement since it was not claimed as an asset in the bankruptcy.

{20} We see nothing to indicate that Husband was seeking equitable division of other undivided community assets during this exchange. We conclude that Husband did not seek a division of undivided assets at the October 2007 hearing and cannot now complain that the district court’s ruling erroneously denied Husband the right to have the undivided assets divided. Thus, the only issue properly before the district court was the division of the PERA benefits requested by Wife.

D. Lump Sum Versus Pay As It Comes In

{21} Husband argues that once the district court determined the value of Wife’s interest in the PERA benefits, the proper way to have divided the benefits was a lump-sum payment. Whether the correct law has been applied and whether the district court accurately applied the law to the facts are reviewed de novo. In re N.M. Indirect Purchasers Microsoft Corp., 2007-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976 (filed 2006).

{22} Husband contends that under Ruggles, the proper manner of dividing the community interest in a party’s retirement benefits is to value, divide, and distribute the interest through a lump-sum payment. In Ruggles, our Supreme Court indicated that the preferred method to distribute retirement benefits upon divorce is to “value, divide, and distribute them (or other assets with equivalent value) to the divorcing spouses” as a lump-sum payment. 116 N.M. at 54-55, 860 P.2d at 184-85. The Court also discussed some of the disadvantages of the pay-as-it-comes-in method of distribution; nevertheless, the Court acknowledged that under some circumstances, when the lump-sum method is not possible or practicable, other methods, including the pay-as-it-comes-in method, may be utilized. Id. “One such occasion will arise when the court has no satisfactory evidence upon which to make a finding of present value. Another will relate to the parties’ financial circumstances: If there are no other assets, or insufficient assets, or unsuitable assets, with which to satisfy (or secure) a lump[-]sum distribution, the court may be forced to award the non[-]employee spouse’s share as it comes in.” Id. at 67, 860 P.2d at 197 (internal quotation marks omitted).

{23} In the instant case, the only evidence before the district court was that Husband had offered to buy out Wife through a $5000 lump-sum payment, but that he did not have the ability to pay a lump sum at the time of the October 2007 hearing and would have to pay it over time. Under these circumstances, the district court did not abuse its discretion by awarding Wife her share of the PERA benefits under a pay-as-it-comes-in method.

E. Laches, Equitable Estoppel, and Waiver by Acquiescence

{24} Husband argues on appeal that the district court erred by denying his laches, equitable estoppel, and waiver-by-acquiescence defenses. He argues that there was sufficient evidence to support these affirmative defenses. The district court rejected these affirmative defenses because Wife “pursued her claim in California and New Mexico and [Husband] has not been prejudiced.” Husband had the burden of proof on these defenses. See J.A. Silversmith, Inc. v. Marchiondo, 75 N.M. 290, 294, 404 P.2d 122, 124 (1965) (“[I]t is well settled that the party alleging the affirmative has the burden of proof.”). “We review a trial court’s decision to grant or deny equitable relief for abuse of discretion. Where the court’s discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence.” Vigil v. Fogerson, 2006-NMCA-010, ¶ 56, 138 N.M. 822, 126 P.3d 1186 (filed 2005) (internal quotation marks and citations omitted). “An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.” Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M.
The elements of laches are:

(1) conduct on the part of another which forms the basis for the litigation in question; (2) delay in the assertion of the complaining party’s rights; (3) lack of knowledge or notice on the part of the defendant that the complaining party would assert such rights; and (4) injury or prejudice to the defendant in the event relief is accorded to the complaining party or the suit is not barred.


To establish equitable estoppel, Husband was required to show:

(1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.


Waiver by acquiescence may arise “where the evidence shows the existence of an agreement . . . supported by consideration, and where the agreement has been acquiesced in over a period of time under circumstances giving rise to estoppel.” Sisneroz v. Polanco, 1999-NMCA-039, ¶ 12, 126 N.M. 779, 975 P.2d 392 (omission in original) (internal quotation marks and citation omitted). Furthermore, an enforceable waiver cannot be inferred absent proof of an express agreement except where there are unequivocal acts or conduct showing an intent to waive. Id. ¶ 13. “[I]n no case will a waiver be presumed or implied . . . unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.” Id. (internal quotation marks and citation omitted).

We will discuss each of these defenses separately; however, we note that the following evidence is relevant with regard to each of the defenses. At the October 2007 hearing, Husband testified that on one occasion, around the time of his subsequent divorce, Wife was angry and told him that “she didn’t want any money of that damn retirement.” To show his unawareness that Wife would assert a claim for a share of the PERA benefits after Wife’s alleged statement, Husband relies on his decision to pay a lump sum of $15,000 to his subsequent wife for her share of the community interest based on the full value of the pension. Husband also testified that after Wife had told him she did not want any of the retirement, he attempted further settlement negotiations with Wife before his retirement. Finally, Husband asserts he was prejudiced by being “forced” to choose Option A under the PERA, which paid the maximum monthly payments, due to Wife’s “failure to perfect her claim.” Alternatively, Husband could have selected Options B or C, which pay less but allow the member to designate a survivor beneficiary and are only available to members with spouses or former spouses. Husband also asserts prejudice due to his paying his subsequent wife for her share of the community interest based on the full value of the pension without accounting for a subsequent claim by Wife.

On the other hand, Wife testified that she pursued her interest in the retirement as soon as she thought she could when Husband retired. She testified that between 2005 and 2007 she rejected Husband’s offers to settle for a lump sum of $5000 or $200 per month. Wife also testified that she never engaged in negotiations with Husband or his attorney in terms of waiving her interest in the PERA benefits, that she did not sign anything waiving her interest, and that it was never her intent to waive her marital interest in the PERA benefits.

1. Laches

Based on Wife’s testimony that she asserted her rights as soon as Husband retired, there was sufficient evidence for the district court to find that delay in the assertion, the second element of laches, was not met. Moreover, Husband does not cite any New Mexico or any other authority indicating that Wife was required to send a copy of the California decree to the PERA administrator or domesticate the California divorce in New Mexico within a certain amount of time in order “to secure her interest.” Also, Wife testified that she rejected Husband’s offers to settle for a lump sum or $200 per month, and Husband testified that he continued to try to settle with Wife even after her alleged statement giving up her right to the retirement around the time of Husband’s subsequent divorce, which would allow the district court to reasonably find that Husband did not lack knowledge that Wife would pursue her interest in the retirement at the time Husband retired. The court could conclude that Husband did not show lack of knowledge or notice on his part that Wife would assert her rights to meet the third element of laches. We do not reach whether there was sufficient evidence for the district court’s finding that there was no prejudice because Husband failed to prove the second and third elements of laches. See Thomas v. Pigmam, 77 N.M. 521, 522-23, 424 P.2d 799, 800 (1967) (affirming the district court’s denial of a laches defense because the defendant failed to prove two out of the four elements of laches); see also Letson v. Liberty Mut. Ins. Co., 523 F. Supp. 1221, 1225 n.5 (D.C. Ga. 1981) (“Since there was no delay, the issue of prejudice to the defendant is moot.”).

2. Equitable Estoppel

As to the first element of equitable estoppel, conduct that amounts to a false representation or concealment of material facts, Husband argues that because Wife stated she did not want any of his retirement and she ignored Husband’s attempts to negotiate a settlement, Wife “falseely represented [her] secret intent to assert her claim.” Wife having obtained the QDRO without giving him proper notice, Husband argues, is further evidence of Wife’s undisclosed intent to assert her claim to the PERA benefits despite her alleged statement and actions that she did not want any of the benefits.

With regard to the second element of estoppel, intention or at least expectation that such conduct shall be acted upon by the other party, Husband argues that not only did Wife have exclusive knowledge of her intent to pursue a claim, but “she went to great lengths to hide that knowledge from [Husband].” Husband further argues that the QDRO, without proper service, notice, or his advance knowledge, supports this point. Finally, as to the third element of estoppel, knowledge, actual or constructive, of the real facts, Husband contends that Wife not only should have known but in fact knew that Husband was relying on
her statement. Husband notes that Wife knew about his subsequent divorce and that he was going to have to buy his subsequent wife out of his retirement. Because Wife had already told him that she did not want any of the retirement, Husband argues, she should have known that he would rely on that when paying out a lump sum to his subsequent wife. Husband also argues that Wife was informed, shortly after his subsequent divorce, that he would be retiring and she did not assert her claim until after she obtained the QDRO.

The district court concluded that Wife had pursued her claim in California and New Mexico and that Husband had not been prejudiced. Based on the evidence before the court that Wife did not intend to give up her rights, that she asserted her rights as soon as she thought she was allowed to do so, that she rejected Husband’s settlement offers, and that she received payments only after Husband had already begun receiving his installments, there was sufficient evidence for the court to find that estoppel did not bar Wife from asserting her claim.

3. Waiver by Acquiescence

Husband argues that because Wife took no action to assert her claim to the retirement from 1994 until 2006, made statements that she would not be asserting her claim, and ignored or rejected all of Husband’s settlement offers, she waived her rights to the retirement. An enforceable waiver cannot be inferred absent proof of an express agreement except when unequivocal acts or conduct showing an intent to waive are shown. Sisneroz, 1999-NMCA-039, ¶ 13. In no case will a waiver be presumed or implied unless Wife’s actions misled Husband “to his prejudice, into the honest belief that such waiver was intended or consented to.” Id. (internal quotation marks and citation omitted).

Here, there was sufficient evidence to support the district court’s conclusion that Wife did not waive her rights to the PERA benefits. Wife testified that she rejected Husband’s offers to settle for a lump-sum payment of $5000 or $200 per month. As mentioned earlier in this opinion, Wife also testified that she never engaged in negotiations with Husband or his attorney in terms of waiving her interest in the PERA benefits, that she did not sign anything waiving her interest, and that it was never her intent to waive her marital interest in the PERA benefits. Moreover, the district court was free to disbelieve that Husband honestly relied on Wife giving up her interest under the circumstances in which she stated that “she didn’t want any money of that damn retirement,” when Husband continued his attempts to settle with her even after the alleged statement. See Santa Fe Pac. Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, ¶ 33, 143 N.M. 215, 175 P.3d 309 (holding that questions of credibility are reserved for the district court as fact finder). We conclude that the district court did not err in its conclusion that Wife did not waive her rights to the PERA benefits.

F. The Issue of How to Calculate Retirement Benefits

Husband argues that the district court’s determination that Wife was entitled to a share of Husband’s PERA benefits was based on his 2005 salary and benefit level rather than on his 1994 salary and benefit level was erroneous because it unfairly awarded Wife a portion of Husband’s separate post-divorce increases. Because in New Mexico, absent an agreement regarding calculation of benefits, there is no set rule for determining every case involving the division of retirement benefits, it appears that the district court is to exercise its wisdom, sound reasoning, and sound discretion to divide this asset. See Copeland, 91 N.M. at 413, 575 P.2d at 103 (recognizing that “[t]here can be no set rule for determining every case and as in all other cases of property distribution, the trial court must exercise a wise and sound discretion” (internal quotation marks and citation omitted)). We may characterize a discretionary decision “premised on a misapprehension of the law” as an abuse of discretion. N.M. Right to Choose/NARAL v. Johnson, 1999-NMCA-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted). “[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo.” Id. (internal quotation marks and citation omitted).

The record reflects that the district court was evidently under the impression that the PERA required the use of what is known as the time rule. When Wife rested her case in the October 2007 hearing, Husband’s counsel requested that Wife’s motion be dismissed, but the court denied the request and added, “I think there is sufficient evidence in the record to establish during the course of the marriage he worked for the Deming Police Department and accumulated a retirement, PERA, as to the value of that retirement it is to be subject to a mathematical calculation under

the PERA rules, which is number of years of the marriage, and number of years total worked, or total years of contributions.” In its findings at the end of the October 2007 hearing, the court ordered a qualified domestic relations order to be entered “in accordance with the rules established by [the] PERA, which established that the retirement will be divided by formulation taking into account the number of years of marriage between the parties, and the total number of years served by [Husband] under the state retirement plan, and that [Wife] would be entitled to fifty percent of that formulated percentage.” The court’s impression is understandable given Wife’s counsel’s representations that the PERA required the time rule to be used.

In his opening statement, Wife’s counsel mentions that the California “PERA order was entered consistent with New Mexico law.” He told the court that the California default judgment was “in accordance with New Mexico law, and it would have been in accordance with California law had there been jurisdiction.” He stated that he worked with the PERA to “make sure that this was an appropriate order,” which he based on the one that had previously been entered; that “the calculation was actually performed using the time rule, that is the formula in use in [the] PERA”; and that when the QDRO “was approved and entered by [the] PERA, they calculated based on their formula, and this is a statutory formula.” In closing, Wife’s counsel stated that his draft of a PERA order was actually approved by the PERA administrator and that he “double checked with them and they did want the formula approach in there rather than calculation.”

When Wife’s counsel told the court that Wife’s share of Husband’s monthly payments should be $1025.90, Husband’s counsel protested by asking, “That’s the time calculation . . . correct?” He also asked, “there are two approaches, and you are saying [the] PERA preferred the time approach?” Wife’s counsel replied, “That’s their calculation using the time rule.” Wife’s counsel further stated that it would come out to the same thing, but this is their calculation.” After this exchange, the court simply stated, “I’m using the time rule.” During the hearing, there was no discussion about the fact that the PERA has no rule and there is no law requiring use of the time rule, or that pursuant to the PERA, there existed instructions for lawyers to use in drafting benefits division-related documents and that those instructions merely.
indicated that the time rule was a possible formula or methodology that could be considered. See PERA, Attorney Instructions: Model Order Dividing PERA Retirement Benefits, at 3-4, available at http://www.pera.state.nm.us/forms/AttyInstOrder-DivPERABen.pdf.2

40 The time rule is a method for calculating a non-employee spouse’s share of a retirement plan. “The time-rule calculation first takes the number of months that [the employee spouse] was participating in the plan during marriage and divides that number by the number of total months of employment during which [the employee spouse] was covered under the plan. The result of that calculation is then multiplied by the total amount of retirement benefits and then that number is divided by two.” English v. English, 118 N.M. 170, 176, 879 P.2d 802, 808 (Ct. App. 1994). The “ratio of community service years to total service years is multiplied against the amount of benefit the participant receives at retirement . . . even though that date may be after the benefit/she receives at retirement.” Thomas C. Montoya, N.M. Domestic Relations Law and Forms (1st ed., Lexis Law Publishing 1997) (1996) at § 7.114 (emphasis omitted).

41 Jurisdictions that follow the time rule reason that post-divorce increases are built on the marital foundation. See Gemma v. Gemma, 778 P.2d 429, 431 (Nev. 1989) (stating that courts that follow the time rule reason that “early contributions to the pension plan, while smaller, are invested and earned more interest, that the emphasis should be on the qualitative nature of the community interest as opposed to the quantitative interest, and that the early working periods are the building blocks to upward mobility and hopefully an increased salary”). Application of the time rule “appears to work appropriately in a limited situation” where: “(1) the benefit holder was married at the inception of the benefit plan participation, and (2) the benefit holder experiences only standard inflation raises and promotions throughout the benefit plan participation.” Michelle Adams Thullier, Comment, Divorce and Defined Benefit Plans: Retiring Twenty-Five Years of Unjust Division in Berry v. Berry, 49 S. Tex. L. Rev. 753, 770 (2008). The following hypothetical illustrates the unfairness of applying the time rule in certain situations.

[A]ssume a benefit holder begins his or her professional career as a single person, then, after several years, marries for a couple of years before divorcing and remaining single until retirement. Under the time rule, this short marital period of a couple of years will count as a marital foundation for the future success of the benefit holder and the value of the benefit plan. In reality, the benefit holder’s foundation was built as a single person. The time rule’s disregard for this fact results in an infringement on the benefit holder’s separate property because it allows the non-benefit holder to share in a fraction of the benefit holder’s inflated, post-divorce, separate property success.

Id. at 770-71 (footnotes omitted). Along the same lines, attorney instructions provided along with the PERA model order note that “[i]t is not advisable to use [the time-rule method] if the marriage was of relatively short duration, especially if the marriage and divorce occurred very early in the member’s career.” PERA, supra, at 4 (emphasis omitted).

42 However, contrary to what appears to have been the district court’s impression, the PERA does not mandate that any specific formula must be used. Rather, the PERA merely indicates that a formula determined by a court may be submitted as part of a court order. Section 10-11-136 states, in part:

A court of competent jurisdiction, solely for the purposes of effecting a division of community property in a divorce or legal separation proceeding, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the [PERA]. In so doing, the court shall fix the manner in which warrants shall be issued, may order direct payments to a person with a community interest in the pensions or other benefits, may require the election of a specific form of payment and designation of a specific survivor pension beneficiary, refund beneficiary or survivor pension beneficiary. Attorneys drafting orders for division of PERA benefits can request a model order with instructions. See 2.80.1600.10(C) NMAC (2001). The instructions indicate in bold typeface that the two sample division methods set out in the instructions are not required by the PERA, that “[i]t is up to the parties or the court to arrive at a method to be applied to the particular case,” and, also in bold typeface and in all capital letters, that the time-rule method “is not required by statute, and is offered only as an example of a commonly used method of determining the community interest in the gross amount of pension or contributions.” PERA, supra, at 3-4 (emphasis omitted).

43 The time rule used by the PERA administrator when Wife obtained the California QDRO came from the California court; it was not required under the PERA. Although it appears that California courts have judicial discretion in selecting a method to divide retirement benefits absent an agreement by the parties, their most commonly used method is the time rule. See In re Marriage of Adams, 64 Cal. App. 3d 181, 187 (1976); see also In re Marriage of Lehman, 18 Cal. 4th 169, 187 (1998) (stating that the time rule is the most frequently employed method to apportion retirement benefits). The reasoning underlying the district court’s use of the time rule in the instant case was faulty and because of that we cannot affirm the court’s use of the time rule.

44 Courts that use the time rule seem to be careful to attribute to the employee spouse post-divorce increases that are the result of the employee spouse’s separate singular effort. See, e.g., Adams, 64 Cal. App. 3d at 187 n.8 (“[W]e can envision an increase in benefits after separation that might be caused solely by the employee spouse’s earnings. In such a case[,] it would be an abuse of discretion to give a portion of the increase to the community.”). To accomplish a more equitable division under the time rule, Nevada courts afford the employee spouse an opportunity to show whether extraordinary post-divorce increases are due to his or her sole separate effort in order to determine whether the non-employee spouse is entitled to a share of those assets. See Fondi v. Fondi, 802 P.2d 1264, 1266 (Nev. 1990) (“A substantial increase in retirement benefits might be almost completely due to work or achievement after the marriage. . . . [S]uch an extraordinary increase in benefits might occur where the employee spouse attains a significantly higher-paying position while remaining within the coverage of the same
pension plan, either through earning a post-divorce degree, or transfer within the company to an unrelated area of service. Such a situation . . . stood in sharp contrast to the usual one, where the employee’s wage increases were simply due to a rise in the cost of living, or a gradual movement up the corporate ladder.” (citations omitted).

When a Nevada district court finds that the employee spouse’s post-divorce increases are due to extraordinary separate effort, the court calculates a hypothetical gross monthly retirement payment that the employee spouse would have received in the absence of the extraordinary post-divorce increases. *Id.* at 1266-67. To determine this hypothetical gross monthly retirement payment, instead of using the employee spouse’s actual final average salary, the court uses a hypothetical “highest income the employee spouse would have received under the normal course of events, this being ordinary promotions and cost increases.” *Id.* (internal quotation marks and citation omitted). It is from this supposed gross monthly retirement payment that would have resulted if the employee spouse had only received ordinary promotions and cost increases that the court ascertains and apportions to the non-employee spouse his or her share of the benefits using the time rule. *Id.* Thus, under this Nevada approach the variable is not the fraction or ratio portion of the time rule but what average salary the court can use to determine a hypothetical monthly benefit payment.

{45} The Adams court mentions a different method to divide retirement benefits known as the “insurance apportionment rule,” where the plan is divided applying “a percentage based upon the amounts paid into the fund during marriage as a percentage of total amounts paid.” *See Adams,* 64 Cal. App. 3d at 186 n.6. A similar approach also appears to be suggested in the PERA model order where the non-employee spouse may receive a “[percentage] of the gross retirement benefits or contributions accrued in [the employee spouse’s] name [as] community property.” *See PERA, supra,* at 4 (stating that this method is often used if the employee spouse is retired and also “if the parties or the court determines the percentage of the total pension that will be designated as community property when the [employee spouse] retires”).

{46} There is yet another method used by Texas courts that includes a formula that calculates the community interest by using the date of divorce as opposed to the date of retirement. *See Berry v. Berry,* 647 S.W.2d 945, 946-47 (Tex. 1983). We refer to this as the Berry method. Under the Berry method, the court is to value the interest as if the employee spouse would have retired on the date of divorce. Thuillier, *supra,* at 759-60. In order to calculate the amount of retirement benefits that the employee spouse would have received at divorce, the court uses the employee’s average salary at the time of divorce. *See id.* at 760-62; *see also Berry,* 647 S.W.2d at 946-47 (concluding that “the employee’s interest in [the] plan[] was community property, and that as of the date of the divorce, [the wife was] entitled to one-half of the value” (internal quotation marks and citation omitted)). The court then calculates the non-employee spouse’s share as one half of:

\[
\text{Benefits as if retired at divorce} \times X
\]

\[
\text{time of service during marriage}
\]

\[
\text{time of service period up to divorce}
\]

*See Thuillier, supra,* at 760-62.

\{47\} Use of different approaches can significantly change the non-employee spouse’s share of retirement benefits. For instance, assuming without deciding that Husband’s testimony was accurate, Husband’s monthly salary at the time of divorce was $1868, which would have generated monthly retirement benefit payments of $631.38. Since the entire number of years Husband participated in the plan while married and the number of years of participation until the divorce are both 9.6 years, the ratio equals one or one hundred percent. In other words, all of the benefits up until the divorce were community property. Wife would be entitled to one half of the $631.38, which equals $315.69. In contrast, because Husband earned significantly more money after divorce and to the point of his retirement, using the time rule would result in a $1025.90 monthly share for Wife.

\{48\} The issue of what formula or method of calculation to default to in a situation where, like here, there was a default divorce and the parties never agreed to a division of retirement benefits has not been decided in New Mexico. Unlike our recent opinion in *Garcia v. Garcia,* 2009-NMCA- , N.M., ___ P.3d ___ (No. 28,106, Oct. 30, 2009), the district court in the present case did not even have an ambiguous agreement to interpret to attempt to arrive at an appropriate calculation of benefits. The divorce in the present case was granted through a default judgment, and the California court set aside its time-rule-based division of the PERA benefits.

\{49\} Husband relies on *Franklin v. Franklin,* 116 N.M. 11, 17, 859 P.2d 479, 485 (Ct. App. 1993), to support his position that the court should have used the date of divorce to calculate Wife’s share of the PERA benefits. We have described in *Garcia* why we limit *Franklin* to its peculiar circumstances and why we did not consider it controlling in that case. *See Garcia,* 2009-NMCA- , ¶¶ 45-48. For the same reasons, we do not think *Franklin* controls our analysis or decision in the present case.

\{50\} *Franklin* does not provide any one particular rule or formula or methodology that must be followed in instances in which the parties have not agreed to a formula or method for calculating the community share of retirement benefits. Nevertheless because of how *Franklin* resolved the calculation issue, one might argue that, at the very least, *Franklin* can be read to indicate that, absent any agreed-upon method or formula for dividing retirement benefits, the default for the court is solely to rely on evidence presented by the parties as to community and separate efforts in order to attempt to determine the non-employee spouse’s community share of the employee-spouse’s retirement benefits. *See 116 N.M.* at 15-19, 859 P.2d at 483-87. While to read that into *Franklin* might too severely limit the court’s discretion in reaching an equitable division, *Franklin* does demonstrate that when the parties have not satisfactorily agreed to a division methodology, the court’s resolution may be reached by defaulting to a division based on evidence presented by the parties from which the court can ascertain a demarcation between periods and calculations of ordinary cost of living increases and periods and calculations based on extraordinary promotions and salary increases. *See id.*

\{51\} In addition to *Franklin,* Husband also relies on *Madrid v. Madrid,* 101 N.M. 504, 506, 684 P.2d 1169, 1171 (Ct. App. 1984). However, Husband fails to develop his reliance on *Madrid* through any analytic detail or argument. Moreover, as we indicate in *Garcia,* *Franklin* did not see *Madrid* as controlling in pay-as-it-comes-in cases. *See Garcia,* 2009-NMCA- , ¶ 52. Furthermore, it is noteworthy that, unlike in *Garcia* and the present case, in *Madrid* the increases in benefits came long after the husband began receiving benefits and occurred only as a result of post-divorce company-union negotiations over entitlement to retirement benefits. *See Madrid,* 101 N.M. at 505-06, 684 P.2d at 1170-71. *Madrid* does not require the court...
in pay-as-it-comes-in cases to limit the non-employee spouse’s community share in the employee spouse’s retirement benefits to an amount based on the employee spouse’s average salaries and the level of benefits at divorce.

As indicated earlier in this opinion, in Copeland, the Court stated that “[t]here can be no set rule for determining every case and as in all other cases of property distribution, the trial court must exercise a wise and sound discretion.” 91 N.M. at 413, 575 P.2d at 103 (internal quotation marks and citation omitted). Ruggles repeated and confirmed this Copeland approach. Ruggles, 116 N.M. at 58, 860 P.2d at 188. In addition, in Ruggles, the Court stated that “the rule for distribution of a non[-]employee spouse’s interest in a retirement plan, whatever the rule is, should be applied only in the absence of an agreement between the spouses on the subject.” Id. at 66, 860 P.2d at 196. Ruggles also noted that Franklin “illustrates the difficulties that can arise under the reserved jurisdiction method when it becomes necessary to determine, sometimes long after the date of divorce, the amount of the non[-]employee spouse’s interest in benefits when the employee spouse actually retires.” Ruggles, 116 N.M. at 65 n.14, 860 P.2d at 195 n.14. We will not in this case attempt to provide definite guidelines by which district courts in their mandated purpose to achieve an equitable result might determine which formula or method of calculation to use in dividing benefits when the parties have not agreed to a particular formula or methodology.

In the present case, we believe that the district court thought that the time rule was required under the PERA. It does not appear that the court engaged in analysis and exercised discretion but, instead, felt bound by what it believed was a statutory mandate. Neither statute nor case precedent in New Mexico requires or permits the time rule or, for that matter, any particular rule or method of calculation to be applied as an across-the-board or automatic-default formula or method of calculation when the parties have no agreement on how to calculate retirement benefits. It is obvious to us that when there has been no agreement of the parties and the issue is contested, unless and until our Supreme Court or Legislature decides that district courts are to default to a particular rule, formula, or methodology, it is essential for effective appellate review on the issues that the court explain why it has chosen the formula or method of calculation that it uses. It is also important that the court explain how it believes that the choice is an equitable and fair one for the parties. We therefore reverse the district court’s use of the time rule and remand for the court to reassess how to calculate Wife’s community interest in Husband’s PERA benefits.

CONCLUSION

We affirm the district court’s rulings against Husband on all of Husband’s affirmative defenses. We affirm the court’s adoption of a pay-as-it-comes-in method of distribution instead of a lump-sum method. We reverse the district court’s determination in regard to the calculation of Wife’s community interest in Husband’s PERA benefits and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
ROBERT E. ROBLES, Judge
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NMLA has an opening for a Staff Attorney in its Albuquerque Law Office. One (1) or more years of legal experience required. NMLA represents low-income individuals and families in a wide variety of poverty law areas including family law, housing, public benefits, consumer. Expectation is that attorney will be active in local bar and community activities. The candidate will handle general poverty law cases, utilizing a computerized case management system, participate in community education and outreach, as well as participate in recruitment of pro bono attorneys. Requirements: Candidates must possess excellent writing and oral communication skills, ability to manage multiple tasks, skills sufficient to implement an array of advocacy strategies, ability to manage a caseload, and the ability to build collaborative relationships within the community. Reliable transportation is mandatory. New Mexico bar license is preferred. NMLA offers an excellent benefits package. Competitive salary based on experience. EEO Employer. Send Resume, two references and a writing sample to: Gloria A. Molinar, NMLA, PO Box 25486, Albuquerque, NM 87125-5486 and or email to: gloriam@nmlegalaid.org; Deadline: February 26, 2010

**Legal Assistant**

New Mexico Educators Federal Credit Union is the State’s largest Credit Union supporting over 115,000 member-owners. Currently we are in search of a Legal Assistant, who will provide support to our Legal Department. This position will involve the preparation, editing and finalization of pleadings and correspondence for legal matters and responses to garnishments and civil subpoenas. The ideal candidate will have the following minimum qualifications: High School Diploma or GED, college course work or certificate preferred. Two years clerical support experience, at least two years legal assistant experience with direct experience in preparing court filings, legal responses and preparing legal correspondence. Proficient in written and oral communication skills, advanced knowledge of legal and court procedures to include experience on Collection and Bankruptcy process. Thorough knowledge of court procedures, processes and familiarity with forms and paperwork. Experience with Microsoft Office and Word Software. Ability to maintain calendaring systems for tasks, deadlines and hearings and manage a large volume of pending cases. Must be an independent self-starter with outstanding communication skills and superior customer service ability. To learn more about this exciting opportunity and complete an online application, visit our careers page at www.nmefcu.org or e-mail to human-resources@nmefcu.org, fax to (505) 998-2685. Apply in person in Albuquerque at 4100 Pan American Freeway NE, Bldg. C. EOE

**Legal Secretaries / Paralegals**

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**Legal Secretary**

Downtown insurance defense firm seeks legal secretary with 3+ yrs. litigation experience. Excellent grammar, proofreading and organizational skills required. Good benefits. Salary DOE. Send resume and salary history to: Madison, Harbour & Mroz, P.A. Attn.: Personnel, P. O. Box 25467, Albuquerque, NM 87125, or fax to: (505) 242-7184.
Legal Assistant/Paralegal
Extensive prior experience in civil litigation and document control/management required. Seeking professional, organized, and highly skilled individual with attention to detail. Excellent computer skills required. All inquiries confidential. Competitive benefits. Resumes, Atkinson, Thal & Baker, PC, 201 Third Street NW, Suite 1850, Albuquerque NM 87102.

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