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Special Insert:
2010 SBNM Staff Directory

www.nmbar.org
In May 1950, the University of New Mexico’s School of Law graduated its first class. To commemorate the 60th anniversary of this event, Dean Kevin Washburn is proud to announce a celebration to honor this legacy. The 60 for 60 project will honor the School of Law’s role in New Mexico and the nation by commemorating the 60 most influential people, events, legislative breakthroughs, transformational changes and/or accomplishments that have shaped the state’s legal community.

The Book
Nominations are now being accepted for a 60 for 60 book, which will celebrate the final 60 selected people and accomplishments that have paved the way in shaping the law school and the state since 1950.

How to Submit Your Nomination(s)
Nominations may be sent via the law school’s website: http://lawschool.unm.edu/60for60/ or they can be mailed to: David Myers, UNM School of Law Archivist, UNM School of Law, MSC11-6070, 1 University of New Mexico, Albuquerque, NM 87131-0001. They should be at least 250 words and no more than 600 words. More than one nomination per person is welcome. Nominations must be received by April 1, 2010.
Photo submissions also are welcome. Check the website: http://lawschool.unm.edu/60for60/ for instructions on how to submit them electronically.

The Event
This fall, the School of Law will honor and recognize the final 60 at a festive celebration.

Questions: Contact David Myers at 505.277.6796.
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

STATE BAR
of NEW MEXICO
FORECLOSURE CLES - SPRING 2010
See Dates Below for Details
Location for All: State Bar Center, Albuquerque

ABC’s of FORECLOSURE LAW
Wednesday, March 10, 2010 • 3.7 General CLE Credits
☐ Standard Fee $119

Presenters: Angelica Anaya Allen, Director, Fair Lending Center, United South Broadway Corporation
Brian A Thomas, Esq., Law Offices of Brian A. Thomas, PC

12:30 p.m. Registration
1:00 p.m. The Process of Foreclosure
2:15 p.m. Alternatives to Foreclosure: Loan Modifications
and More
3:30 p.m. Break
3:45 p.m. Foreclosure Defenses and Counterclaims
5:00 p.m. Adjourn and Reception (State Bar Center Lobby)

What’s happening with foreclosures in New Mexico?
See page 10 of this issue for an article on foreclosures in New Mexico.

TWO MORE FORECLOSURE CLEs ARE COMING!!!
Thursday, April 8, 2010 • FREE CLE’ (See below for details)
2.0 General CLE Credits

10:00 a.m. Bankruptcy in New Mexico
11:00 a.m. Alternative Resolutions to Foreclosure (including
mediation, and loan modification)

Noon Adjourn and Lunch
(provided at the State Bar Center)

Thursday, May 6, 2010 • FREE CLE’ (See below for details)
2.0 General CLE Credits

10:00 a.m. Legal Issues in Loan Origination
11:00 a.m. Holders

Noon Adjourn and Lunch
(provided at the State Bar Center)

* The April 8 and May 6 CLE’s will be FREE and ONLY available to attorneys who have either (a) already taken a pro bono case in 2010 from the Foreclosure Initiative Group OR (b) are willing to take a pro bono case upon the completion of the free CLE. Contact Marilyn Kelley at the State Bar of New Mexico for more information about how to take a pro bono case (mkelley@nmbar.org or 505.797.6048).

LIMITED to the first 50 attorneys who respond.

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 ____________________________________________________________

LIVE WEBCAST March 10
also available via
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From the New Mexico Court of Appeals
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• Professionalism Tip •

With respect to parties, lawyers, jurors and witnesses:
I will be punctual in convening all hearings, meetings and conferences.

Meetings

February
25
Health Law Section
7:30 a.m., Via Teleconference
25
Board of Editors
8:30 a.m., State Bar Center
25
NREEL Board of Directors
noon, State Bar Center
25
Technology Committee
4 p.m., State Bar Center
26
Board of Bar Commissioners
10 a.m., State Bar Center
27
Young Lawyers Division
Board of Directors
10 a.m., State Bar Center

State Bar Workshops

February
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 p.m., Clinics
San Jose Senior Center, Carlsbad
25
Lawyer Referral for the Elderly Workshop
10:15–11:30 a.m., Presentation
10–11:15 a.m., Presentation
Roswell Joy Center, Roswell

March
23
Lawyer Referral for the Elderly Workshop
9:45–11 a.m., Presentation
1–4 p.m., Clinics
Munson Senior Center, Las Cruces

Cover Artist: Working from reference photographs, Linda Manion’s realism is represented in pastels. A self-taught artist, she finds that the application of her own technique brings out the available diversity of pastels from softness to rich brilliance. Manion paints to memorialize the subject, depicting its likeness and revealing its inner beauty. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
**NOTICES**

**COURT NEWS**

**N.M. Supreme Court**

**Access to Justice Commission**

**Upcoming 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.

**Compilation Commission**

**Available Products**

The following products are now available through the New Mexico Compilation Commission:

- *New Mexico Reports*, Volume 146 ($71.40)
- *Official 2010 New Mexico Rules Annotated* three-volume set ($84)
- *New Mexico Official Forms*, a two-disc set containing 1,345 court-approved and statutory forms ($194.25)

All prices include UPS flat rate shipping and 5 percent N.M. gross receipts tax. Call Brad Terry, (505) 363-3116, to reserve sets or for additional product information.

**Judicial Performance Evaluation Commission**

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court to provide voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The next regular meeting will be from 8 a.m. to 5 p.m., March 5, at the State Bar Center, Albuquerque.

**UJI Criminal Committee**

**Committee Vacancy**

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. Attorneys interested in volunteering time on this committee may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for submissions is Feb. 26.

**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 Bauman, (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.

**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.

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

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic relations, and adoptions</td>
<td>1978–1993</td>
<td>March 2</td>
</tr>
<tr>
<td>(505) 827-4687</td>
<td></td>
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</tbody>
</table>
MEMBER BENEFIT OF THE WEEK

LAW PRACTICE MANAGEMENT COMMITTEE

The Law Practice Management Committee offers information on:

- Client Relations
- Forms
- Employment Issues
- Malpractice
- Marketing
- Technology
- Products and Services Directory
- Insurance
- Risk Management
- Accounting
- Law Office Business
- And More...

E-mail questions or comments to membership@nmbar.org.


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.

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:
  March 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.

Board of Bar Commissioners

Meeting Agenda

10 a.m., Feb. 26, State Bar Center
  1. Swearing-in of new commissioners
  2. Approval of December 9, 2009 meeting minutes
  3. Finance Committee report
  4. Acceptance of December financials
  5. Fee waiver requests
  6. Approval of resolution to amend and restate the State Bar 401(k) Plan
  7. 2012 National High School Mock Trial Program
  8. UNM Law School Student Loan Program
  9. Bylaws and Policies Committee report and recommendations
  10. Pro Hac Vice Committee report and grant recommendations
  11. Jiffy Committee report and updates

12. ALPS/MEWA discussion and request for approval of feasibility study
13. Appoint a Dues Form Committee
14. Appoint a Bar Center Wall of Honor Committee
15. Governmental Affairs Committee report
16. Casemaker report and discussion
17. Discussion of 2010 initiatives
18. President's report
19. Executive director's report
20. State Bar newsletter and department reports
21. Bar commissioner and division (SLD, YLD and PD) reports
22. State Bar Strategic Plan
23. Section, committee and division annual reports
24. New business
25. State Bar Birthday Celebration and Reception, 4–6 p.m.

Employment and Labor Law Section Board Meeting

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, March 3, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar website, www.nmbar.org, or contact Chair Aaron Viets, (505) 766-7588 or aviets@rodey.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/Public Law/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 not 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
(505) 827-4645.
Applications must be postmarked by March 1. Direct questions to Moore at (505) 827-4645.

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 luncheon speaker is Albuquerque Mayor Richard J. Berry.

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.

UNM

School of Law

Student Bar Association

4th Annual Barristers Ball

Student Bar Association President Othiamba Umi, UNM Regent President Raymond Sanchez, and the Barrister’s Ball Host Committee cordially invite the legal community to the UNM School of Law 4th Annual Barristers Ball, 7 p.m. to midnight, March 6, at Hotel Albuquerque in Old Town. This year proceeds will support the Association of Public Interest Law Summer Grant Program which provides grants to law students who obtain unpaid summer clerking positions for public interest law organizations. These grants allow students to learn about career opportunities in public interest law and to help under-served communities in New Mexico. There will be cocktails from 7 to 9 p.m. with a DJ and dancing to follow. Student tickets are $20 until March 2, $25 starting on March 3, and $30 at the door. Tickets for non-students are $30. Tickets will be sold from 10 a.m. to 2 p.m. in the forum at UNMSOL and are also available online ($1 service fee) at http://unmbarristersball.blogspot.com.

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.

Abbreviated Hours: March 15–19:
Spring Break  8 a.m.–6 p.m.

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.

Legal Services Corporation

Civil Legal Services Grants

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 2011. A request for proposals, filing dates, submission requirements and other information will be available April 8 at www.grants.lsc.gov. The listing of eligible service areas for each state and the estimated grant amounts for each service area will be included in the RFP. Applicants must file a notice of intent to compete, available from the RFP, in order to participate in the competitive process. Direct inquiries to competition@lsc.gov.
Final Decisions
Final Decisions of the N. M. Supreme Court....................... 4

Matter of Eric Turner, Albuquerque
(Disciplinary No. 08-2009-573) N. M. Supreme Court ordered
an indefinite suspension for a minimum period of three years,
restitution and costs.

Matter of Candace Coulson, Albuquerque
(Disciplinary No. 03-2009-566) N. M. Supreme Court approved
a consent agreement for a deferred suspension, with costs and
restitution.

Matter of Robert Martinez, Albuquerque
(Disciplinary No. 12-2008-560) N. M. Supreme Court ordered
an indefinite suspension for a minimum period of two years with
restitution and costs.

Matter of Jay P. Goodman, Santa Fe
(Disciplinary No. 10-2008-554) N. M. Supreme Court ordered
a formal reprimand for charging an excessive fee and ordered
restitution of the fee. N. M. Supreme Court also remanded the
issue of costs to the Disciplinary Board.

Resignations in Lieu of Discipline ......................... 0

Summary Suspensions
Total number of attorneys summarily suspended .................. 0

Disability Suspensions
Total number of attorneys placed on disability suspension ....... 0

Charges Filed
Charges were filed against an attorney for allegations of failing
to provide competent representation, failing to expedite litigation
consistent with the interests of a client and failing to obey an order
of the tribunal.

Charges were filed against an attorney for allegations of failing
to cooperate with disciplinary counsel.

Charges were filed against an attorney for allegations of failing
to respond to disciplinary counsel, failing to competently represent
a client, failing to communicate with a client, charging an
unreasonable fee, and failing to expedite litigation consistent
with the interests of a client.

Charges were filed against an attorney for allegations of failing
to competently represent a client, missing appellate deadlines,
failing to expedite litigation consistent with the interests of a
client, failing to maintain proper trust account records and
failing to properly supervise non-lawyer assistants.

Charges were filed against an attorney for allegations of failing
to act with reasonable promptness and diligence in representing
a client, charging an unreasonable fee and failing to cooperate with
disciplinary counsel.

Charges were filed against an attorney for allegations of failing
to provide competent representation, failing to act with reasonable
promptness and diligence, failing to communicate with the client,
failing to charge a reasonable fee, failing to expedite litigation
consistent with the interests of a client, and failing to cooperate
with disciplinary counsel.

Petitions for Reciprocal Discipline Filed
Petitions for reciprocal discipline filed.............................. 0

Petitions for Reinstatement Filed
Petitions for reinstatement filed................................. 0

Formal Reprimands
Total number of attorneys formally reprimanded .............. 0

Informal Admonitions
Total number of attorneys admonished......................... 2

An attorney was admonished for failing to properly segregate
funds and failing to maintain proper trust account records.

An attorney was admonished for making a false statement of
material fact and engaging in conduct involving fraud, deceit or
misrepresentation.

Letters of Caution
Total number of attorneys cautioned............................... 7

Attorneys were cautioned for the following conduct: (1) failure
to properly bill clients in accordance with Rule 16-115; (2) failure
to adequately screen for conflicts of interest; (3) failure to properly
distribute funds from a settlement agreement (2 letters of caution);
(4) taking actions on behalf of a client without first securing
permission from that client; and (5) making inappropriate
comments during the course of representation.

<table>
<thead>
<tr>
<th>Allegations</th>
<th>No. of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust Account Violations</td>
<td>10</td>
</tr>
<tr>
<td>Conflict of Interest</td>
<td>1</td>
</tr>
<tr>
<td>Neglect and/or Incompetence</td>
<td>43</td>
</tr>
<tr>
<td>Misrepresentation or Fraud</td>
<td>5</td>
</tr>
<tr>
<td>Relationship with Client or Court</td>
<td>9</td>
</tr>
<tr>
<td>Fees</td>
<td>13</td>
</tr>
<tr>
<td>Improper Communications</td>
<td>5</td>
</tr>
<tr>
<td>Criminal Activity</td>
<td>1</td>
</tr>
<tr>
<td>Personal Behavior</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>13</td>
</tr>
<tr>
<td>Total number of complaints received</td>
<td>107</td>
</tr>
</tbody>
</table>
What’s Happening with Foreclosures in New Mexico and What Can Attorneys Do to Help?

By Members of the Foreclosure Initiative

Without question, our courts are being overwhelmed by foreclosure petitions. New Mexico was late to the party, but conservative projections estimate that over 9,700 mortgage foreclosure cases will be filed this year, a number that may be too small given reports from around the state. Put differently, some courts report that as many as 25 percent of all civil filings are debt- or foreclosure-related cases, and others report that their experience may exceed 40 percent of all civil filings.

The Foreclosure Initiative is a group of like-minded people working to address the problem. Current participants are United South Broadway Corporation (USB), a non-profit organization located in Albuquerque but operating statewide, the State Bar of New Mexico (SBNM), the Attorney General’s Office, Law Access New Mexico’s 2nd Judicial Volunteer Attorney Pool (VAP), and a few volunteer attorneys. Here is how this effort works: people facing foreclosure can call USB for an initial screening to determine whether the borrower qualifies, by income, for free services. If they do, USB will provide credit counseling, attempt to work out a resolution with the lender and, if that fails, provide a staff attorney to assist. If borrowers do not qualify for services or if USB is unable to take more cases, they are sent to the referral projects at either SBNM or VAP which will then try to find a volunteer attorney to help.

Why This Organized Effort?

Some may question why there is any organized effort to help people facing foreclosure. Why not let borrowers hire private attorneys if needed? After all, they contracted to pay their mortgages. If they cannot afford to hire an attorney, why not let the market take care of the problem? There are three answers to these questions. First, for at least 100 years the right to contract has not been without restrictions in its application, particularly where abuses exist or where restricting enforcement is in the public interest. Second, most people facing the prospect of losing their homes cannot afford to hire attorneys, and the problem is now so overwhelming that any amicable solution would be welcomed by both lenders and borrowers. Third, the foreclosure of homes causes a “spill-over” by reducing property values, harming your clients, you as homeowners, and your government’s ability to function. One study predicts a “spill-over” impact of over $2 billion in lost property value across New Mexico over the next few years.

How Did We Get Here?

At the turn of the twentieth century, the right to contract was held to be inviolate. The Supreme Court repeatedly struck down laws that attempted to ameliorate some of the most obvious abuses of the right to contract, particularly in areas involving employer-employee relations. Thus, laws relating to health and safety in the workplace, workers’ compensation schemes, rights to unionize, and maximum working hours were held to be unconstitutional because they interfered with the right of employers and employees to reach their own agreements. The law failed to provide a respite from contracts. Gradually, however, from the early part of the twentieth century until the late 1930s, the Supreme Court began to accept restrictions on employment contracts that curbed abuses and helped “level the playing field.” Congress and state legislatures responded with legislation designed not just to assist employees but also the general public in a variety of areas, including home ownership.

The perception is that 30-year mortgages have been around forever, but during the Great Depression, the majority of home mortgages were short-term loans that needed to be refinanced every five years. Not surprisingly, by the early 1930s as many as half of the home loans in the country were in default. Franklin Roosevelt, building on the reforms started at the turn of the century in the employment context, saw a role for government and intervened. In 1934, the Federal Housing Administration developed the 30-year fixed-rate loan program to provide homeowners with lower payments and mortgage stability. Thus began the common concept of 30-year mortgages. All facets of home purchase were generally conducted with the same entity. Banks and other lending institutions sought out customers, provided the loan, serviced the loan and made their profit largely from the difference between the interest rate charged to the borrower for the loan and the lower interest rate paid by the lender on short-term deposits.

In the 1970s, everything changed with the advent of “mortgage securitization.” This is a fancy way of saying that the original lender sold the mortgage papers to someone else for a profit. No longer did mortgage lenders retain the loans in-house. Rather, the lenders “originated” the loan and then sold it to secondary markets.
The banks made money from the origination fee and the proceeds of the sale of the loan. This new market created new problems. Because the original lender had no intention of keeping the loan in-house, the incentive was to “sell” as many mortgages as possible. A greater volume of loans (even bad loans) led to more income for the lender. Thus, underwriting standards (investigations into the borrower’s ability to pay) were relaxed and, because the origination fee charged by the lender was often based on the loan value, lenders had an incentive to encourage larger borrowing. The stage was set for loans to be provided to people who could not afford them.

In addition, home prices in the 1980s started a relentless and seemingly endless increase. Because of that and the fact that the lenders were looking to expand the market, newer, riskier loans were sold, and people who could not otherwise afford a traditional loan were placed in “non-traditional” or “alternative loan” products. The idea was that the increased home prices would make such loans viable. The loans included such products as interest-only loans, payment option adjustable rate mortgage, and hybrid adjustable rate mortgages. With interest-only loans, the borrower is required to pay only the interest due on the loan for an initial period, such as three to five years. After that interest-only period, the borrower must pay both the principal and interest. Adjustable rate mortgages (ARM) allow the borrower to choose from a number of different payment options. For example, an ARM might provide that a borrower may have a below-interest-rate payment for a few years, followed by higher adjustable rates for the remaining term of the loan. These types of alternative loans have moved from a marginal to a place of dominance. Interest-only loans now constitute 27 percent of loans nationwide and 30 percent of subprime loans. With home prices now falling instead of rising, many homeowners are “upside down.”

While no one forced these homeowners to accept these loans, it should also be said that many of these loans were structured in a way that would fail by design if housing prices did not continue to increase. Lenders knew or should have known this, but given the economic pressures to sell as many mortgages as possible, they failed to warn families about impending problems and they failed to perform the underwriting necessary to prevent impending problems. Added to this, the loss of jobs caused many families who could have once afforded a mortgage to now be under water and facing the loss of their homes.

Responding to the Problem

Philosophically, while free enterprise and the right to contract are critical to the economic engine of our country, the excesses, abuses, and damage to the public good justify intervention on behalf of the borrower. The legal community can and should respond to this crisis. Given the widespread nature of the problem, lawyers are uniquely positioned to help. The legal community provides a critical bridge between lenders and borrowers that benefits everyone. It doesn’t take a genius to realize that a massive number of foreclosures hurt the lenders—just visit the west side of Albuquerque or Rio Rancho. Whole neighborhoods are filled with for sale signs. A bank trying to sell a home in such a neighborhood has little chance of recouping its losses. However, the problem, repeated over and over again in New Mexico courts, is the filing of foreclosure petitions with no response from the borrower. This leads to default. The homeowners hide under the mattress hoping the problem will go away, and the banks get stuck with a property that cannot be sold anywhere near the value of the mortgage.

The Foreclosure Initiative is pursuing four avenues.

1. Legislation

Recent efforts in the New Mexico Legislature have produced results. Mortgage brokers are now identified as fiduciaries of the consumers, not the banks. Enhanced protections require documented evidence of benefits to the consumer as well as evidenced ability to repay. Regrettably, although proposals were made to require mandatory mediation in all foreclosures, lobbyists for the lenders defeated these proposals. On a federal level, there continues to be concern that the powerful banking lobbies will defeat efforts to further protect consumers.

2. Mediation

Mediations are happening in the courts—by program in the 1st and 13th Judicial Districts—and in other districts by orders from the presiding judges. Mediations are also occurring in more informal settings through agencies such as USB, which is now the referring agency of first resort for low-income borrowers.

A “work-out” between the borrower and lender does not necessarily mean that the borrower can stay in the home. Sometimes it means the cooperation of the borrower in selling the house. For example, a short sale can occur when the lender agrees to accept a sales price of the home even if it doesn’t meet the balance owed on the mortgage, or terms of payment can be relaxed, keeping the borrower in the home but allowing the lender to be paid over a longer period of time.

Unfortunately, it appears that many borrowers have a “head in the sand” approach to the problem. For example, the Foreclosure Initiative is now sending postcards to everyone who has been served with a mortgage petition in the 2nd Judicial District, encouraging them to take action and advising them of the possibility of receiving free or reduced-fee legal services. The response has not been encouraging.

3. Recruiting Attorneys

The Foreclosure Initiative needs more volunteer attorneys to assist when borrowers cannot be helped by USB. To assist volunteer attorneys, the Foreclosure Initiative has provided and continues to provide a virtually free ($7.50 fee) all-day seminar and DVD on mortgage foreclosures. If you are interested, please call (505) 248-0370. Groups have set up video replays of that seminar for smaller groups of volunteer lawyers, mediators wanting some training in foreclosure issues, and for local pro bono committees willing to serve this essential need. In addition, SBNM has three upcoming foreclosure CLEs (see page 4 of this issue of the Bar Bulletin for more information). Over 200 attorneys attended the virtually free CLE when it was first presented in May 2009, and of those 200 around 80 volunteered to handle pro bono foreclosure filings. However, the need is so great, a significant commitment from the legal community is critical. For those willing to volunteer to handle

To volunteer to assist low-income New Mexicans or for further information, contact Marilyn Kelley at SBNM, mkelley@nmbar.org or (505) 797-6048; or Rosalie Fragoso at VAP, rosali@lawaccess.org or (505) 944-7167, ext. 124. Refer borrowers to USB at (505) 764-8867.
two foreclosure defense cases for means-tested, owner-occupied residence consumers, the Foreclosure Initiative program provides access to “mentor” practitioners who practice in this area, materials for attorneys handling foreclosure defense, and malpractice coverage if the case is pro bono or reduced fee and is referred through SBNM or VAP. The need is great and more volunteers are needed.

4. Helping People Help Themselves
The Foreclosure Initiative is presently working on a kit for homeowners which will include points for “work out” and forms for entry of pro se appearance and answer. If people are afraid or hesitant to call, they can at least help themselves.

The foreclosure problems confronting New Mexico families are not going to be resolved quickly. For some time to come, debt- or foreclosure-related civil filings will continue to increase in the courts. The number of families facing the frightening prospect of foreclosure and the number of citizens impacted by poor underwriting practices will continue to make headlines and tax government and charitable resources. The members of the Foreclosure Initiative would like to take this opportunity to invite attorneys throughout New Mexico to utilize their unique position and step forward to assist their communities in this crisis.

About the Authors: The Foreclosure Initiative is a combined effort to address the dearth of legal resources available to consumers facing foreclosure. Current participants are the United South Broadway Corporation, Law Access New Mexico’s 2nd Judicial Volunteer Attorney Pool, the Attorney General’s Office, the State Bar’s Public and Legal Services Department, and several private attorneys.

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## LEGAL EDUCATION

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### NOTES

- G = General
- E = Ethics
- P = Professionalism
- VR = Video Replay
- Programs have various sponsors; contact appropriate sponsor for more information.
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<td>31,186</td>
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<td>31,224</td>
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<td>30,827</td>
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<td>State v. Mailman</td>
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<td>31,745</td>
<td>State v. Jackson</td>
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## WRIT QUASHED AND REMANDED TO NEW MEXICO COURT OF APPEALS:

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<tr>
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## WRIT DENIED:

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<td>Farmington v. Dickerson</td>
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OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925
EFFECTIVE FEBRUARY 12, 2010

PUBLISHED OPINIONS

Date Opinion Filed
No. 28034 2nd Jud Dist Bernalillo CR-06-4221, STATE v T WILLIAMS (reverse and remand) 2/8/2010
No. 28857 AD SWB-07-41, Camino Real Environmental (affirm in part and remand) 2/10/2010
No. 28679 13th Jud Dist Valencia CV-07-577, R CORDOVA v VALENCIA COUNTY (affirm) 2/11/2010

UNPUBLISHED OPINIONS

No. 29438 1st Jud Dist Santa Fe CV-06-1544, A BARELA v R RUTLEDGE (affirm) 2/8/2010
No. 29568 5th Jud Dist Eddy CR-08-56, STATE v A MILLER (affirm) 2/8/2010
No. 29676 4th Jud Dist Guadalupe CR-07-1024, STATE v J SWALLOWS (affirm) 2/8/2010
No. 29686 6th Jud Dist Luna CR-07-217 STATE v J ORDONEZ (affirm) 2/8/2010
No. 29779 7th Jud Dist Torrance CR-08-37, STATE v H MOORE (affirm) 2/8/2010
No. 29866 1st Jud Dist Santa Fe CV-06-1544, A BARELA v R RUTLEDGE (affirm) 2/8/2010
No. 29924 5th Jud Dist Chaves CV-08-84, STATE v R BECKER (dismiss) 2/8/2010
No. 25510 2nd Jud Dist Bernalillo CV-99-7830, S BISHOP v EVANGELICAL (affirm in part and remand) 2/9/2010
No. 29913 2nd Jud Dist Bernalillo CV-08-17386, CV-09-10117, R ROMERO v F SEDILLO (affirm) 2/10/2010
No. 29767 2nd Jud Dist Bernalillo CR-08-778, STATE v I GRANDBERRY (reverse) 2/11/2010
No. 29220 11th Jud Dist San Juan YR-07-4, STATE v J MILLIGAN (affirm) 2/12/2010
No. 29786 8th Jud Dist Taos CV-09-18, A ARELLANO v T VELARDE (affirm) 2/12/2010
No. 29895 13th Jud Dist Sandoval CV-07-596, LIONS GATE v STATE ENGINEER (affirm) 2/12/2010
No. 30008 9th Jud Dist Roosevelt LR-08-9 STATE v R LANCASTER (reverse) 2/12/2010

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

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

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

**EFFECTIVE FEBRUARY 8, 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/

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<td>28-202 Judicial proceedings; excusals; recusals and withdrawals (Rules Governing the Judicial Evaluation Commission)</td>
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<td>28-203 Powers and duties of the Commission (Rules Governing the Judicial Evaluation Commission)</td>
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<td>28-205 Confidentiality of information (Rules Governing the Judicial Evaluation Commission)</td>
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<td>28-401 Criteria for evaluation of judicial performance (Rules Governing the Judicial Evaluation Commission)</td>
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<td>1-079 Public inspection and sealing of court records (Rules of Civil Procedure for the District Courts)</td>
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<td>5-704 Death penalty; sentencing.</td>
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<td>UJI Criminal</td>
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<td>14-121 Individual voir dire; death penalty cases; single jury used.</td>
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<tr>
<td>14-121A Individual voir dire; death penalty cases; two juries used.</td>
<td>11/30/09</td>
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</table>
The Executive Office has administrative responsibilities related to the management, policies and mission of the State Bar and the New Mexico State Bar Foundation, including administrative responsibilities related to the Board of Bar Commissioners, the Client Protection Commission, and the Commission on Professionalism.

**Joe Conte**
**Executive Director**
Joe Conte has overall responsibility for the day-to-day operations of both the State Bar and the New Mexico State Bar Foundation, including Administration, Membership and Communications, Public and Legal Services and the Center for Legal Education. Joe is responsible to and reports to the 22-member Board of Bar Commissioners.

**Kris Becker, Assistant Director**
**Board and Meeting Administration**
Kris Becker is responsible for the administration of the Board of Bar Commissioners, including coordinating meetings, elections, judicial nominating commissions and appointments to the Supreme Court Boards and Committees. She maintains the State Bar Bylaws and Policies. Kris coordinates meetings, receptions, special events and the annual awards for the State Bar’s annual meeting, in addition to coordinating the bi-annual Justice Pamela B. Minzner Leadership Training Institute. She also manages the Bar Center meeting space and oversees the meeting and catering services assistant. In addition, Kris is a member the Management Team.

**Alan Kroll**
**Meeting and Catering Services Assistant**
Alan Kroll assists with the coordination of the Bar Center room rentals for State Bar members and outside entities, including setting up rooms, preparing signage, providing catering and audiovisual services, purchasing supplies, maintaining inventory, and processing invoices.

The Office of the General Counsel was established to assist the State Bar and the State Bar Foundation with the policy and regulatory functions of an integrated bar. Staff works specifically to protect the legal and policy interest of the State Bar; provide a professional legal resource for Bar leadership, volunteers and staff; and assist with outreach to State Bar members, the courts, and the public.

**Richard B. Spinello, Esq.**
**General Counsel**
Richard Spinello is charged with the responsibility of overseeing a professional office to protect the legal and policy interests of the State Bar. He assists in the areas of expansion of regulatory functions; provides a professional legal resource for the State Bar leadership, volunteers, and staff; administers and manages programs assigned to the office; assists with outreach to the judiciary; and advises in the areas of legislative, executive, and judicial processes.

**Christine Joseph**
**Program Administrator**
Chris Joseph oversees program administration for the Client Protection Fund Commission, the Fee Arbitration Program, and various assigned State Bar committees and programs. She provides professional administrative assistance to the Office of the General Counsel and the programs and projects assigned to the office. In addition, Chris serves on the Management Team.
Finance/Human Resources collects membership fees, processes membership status changes, replaces State Bar cards, and addresses membership questions. The department keeps the State Bar compliant with policies, procedures, practices, and the law with regard to finances and generally accepted accounting principles (GAAP).

**MaDonna Vandeventer, Director**

Vandeventer manages the dues collection process, changes in membership status, fee waiver requests, data input for new members, and human resources and benefits for the State Bar staff. She supervises the accounting staff and the receptionist. Madonna assists the auditors with the preparation of the budget and the financial audits and works directly with the Finance Committee on the financial well being of the State Bar.

**Gwenn Bolling**

**Accounting Manager**

Bolling generates monthly financial statements (client protection, pro hac vice, committees, sections, divisions and internal departments), the State Bar Foundation (general, Center for Legal Education, State Bar Center, Public Legal Services Department, and Access to Justice), and the Paralegal Division. She also processes payroll, daily deposits, and payables and receivables for all entities listed above. Gwenn is a member of the the Management Team.

**Jeanette Gutierrez**

**Director of First Impressions**

As the receptionist at the State Bar, Jeanette answers the phones, directs calls, and assists visitors to the State Bar Center. She produces and mails duplicate and new admittee State Bar cards and assists with walk-in orders for the Bench & Bar Directory. She logs incoming and all out-going checks for tracking. She inputs timeslips for directors and completes special assignments as requested.

Operations is responsible for address changes; database maintenance; e-mail extracts; IT infrastructure; software and hardware technical support; production; printing and mailing services; CD-DVD duplication; web design, development, and content management; ENews; building maintenance and security; and video conferencing services.

**Veronica Cordova, Director**

**Operations**

Cordova oversees the database, report writing, data extracts, and troubleshoots IT issues. She is responsible for building maintenance and security and coordinates Print Shop scheduling and cost accounting. She designs and develops the website, ENews, and the Intranet and serves as the project manager for Casemaker. She also manages technical support services for video conferencing to include site hosting, installation, training and immediate support to staff for scheduling and billing.

**Michael Rizzo**

**Print Shop Assistant**

Rizzo assists in the Print Shop to collate and mail the weekly Bar Bulletin. He helps with assembly, bundling and delivery of the Bar Bulletin to the post office.

**Brian Sanchez**

**Pressman**

Sanchez prints all in-house publications, including the Bar Bulletin, New Mexico Lawyer, CLE inserts, handbooks and pamphlets, and newsletters/information from divisions, sections and committees, as well as from other entities like the Hispanic Bar Association and the New Mexico Criminal Defense Lawyers Association.

**Pam Zimmer**

**Data Entry/Production Clerk**

Zimmer enters data into the database, including new admittee information and status changes from the court. She bundles the Bar Bulletin for the mailing, duplicates CD/DVDs for various projects, and handles various other mailings. Pam is a member of the Management Team.
The Center for Legal Education (CLE) is a non-profit, self-supporting entity operated as an entrepreneurial enterprise to successfully compete in the CLE marketplace.

Rob Koonce is responsible for operations management, marketing/advertising, strategic planning, and budgeting for the department. He coordinates CLE programming activities, including all state, local, and national series live seminars, webcasts, teleseminars, annual institutes and conferences, as well as archived self-study formats.

Sylvia Aguirre coordinates seminars, which includes providing written materials and ensuring that all audio/visual equipment is ready for presentation. She maintains CLE’s website, registers attendees and files credits with Minimum Continuing Legal Education. She can be contacted for all general questions regarding the Center for Legal Education. Sylvia is a member of the Management Team.

The New Mexico Business Weekly named the State Bar of New Mexico to its top ten list of “Best Places to Work” in the mid-sized company category in 2009. According to Nancy Salem, publisher of the N.M. Business Weekly, the publication “recognizes the top employers in the state, those who are changing the definition of ‘workplace’ for the better. From bountiful benefits to opportunities for growth and advancement, these companies know how to attract top-notch talent and keep employees happy and committed.”

Staff attended a breakfast honoring the top 10 standings in small, medium and large companies.
MEMBERSHIP AND COMMUNICATIONS

Services provided by the Membership and Communications Department include assistance to sections, committees and divisions; production of State Bar publications; administration and promotion of member benefits and services; and informing the media about the legal system and services available to the public.

Christine Morganti, Director
Membership and Communications

In addition to overseeing the department staff and budget, Chris Morganti provides advice and assistance to section, committee, division, and law student members, offering guidance on State Bar policies and bylaws and the utilization of State Bar resources to accomplish their goals. She is responsible for oversight and marketing of member benefits and services. Chris works with staff to finalize the Bar Bulletin and the Bench & Bar Directory. In addition, she interacts with the media to inform the public about the legal system and services available through the State Bar.

Tony Horvat
Membership Coordinator

Tony Horvat provides information and acts as chief administrator for sections, committees, and divisions. He maintains the website and database for these groups; coordinates their meetings, elections and appointments; disseminates financial statements; processes reimbursements; updates bylaws; maintains physical files; and transmits non-CLE based communications via e-blast. In addition, he schedules and assists groups utilizing video conferencing. Tony is the point of contact for the Law Student Membership Program, the Bill Kitts Network Program, and assists in finalizing the Bar Bulletin.

Dorma Seago
Editor

Dorma Seago edits the weekly Bar Bulletin, the quarterly New Mexico Lawyer, the annual Bench & Bar Directory and Staff Directory, and other publications and documents as needed. She receives material from numerous internal and external sources and prepares the submissions for publication. She works directly with the Compilation Commission and the N.M. Supreme Court to obtain court documents for publication. She writes, conducts interviews, and takes photographs. Dorma provides staff support to the Board of Editors which has editorial content responsibility for the Bar Bulletin. She is a member of the Management Team.

Marcia C. Ulibarri
Account Executive

Marcia Ulibarri is the point of contact for advertising and marketing in the Bar Bulletin, New Mexico Lawyer, Bench & Bar Directory, ENews, the online Products & Services Directory and Premium Listings (Find an Attorney), the State Bar Center exhibit tables and the Member Benefits Program. She works with the Membership Services Committee in organizing “Connections,” networking events that connect members to members or members to other professionals. Marcia answers questions regarding ad placement, cost, ad copy, and design. She is also the contact for the annual meeting sponsorships and exhibit space.
Public and Legal Services

The Public and Legal Services Department (PLSD) and the New Mexico State Bar Foundation provide a legal helpline, statewide public workshops, educational materials, and opportunities for both members of the State Bar and the public. The department works to further the mission of the State Bar in the areas of promoting access to justice for the citizens of New Mexico, providing public service, promoting respect of the law and the legal system, and assisting members with their professional obligations under the Rules of Professional Conduct and the Creed of Professionalism. Six components make up PLSD: Access to Justice Pro Bono Project (ATJ), Bridge to Justice Legal Assistance and Referral Programs (BTJ), Equal Access to Justice Campaign (EAJ), Lawyer Referral for the Elderly Program (LREP), Support Services and Centralized Intake, and State Bar President Initiatives and Projects.

Kasey Daniel, Esq.
Director
Public and Legal Services
Kasey Daniel has overall management responsibility for PLSD and the legal service programs. These programs include the six components listed above. In addition, Kasey serves on the Legal Services and Programs Committee. She is also chair of the Access to Justice Systems Planning Committee.

Jessica Campbell
LREP Legal Assistant
Jessica Campbell coordinates statewide private attorney referrals for LREP clients, helps schedule and publicize workshops, and provides general administrative support for the program. In addition, she provides backup support for the intake staff.

Harold Daum
LREP Volunteer
Harold Daum donates many hours each month to LREP where he assists with quality control and statistics. He follows up with private attorneys who accept LREP case referrals, collects case status information, and tracks the amount of time that attorneys have donated to LREP clients. Information about the attorney's pro bono contribution is included in the attorney's State Bar record.

Jorge A. Jimenez
Senior Administrative Assistant/BTJ Referral Coordinator
Jorge A. Jimenez refers callers to attorneys under the BTJ Referral Program. He provides administrative support to the PLSD director and back-up support for LREP. He provides Spanish translation and conducts intakes for Spanish-speaking callers. Jorge is a member the Management Team, serving as chair in 2010.

J. Gayolyn Johnson, Esq.
LREP Staff Attorney
Gayolyn Johnson conducts legal workshops and client clinics at senior centers around the state. She provides legal advice and information on the LREP helpline and designs and prints publicity posters for the workshops.

Marilyn Kelley
Assistant Director
Marilyn Kelley assists the PLSD director with program management, grant development and compliance, and oversight of the intake and administrative staff. She administers all education-related programs for youth and adults, including the bankruptcy and estate planning workshops. She coordinates Law Day events and works with the Disabilities Committee and the Public Legal Education Commission. Marilyn is a notary public and a member of the State Bar's Paralegal Division and Central New Mexico's Paralegal Studies Advisory Committee.
CHARLES D. NOLAND, ESQ.
LREP STAFF ATTORNEY
Chuck Noland provides legal advice, information, and brief services to New Mexicans 55 and older via the LREP helpline. He also presents legal workshops and meets with LREP clients at senior centers around the state and assists the director in planning the workshop schedule.

LUCAS ROMERO
ADMINISTRATIVE CLERK
Lucas Romero gathers basic information and directs callers to the appropriate referral program. Lucas speaks Spanish.

NITA TAYLOR
PRO BONO COORDINATOR
FOR ACCESS TO JUSTICE
Nita Taylor is responsible for implementing the Ten Step Plan for Improving Access to Justice. She works with judges, civil legal services providers, and private bars to create and support local pro bono committees in each judicial district. She assists these committees in formulating and implementing plans to provide New Mexico’s poor population with greater access to the legal system. Nita also coordinates the Executive Directors Forum.

RICHARD WEINER, ESQ.
LREP STAFF ATTORNEY
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OPINION

PATRICIO M. SERNA, JUSTICE

{1} Joe and Joanne Valles (Valleses) entered into a contract with a licensed contractor, Reule Sun Corporation (Reule) to apply stucco on their home. Reule hired an unlicensed subcontractor, Perez Plastering (Perez), to complete the project. Valleses were dissatisfied with both the initial stuccoing and re-stuccoing efforts and did not pay Reule. Reule filed a complaint alleging breach of contract and to file a lien against Valleses’ property. The district court found in favor of Reule, foreclosed the lien on Valleses’ property, and awarded damages to Reule. Valleses appealed and the Court of Appeals upheld the district court’s decision. Reule Sun Corp. v. Valles, 2008-NMCA-115, ¶¶ 1, 31, 144 N.M. 736, 191 P.3d 1197. We initially denied Valleses’ petition for writ of certiorari, but after motions for reconsideration and to file an amicus brief were granted, we granted the petition. We reverse.

I. BACKGROUND AND PROCEEDINGS BELOW

{2} Valleses entered into a contract with Reule for the application of stucco to their home for the price of $11,350.51. Reule hired Claudio Perez, an unlicensed contractor doing business as Perez Plastering, to complete the project. Reule did not pay Perez a salary, but instead paid him on a contract-to-contract basis. Perez had his own state tax identification number and paid his own taxes. Reule did not consider Perez an employee for tax purposes.

{3} Valleses were dissatisfied with the stucco job and Reule agreed to apply another layer of stucco for an additional charge of $888.83, bringing the contract price to $12,239.34. After the second application was completed, Valleses were still dissatisfied with the results and they indicated that they did not want Reule to enter their property to remedy any mistakes or to finish the clean-up procedures. Valleses never paid Reule the balance due on the contract after an initial down payment of $1,000. Reule filed a complaint of lien against Valleses’ property, followed by a complaint for breach of contract and to foreclose claim of lien. Valleses answered the complaint and asserted various counterclaims.

{4} Following a bench trial, the district court found that Perez performed the contract “under the complete direction and control of [Reule]” and that the “subject of [the] lawsuit [did] not involve a claim for compensation by an unlicensed contractor in violation of NMSA 1978, § 60-13-30.” The court also concluded that Reule had substantially performed its obligation under the contract and concluded that the protective purposes of the Construction Industries Licensing Act (CILA), NMSA 1978, §§ 60-13-1 to -59 (1967, as amended prior to 2003) were met. The district court found in favor of Reule, foreclosed the lien on Valleses’ property, and awarded Reule damages, including prejudgment interest, attorney fees, and costs. Valleses appealed.

{5} In affirming the district court’s judgment, the Court of Appeals applied the common law control test and held that Perez was Reule’s employee and not a subcontractor. Reule Sun Corp., 2008-NMCA-115, ¶¶ 11, 31. Then, relying on Mascareñas v. Jaramillo, 111 N.M. 411, 806 P.2d 59, 61 (1991) and Latta v. Harvey, 67 N.M. 72, 75-76, 352 P.2d 649, 650-51 (1960) for the proposition that “an employee is not a contractor and is therefore not required to obtain a contractor’s license[,]” the Court concluded that it “need not reach the question of whether a duly licensed contractor may recover for work performed by an unlicensed subcontractor.” Reule Sun Corp., 2008-NMCA-115, ¶ 11.

{6} We granted Valleses’ petition for writ of certiorari, which raised three issues: (1) whether the Court of Appeals erred when it applied the common law employee exception to the licensing requirements of the CILA; (2) whether the Court of Appeals erred when it failed to review the application of the facts under a de novo standard of review; and (3) whether an unlicensed business entity can be an “employee” of a licensed entity. We hold that an individual
who qualifies as a “contractor” under the CILA’s definition is required to have a contractor’s license when performing the specified acts described in the CILA, regardless of whether such an individual can be classified as an employee of a licensed contractor. Because we hold that Reule is precluded from maintaining an action for recovery of compensation for the work completed by Perez, we do not need to address the remaining two issues.

II. DISCUSSION

A. STANDARD OF REVIEW

[7] We are asked to determine if the Court of Appeals erred when it applied a common law employee exception to the CILA’s licensing requirements. This analysis is one of statutory construction, which we review de novo. Bishop v. Evangelical Good Samaritan Soc’y, 2009-NMSC-036, ¶ 8, 146 N.M. 473, 212 P.3d 361.

B. PRESERVATION

[8] Reule argues that Valleses failed to preserve the issue regarding the application of the common law control test to determine if a contractor is exempted from the CILA’s licensing requirements because they did not raise the issue in district court. Reule also argues that if application of the common law control test was an error, this Court should nonetheless refrain from reviewing the issue because the Valleses invited such error when they argued for its application below. We disagree with both contentions.

[9] “To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . .” Rule 12-216(A) NMRA; see also Chrysler Credit Corp. v. Beagles Chrysler-Plymouth, 83 N.M. 272, 273, 491 P.2d 160, 161 (1971) (a “matter not brought to the attention of the trial court cannot be raised for the first time on appeal”).

[10] In the district court, Valleses did not argue that the Section 60-13-3(D)(13) exception was the exclusive exception to the CILA’s licensing requirement for employees, nor did they argue that classifying Perez as an employee via the common law control test was inappropriate. Valleses were not required to raise either issue at the district court level. Until the district court and the Court of Appeals employed the common law control test to determine that Perez was an employee and thus exempt from the CILA’s licensing requirements, neither question was raised by Valleses was then at issue. Rather, Valleses were only required to argue that the wage-earner exception was inapplicable to exclude Perez from the CILA licensing requirements and the record indicates that they had done so.

[11] The testimony solicited at trial regarding the nature of the work relationship between Reule and Perez was primarily relevant to the question of whether Perez was a wage earner. For instance, Perez testified that he was paid by contract and not by salary and Reule testified that Perez paid his own taxes and was not an employee for tax purposes. Additionally, in their proposed findings of fact, Valleses asserted that (1) Perez was not Reule’s employee at the time he entered into the contract; (2) he did not receive a salary from Reule, but instead was paid on a contract-to-contract basis; and (3) he provided Reule with his own federal and state tax identification numbers and was doing business as Perez Plaster. Finally, Valleses specifically referenced the Section 60-13-3(D)(13) exception to the CILA’s definition of “contractor” in their proposed conclusions of law. Thus, Valleses adequately preserved the issue of whether the Section 60-13-3(D)(13) wage-earner exception applied to Perez.

[12] We also hold that Valleses did not invite error when they referenced and included the common law control test in their arguments in district court. We have held that “to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice.” State v. Collins, 2007-NMCA-106, ¶ 27, 142 N.M. 419, 166 P.3d 480 (internal quotation marks and citation omitted). A review of the record, however, indicates that Valleses’ argument regarding the control test was an alternative argument to their primary contention that Reule was barred from bringing an action for recovery under Section 60-13-30(A). For instance, we find significant the sequence in which Valleses presented their proposed conclusions of law to the district court. Valleses first referred to the CILA in their proposed conclusions of law by including its purpose and specifically citing several of its subsections. They included the licensing and certification requirements, as well as the remedy afforded to a consumer who is a party to a construction contract with an unlicensed contractor of Subsections 60-13-1.1(A) and (C). Valleses also specifically included Section 60-13-30(A)’s bar on recovery for unlicensed contractors, the CILA’s definition of “contractor,” the wage-earner exception, Section 60-13-3(D)(13), case law that stands for the proposition that contractors are prohibited from transferring a license or certificate of qualification to another, and the penalties that may be incurred if a contractor allows a contractor’s license to be used by an unlicensed person. Finally, Valleses proposed that the court conclude that “[t]he work performed by Perez is required to be licensed” and that “[Reule] violated the Act by permitting Perez . . . to work under [Reule’s] license to perform the Contract.”

[13] Valleses only mentioned the common law control test after they proposed numerous conclusions of law pertaining to their arguments that Reule was in violation of the CILA, precluding them from recovery. Under the then-governing case law, the control test was used to exempt individuals from the CILA’s licensing requirement. Valleses would have been remiss if they did not argue in reference to the control test and would have run the risk of conceding the point to Reule. Cf. Sullivan v. Sullivan, 82 N.M. 554, 555, 484 P.2d 1264, 1265 (1971) (holding that where a defendant did not object to action at trial, he cannot complain about such action to the Supreme Court). Valleses attempted to present a comprehensive case incorporating what they anticipated would be the necessary arguments; they did not “invite” the use of the control test, but instead referred to it in their argument because it was embedded in the inquiry. Granted, Valleses could have been clearer and stated that the control test was an alternative argument. However, for preservation purposes and in analyzing the invitation of error claim, we hold that the manner in which Valleses referenced the control test in their arguments did not amount to an invitation of the error.

C. STATUTORY ANALYSIS

[14] “The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent,” which is determined by looking “not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.” Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69. “We [will] give effect to the legislative intent by adopting a construction which will not render the statute’s application absurd or unreasonable and will not lead to injustice or contradiction.” Maes v. Audubon Indemnity Ins. Group, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934 (internal quotation marks and citation omitted).

[15] Our statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of
those words. *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579. “Under the plain meaning rule, when a statute’s language is clear and unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written.” *Id.* (internal quotation marks and citation omitted). In addition to the plain meaning examination, “[w]e also consider the statutory subsection in reference to the statute as a whole and read the several sections together so that all parts are given effect.” *Bishop*, 2009-NMSC-036, ¶ 11. Finally, the practical implications, as well as the statute’s object and purpose are considered. *Id.*

1. Perez Was a “Contractor” Under the CILA and Was Required to Be Licensed

[16] To determine whether the Court of Appeals erred when it applied a common law employee exception to the CILA licensing requirements, we must first determine if Perez was a “contractor” under the meaning of the statute. The CILA defines a contractor as “any person who undertakes, offers to undertake . . . by himself or through others, contracting includes constructing, altering, repairing, installing or demolishing any . . . building, stadium or other structure.” Section 60-13-3(A)(2). Additionally, the CILA includes subcontractors and specialty contractors in its definition of contractors. Section 60-13-3(B). There is no dispute that Perez, by virtue of applying stucco to Valleses’ house, was a contractor under the meaning of the CILA.

[17] Rather, the question for us to determine is whether Perez falls within an exclusion and so is exempted from the CILA’s licensing requirement.

[18] We next determine, therefore, whether Perez qualifies under one of the exceptions listed in Section 60-13-3(D). This subsection lists several exceptions to the definition of a “contractor” under the CILA. The most pertinent exception states that the definition of a “contractor” does not include “an individual who works only for wages.” Section 60-13-3(D)(13).

[19] To determine the meaning of this exclusion, we first look to the plain meaning of the language used by the Legislature. In this case, we have the benefit of the CILA’s statutory definition of “wages.” Section 60-13-2(I) defines “wages” as “compensation paid to an individual by an employer from which taxes are required to be withheld by federal and state law.” *Id.* Under the plain meaning rule, and by reading the exception in conjunction with the statutory definition of “wages,” we interpret the Section 60-13-3(D)(13) exception to exclude from the definition of a “contractor” individuals who work only for compensation from which taxes are required to be withheld by federal and state law. In this case, it is clear that Reule did not withhold Perez’s taxes. Perez does not qualify under the wage-earner exception to the definition of a “contractor” under the CILA and was thus required to possess a contractor’s license. Because the statutory language is clear and unambiguous and its application to the facts of this case is straightforward, we “refrain from further statutory interpretation.” *See Hubble*, 2009-NMSC-014, ¶ 10. We now discuss the Court of Appeals’ decision not to address Section 60-13-30(A)’s preclusion following its determination through the common law control test that Perez was Reule’s employee.

2. An Unlicensed Contractor’s Classification Under the Common Law Control Test as an Employee of a Licensed Contractor Does Not Exempt the Unlicensed Contractor from the CILA’s Licensing Requirements

[19] The Court of Appeals cited both *Mascareñas*, 111 N.M. at 412, 806 P.2d at 61, and *Latta*, 67 N.M. at 75-76, 352 P.2d at 650-51, for the proposition that “an employee is not a contractor and is therefore not required to obtain a contractor’s license.” *Reule Sun Corp.*, 2008-NMCA-115, ¶ 11. The Court also quoted the control test language from *Campbell v. Smith*, 68 N.M. 373, 377, 362 P.2d 523, 525-26 (1961): “[i]n the principal test to determine whether one is . . . an employee is whether the employer has any control over the manner in which the details of the work are to be accomplished.” *Id.* ¶ 13. After examining the relationship between Perez and Reule using the common law control test factors, the Court held that Perez was Reule’s employee, and thus, the question of whether Reule could recover for work performed by Perez did not need to be reached. *Id.* ¶¶ 11-15.

[20] Although the Court of Appeals cited *Mascareñas*, a careful review of that opinion reveals that the *Mascareñas* Court actually analyzed the employer-employee relationship under the lens of the Section 60-13-3(D)(13) wage-earner exception, and not the common law control test. 111 N.M. at 412, 806 P.2d at 61 (“If [the contractor was a wage-earning employee], he was not required to obtain a contractor’s license pursuant to NMSA 1978, Section 60-13-3(D)(13)”). Although the *Mascareñas* Court did mention the common law control test, it did not use it in its analysis, but instead based its decision on the fact that the contractor was not paid an hourly wage and did not have time slips and tax forms. *Id.* Therefore, we do not include *Mascareñas* in the line of cases that used the common law control test to determine whether a contractor is exempt from the CILA’s licensing requirements.

[21] On the other hand, *Latta* and *Campbell*, did use the control test in determining whether a contractor was exempt from the CILA’s licensing requirements. Given our previous holding in *Latta*, the Court of Appeals appropriately analyzed the relationship between Perez and Reule under the lens of the common law control test to determine whether Perez was Reule’s employee or an independent contractor. *Reule Sun Corp.*, 2008-NMCA-115, ¶¶ 11-15. After holding that Perez was sufficiently under Reule’s control and therefore its employee, the Court also correctly followed precedent when it held that Perez was not required to obtain a license, rendering the bar for recovery articulated in Section 60-13-30(A) inapplicable. Ruehl Sun Corp., 2008-NMCA-115, ¶ 22. We now take this opportunity to examine the history of the CILA as well as the rationale of our previous holdings in *Latta* and *Campbell* to determine whether the common law control test remains applicable.

[22] Since its enactment, the wage-earner exception has been incorporated into the CILA. In the 1939 session laws, the Legislature excepted wage earners from its definition of a “contractor”:

A contractor within the meaning of this act is a person, firm, . . . other than those engaged in highway or railroad construction, or for either a fixed sum, price, fee, percentage, or other compensation other than wages, undertakes or offers to undertake, or purports to have the capacity to undertake to construct, alter, repair . . . 1939 N.M. Laws, ch. 197, § 3 (emphasis added). Likewise, in the 1953 compilation, the Legislature retained the exception. NMSA 1953, § 67-16-3 (1939, as
amended through 1947). In the context of licensing requirements, the statute has never contained an exception for individuals who are classified as “employees” by using control test factors.

{23} Despite the absence of an “employee” exception in the controlling statute, the Latta Court nonetheless relied on an unlicensed contractor’s classification as an employee under the common law control test to determine that the unlicensed contractor was barred from recovery. 67 N.M. at 75, 352 P.2d at 650-51. In that case, the plaintiff, an unlicensed contractor, was hired by one of the defendants to work on a water well. Id. at 74, 352 P.2d at 650. After the work was unsuccessful, both the plaintiff and that defendant agreed that the plaintiff would drill a second hole for a well and conduct additional work on the first well. Id. The plaintiff completed the work on the first well and moved his equipment to the location of the second well in preparation for further work. Id. The plaintiff brought an action against the defendants for the value of drilling work and for furnishing standby equipment and services. Id. The district court focused on the relationship between the plaintiff and the defendant and concluded that the “plaintiff was at all material times hereto the servant and employee of defendant.” Id. at 75, 352 P.2d at 650 (internal quotation marks omitted). The district court rendered judgment in favor of the plaintiff and the defendants appealed. Id. at 74, 352 P.2d at 650.

{24} On appeal to this Court, the defendants contended that because the plaintiff did not have a contractor’s license, and because his drilling was covered by the contractors licensing act as required by NMSA 1953, Section 67-16-3, he was barred from recovering under NMSA 1953, Section 67-16-14 (1939, as amended through 1947) Latta, 67 N.M. at 75, 352 P.2d at 650-51. The Latta Court declined to address this contention because “the findings [made] it sufficiently plain that Latta was an employee, and not an independent contractor. At all times, the right of control of the performance of the work and the right to direct the manner in which the work would be done was in [defendant].” Id. at 75, 352 P.2d at 651. Thus, the Latta Court concluded that the plaintiff was not precluded from maintaining the action to recovery. Id. at 76, 352 P.2d at 651.

{25} The following year, in Campbell, this Court also analyzed the relationship between a subcontractor and his employer by using the control test to determine whether the subcontractor was subject to the licensing requirement of NMSA 1953, Section 67-16-3. 68 N.M. at 377-78, 362 P.2d at 525-26. The defendants in Campbell hired the plaintiff subcontractor to construct a drive-in theater, wherein the plaintiff was to be responsible for purchasing all the equipment and supplies and for employing all necessary labor. Id. at 375, 362 P.2d at 524. The plaintiff alleged that he was to have “sole supervision and direction of the construction” as well as managerial duties once the theater was in operating condition. Id. The plaintiff was to receive a salary of $30 per week and a share of annual profits for his construction work and as the theater’s manager. Id. The plaintiff completed the construction, and three months after the theater opened for business, he quit due to a disagreement with the defendants. Id. The plaintiff brought an action to recover the value of his services in connection with the theater’s construction. Id. at 374, 362 P.2d at 524. A jury rendered a verdict in favor of the plaintiff and the defendants appealed.

{26} On appeal, this Court used the control test to examine the relationship between the plaintiff and the defendants to determine whether the plaintiff was an independent contractor or the defendants’ employee: “[t]he principal test to determine whether one is an independent contractor or an employee is whether the employer has any control over the manner in which the details of the work are to be accomplished.” Id. at 377, 362 P.2d at 525-26. The Court further stated that “it is the right to control, not the exercise of it, that furnishes the test.” Id. at 377, 362 P.2d at 526 (internal quotation marks and citation omitted). The Court found that significant control was present in that the defendants did not have the right to “terminate the employment at will which was said to give the employer the right to exercise control over the manner in which details of the work were to be exercised.” Id. at 378, 362 P.2d at 526. Thus, the Court held that the plaintiff was an independent contractor under the meaning of NMSA 1953, Section 67-16-3, and because he failed to allege that he had a contractor’s license, he was precluded from maintaining the action by NMSA 1953, Section 67-16-14. Campbell, 68 N.M. at 378, 362 P.2d at 526.

{27} The Courts’ creation of an “employee” exception is a clear deviation from the CILA. From its inception, the CILA has excluded individuals receiving compensation in the form of “wages” from the definition of “contractor” and from its licensing requirements. Never has the CILA provided that individuals who may be classified as “employees” under the control test be excepted from the definition of a “contractor,” nor be exempt from its licensing requirements. Thus, the Latta and Campbell Courts improperly read a control test “employee” exception into the statute and effectively broadened the statutory exclusion beyond the scope that the Legislature intended.

{28} In response to Latta and Campbell, the Legislature effectively abrogated the common law control test as applied to the CILA by adding the definition of “wages” to the definitions section of the statute: “‘wages’ means compensation paid to an individual by an employer from which taxes are required to be withheld by federal and state law.” 1967 N.M. Laws, ch. 199, § 2(I). This addition emphasized the Legislature’s intent to limit the exception relating to employees only to wage earners, as opposed to the broader category of employees. Furthermore, the wage-earner exception was made more explicit when the Legislature reformed the statute. The paragraph once containing the definition of a “contractor,” along with its exceptions, was transformed into three different subsections. Compare 1939 N.M. Laws, ch. 197, § 3, and NMSA 1953, § 67-16-3, with 1967 N.M. Laws, ch. 199, § 3. The wage-earner exception was placed into its own subsection, Section 3(C)(13), and it provided that a “contractor” does not include “an individual who works only for wages[.]” 1967 N.M. Laws, ch. 199, § 3(C)(13).

{29} We interpret the Legislature’s addition of the definition of “wages,” along with the statute’s restructuring, as a repudiation of the control test as applied to the CILA. We hereby overrule the Latta-Campbell line of cases to the extent that they may be interpreted to allow an unlicensed contractor to be exempt from the CILA’s licensing requirement because such a contractor may be classified as an employee of a licensed contractor under the common law control test. The Legislature has expressly designated wage earners to be excepted under the definition of “contractors” and to allow an individual, who would otherwise be required to have a license, to nonetheless be exempt because such an individual was under the “control” of a licensed contractor, would be adding an exception to the statute.

{30} We next address Reule’s contention that the Legislature has adopted the common law control test as evidenced by the addition of NMSA 1978, Section 60-13-3.1
and it provides:

for purposes of the employer and employee relationship within those construction industries subject to the Construction Industries Licensing Act, a contractor who is an employer shall consider a person providing labor or services to the contractor for compensation to be an employee of the contractor and not an independent contractor unless the following standards indicative of an independent contractor are met.

The statute then lists six different standards, only one of which must be met to classify the individual as an independent contractor and not as an employee. In particular, the first standard provides that an individual is considered an independent contractor if “the person providing labor or services is free from direction and control over the means and manner providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results.” Section 60-13-3.1(A)(1) (emphasis added).

It may be tempting to equate the use of the specific language in Section 60-13-3.1(A)(1), which is consistent with the common law control test, and its placement at the beginning of the CILA with the Legislature’s intent to adopt the common law control test for all CILA purposes. However, we disagree and hold that Section 60-13-3.1 does not reflect such an intent when determining whether a contractor is required to be licensed.

Section 60-13-3.1(A)(1) is consistent with the common law control test only in the context of examining the employer-employee relationship to classify a contractor as either an employee or an independent contractor. See § 60-13-3.1(A) (“for purposes of the employer and employee relationship . . . an employer shall consider a person providing labor or services to the contractor for compensation to be an employee of the contractor and not an independent contractor unless the following standards indicative of an independent contractor are met”) (emphasis added)). There is no language contained in this section that indicates that the classification of a contractor as an employee will exempt such contractor from the CILA’s licensing requirements or serve as an exception to the definition of “contractor.”

Further, as indicated in the compiler’s note, Section 60-13-3.1 was not enacted as part of the CILA: “[t]his section was not enacted as part of the Construction Industries Licensing Act but has been compiled here for the convenience of the user.” Thus, because the compiler and not the Legislature determined the location of this section in the statutes, the application effect normally present in sections placed at the beginning of an act, such as the purpose and general definition sections, is not present in this instance. See, e.g., Wilschinsky v. Medina, 108 N.M. 511, 517, 775 P.2d 713, 719 (1989) (noting that when the Legislature provides definitions as part of a statute, those definitions are binding on the courts interpreting the statute).

Also, reading the different subsections of Section 60-13-3.1 as a whole indicates that the employer-employee analysis is not applicable in the context of licensing, but instead in the context of unfair labor practice. See § 60-13-3.1(C) (describing the punishment for a contractor who intentionally and willfully reports an employee as an independent contractor when the employee does not meet the standards in Subsection A); § 60-13-3.1(D) (describing the implications of a conviction of a contractor for violating Subsection C). Thus, we hold that Section 60-13-3.1 does not indicate that the Legislature intended to adopt the common law control test for licensing requirement determinations.

Allowing an individual to whom the CILA’s definition of “contractor” applies, but who may also be classified as an employee of a licensed contractor via the common law control test, to be exempt from the CILA’s licensing requirement impermissibly adds an exception to the statute. In addition, the Legislature has not adopted the control test for license requirement purposes. As a result, an unlicensed contractor’s classification as an employee of a licensed contractor via the common law control test does not exempt the unlicensed contractor from the CILA’s licensing requirements. Therefore, regardless of Perez’s classification under the common law control test, he was required to have a license for the work he performed on Valleses’ house.

Given that Perez was not exempt from the CILA’s licensing requirement, we now turn to the applicability of Section 60-13-30(A).

Section 60-13-30(A) provides:

No contractor shall act as agent or bring or maintain any action in any court of the state for the collection of compensation for the performance of any act for which a license is required by the Construction Industries Licensing Act without alleging and proving that such contractor was a duly licensed contractor at the time the alleged cause of action arose.

Applying the plain meaning rule to this section, the word “such” denotes that a contractor is prohibited from bringing any action to collect compensation for the work that particular contractor performed if he or she was unlicensed at the time of performance. Applying this interpretation to the facts of this case, it is clear that Perez, because he was not licensed at the time the alleged cause of action arose, would be prohibited from bringing or maintaining an action for compensation. However, the facts of this case present a different situation since a licensed contractor is attempting to maintain an action to collect compensation for work performed by another contractor; in this case, an unlicensed one.

This section of the CILA expressly prohibits a contractor in a multi-party situation from acting as an agent for an unlicensed contractor during the collection process. Section 60-13-30(A). Black’s Law Dictionary defines “agent” as “One who is authorized to act for or in place of another; a representative . . . .” Black’s Law Dictionary 72 (9th ed. 2009). In this case, the record is clear that Perez has no stake in the outcome of the case. He has already been fully compensated by Reule for the work he completed and is not seeking any other form of compensation. Thus, Reule is not “acting for or in place of” Perez and cannot be considered his agent. We must now determine whether a licensed contractor is precluded from bringing or maintaining an action to collect compensation for work performed by an unlicensed contractor for whom the licensed contractor is not acting as an agent.

Reading Section 60-13-30(A) as it relates to the CILA as a whole, we hold that it precludes a licensed contractor from bringing or maintaining an action to collect compensation for work performed by an unlicensed subcontractor. The purpose of
the CILA is to “promote the general welfare of the people of New Mexico by providing for the protection of life and property by adopting and enforcing codes and standards for construction, alteration, installation, connection, demolition and repair work.” Section 60-13-1.1. The CILA further states that:

To effect this purpose, it is the intent of the legislature that . . . examination, licensing and certification of the occupations and trades within the jurisdiction of the Construction Industries Licensing Act be such as to ensure or encourage the highest quality of performance and to require compliance with approved codes and standards and be, to the maximum extent possible, uniform in application, procedure and enforcement. Section 60-13-1.1(A).

The Legislature effects its purpose by requiring an applicant for a license to undergo extensive training and to have considerable construction experience and, once licensed, to comply with stringent standards and codes under the penalty of law. See, e.g., § 60-13-12(A) & (B) (prohibiting an unlicensed contractor from (1) acting as a licensed contractor for work specified in the Act, and (2) bidding on a contract); § 60-13-14(B)(8) (requiring an applicant for a license to “have had four years, within the ten years immediately prior to application, of practical or related trade experience dealing specifically with the type of construction or its equivalent for which the applicant is applying for a license”); § 60-13-23 (listing the grounds for a license suspension or revocation); § 60-13-59(C) & (D) (requiring every building permit to contain the name and license number of the general contractor and for it to be prominently displayed at the construction site).

In addition, the CILA contains provisions that effect its purpose by prohibiting an individual who has not undergone the stringent application procedures and who has not met the experience requirements from obtaining a license or from using another’s license. See, e.g., § 60-13-13.2 (providing that the “division shall not accept an application, shall not issue a license and shall require a change in the name of a proposed license if the proposed name is identical to or . . . so similar that it may cause confusion with a name on a pending application or an existing license”); § 60-13-18(A) (prohibiting the transferring of licenses). By not allowing a contractor’s license to be transferred either intentionally or inadvertently to another individual, it is more likely that a person who has undergone the necessary training and testing will actually perform the activities specified in the Act. This is aligned with the stated purpose of “ensur[ing] or encourag[ing] the highest quality of performance” for the people of New Mexico. See § 60-13-1.1(A).

When reading Section 61-13-30(A) together with the other provisions in the CILA and considering its practical implications, we hold that our decision to preclude a licensed contractor from collecting for work performed by an unlicensed contractor is aligned with the CILA’s purpose. This preclusion would encourage licensed contractors to hire only licensed individuals, which comports with the CILA’s strict application and experience requirements because it does not allow for unlicensed contractors to evade the stringent standards otherwise required by the Act. Also, because our interpretation would not allow a licensed contractor who hires unlicensed contractors under the guise of his or her license to go unpunished, it reinforces the CILA’s prohibition against the transferring of licenses. Further, our interpretation aligns with those provisions that provide penalties for non-compliance. Thus, when we read the CILA in its entirety and “construe each part in connection with every other part to produce a harmonious whole,” see State v. Javier M., 2001-NMSC-030, ¶ 27, 131 N.M. 1, 33 P.3d 1 (internal quotation marks and citation omitted), and consider the practical effects of our interpretation, Section 60-13-30(A) precludes a licensed contractor from collecting for work performed by an unlicensed contractor.

We did consider the competing practical considerations: the possibility that individuals such as Valleses in this case may be unjustly enriched if a licensed contractor is precluded from collecting compensation for work done by unlicensed individuals. However, our holding in Triple B Corp. v. Brown & Root, Inc., 106 N.M. 99, 102, 739 P.2d 968, 971 (1987), has already addressed these competing policies:

We will not recognize an equitable defense of unjust enrichment because the Legislature in Section 60-13-30 necessarily authorized the unjust enrichment of the recipients of work performed by unlicensed contractors. In order to protect the public from irresponsible or incompetent contractors, the Legislature chose to harshly penalize unlicensed contractors by denying them access to the courts to collect compensation for work performed. Its policy must override the judicial principle that disfavors unjust enrichment.

It is so ordered.

Patricio M. Serna, Justice

We concur:
Edward L. Chávez, Chief Justice
Petra Jiménez Maes, Justice
Richard C. Bossen, Justice
Charles W. Daniels, Justice
APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
JOE PARKER, District Judge

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus
WILLIAM RILEY,
Defendant-Appellant.
No. 29,992 (filed: January 19, 2010)

OPINION
PATRICIO M. SERNA, JUSTICE

1. BACKGROUND

2. On June 25, 2004, Defendant shot his friend, Shawn Pitts (Victim) multiple times while Victim was inside a car in Defendant’s driveway. Victim later died from his wounds. Defendant and Erica Moten had been in a relationship for five to six years and had two children together. They lived in a house together in Clovis until Moten ended the relationship about one and a half months prior to the murder. After the relationship ended, Defendant moved into his own apartment and made attempts to reconcile with Moten. Two or three weeks before the murder, Moten began to date Victim. Moten and Victim kept their relationship a secret because Victim did not want to ruin his friendship with Defendant. Victim was also dating Moten’s close friend, Ray Shaun Parsons, who Moten considered to be her sister and who had the same grandmother, Anne Parsons (Grandmother).}

3. About three weeks before the murder, Defendant had a lengthy conversation with Grandmother about his relationship with Moten and how he wanted to reconcile with her so that he, Moten, and their children could be a family again. Grandmother was aware that Moten and Victim were “seeing” each other, but she did not inform Defendant because she was concerned how Defendant would react if he knew. She testified that “hell might break loose” if Defendant caught the two of them together. Defendant informed Grandmother that Parsons was “messing around” with Victim and that he was concerned that Victim was mistreating her. Grandmother testified that Defendant was depressed because he was not able to reconcile with Moten and maintain his family. Grandmother characterized the relationship between Defendant and Moten as obsessive and encouraged Defendant to get counseling. Grandmother also encouraged Defendant to move back to his family in California for a while so that he could reflect on what went wrong with his relationship and to think about his daughters. Defendant moved back to California.

4. While in California, Defendant made a phone call to Grandmother’s house in an attempt to contact Moten and spoke with Grandmother. Defendant informed Grandmother that he was returning to Clovis and told her, “I didn’t take care of things before I left there and I’ve just got to come back and I’ll just get everything done I need to do and then I’m going to just go on back to California and maybe things will work out for us later.” A day or two before the murder, Defendant called Moten from a bus stop in Arizona and told her that he was returning to Clovis. Then the night before the murder, Defendant broke into Moten’s house and wrote her a letter, dated Thursday, 11:00 p.m. to 3:00 a.m., and left it for her in the house. In the letter, Defendant expressed his desire to reconcile with Moten and to have a family and stated, “You [are] the world in my life, I want to be back in your arms, I want to love you and my God given children, you guys are my [oxygen] with out you I [can’t] breathe[.]” Defendant also stated in the letter,

But I came back to Clovis and I had to flat out dis [that] bitch, I [don’t] want my sister in law to be acting like that [though] because she is a smart and decent girl and if a bitch even get out of line with her (Shawn) I might snap and [lose] it!!

5. The following day, Victim’s friend, Chris Aultman, drove Victim from Parsons’...
house to the daycare at which Parsons and Moten worked to retrieve keys to Parsons’ home. Aultman remained in the car while Victim retrieved the keys and looked up to see Defendant and Victim talking in front of the daycare. Defendant and Victim began to argue about Moten. Defendant told Victim, “Let’s go talk at my house.” The two then started walking towards Defendant’s apartment, with Aultman driving along beside them. When the three men reached Defendant’s apartment, Defendant and Victim continued arguing and were “in each other’s face,” and Aultman exited his car and attempted to separate them. After they were separated, Defendant called Victim a “bitch” and Victim called Defendant a “coward.” At that point, Aultman and Victim got into the car and Defendant went into his apartment. About five to ten seconds later, Defendant ran out of his apartment with a gun in his hand, yelling, “I’ll kill you. I’ll kill you” and began shooting at the car. Aultman had seen the gun that Defendant wielded in Defendant’s possession prior to the murder. In all, Defendant fired at Victim five or six times. As Defendant was shooting, Aultman saw Victim’s chest bleeding. Aultman got out of the car and began to run away, and Defendant ran towards the daycare with the gun in his hand. Defendant ran down an alley, jumped the fence to the daycare and went inside the building. Once inside, Defendant took off his shirt and threw it behind a refrigerator. Defendant then left the daycare and proceeded to run up the road in a frantic manner where he was eventually detained by police. Meanwhile, back at Defendant’s apartment, Aultman returned to the car to check on Victim. When Aultman got into the car, Victim grabbed his arm and said, “I can’t believe he shot me.” Aultman then drove Victim to the hospital where Victim later died.

[7] Police recovered Defendant’s shirt from behind chairs or boxes that were next to a refrigerator in the daycare. Police collected clothing and DNA samples from Defendant. Upon examination, the shirt collected from Defendant as well as his left hand appeared to contain blood stains. Also, one of the T-shirts tested contained the DNA of both Defendant and Victim. Police conducted a gunshot residue test of Defendant and while the test was being conducted, Defendant stated that he had shot a firearm a couple of days before. Also, Defendant’s shoe and a shoe print found at the daycare were consistent in terms of physical shape, size, and tread design.

[8] After conducting a crime scene recreation, a crime unit investigator concluded that Victim was shot while in the passenger seat of the car. Based on the evidence found at the scene, the investigator concluded that Victim was initially in the passenger seat, then he started to turn towards the driver side of the car, exited the car from the driver side, ran away from the car, and then returned to the car before being driven to the hospital. The investigator also opined as to the sequence of the shots: the first shot struck the hood of the car and was shot from the entrance of Defendant’s apartment, which was about 38 feet away; the second shot struck and shattered the window on the passenger side of the car; the third shot most likely struck Victim, traveled through his clothing, and struck the steering column; the fourth shot struck Victim in the upper torso; and the fifth shot struck Victim in the buttocks.

[9] An autopsy of Victim’s body revealed Victim sustained three gunshot wounds: on the left shoulder, on the left chest area, and on the right buttocks. The medical investigator concluded that the second shot—which struck and broke Victim’s breastbone, traveled through the right or left lung, and exited from the right side of Victim’s body—was a fatal wound. The medical investigator was able to determine that the distance between the barrel of the gun and Victim’s body was within two to three inches of Victim’s body for the left shoulder wound, within three to four inches for the chest wound, and within a foot and a half for the buttocks wound. A combination of gunshot wounds was the cause of Victim’s death.

[10] Defendant was charged with first degree murder, aggravated assault with a deadly weapon, tampering with evidence, and shooting at or from a motor vehicle. A jury found Defendant guilty on all charges and Defendant appealed to this Court.

II. DISCUSSION

A. Sufficiency of the Evidence

[11] Defendant argues that there was insufficient evidence of deliberate murder to support his first degree murder conviction. We disagree.

[12] “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” State v. Duran, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). In applying this standard, an appellate court “review[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” State v. Rudolph, 2008-NMSC-036, ¶ 29, 144 N.M. 305, 187 P.3d 170 (internal quotation marks and citation omitted). In reviewing the evidence, the relevant question is whether “any rational jury could have found each element of the crime to be established beyond a reasonable doubt.” State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). The reviewing court does not substitute its judgment for that of the jury: “[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant’s version of the facts.” State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Nor will this Court “evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” State v. Graham, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (internal quotation marks and citation omitted).

[13] In New Mexico, first degree murder includes “any kind of willful, deliberate and premeditated killing[.]” NMSA 1978, § 30-2-1(A)(1) (1963) (amended 1994). A deliberate decision is one “arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action.” UJI 14-201 NMRA. “Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established

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1 Defendant was also charged with possession of a firearm, possession of marijuana with intent to distribute, possession of drug paraphernalia, and child abuse. Defendant made a motion to sever these charges from the other four charges. The district court granted the motion to sever and the State later dismissed the severed charges.
The State presented substantial evidence to support the jury’s conclusion that Defendant killed Victim with deliberate intent. There was background evidence of Defendant’s state of mind prior to the day of the murder. Defendant was upset and depressed after Moten ended their six-year relationship and made futile attempts to reconcile with Moten. Grandmother testified that the relationship between Defendant and Moten was “obsessive,” that he had encouraged Defendant to get counseling and that “hell might break loose” if Defendant discovered that Moten and Victim were “seeing” each other. While in California, Defendant made a phone call to Grandmother and told her that he was returning to Clovis because he “didn’t take care of things” before he had left and how he will “just get everything done.” The night before the murder, Defendant broke into Moten’s house and left her a letter that stated his desire to reconcile with her and to maintain his family. He wrote that Moten was “the world in [his] life” and that he could not breathe without her and their two children. He expressed his concerns about Victim “messaging around” with Parsons and wrote that he would “snap and [lose] it” if Victim “[got] out of line” with her. On the day of the murder, Defendant confronted Victim at the daycare and the two began arguing loudly about Moten until Defendant told Victim that they should “go talk at [his] house.” The two continued arguing, and at one point, they were “in each other’s face.” When they separated, Defendant called Victim a “bitch” and Victim called Defendant a “coward.” Defendant then went into his apartment and five to ten seconds later, came out running towards Victim and Aultman with a gun in his hand. Defendant yelled, “I’ll kill you. I’ll kill you” as he shot at Victim five or six times. Additionally, the jury was presented with physical evidence from which it could have inferred deliberate intent. There was evidence that Victim was shot two times at point-blank range while he was in the passenger seat of the car and was once again shot in his buttocks as he was attempting to flee from the car.

Relying on State v. Taylor, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863 and Garcia, 114 N.M. 269, 837 P.2d 862, Defendant asserts that the evidence was insufficient to support a conviction of first degree murder. In claiming that his actions were “no different than those in Taylor and Garcia[sic],” Defendant contends that “[i]t here was no evidence to sustain a finding that [Defendant] weighed the considerations for and against his proposed course of action; and that he weighed and considered the question of killing and his reasons for and against his choice.” We disagree.

In Taylor, the Court of Appeals reversed a first degree murder conviction because there was insufficient evidence of Defendant’s deliberation. 2000-NMCA-072, ¶¶ 24, 26. In that case, while the defendant and his wife were at home, the wife slapped their eighteen-month-old daughter in the face. Id. ¶ 4. After the wife hit the baby the third time, the defendant retrieved a gun and shot his wife three times. Id. ¶ 5. Defendant told the police that his wife “had the devil in her eyes” when she was slapping the baby and that he shot “the devil.” Id. After a competency hearing pursuant to NMSA 1978, Section 31-9-1.5 (1988) (amended 1999), the district court found that there was “clear and convincing evidence that [the d]efendant committed first degree murder.” Id. ¶ 7.

The Court of Appeals reversed, stating that “the events surrounding the shooting are vague . . . . [and] our knowledge of the circumstances is limited.” Id. ¶¶ 20, 26. The Court held that the judicial findings—the defendant’s confusion between his wife and the devil, the fact that he wandered through the desert looking for his wife after he had already shot her, and the defendant’s statements that his daughter was with his wife and with God—“put into question [the d]efendant’s state of mind at the time of the shooting, and they raise grave doubts about whether [the d]efendant’s killing of [his wife] was the result of careful thought.” Id. ¶ 21 (internal quotation marks, brackets, and citation omitted). The Court held that the “strongest evidence supporting the district court’s finding of first degree murder”—the defendant’s admission that he armed himself by direct evidence.” State v. Sosa, 2000-NMSC-036, ¶ 9, 129 N.M. 767, 14 P.3d 32 (internal quotation marks and citation omitted).

In Garcia, this Court also reversed a conviction for first degree murder because there was insufficient evidence to support a finding of deliberate intent. 114 N.M. at 275-76, 837 P.2d at 868-69. In that case, the defendant and the victim began arguing, subsequently made up, then began fighting again until ultimately the defendant stabbed the victim. Id. at 270, 837 P.2d at 863. We concluded that “there was no evidence to support the jury’s conclusion that . . . [the defendant] decided to stab [the victim] as a result of careful thought; that he weighed the considerations for and against his proposed course of action; and that he weighed and considered the question of killing and his reasons for and against this choice.”

Additionally, the nature of the killing in this case further distinguishes it from Taylor and Garcia. In both Taylor and Garcia, there was no evidence of the defendants’ state of mind prior to the respective killings. Here, the State presented evidence of Defendant’s emotional state regarding the recent break up in the weeks prior to the murder as established by Defendant’s conversations with Grandmother, the letter he wrote to Moten, and the fact that he and Victim were arguing about Moten in the moments leading up to the killing. Defendant also expressed his attitude toward Victim in a threatening tone when he wrote the letter to Moten.

Additionally, the nature of the killing in this case further distinguishes it from Taylor and Garcia. The manner in which Defendant continued to shoot Victim differed significantly from the way the Taylor and Garcia defendants killed their respective victims. While the Taylor defendant’s retrieval of a gun and subsequent shooting of his wife after seeing her slap their daughter for the third time and the Garcia defendant’s fatal stabbing which came in the
midst of a period of fighting and making up were insufficient to prove deliberate intent, a reasonable jury could infer deliberate intent based on Defendant’s actions in this case. Defendant came running out of his apartment yelling, “I’ll kill you. I’ll kill you[.]” as he began to shoot at Victim. He first shot from about thirty-eight feet away and then ran towards Victim and fired four or five more shots. Defendant fired two of the shots from less than four inches from Victim’s body and then shot Victim one final time as Victim was attempting to escape from the car. See State v. Garcia, 95 N.M. 260, 261-62, 620 P.2d 1285, 1286-87 (1980) (finding of deliberate intent when defendant was aggressor and victim had tried to run away before fatal shot).

{21} The evidence of Defendant’s state of mind in the days leading up to the murder and his declaration of his intent to kill Victim just before opening fire, coupled with the physical evidence is sufficient to prove Defendant’s deliberate intent to kill. Viewing the evidence in the light most favorable to the verdict, we hold that a reasonable jury could have concluded that Defendant killed Victim with deliberate intent. Defendant’s first degree murder conviction is affirmed.

B. Motion to Strike the Jury Pool

{22} On appeal, Defendant argues that he was denied his Sixth and Fourteenth Amendment rights to have a petit jury selected from a fair cross-section of the community. The State contends that Defendant failed to preserve the constitutional issue for appeal because his objection in district court was “legally insufficient.” We agree with the State.

{23} During the jury selection process, Defendant moved to strike the entire jury panel because he claimed that since Defendant was black, “under Batson [v. Kentucky, 476 U.S. 79 (1986)],” he was entitled to “a jury panel that at least has some blacks.” Defendant moved for a mistrial, requested that the entire jury panel be struck, and that the State be given six months to ensure that a “proper” jury was empaneled. In the alternative, Defendant sought an interlocutory appeal so that the court could determine “whether a panel without any blacks should hear [the] case.” The court denied Defendant’s motions. After trial, during the sentencing proceeding, Defendant orally moved for a new trial because there were “no blacks or no African Americans on the jury[.]” and asked the court to take judicial notice of a 2000 federal census study which revealed that about ten percent of Curry County’s population was black. The court denied the motion and proceeded with the sentencing.

{24} “To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]” Rule 12-216(A) NMRA. Because the purpose of an objection is to invoke a ruling of the court upon a question or issue, an objection must be made with “sufficient specificity to alert the mind of the trial court to the claimed error,” State v. Lopez, 84 N.M. 805, 809, 508 P.2d 1292, 1296 (1973), and it must be made timely. State v. Gonzales, 112 N.M. 544, 550, 817 P.2d 1186, 1192 (1991) (“review by an appellate court must be predicated upon a timely objection by a defendant”).

{25} Defendant’s objections regarding the jury pool were insufficient in terms of specificity and timeliness. Defendant’s initial objection during the jury selection process, on the basis that he was entitled to “a jury panel that would have at least some blacks,” did not amount to the constitutional challenge that he now asserts. See United States v. Grose, 525 F.2d 1115, 1119 (7th Cir. 1975) (“The mere observation that a particular group is under-represented on a particular panel does not support a constitutional challenge.”). On the other hand, while Defendant’s post-trial objection contained slightly more specificity regarding a fair cross-section argument, it was untimely because at that juncture, the district court could not have remedied the situation. See State v. Montoya, 80 N.M. 64, 67, 451 P.2d 557, 560 (1968) (“The burden is on the appellant to make his objection known to the court at the earliest time in order to afford the court the opportunity to rule on the matter before allowing the argument to continue.”). Thus, Defendant failed to preserve his claim that he was denied his right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

C. Cross-Examination of Aultman

{26} Defendant argues that the trial court abused its discretion when it granted the State’s motion in limine regarding an incident involving witness Aultman. Defendant also claims for the first time on appeal that the court’s decision deprived him of his right to fully cross-examine an accused person against him under the Sixth Amendment. However, since the issue of denial of the right to confrontation may not be raised for the first time on appeal, State v. Torres, 2005-NMCA-070, ¶ 20, 137 N.M. 607, 113 P.3d 877, we will not address the Sixth Amendment issue, but only the district court’s grant of the State’s motion in limine on an evidentiary basis. See State v. Lucero, 104 N.M. 587, 591, 725 P.2d 266, 270 (Ct. App. 1986) (holding that the defendant’s hearsay objection “was not sufficiently specific to alert the trial court to the claimed constitutional error[,]” a violation of his confrontation clause rights).

{27} On June 7, 2004, two and a half weeks prior to Victim’s murder, Aultman was in his car with his friend, George Allison, when Allison allegedly exited the car and threatened three people with a gun. Aultman and Allison were subsequently detained and a loaded .22 caliber revolver was recovered from the vehicle. Aultman told police that the gun belonged to his girlfriend. Due to a lack of participation by the alleged victims, no charges were filed against either Aultman or Allison. The State filed a motion in limine, requesting that the court preclude Defendant from soliciting any testimony in reference to the June 7 incident on the basis that the incident is “more prejudicial than probative.” The court granted the State’s motion on that basis.

{28} “With respect to the admission or exclusion of evidence, we generally apply an abuse of discretion standard where the application of an evidentiary rule involves an exercise of discretion or judgment . . . .” Dewitt v. Rent-A-Center, Inc., 2009-NMSC-032, ¶ 13, 146 N.M. 453, 212 P.3d 341. A trial court abuses its discretion when its “ruling is clearly against the logic and effect of the facts and circumstances of the case.” State v. Simonson, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). Rule 11-403 NMRA provides in part that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” Rule 11-403 NMRA. The court abused its discretion in admitting the hearsay evidence regarding the June 7 incident on the basis that the hearsay evidence was “more prejudicial than probative.” The court abused its discretion in excluding evidence with respect to the June 7 incident on the basis that the evidence was “more prejudicial than probative.”

{29} Defendant argued that the June 7 incident established that Aultman had a weapon before the murder and that this fact “left open the possibility that . . . Aultman had inflicted the fatal shots.” He also argued that the court’s decision to prohibit any testimony regarding the June 7 incident did not allow him to “develop additional evidence that . . . Aultman was the slayer.”

{30} Regarding the probative value of the June 7 incident, any connection between the incident and Aultman’s involvement in the Victim’s murder is too attenuated. It was not Aultman that was suspected of assaulting people with a gun;
he was merely in the same car as the alleged perpetrator. Additionally, the gun found in the car during the June 7 incident was a .22 caliber revolver, as opposed to a .45 caliber revolver used in the murder. The district court noted this attenuation when it asked Defendant’s trial counsel, “[D]oesn’t it seem pretty remote that we’re talking about a passenger, not a defendant, not the driver, not the weapon’s owner? Doesn’t it seem we’re pretty remote in that regard?” Regarding the prejudicial factor of the Rule 11-403 balancing test, the State argued that it is “real prejudicial to try and bring up the fact that a witness—not even the accused, but a witness was involved in an aggravated assault that he was not accused of.” We agree with the State. Generally, any reference to an incident involving a person threatening people with a gun would be considered prejudicial. In this case, given that a gun was used to kill Victim, any mention of Aultman being involved in an assault that also involved a gun would have a higher prejudicial effect. 

The district court’s ruling that “the prejudicial nature of the testimony outweighs the probative value . . . related to the . . . June 7th, 2004 incident[]” was not “clearly against the logic and effect of the facts and circumstances of the case,” Simonson, 100 N.M. at 301, 669 P.2d at 1096, and therefore, it did not abuse its discretion when it excluded testimony regarding the June 7 incident.

D. Double Jeopardy

Defendant contends that his convictions for both shooting at a motor vehicle and first degree murder constitute a double jeopardy violation. Defendant did not raise this issue in district court. However, it can be raised for the first time on appeal. See State v. Lopez, 2008-NMCA-002, ¶ 12, 143 N.M. 274, 175 P.3d 942; NMSA 1978, § 30-1-10 (1963) (“The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.”).

Defendant acknowledges that this Court has already held that convictions for these two offenses do not constitute a double jeopardy violation but nonetheless asks this Court to reconsider those holdings. See State v. Gonzales, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992) (holding that a conviction for first degree murder and shooting into an occupied vehicle did not constitute a double jeopardy violation because “the legislature intended for separate punishment for unitary conduct that violated both statutes”); State v. Dominguez, 2005-NMSC-001, ¶¶ 16, 21, 137 N.M. 1, 106 P.3d 563 (Bosson, C.J., Chávez, J., dissenting) (holding that convictions for (1) voluntary manslaughter and shooting at or from a motor vehicle and (2) aggravated battery and shooting at a motor vehicle did not constitute double jeopardy violations). We agree with the State. Generally, any aggravated assault that he was not accused, but a witness was involved in an assault that also involved a gun would have a higher prejudicial effect.

The district court’s ruling that “the prejudicial nature of the testimony outweighs the probative value . . . related to the . . . June 7th, 2004 incident[]” was not “clearly against the logic and effect of the facts and circumstances of the case,” Simonson, 100 N.M. at 301, 669 P.2d at 1096, and therefore, it did not abuse its discretion when it excluded testimony regarding the June 7 incident.

E. Enhancements of Defendant’s Sentence

Defendant contends and the State concedes that portions of his sentence were unconstitutionally enhanced pursuant to Section 31-18-15.1. We affirm Defendant’s convictions but remand to the district court with instructions to vacate the aggravated portions of his sentence.

III. CONCLUSION

The State presented sufficient evidence such that a reasonable jury could have concluded that Defendant killed Victim with deliberate intent and thus his first degree murder conviction is affirmed. Defendant was not denied his right to a fair and impartial trial under the Sixth and Fourteenth Amendments when the district court denied Defendant’s request for a new jury panel, and the district court did not abuse its discretion when it granted the State’s motion in limine regarding the June 7 incident involving Aultman. Defendant’s convictions for first degree murder and shooting at or from a motor vehicle do not constitute a double jeopardy violation.

Portions of Defendant’s sentence were unconstitutionally enhanced pursuant to Section 31-18-15.1. We affirm Defendant’s convictions but remand to the district court with instructions to vacate the aggravated portions of his sentence.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice (special concurring)
the decision to modify a number of cases which no party had requested to be modified, stating “[W]e must zealously guard against the inclination to become cavalier in ignoring the importance of stare decisis . . . once we start raising and resolving issues sua sponte which result in overruling controlling precedent, we will be unable to restrain ourselves . . . .”); Ex parte Hanna Steel Corp., 905 So. 2d 805, 810 (Ala. 2004) (Lyons, J., concurring in the result) (“Without a specific request to overrule prior precedent . . . a court taking such action sua sponte cuts off an adverse party’s right to have the court consider the important subordinate question-assuming the precedent was wrongly decided, whether stare decisis requires adherence to it.”). 

However, I cannot agree with the statement in paragraph 35 of the majority opinion that we do not find “any reason to depart from our precedent” regarding the double jeopardy analysis in State v. Gonzales, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992) and Dominguez. To agree with this statement would be a signal that I have abandoned my concerns with our double jeopardy analysis in this area. I hesitate to abandon my concerns because I firmly believe that our precedent is not in line with United States Supreme Court precedent regarding double jeopardy. A defendant who kills a victim in a single homicidal act should only be prosecuted under the homicide statutes absent a clear declaration by the Legislature that it intended punishment under multiple statutes. The Legislature is quite capable of articulating when it intends multiple punishments to apply. The following are examples of the Legislature expressing its intent to punish unitary conduct under more than one statute. NMSA 1978, § 30-6A-3(G) (1984, amended 2007) (“The penalties provided for in this section shall be in addition to those set out in Section 30-9-11 NMSA 1978.”); NMSA 1978, § 30-31-26(A) (1972) (“Any penalty imposed for violation of the Controlled Substances Act [§§ 30-31-1 to -28, 30-31-30 to -40 NMSA 1978] is in addition to any civil or administrative penalty or sanction otherwise provided by law.”); NMSA 1978, § 30-45-6(A) (1989) (“Prosecution pursuant to the Computer Crimes Act [§§ 30-45-1 to -7 NMSA 1978] shall not prevent any prosecutions pursuant to any other provisions of the law where such conduct also constitutes a violation of that other provision.”); NMSA 1978, § 30-52-1(D) (2008) (“Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.”). 

I have previously expressed my disagreement with the approach taken by this Court in Gonzales, and I will not elaborate further. See Dominguez, 2005-NMSC-001, ¶¶ 37-39 (Chávez, J., dissenting); State v. Armendariz, 2006-NMSC-036, ¶¶ 32-39, 140 N.M. 182, 141 P.3d 526 (Chávez, J., concurring in part and dissenting in part). I will not vote to overturn controlling precedent unless I am persuaded to do so after I have had the benefit of full briefing and argument on the relevant factors for overturning our precedent. Accordingly, I concur in the result of Section II(D).

EDWARD L. CHÁVEZ, Chief Justice

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

I dissent from only the double jeopardy portion of the Opinion and concur wholeheartedly in the rest. My views on double jeopardy have been previously stated in State v. Dominguez, 2005-NMSC-001, ¶¶ 28-36, 137 N.M. 1, 106 P.3d 563 (Bosson, C.J., Chávez, J., dissenting), as well as by Chief Justice Chávez in the same opinion, Id. ¶¶ 37-42, with which I concur. 

Disagreement stems from what stare decisis effect, if any, we should continue to give the earlier opinion of this Court in State v. Gonzales, 113 N.M. 221, 824 P.2d 1023 (1992), as well as the majority opinion of this Court in Dominguez which relied on Gonzales. Disturbingly, counsel in the present appeal has not asked this Court to overrule or modify our precedent by applying the factors we traditionally employ in a stare decisis analysis. I think our double jeopardy jurisprudence would benefit from such introspection, but perhaps it would best be initiated by the parties themselves and not by this Court acting sua sponte. I look forward to renewing our discussion at some time in the near future, hopefully guided by thoughtful arguments and briefs of counsel addressing stare decisis.

RICHARD C. BOSSON, Justice

DANIELS, Justice (specially concurring).

I concur in the Opinion of the Court, but I also am troubled by concerns of both our double jeopardy and our stare decisis jurisprudence.

Defendant shot into a motor vehicle and killed someone. He has been punished cumulatively for the first-degree murder of the person he killed and for the second-degree felony of causing great bodily harm (the death of the same person) by shooting into a motor vehicle. If the resulting double jeopardy issue were a matter of first impression for this Court, I would have no hesitation in concluding that the Legislature did not intend to punish a person cumulatively for both crimes, simply because a bullet penetrated a motor vehicle before killing its intended victim. This is particularly so where the offense of shooting into a motor vehicle has been statutorily enhanced from a fourth-degree to a second-degree felony by the additional essential element that the shooting resulted in great bodily harm.

However, this is not a matter of first impression. It was squarely decided by this Court in State v. Gonzales, 113 N.M. 221, 824 P.2d 1023 (1992), and reaffirmed more recently, albeit by a divided Court, in State v. Dominguez, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563. If the only things that have changed since the decisions in Gonzales and Dominguez are the identities of the human beings occupying the seats on this Court, legitimate concerns of stare decisis come into sharp focus. If we are guided by the rule of law and not by personalities, a mere change in composition of the Court should not be the cause of changes in the meaning of rules of law, including particularly the definitive interpretation of legislative enactments.

Stare decisis is not the only jurisprudential concern, however, that should be taken into account in rethinking older holdings that seem inappropriate at a later time. There are other considerations that quite legitimately cause us to reevaluate and occasionally change prior holdings, as summarized in Paragraph 34 of our majority Opinion. But those considerations have not been developed in this case. At this time, I am not persuaded that a case has been made to us for overruling our precedents, and I therefore concur in the result reached in Justice Serna’s Opinion.

CHARLES W. DANIELS, Justice
This case involves enforcement of a 1994 marital settlement agreement and a 1995 domestic relations order relating to a wife’s entitlement to a husband’s retirement benefits. We are mainly concerned with two issues, namely, (1) when the wife was entitled to begin receiving benefits, and (2) how to calculate the amount of benefits to be paid to the wife. Based on its interpretations of the documents, the district court determined that the wife was entitled to receive benefits starting at the husband’s first retirement eligibility as opposed to his actual retirement. The court also determined that the benefits should be calculated based on the husband’s average salaries at the time of retirement eligibility as opposed to at the time of the divorce. We hold that the court did not err, and we affirm.

INTRODUCTION TO THE CASE

By way of introduction, we note the circumstances underlying the issues before us. The parties did not talk to each other about calculation of retirement benefits when they signed their marital settlement agreement. The agreement passed between their attorneys specifically discussed with their clients how each share would be calculated or specifically discussed the point in time when the non-employee recipient would begin receiving the monthly distribution of her share of the benefits. There is no evidence that either spouse formed any particular intention at the time of the marital settlement agreement with respect to the when and the how-much aspects of the distributions. The attorneys prepared and the parties agreed to retirement benefits provisions that were ambiguous—both as to when the non-employee spouse was to begin receiving her monthly distribution of her community share and as to how her community share of the employee-spouse’s benefits was to be calculated.

These unfortunate circumstances became significant hurdles when, years after the divorce occurred, the non-employee spouse raised issues as to when she should have begun to receive payments and how much she should receive. In the district court, the case became a procedural morass and this complicated resolution of the issues. Ultimately, the parties argued for their respective, differing view of language in the documents. The district court chose the non-employee-spouse’s view. In wrestling with an unsatisfactory history, we have treated the appeal narrowly as one involving whether the district court erred in its interpretation of ambiguous language in controlling documents. With the foregoing introduction in mind, we now turn to the background and specific issues in the present case.

BACKGROUND

In Section II(A)(5) of the MSA, as part of the parties’ compromised distribution of the community property, Wife was to receive the following as her separate property.

One-half of the community interest in Husband’s retirement plan with [the] United States Postal Service through the date of August 31, 1994, to be determined in accord with the following formula:

\[ d = \frac{ab}{2c} \]

where:

\( a \) = Husband’s gross monthly retirement benefits;

\( b \) = Months of credited service from August 9, 1978, through the date of August 31, 1994, a total of 192 months[.]
c = total number of months of credited service at retirement
(unknown at this time);
d = Wife's interest.
In Section II(B)(4) of the MSA, Husband was to receive 
"[o]ne-half of the community interest in his retirement plan . . . 
and all of the interest he accrued in his retirement plan prior to the marriage and 
subsequent to August 31, 1994."

[6] The domestic relations order filed in March 1995 dividing Husband's civil 
service retirement benefits provided that the retirement benefits accrued by Hus-
bond during the marriage to the date of the 
divorce were community property. The order also provided that Wife was entitled 
to receive her share of the benefits directly from the plan administrator. The order fur-
ther provided that Wife was entitled to her portion of Husband's retirement benefits 
based on a formula set out in the order that was similar to that in Section II(A)(5) of the 
MSA. The formula stated:

\[ D = \frac{50\% \times A \times B}{C} \]

where

A = [Husband’s] gross monthly retirement benefits
B = 192 months
C = Total number of months of creditable service employ-
ment of [Husband] at his retirement

D = [Wife’s] share

Wife’s Motion to Enforce the MSA and Husband’s First Appeal

[7] In March 2006, Wife asked the court to enforce her interest in Husband’s retire-
ment and to award accrued pre-retirement amounts. At a July 19, 2006, hearing on 
the enforcement of the MSA, Wife appeared with counsel and Husband appeared pro se. 
Wife sought $590 in monthly payments as of December 11, 2005, which was the first 
eligibility date of Husband’s interest in his retirement, and she also sought arrearages 
totaling $4425. Wife’s counsel presented a benefits calculation that was, in counsel’s view, 
“pretty standard because typically . . . if you think of the numerator being the 
months of the marriage, the denominator being the entire time that the person earns 
the retirement, times one-half, then that’s the community interest.” Wife’s counsel 
explained the following to the court:

[What] happens actually, in prac-
tice is . . . over time . . . the 
percentage that the former non-
employee spouse receives gets 
lower because the fraction, since 
the numerator stays the same and 
the denominator gets bigger, her, 
it’s usually the wife, her fraction 
of share actually gets smaller and 
smaller, the percentage goes down 
over time, but . . . the rea-
son people negotiate this is, one 
they don’t have a choice because 
there isn’t enough money at the 
time they divorce and, and the 
second reason is typically the 
income goes up, as people re-
ceive promotions, hopefully in 
grade cost of living and so it’s a 
smaller percentage times a higher 
monthly benefit amount.

Wife’s counsel also indicated that the for-
ma used “typically . . . included in most 
cases . . ., not only the marital settlement 
agreement, but it’s also in the qualified 
domestic relations order, if there is one 
and that the formula “was negotiated, it’s 
in the [MSA].” In addition, Wife’s counsel 
explained:

[W]e wrote in, in the formula, 
that the marital months were 192, 
according to my math [Husband] 
spent a total of 824 months earning 
this retirement. . . . [So] that 
with my math, came out to be 
23.2 percent is [Wife’s] share of 
the gross monthly annuity which 
would be $2533. That’s what he 
would have started receiving 
December 11 of 2005. So, I cal-
culated that [Husband] would be 
required to pay . . . [Wife] $590 
per month. That’s 23.2 times 
2533, . . . he should have been 
paying it since December. [So] he 
has accrued an arrearage of, 
for seven and a half months of re-
tirement, . . . [Wife] should have 
received commencing December 
11. [A]nd . . . seven and a half 
months times the $590 is $4425.

[8] During this July 19, 2006, hearing, the court inquired of Husband if 
he was going to have an attorney, to which 
Husband replied that he could not afford 
one but was in the process of coming up 
with the money to obtain one. The court 
then inquired regarding the MSA, and 
Husband stated that he “agreed with the formula that they came up with.” When 
asked if he understood what that meant, 
Husband said, “I thought that was upon 
retirement.” In response to a statement by 
the court to Husband that under the cur-
rent law, as represented by Wife’s counsel, 
Wife was entitled to her benefits when 
Husband became eligible for retirement, 
Husband responded, “Okay.” In response 
to a statement by the court to Husband that 
under the case of Ruggles v. Ruggles, 116 
N.M. 52, 860 P.2d 182 (1993), as it was 
represented by Wife’s attorney, Wife was 
entitled to receive the amounts that Wife’s 
attorney had represented earlier, and to a 
follow-up inquiry whether he understood 
that, Husband replied, “I understand 
that.” “[S]ympathetic to a degree” that 
Husband did not have an attorney, the 
court indicated that if Husband chose to 
get legal counsel “to dispute that amount,” 
Husband would have to have his attorney 
file a motion in that regard, suggesting that 
the court would not “go back and redo” 
the formula, but that perhaps “the figures 
that [Wife would] receive . . . would change.”

[9] In calculating what Wife was entitled 
to receive, the court used the figures pre-
sented by Wife’s attorney. Following the 
hearing, also on July 19, 2006, the court 
issued a minute order requiring Husband 
to pay Wife $590 per month as her share of 
the retirement benefit commencing August 1, 2006. This amount was calcu-
lated based on what Husband would have 
received had he retired on December 11, 
2005. Using the monthly $590 amount, 
the court also entered a judgment of 
$4425 for arrearages based on seven and 
one-half months of benefits that Wife was 
entitled to receive beginning December 
11, 2005.

[10] Husband obtained an attorney and 
filed a motion for rehearing on August 2, 
2006, asserting that the court erred (1) be-
cause the MSA did not provide that Wife 
would receive any payment prior to Hus-
band’s actual retirement, and (2) because 
the $590 per month calculation violated 
Sections II(A)(5) and II(B)(4) of the MSA 
and the case of Madrid v. Madrid, 101 
N.M. 504, 684 P.2d 1169 (Ct. App. 1984), 
by granting Wife a portion of Husband’s 
retirement benefits earned after divorce.

[11] The court set this motion for re-
hearing to be heard on October 5, 2006. 
On August 28, 2006, Husband filed a mo-
tion requesting the court to enter an order 
determining that the July 19, 2006, minute 
order was a temporary order until the court 
entered an order disposing of Husband’s 
August 2, 2006, motion for rehearing. 
Husband expressed the concern that under 
Rule 1-059 NMRA the motion would be 
denied by operation of law on September 
1, 2006, rendering the October 5, 2006,
hearing moot. Husband filed a notice of appeal on October 2, 2006.  

{12} The court nevertheless held a hearing on October 5, 2006, on Husband’s motion for rehearing. No record of this hearing is before this Court. In a July 25, 2007, hearing in the district court, Husband’s counsel stated that in the October 5, 2006, hearing the court did not think it had jurisdiction, and it therefore declined to consider any aspect of Husband’s motion for rehearing, including Husband’s offer of proof on the appropriate calculation of benefits.  

{13} In Husband’s October 2, 2006, appeal to this Court, he contended in his docketing statement that the district court incorrectly determined that Wife was entitled to benefits before his actual retirement and that the calculation of Wife’s benefits was erroneous because the court did not determine the community interest in the retirement benefits as of August 31, 1994. Husband quoted portions of an exchange at the July 19, 2006, hearing between the court and Husband and portions of statements made by Wife’s counsel. We issued a calendar notice proposing to reverse and remand for an evidentiary hearing on the issue of when Wife should begin receiving benefits and proposing to affirm on the issue regarding the calculation of Wife’s benefits. Husband filed a memorandum in support of our proposed remand and in opposition to our proposed disposition with regard to the calculation. Wife did not file any memorandum. In his memorandum, Husband clarified his calculation argument by stating that the district court improperly included Husband’s post-divorce pay increases in Wife’s entitlement by applying Husband’s gross monthly salary as if he had retired in December 2005 instead of the gross monthly salary he was receiving at the time of the divorce in August 1994, thereby giving a portion of Husband’s separate property to Wife.  

{14} This Court issued a memorandum opinion in February 2007. Based on silence in the MSA and upon Ruggles, and on our determination that the district court did not conduct a proper evidentiary hearing, we reversed the district court’s July 19, 2006, minute order and remanded for an evidentiary hearing “to determine the intent of the parties as to when Wife is to begin receiving her portion of Husband’s retirement benefits.”  

{15} Although we had proposed in our calendar notice to affirm the district court’s calculation of the benefits, in the memorandum opinion we did not expressly state that we affirmed the district court’s benefit calculation. Instead, this Court stated the following:  

We decline to address Husband’s arguments as to benefit computation because they were not raised in the district court. . . . The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead[s] us to conclude that the district court never considered the arguments set forth in Husband’s motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband’s arguments are not properly before us on appeal.  

We expressed “no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires.”  

Remand From First Appeal  

{16} On remand, the district court held an evidentiary hearing on July 25, 2007. The court received testimony on the issue of intent of the parties as to when Wife was to receive her share. The court found that Wife had a right that she did not waive to receive her benefits at Husband’s earliest eligibility for retirement, which was in December 2005. The court also addressed the calculation issue and adopted Wife’s view of the appropriate calculation. We separately discuss the court’s handling of the two issues in more detail later in this opinion.  

Standard of Review  

{17} “The question of interpretation of language and conduct (the question of the meaning to be given the words of the contract) is a question of fact where that meaning depends on reasonable but conflicting inferences to be drawn from events occurring or circumstances existing before, during, or after negotiation of the contract.” C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991). We review district court determinations for substantial evidence. See Salazar v. D.W.B.H., Inc., 2008-NMCA-054, ¶ 6, 144 N.M. 828, 192 P.3d 1205 (“On review, we will uphold the trial court’s judgment if it is supported by substantial evidence.”); Landavazo v. Sanchez, 111 N.M. 137, 138-39, 802 P.2d 1283, 1284-85 (1990) (stating that “[i]f substantial evidence supports a trial court’s conclusion it will not be disturbed on appeal” and that the Court “examin[es] the record only to determine if there is substantial evidence to support the district court’s ruling” (internal quotation marks and citation omitted)); Britton v. Britton, 100 N.M. 424, 430, 671 P.2d 1135, 1141 (1983) (stating that “[t]he standard of review on appeal is whether substantial evidence reasonably supports the factual determinations of the trial court”). We resolve factual disputes and indulge reasonable inferences in favor of the prevailing party. Las Cruces Prof’l Firefighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177 (filed 1996). We review de novo the court’s resolution of an ambiguity in documents. See Bd. of Educ. v. James Hamilton Constr. Co., 119 N.M. 415, 418, 891 P.2d 556, 559 (Ct. App. 1994) (“[A]n appellate court is not bound by a trial court’s [legal] interpretation of a written document, where the interpretation rests solely upon the wording of the document.” (second alteration in original) (internal quotation marks and citation omitted)); see also State v. Duran, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836 (stating that the Court conducts review de novo “along with our review of any inferences the district court may have drawn from its factual findings” (internal quotation marks and citation omitted)). “The interpretation of a contract is an issue of law that we review de novo.” Mueller v. Sample, 2004-NMCA-075, ¶ 8, 135 N.M. 748, 93 P.3d 769. We review the application of the law to the facts de novo. Paz v. Tijerina, 2007-NMCA-109, ¶ 8, 142 N.M. 391, 165 P.3d 1167.  

DISCUSSION  

I. The Issue of When Wife Was Entitled to Receive Benefits  

A. The July 25, 2007, Hearing  

{18} In the July 25, 2007, hearing on remand on the issue of when Wife was entitled to receive benefits, Wife argued that Husband had the burden to show evidence of an agreement that would override the New Mexico law of community property and the application of Ruggles. The district court agreed. Husband could not recall whether he discussed his retirement with Wife. Husband testified that it was his understanding that Wife would receive her community share of his retirement benefits when he actually retired.  

{19} While not disputing that he was eligible for retirement in December 2005 because he had thirty years of service and had reached age fifty-five, Husband testified and argued that no specific time or date of retirement had been set out in the MSA because at that time, under 5 U.S.C.
§ 8336 (1966, as amended through 2007), which was the applicable federal retirement law, retirement with benefits could have occurred either after becoming age fifty-five with thirty years of service or after becoming age sixty with twenty years of service. See 5 U.S.C. § 8336(a), (b). Husband argued that because of the applicable federal retirement law, the MSA stated “at retirement.” Thus, he argued, the parties intentionally did not specify a time, the words “at retirement” meant exactly what they said, under Ruggles the MSA language controlled, and Wife was to receive her benefits beginning when Husband actually retired. Further, Husband indicated that the parties and their counsel knew at the time of the divorce that Husband could retire either at age fifty-five with thirty years of service or at age sixty with twenty years of service, and that this was why the MSA stated the date of retirement was “unknown at this time.” Husband also argued that the MSA was “not negotiated around the table where everyone was present,” that it was signed after “drafts were circulated,” and that, therefore, there was no “meeting of the minds” as to when Wife would receive retirement benefits.

20. The attorney who represented Wife in the 1994 dissolution proceeding testified that, at the time she drafted the MSA, she was aware of Ruggles and would not have allowed her client to sign a settlement that provided her with retirement benefits “if and when [Husband] chose to retire[.]” The attorney also testified that she used boilerplate language in drafting the MSA when stating that the MSA was drafted “pursuant to the laws of the State of New Mexico.” Wife testified that her expectation was that she would receive her share of the retirement benefits when Husband turned fifty-five and that Husband could not delay when she would receive her share based on his decision alone.

21. The district court entered the following findings of fact related to the issue of when Wife was entitled to receive her share of the retirement benefits.

6. At the time of divorce and the entry of the MSA[,] both parties knew and anticipated that if [H]usband continued his employment under the civil service system he would be eligible for retirement when he reached age [fifty-five] on December 11, 2005.

7. During the marriage[,] Wife understood that at age [fifty-five] [H]usband would have sufficient age and years to retire from the Postal Service.

8. The division formula states that the total number of months of credited service were “unknown at this time[.]” In fact the number of credited service months could have been impacted by any number of factors, including early retirement, vacation and leave credit, dismissal prior to age [fifty-five], and thus could not have been known with certainty. (See Husband’s own statement in his initial [r]equested [f]indings of [f]act that Husband would be eligible at age [fifty-five] “assuming he continued his employment under the civil service system. . . .”[”]).[[Emphasis omitted.]]


10. If Husband waits to pay Wife her retirement benefit until he actually retires, then he is in absolute control of when [W]ife receives her share of the community property.

11. Husband has failed to show by a preponderance of the evidence that there was any discussion, negotiation[,] or agreement that [W]ife would be paid her retirement only when he actually retired.

The court also entered the following conclusions of law.

3. The [c]ourt finds that [W]ife did not waive her right to receive her portion of . . . [H]usbands retirement benefits at [H]usbands earliest eligibility for retirement.

4. The parties did not expressly agree on the precise date that [H]usband would retire. However, the [c]ourt finds, through the testimony of the parties and other evidence presented on remand, that the parties anticipated and expected that [H]usband’s retirement benefit would be distributed upon . . . [H]usband’s earliest date of retirement eligibility, not necessarily whenever [H]usband chose to retire. Not only does the [c]ourt find that the parties intended for [H]usband to retire on his earliest eligibility date, but that given the negotiations regarding division of [H]usband’s retirement benefits were conducted during the anticipated divorce of the parties, to find otherwise would be unlikely, unfair[,] and unjust under the circumstances.

5. Consistent with this ruling [H]usband should commence payment of the expected retirement benefits effective December[ ] 2005.

22. In holding in Wife’s favor, the court had before it the federal law relating to Husband’s retirement requirements, the testimony and argument at the hearing, and Ruggles, which indicated that a marital settlement agreement should be enforced as written and also that when the agreement is unclear as to when a non-employee spouse is to begin receiving retirement benefits, the court should order distribution upon maturity of the retirement plan. 116 N.M. at 67-68, 70, 860 P.2d at 197-98, 200.

B. The Present Appeal

23. In the present appeal, on the issue of when Wife was entitled to receive benefits, Husband argues that, unlike in the present case, the marital settlement agreement in Ruggles did not use the term “at retirement,” whereas the MSA here plainly sets the time “at retirement.” Therefore, according to Husband, Ruggles required the court in the present case to enforce the MSA as written. We must reject this argument on the ground that the issue was settled in this Court’s memorandum opinion in the prior appeal. We determined that, as in Ruggles, the MSA was silent, if not ambiguous, as to when Wife was to begin receiving her share of the retirement benefits, and we therefore remanded for the district court to fill in a critical gap by conducting an evidentiary hearing as to when the parties intended that Wife would begin receiving her share of the retirement benefits. We will not revisit our previous ruling on that question.

24. Based on the July 25, 2007, hearing, the district court decided that Husband failed to carry his burden to show “that there was any discussion, negotiation[,] or agreement that [W]ife would be paid her retirement only when he actually retired.” The court did not make an express finding of intent of the parties. However, the court found that if Wife were to wait until Husband actually retired to receive her benefits,
Husband would be in absolute control of when she would receive her benefits. The court therefore concluded that the parties anticipated and expected that the retirement benefits would be distributed at first retirement eligibility and that “to find otherwise would be unlikely, unfair[,] and unjust under the circumstances.”

As discussed in Ruggles, a unilateral choice not to retire would impair the non-employee-spouse’s interest in the retirement “because she would be deprived of immediate enjoyment and management of her community property.” Id. at 61, 860 P.2d at 191 (commenting on Gillmore v. Gillmore, 629 P.2d 1, 4 & n.4 (Cal. 1981)), where the court held that a non-employee spouse should begin receiving benefits at the date of retirement maturity rather than actual retirement and recognizing that “the timing of receipt and the control of an asset are important aspects of its value” (internal quotation marks omitted)). We conclude that the district court’s determinations based on the MSA are supported by substantial evidence and are appropriate under the circumstances and under Ruggles to support the court’s conclusion that Wife was entitled to receive her benefits beginning December 11, 2005.

Husband nevertheless argues that language in the domestic relations order must be read to evidence an intent that Wife was to receive benefits only upon Husband’s actual retirement because, pursuant to the domestic relations order, Wife was to receive her share of the benefits directly from the plan administrator and not from Husband. Therefore, according to Husband, because he has not yet retired, Wife’s payment from the plan administrator can only occur when he actually retires. Husband does not indicate in his briefs, and in our review of the record we have not located, where he argued this rationale to the district court. We therefore do not address the rationale. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (“To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.”). Although, because of the possibility of further review proceedings, we suggest that were we to address the issue we would likely disagree with it. The court could have concluded that the language in the domestic relations order was standard pre-Ruggles language that, if interpreted as Husband suggests, was inconsistent with the Ruggles policy against provisions that leave the employee spouse in control of when the non-employee spouse begins to receive his or her community share. Furthermore, there exists no indication in the record that this language in the domestic relations order was intended to impact Wife’s right to receive benefits at first retirement eligibility. If anything, this language contributed ambiguity, and it was up to the district court to decide what the parties intended. Under these circumstances, “the court may award the non-[-]employee spouse an amount payable by the employee spouse . . . equal to the share of the retirement benefit she would be entitled to receive if the employee spouse elected to retire.” Ruggles, 116 N.M. at 67, 860 P.2d at 197.

II. The Issue of Calculation of Wife’s Retirement Benefits

A. Preliminary Issue of Jurisdiction on Remand

We address at the outset Wife’s argument that Husband cannot raise the calculation issue in this appeal because the district court lacked jurisdiction and authority on remand to change the calculation as Husband requested. We review this issue de novo, as it involves a legal issue. See Fed. Express Corp. v. Abeita, 2004-NMCA-011, ¶ 2, 135 N.M. 37, 84 P.3d 85 (filed 2003). Wife bases her position on her view that, in Husband’s prior appeal, this Court did not consider Husband’s calculation argument and that we remanded solely for the purpose of developing the intent of the parties on the issue of when Wife was to begin receiving retirement benefits. Wife relies on law-of-the-case and jurisdiction-on-remand doctrines. See Hughes v. Hughes, 101 N.M. 74, 75, 678 P.2d 702, 703 (1984) (“The . . . opinion in the prior appeal constitutes the law of the case. It is binding on the district court, and is to be referred to if there is any doubt or ambiguity regarding the mandate. Our mandate and opinion in the prior appeal set forth the full extent of the jurisdiction of the district court on remand.” (citations omitted)); State v. Gage, 2002-NMCA-018, ¶ 21, 131 N.M. 581, 40 P.3d 1025 (filed 2001) (noting the “hard-and-fast rule that the law of the case established on appeal binds the district court on remand under the appellate court mandate”). But see Reese v. State, 106 N.M. 505, 507, 745 P.2d 1153, 1155 (1987) (stating the majority understanding of the law-of-the-case doctrine is that the doctrine “is merely one of practice or court policy, and not of inflexible law” and “that appellate courts are not absolutely bound thereby, but may exercise a certain degree of discretion in applying it” (internal quotation marks and citation omitted)). This issue requires a look not only at our memorandum opinion in the prior appeal but at the proceedings in the district court and this Court leading up to issuance of that memorandum opinion.

It is clear that Husband failed to raise any error in the July 19, 2006, hearing in regard to the court’s calculation of Wife’s share of retirement benefits. Yet it is equally clear that the district court offered to reconsider the calculation issue if Husband obtained an attorney and filed a motion in that regard. Husband argues the issue was preserved in the district court for review in his first appeal because it was raised in his August 2, 2006, motion for rehearing. He argues that the fact the motion was denied by operation of law thirty days after being filed does not affect preservation, citing Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970), in which our Supreme Court reviewed a damages award that the appellant argued was excessive for the first time in a motion for a new trial that was automatically denied by operation of law thirty days after filing. Id. at 386, 467 P.2d at 402. While we do not agree that Montgomery Ward is applicable to the circumstances here, in that it was not presented with, nor did it decide the issue here, we agree with Husband that the issue was sufficiently preserved in the district court for review by this Court in Husband’s first appeal. Husband’s motion for rehearing and attempts to get it heard, and his docketing statement and memorandum in opposition filed in the calendaring process in the prior appeal, indicate that Husband sufficiently alerted the district court as well as this Court in the calendaring process to the point of error he was asserting in regard to the calculation of Wife’s retirement benefits. We also agree with Husband that we should entertain the calculation issue in the present appeal.

The memorandum opinion of this Court on summary calendar in the prior appeal is not as clear on the calculation issue as it should have been. See Scanlon v. Las Cruces Pub. Sch., 2007-NMCA-150, ¶ 7, 143 N.M. 48, 172 P.3d 185 (holding the law-of-the-case doctrine would not be applied where this Court’s calendar notice was ambiguous). This Court stated in the memorandum opinion that it declined to consider Husband’s calculation arguments because they were not raised in the district court. However, we acknowledged that it appeared “that Husband did raise [the] issue
in his motion for rehearing,” we noted that the motion was denied by operation of law, and we expressed concern that the district court never considered the issue raised in the motion for hearing. We did not expressly affirm the calculation in the district court’s minute order, nor did we expressly reverse that calculation or remand that issue. We held that Husband’s arguments were “not properly before us on appeal.” Yet, without explaining the purpose for the statement, we stated that we expressed no comment as to what amount of benefits Wife should receive if the district court determined that she was entitled to benefits before Husband retired, a statement Husband construes to apply to the calculation issue. Husband essentially argues that we reversed the entire minute order, meaning the reversal included not only the issue as to when Wife was to begin receiving her benefits, but also the amount she was to receive.

On remand, the district court’s position on whether the calculation issue was properly before the court was also unclear. The district court stated on more than one occasion its view that the calculation issue was not before the court on remand. However, at Husband’s request, the court permitted Husband to “make a record” on the issue. Then, after further argument and Husband’s counsel’s statement that he was “prepared to go forward with evidence as to the appropriate amount of the calculation,” the court stated, “OK, we’ll do that . . . . That’s fine” and further stated, “That might be just . . . fine, so we can make a good record, and now . . . what I’ll do is listen to it.” Husband proceeded to testify, and the court admitted in evidence a document that showed Husband’s version of the appropriate calculation.

Husband and Wife submitted requested findings of fact and conclusions of law relating to the appropriate calculation. One of Husband’s requested findings of fact stated that the proper calculation of the community interest was that contained in his admitted exhibit. The exhibit was based on an average salary during the three years ending August 31, 1994, on days of service during the marriage of $866 (or 192 months), and on days of service at the time of valuation at divorce of $404 (or 276 months), resulting in a community percentage of 69.8% and an accrued community benefit of $749.07 with Wife’s one-half interest at $374.53. In her requested findings of fact, Wife stated that the court had improperly allowed Husband’s evidence on the calculation issue and that she submitted her findings without waiving her trial objection in that regard. Wife pointed out in her requested findings how, in her view, Husband had “misstrued and misapplied the formula.”

The court entered findings of fact and conclusions of law on the issue repeating verbatim or almost verbatim the following two findings of fact and one conclusion of law requested by Wife.

Husband’s interpretation of limiting . . . [W]ife’s calculation of retirement [benefits] at the time of the divorce would deprive [W]ife of the natural and expected increase in the value of the pension over the years following the divorce.

The “time rule” theory of division of retirement is applicable and equitable here, and was intended by the parties as reflected by the entire formula for division of the postal service retirement. See In re Marriage of Lehman, 18 Cal.[.] 4[th] 169, 955 P.2d 451 (1998), and In re Marriage of Judd, 68 Cal. App., 3d 515, 137 Cal. Rptr. [318] (1977). Under the time rule[,] the community is allocated a fraction of the benefits, the numerator representing length of service during marriage but before separation and the denominator representing the total length of service by the employee spouse. The ratio is then applied to the final plan benefit. See In re Marriage of Gowen, 54 Cal.[.] App., 4[th] 80, 62 Cal. Rptr[,] 2d 453 (1997).

The court finds that there is sufficient information/evidence to determine that the benefit due and owing to [W]ife from [H]usband is $590[.] per month commencing from December[.] 2005. Based on the monthly amount of $590[,][H]usband owes [W]ife $12,390 from December 2005 through August[.] 2007 (21 months) less any amounts previously paid by [H]usband to [W]ife.

We conclude that the district court on remand reconsidered the question of which formula and calculations should prevail and determined that the MSA and domestic relations order supported Wife’s calculation.
that was based solely on Husband’s contrary view of the MSA and domestic relations order in determining the community interest.

{35} The court applied a method that can be applied in New Mexico when the parties agree to use it. See Ruggles, 116 N.M. at 66, 860 P.2d at 196 (stating that “the rule for distribution of a non-[employee’s] 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”). The time rule is a known formula and has been applied in one form or another in other jurisdictions. See, e.g., Lehman, 955 P.2d at 461 (holding that the superior court did not err in apportioning retirement benefits “as enhanced between community and separate property interests through its application of the time rule”); Gowan, 62 Cal. Rptr. 2d at 457 (determining that the district court did not abuse its discretion in applying the time rule and setting out that the ratio derived from the fraction in the rule is “multiplied by the final plan benefit to determine the community interest”); Fondi v. Fondi, 802 P.2d 1264, 1266, 1267 (Nev. 1990) (recognizing that the initial calculation must always comply with the time-rule concept and with the concept called the “wait and see” approach that “the community gains an interest in the pension ultimately received by the employee spouse, not simply the pension that would be recovered were the spouse to retire at the time of divorce,” but acknowledging that “because occasionally this determination would be unfair,” the employee spouse should be allowed to show that a pension increase was due to extraordinary post-divorce effort); Gemma v. Gemma, 778 P.2d 429, 431 (Nev. 1989) (stating that the time rule is one of two approaches used by courts in dividing retirement benefits and that the advantages of the rule “clearly outweigh any other method of pension division”).

{36} It seems indisputable from the proceedings that occurred before the present appeal, despite the evident and unfortunate ambiguity and lack of clarity throughout the proceedings, that the district court determined on remand what it considered was the appropriate calculation of Wife’s share of Husband’s retirement benefits based on the MSA. We will therefore address the calculation issue in this appeal.

{37} Before doing so, however, we note the concern expressed in the dissent in this case about a determination pitting Wife’s counsel’s statements of the formula, with numbers and math, to use in arriving at the gross monthly benefits, against Husband’s exhibit showing how he arrived at the gross monthly benefits using numbers and math. We remain unconcerned. The only conceivable fact before the court that might be considered “evidence” which would be needed to complete the calculation of gross monthly benefits based on the different formula denominators would be Husband’s salary information at divorce and his salary information at retirement eligibility. All else was solely formulaic, Wife choosing the time-rule formula with the figures that necessarily flowed from the nature of the formula, particularly including a denominator in the fraction favoring valuation of the gross monthly benefits at the time of retirement eligibility; and Husband choosing the same formula but changing the denominator of the fraction so that the formula favored valuation of the gross monthly benefits at the time of divorce.

{38} Further, Husband expressly agreed at the July 19, 2006, hearing to the formula presented by Wife’s counsel and did not disagree with the calculation of gross monthly benefits using the denominator that flowed from the time-rule formula. The calculation represented a benefits valuation at the time of retirement eligibility and that valuation in turn was or would necessarily be derived based on Husband’s salaries then, salaries of which Husband was presumably aware. Husband did not present any evidence at the hearing. The most that might be thought, and it would be surmise, is that at the hearing Husband thought that the formula should be different. But the conflict, were it to have existed, would have been in the formula to be used, not in conflicting evidence. Once the formula issue was or would be decided, determining which salaries to use would flow from the formula. Determination of salaries at this time on remand will not be required or needed or serve a useful purpose.

{39} Last, we see no inconsistency in determining that Husband preserved the right to challenge the district court’s ultimate choice of Wife’s proposed formula, on the one hand, and also in determining that once the issue of which formula and calculation to use was before the court, the court could choose Wife’s version and not the version presented by Husband.

B. The Calculation Issue Before Us on Appeal

1. The Ambiguity

{40} The formula in the MSA implements a pay-as-it-comes-in or reserved-jurisdiction approach to distribution. See Ruggles, 116 N.M. at 54-55, 58, 60, 860 P.2d at 184-85, 188, 190 (discussing the lump-sum and pay-as-it-comes-in or reserved-jurisdiction methods of dividing vested, but unvested, benefits and explaining that under the reserved-jurisdiction method, the non-employee spouse receives his or her portion of the benefits when the benefits are paid). But the MSA contains mixed signals as to the point in time that the benefits were to be valued for the purpose of arriving at Wife’s community share.

{41} The formula in Section II(A)(5) of the MSA and in the domestic relations order can support Wife’s and the district court’s views of the gross monthly benefits since the fraction’s denominator is to be the total number of months of credited service at Husband’s retirement, instead of the total number of months of credited service as of the date of divorce. That formula is consistent with the time rule as it is customarily applied for distribution of benefits in a manner that calls for benefits valuation at the time of retirement or at first retirement eligibility. In the present case, this would translate into use of Husband’s salaries at the time of retirement eligibility in determining the gross monthly retirement benefits in the formula.

{42} However, in the same Section II(A)(5), before setting out the formula, the MSA states that Wife will receive “[o]ne-half of the community interest in Husband’s retirement plan with [the] United States Postal Service through the date of August 31, 1994.” Also, Section II(B)(4) states that Husband will receive “[o]ne-half of the community interest in his retirement plan . . . and all of the interest he accrued in his retirement plan prior to the marriage and subsequent to August 31, 1994.” These provisions, by specifying the date of August 31, 1994, provide support for Husband’s view that under the MSA the benefits were to be valued at the time of divorce even though the distribution was to be made at first retirement eligibility or at retirement. Also supportive is the statement in the domestic relations order that the retirement benefits that accrued to Husband during the marriage up to the date of the divorce were community property.

{43} Dividing the benefits under different interpretations leads to significant valuation differences in this case. Under Wife’s approach, her monthly benefits would be $590, calculated as follows: $2,533 X (192/412) X (1/2) = $590, where (1) $2,533 is Husband’s gross monthly annuity calculated using his average
three-year-high salary as of first retirement eligibility in December 2005, (2) 192 is the number of months of marriage and participating in the plan, (3) 412 is the total number of months Husband participated in the plan up to first retirement eligibility, and (4) one-half is Wife’s share of the community retirement benefits, which would be $590. In addition to her arguments relating to the documents, Wife argues that because she was not “cashed out” of the plan with a lump sum at the time of the divorce, and she therefore lacked the ability to control and invest her funds over the years, this Court should hold that the time rule was properly applied. She asserts that the time-rule calculation of benefits, which determines her share of benefits based on the gross amount of Husband’s monthly annuity at first retirement eligibility, would compensate her for the time-accrued value of her share. To do otherwise, Wife argues, is inequitable, and neither the MSA nor any other evidence indicates that Wife intended the inequity that would result from Husband’s calculation and position.

[44] Under Husband’s approach, Wife’s monthly share would be approximately $373, calculated as follows: $1,073 X (192/276) X (1/2) = $373, where (1) $1,073 is Husband’s gross monthly annuity calculated using his average three-year-high salary as of September 1994, which was the approximate time of divorce, (2) 192 is the number of months of marriage and participating in the plan, (3) 276 is the total number of months Husband had participated in the plan up to the date of divorce, and (4) one-half is Wife’s share of the community retirement benefits, which would be $373. In oral argument, Husband contended that a smaller denominator figure, i.e., the total number of months Husband had participated in the plan up to the date of divorce, should be used because its use was more fair to Wife when the gross monthly annuity was based on Husband’s three-year-high salary at the time of divorce. Husband claims that the district court erred in utilizing “a ‘high 3’ salary factor, using [Husband’s] post[-] divorce earnings as of December 11, 2005, rather than the ‘high 3’ factor as of the August 31, 1994[,] determination date.” Pointing to MSA Sections II(A)(5) and II(B)(4) and the domestic relations order, Husband contends that the MSA is clear on the issue, in that it expressly limits Wife’s entitlement to the date of August 31, 1994, or the date of divorce and expressly entitles Husband to the benefits after that date as his separate property.

2. Husband’s Reliance on Franklin

[45] In an apparent attempt to show that his view of how the MSA reads should prevail, Husband argues that in Franklin v. Franklin, 116 N.M. 11, 859 P.2d 479 (Ct. App. 1993), this Court definitively “rejected [the w]ife’s argument that the average salary figures to be utilized are those at the time of retirement, rather than at [at] the time of divorce.” Franklin does not assist Husband. It is not clear whether the formula in Franklin sets out the fraction that appears in the formula in the present case. The divorce decree did not specify a formula to be used in calculating the value and did not set a value on the benefits. Id. at 16, 859 P.2d at 484. This Court specifically wanted it known that the parties’ arguments regarding the formulas and the wife’s argument regarding the court’s use of salary at the time of divorce were unclear. Id. at 15, 16, 859 P.2d at 483, 484. The parties argued for different formulas and calculations to determine the wife’s share of the husband’s benefits, with the husband’s formula explained by his expert witness. Id. at 13-14, 859 P.2d at 481-82. The district court adopted the formula and calculation of the expert witness that were based, among other income adjustments, on the husband’s average monthly compensation at the time of divorce. Id. at 14-15, 859 P.2d at 482-83.

[46] On appeal in Franklin, the wife argued that the district court should have applied the husband’s final average monthly salary at the time of actual retirement; the husband argued that the district court correctly applied the salary figure as of the time of divorce. Id. at 15, 859 P.2d at 483. The wife’s argument was based on the time-rule cases of Fondi, 802 P.2d at 1266, and In re Marriage of Bulicek, 800 P.2d 394, 399 (Wash. Ct. App. 1990), for the view that the benefits payable at retirement are based on a presumed foundation of community effort and the employee spouse had the burden to show otherwise. Franklin, 116 N.M. at 16-17, 859 P.2d at 484-85. The husband’s argument was that his post-divorce higher salaries and bonuses were his separate property and that the court’s income adjustments were necessary to safeguard his interests and to prevent an invasion of his separate property. Id. at 17, 859 P.2d at 485.

[47] As we discussed earlier in this opinion, this Court in Franklin did not address the question of first impression of what portion of the benefit was due to community effort and what portion was attributable to the husband as his sole and separate property. Id. We now clarify that decision to mean that we were not adopting any hard-fast rule as to demarcation of entitlement or as to what salaries to use in valuing the wife’s community interest in the husband’s retirement account. Nor in Franklin did we adopt the wife’s view of the law based on Fondi and Bulicek. Franklin, 116 N.M. at 17-18, 859 P.2d at 485-86. We stated that even were we to do so, the wife would lose on the question of which salary figures to use as part of the formula. Id. We concluded this because the wife did not present any evidence to support her contention that the salaries and bonuses were due to community effort and not separate effort, and because the husband presented the only evidence on the issue and that evidence showed that his post-divorce salary increases were due to his separate efforts. Id. It was on the particular circumstances of the case that we could not “say that the trial court erred in using the amount of [the h]usband’s average compensation as of the date of divorce in calculating [the w]ife’s share of the pension.” Id. at 19, 859 P.2d at 487.

[48] Franklin is limited to its particular circumstances. It does not support Husband’s position in this appeal. That in Franklin we expressly did not adopt and apply the wife’s view of the law and thereby reject the district court’s method of calculation does not require the conclusion that, under circumstances in the present case where the parties’ MSA sets out a formula customarily found in time-rule application, the district court was precluded from interpreting the MSA as calling for a calculation consistent with the time rule.

3. Husband’s Reliance on Ruggles

[49] Husband also attempts to support his position by relying on a footnote in Ruggles that refers to Madrid, 101 N.M. 504, 684 P.2d 1169, and Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987). See Ruggles, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. Husband does not develop an argument as to how the footnote or either Madrid or Mattox applies here to support his position. Husband simply declares that Ruggles “[m]ade it clear that the community retirement benefits must be valued as of the date of divorce,” that the increases in his retirement benefits after divorce were his separate property, and that therefore the district court’s calculation was erroneous as a matter of law. Husband does not discuss the facts in Madrid or Mattox, does not discuss the manner in which this Court in Franklin dealt with Madrid and Mattox, does not discuss the context in
which Ruggles footnoted Madrid and Mattox, and does not discuss Ruggles’ reference to Franklin and acknowledgment of the difficulty in determining whether a non-employee spouse can share in the increase in value of an employee-spouse’s benefits. We first set out important analytic aspects of those cases that Husband has omitted. We then discuss why we reject Husband’s attempt to support his position with the Ruggles footnote.

[50] In Madrid, the parties’ thirty-year marriage was dissolved two years before the husband died. 101 N.M. at 505, 684 P.2d at 1170. At death, the husband had been receiving retirement benefits for eleven years. Id. On remand from a prior appeal, the district court determined the discounted present value of the husband’s pension. Id. This Court followed our Supreme Court precedent that a pension is to be valued at the time of divorce. Id. We further stated that the increases after divorce were the husband’s separate property. Id. at 506, 684 P.2d at 1171.

[51] In Mattox, when the parties divorced after thirty-one years of marriage the husband’s pension plan was vested but not matured. 105 N.M. at 480-81, 734 P.2d at 260-61. The district court ordered a lump-sum payment to the wife that was to be valued at the time of trial, discounted to present value. Id. at 481-82, 734 P.2d at 261-62. In dicta, citing Madrid, we indicated that if the district court had divided the benefits on a pay-as-it-comes-in basis, the additional value from divorce to maturity date would be the husband’s separate property. Id. at 483, 734 P.2d at 263.

[52] Franklin involved a formula for dividing periodic benefits payments that were distributed on a pay-as-it-comes-in basis. 116 N.M. at 12, 859 P.2d at 480. The parties were divorced after thirty-three years of marriage, and the husband retired five years after the divorce. Id. This Court stated that the issue of “which part of the [p]lan is due to community effort and which part of the [p]lan is attributable to [the employee spouse] as his sole and separate property” was a matter of first impression in New Mexico, and although it was determined that we did not need to decide the issue, at the same time, we determined that the issue “was not directly raised in either Mattox or Madrid.” Franklin, 116 N.M. at 17, 859 P.2d at 485 (citations omitted). We indicated in our parenthetical description of Madrid that Madrid determined that “when [a] pension is given a discounted value for the purpose of division, it should be calculated as of the time of divorce.” Franklin, 116 N.M. at 17, 859 P.2d at 485. We indicated in our parenthetical description of Mattox that the “substantial evidence requirement was met when the trial court’s valuation of the pension fell within the range of figures offered by the parties’ experts and both experts testified that their calculations of the present value of the pension did not take into consideration [the] husband’s earnings between the date of trial and date of maturity of the pension.” Id. We read our decision in Franklin to say that neither Madrid nor Mattox dictates in cases with pay-as-it-comes-in retirement distribution orders that the non-employee spouse can have no community interest in the employee-spouse’s post-divorce benefits increases because those increases are separate property. This view is supported in Ruggles.

[53] In Ruggles, in the context of discussion of its prior cases involving division of future retirement benefits at the time of divorce, and in the footnote upon which Husband in the instant case relies, our Supreme Court referred to Madrid and Mattox as “significant opinions concerning the division, distribution, and valuation of retirement benefits upon dissolution.” Ruggles, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. Our Supreme Court indicated in the parenthetical to its Madrid citation that Madrid relied “on [two earlier Supreme Court cases] to hold that [the] retirement plan must be valued at [the] date of dissolution and concluded that increases in [the] plan’s value occurring after dissolution are separate property of [the] employee spouse.” Ruggles, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7. The Court indicated in the parenthetical to its Mattox citation that Mattox relied on four earlier Supreme Court cases in addressing various issues of valuation of a vested, unmatured plan when the Mattox Court stated, “New Mexico cases state clearly that a spouse is entitled to a community share of the portion of retirement that is vested but unmatured at the date of divorce.” Ruggles, 116 N.M. at 59 n.7, 860 P.2d at 189 n.7 (internal quotation marks and citation omitted).

[54] It is noteworthy that the Supreme Court denied certiorari in Franklin just four days before it issued its opinion in Ruggles. See Franklin, 116 N.M. 11, 859 P.2d 479; Ruggles, 116 N.M. 52, 860 P.2d 182. The Court in Ruggles stated that Franklin illustrated the difficulties that can arise in having to make determinations long after the date of divorce in pay-as-it-comes-in cases. Ruggles, 116 N.M. at 65 n.14, 860 P.2d at 195 n.14. Significantly, the Court stated that those difficulties included “determining whether the non-[employee] spouse may share in increases in the amount of the pension due to post-[divorce] increases in the employee[.] spouse’s salary, resulting either from ordinary promotions and cost of living increases or from the employee’s increased effort and achievement at work.” Id. We read these comments in Ruggles as indicating, as we indicated in Franklin, that a non-employee spouse may have a right to share in increases in the value of the employee-spouse’s retirement benefits.

[55] We cannot accept Husband’s arguments based on Ruggles for several reasons. First, Husband shows his own lack of faith in his references by failing to adequately develop them through analysis and argument. Second, we are dealing in the present case with written, agreed on, albeit ambiguous, language, and we see no reasonable basis on which to scuttle the district court’s interpretation of the language based on an argument that the Ruggles footnote somehow requires a contrary interpretation. Even were the footnote or Madrid or Mattox to state what Husband contends they stand for, these authorities would not supplant what the parties agreed upon as interpreted by the court. Third, the context to which the Ruggles footnote relates is sufficiently far afield from the context of calculation of benefits in a pay-as-it-comes-in circumstance as to give no support to Husband. Fourth, as we stated earlier in this opinion, we read Franklin and Ruggles to recognize that, absent an agreement covering division of benefits, a non-employee spouse may be allowed to share in the employee-spouse’s increased retirement benefits value.

[56] Thus, based on the foregoing discussion of Madrid and Mattox and the references to them in Franklin and Ruggles, based on Ruggles’ discussion relating to Franklin, and based on the foregoing reasons for rejecting Husband’s attempt to inject the Ruggles footnote, Madrid, and Mattox into the mix, we determine that Husband can gain no support from Franklin and Ruggles.

III. The District Court Did Not Err

[57] In the case at hand, it is apparent that the parties and their counsel handled the divorce without first achieving a clear, written understanding or, it appears, even an oral understanding. Ambiguity resulted. This case is one in which the proceedings leading up to this appeal were not adequately handled by courts and the parties. Further,
this case is one in which there exists no specific evidence from which community effort or Husband’s singular, separate effort can be derived. The parties do not request that we consider whether such evidence is necessary or should be obtained on remand. We see little choice but to narrow the issue we review to the district court’s resolution of ambiguity in the MSA and the domestic relations order.

[58] The district court resolved the ambiguity in Wife’s favor after considering the language in the documents, the nature of the formula, and the parties’ calculations. One aspect of the MSA that supports the court’s resolution is that the formula itself has every indicia of being the time rule. The time rule contemplates payment of benefits based on the value of the benefits at the time of retirement eligibility.

[59] A compelling aspect of how to determine what figures to use in the formula is the notion that the larger the denominator in the fraction, the smaller Wife’s community share will be. The formula in this case expressly calls for the largest denominator, total years of credited service. In fairness to the non-employee spouse, use of this larger number as the denominator under application of the time rule customarily calls for determination of gross monthly benefits to be calculated based on a valuation of the benefits at first retirement eligibility, instead of a valuation of benefits at the time of divorce. It is telling that Husband’s proffered calculation purposefully employed a denominator reflecting total credited service only up to divorce, a significantly lower figure than that expressly called for in the formula. His apparent, if not obvious purpose in using the lower denominator figure was to be able to use a valuation of the benefits based on his average salaries at the time of divorce, thereby matching a lower denominator to a lower valuation in fairness to Wife. To adopt Husband’s way of calculating the monthly benefit would be to change the denominator specifically called for in the formula.

[60] We determine that the circumstances considered by the district court permit an interpretation of the MSA and domestic relations order favorable to Wife’s position. Thus, under the circumstances in this case, we cannot say that the court’s determinations were unsupported by substantial evidence, that the court’s interpretation of the documents and ultimate calculation ruling were erroneous, or that the court erred in its application of the law to the facts.

CONCLUSION

[61] We affirm the district court’s determination that Wife was entitled to begin receiving her share of Husband’s retirement benefits when Husband first became eligible to retire. We also affirm the district court’s calculation of Wife’s share of retirement benefits.

[62] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

JAMES J. WECHSLER, Judge
ROBERT E. ROBLES, Judge (concurring in part, dissenting in part).

ROBLES, Judge
(concurring in part and dissenting in part).

[63] I concur with the majority’s analysis on the issue of when Wife was entitled to receive benefits. While I generally agree with the majority’s legal analysis regarding calculation of retirement benefits, there must be a different conclusion under the facts of this case. My focus is on procedure and evidence surrounding the calculation issue. Because evidence is lacking in this case and under our standard of review we are unable to affirm, I would remand this case for further proceedings. I therefore must respectfully dissent.

[64] I agree with the majority that Husband preserved his argument concerning the formula to be used. However, this Court’s lack of clarity on the first appeal led to the confusion surrounding the issue, and the conclusions regarding the calculation issue that this Court holds today are an adherence to the earlier, faulty process.

[65] In addition to what the majority has already noted at the initial hearing in 2006 where Husband appeared pro se, the following interactions occurred:

COURT: Okay. Alright. Well, [Husband], I mean, part of the representation is, and I know this is, you folks have been divorced for some long time, but you remember back in . . . actually, let me see if I can get a more specific date, back in 1994.

COURT: Pursuant to your divorce, you remember that? Just listen to my question.

[66] Several minutes later, the court stated:

COURT: So, so what we’re going to do is, is set out . . . getting that done, now if you need to get legal counsel, and herein lies one of the problems, and I understand, I’m sympathetic to a degree, [Husband], that, that you don’t have legal counsel representing you, Ms. Spieldman is legal counsel just representing [Wife], and so you don’t have legal counsel representing you, you’re not a lawyer. . . . If you want to get legal counsel and . . . run this information by your legal counsel if you can afford to do that, you’re certainly welcome to do that and I’ll listen to any argument that they want to make. (Emphasis added).

. . . You need to start that immediately and we’ll find out, and I think probably August 15 would be a good target date for you to start looking at getting . . . that to be your first payment of $590 and it will be $590 from that point forward. Now if you get legal counsel and you’re going to dispute that amount and those kinds of things, well you’ll have to
have your legal counsel file a motion in that regard but it sounds pretty reasonable to me... based upon the formula that you both have agreed to, which we’re not going to go back and redo. The only thing I can think of that would, might make that a little bit different is... whether or not the figures that Ms. Speildman is going to receive from you with regard to your... salary and your employment... would change that number some degree... otherwise, I’m expecting that that’s going to be the amount.

{67} As the majority notes, Husband did hire an attorney and file a motion for rehearing as the district court suggested he do. On the first appeal to this Court, we initially proposed to affirm the district court on the calculation issue. Husband filed a motion in opposition to summary affirmance on that point, and we retracted our initial proposed holding. In our memorandum opinion filed in February 2007, we implied that the issue was not preserved, and we remanded the case.

{68} This Court stated:

We decline to address Husband’s arguments as to benefit computation because they were not raised in the district court. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.”).

{69} We then went on to note that:

“[W]e have not been provided with a copy of the transcript from the hearing on Wife’s motion... The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead us to conclude that the district court never considered the arguments set forth in Husband’s motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband’s arguments are not properly before us on appeal.

. . . .

We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires.

{70} The lack of clarity from this Court on the first appeal was, in part, due to the fact that we provided a ruling on the formula issue without a copy of the transcript from the hearing. The confusion on remand was compounded by the less than clear memorandum opinion generated by this Court. At the hearing on remand, Husband testified and entered into evidence an exhibit with his income information, his formula, and his calculations. Wife objected to the district court addressing the formula issue, arguing that it was beyond the scope of the remand, and that law of the case prevented the district court, and now this Court, from reviewing the issue. The majority correctly notes that the law of the case is inconsistent for this Court to hold that the issue was and is preserved.

{71} After determining that the issue can be reached, the majority, ultimately, concludes “that the district court on remand reconsidered the question of which formula and calculations should prevail and determined that the MSA and domestic relations order supported Wife’s calculation.” Majority Op. ¶ 32. On examination of the record, however, I reach a different conclusion.

{72} At the initial 2006 hearing, Wife’s counsel asserted:

[w]e wrote in, in the formula, that the marital months were 192, according to my math [Husband] spent a total of 824 months earning this retirement. . . . So that with my math, came out to be 23.2 percent is [Wife’s] share of the gross monthly annuity which would be $2533. That’s what he would have started receiving December 11 of 2005. So, I calculated that [Husband] would be required to pay... [Wife] $590 per month. That’s 23.2 times 2533, . . . should have been paying it since December. [$]o he has accrued an arrearage of, for seven and a half months of retirement... [Wife] should have received commencing December 11. [A]nd... seven and a half months times the $590 is $4425.

{73} This oral assertion of Wife’s counsel in 2006 is the only source in the record before this Court of the numbers that are being affirmed. The majority holds that it is reasonable to conclude that the district court relied on Wife’s counsel’s arguments from 2006, rather than the calculation presented by Husband in 2007, and that “[e]xcept perhaps to determine salaries on a particular date for valuation purposes, there was no evidence required.” Majority Op. ¶33. Further, the majority explains that “Husband did not contest the formula or calculation or the manner in which it was presented at the July 19, 2006, hearing,” and that it was not until 2007 that Husband argued that Wife’s formula had no support in evidence. Id. I must disagree with the majority.

{74} First, as the above excerpts of the transcript demonstrate, the court assured Husband that if he chose to revisit any issue, he could hire an attorney and be heard. The district court completely and fully adopted Wife’s mere assertions in a minute order with the caveat that Husband could litigate those issues if he chose. However unorthodox and ill-advised the district court’s actions may have been, the majority is correct that, in the immediate case, Husband’s arguments were preserved. Majority Op. ¶ 28. However, it is inconsistent for this Court to hold that the issue was preserved by Husband when he hired an attorney and filed a motion for rehearing, which alerted the district court, as well as this Court, in the first appeal to his claim of error and, at the same time, state that Wife’s counsel’s explanation was unchallenged. Majority Op. ¶ 33. If we are to hold that the issue was and is preserved, and Husband wishes to litigate it, there is a challenge.

{75} Secondly, as this Court has consistently expressed, “[t]he mere assertions and arguments of counsel are not evidence.” Muse v. Muse, 2009-NMSC-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (filed 2008); see also Henning v. Rounds, 2007-NMCA-139, ¶ 2, 142 N.M. 803, 171 P.3d 317 (We observe, however, arguments
of counsel are not evidence.” (alteration in original) (internal quotation marks and citation omitted)); G & G Servs., Inc. v. Agora Syndicate, Inc., 2000-NMCA-003, ¶ 51, 128 N.M. 434, 993 P.2d 751 (filed 1999) (“[A]rguments of counsel are not evidence.”); Fitzsimmons v. Fitzsimmons, 104 N.M. 420, 427, 722 P.2d 671, 678 (Ct. App. 1986) (“[C]ounsel’s beliefs and statements cannot be considered as evidence.”). Wife’s counsel was not under oath, she was not giving testimony subject to cross-examination, and no documents were admitted into evidence before the district court. Husband had no duty nor opportunity to object to Wife’s counsel’s assertions and arguments regarding the calculation. Every single number that this Court affirms today came from either assertions or argument, not evidence. While Husband stated at the 2006 hearing that he agreed with the formula “that they came up with” in 1994, it does not follow that the numbers argued by Wife’s counsel were the correct numbers to use. In the 2007 hearing on remand, Husband presented his income information, which was admitted into evidence, and which remains the only income evidence in the record. While the district court and the majority may disagree with Husband’s numbers because they were based on income from the time of divorce instead of the time of eligibility, there is nothing in the record that would allow them to apply Wife’s counsel’s numbers from 2006, which were mere assertions of counsel when those assertions are competing with actual income information that has been admitted into evidence.

Finally, under our standard of review, we simply cannot uphold the district court’s determination. The proper lens through which to view our standard of review should be for substantial evidence. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” Concerned Residents of Santa Fe N., Inc. v. Santa Fe Estates, Inc., 2008-NMCA-042, ¶ 68, 143 N.M. 811, 182 P.3d 794 (internal quotation marks and citation omitted). Here, the evidence in the record simply does not support Wife’s position. The district court’s conclusion of law that “[t]he Court finds that there is sufficient information/evidence to determine that the benefit due and owing to [W]ife from [H]usband is $590[,] per month” simply has no basis for support when the only numbers in evidence and in the record belong to Husband.

In writing today, I recognize the need for finality and the security that comes with it. I acknowledge that the parties have already expended considerable time, effort, and money in this matter and deserve a prompt and equitable outcome. However, failing to address procedural difficulties is not justice, it is not in the parties’ interest, and it is not in the interest of this Court. Because of the confusion surrounding this case, Wife never submitted evidence. Were we to resolve this issue today, we would have to conclude that Husband is entitled to application of his numbers because they are the only ones in the record. This matter should be remanded for admission of evidence and a decision which is supported by more than mere assertions. Holding otherwise implies that one party or the other has not had their day in court. We should endeavor to resolve issues on their merits whenever possible. I therefore cannot agree with the majority on this particular issue, and I must dissent.

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