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Special Insert:
  CLE-At-a-Glance
Subject: Chief New Mexico Disciplinary Counsel Sought

Dear Colleagues,

After many years of devoted service as the chief disciplinary counsel for the Disciplinary Board of the Supreme Court, Virginia Ferrara has decided to go on “senior status.” As a result, we are advertising for a replacement for that position. The position entails both management and litigating cases. Our hope is for the Disciplinary Board to complete the selection process in October, with the new person taking over thereafter as their schedule would permit.

The Disciplinary Board is undertaking a wide search for the next chief disciplinary counsel. We encourage anyone interested in filling the position to apply. The disciplinary process is crucial to a healthy legal system. Due in part to the greatly increased numbers of attorneys and in part because of the stresses of the legal practice, the disciplinary system must constantly undergo reexamination to ensure that it is meeting its obligations to protect the public and the integrity of the legal system. The new chief disciplinary counsel will play an integral role in this ongoing and evolving process.

I am sure that the position will be challenging and satisfying. We hope to receive applications from a broad spectrum of people. I can assure you that no one has been “pre-selected.” We hope you seriously consider applying. If you have any questions, please do not hesitate to pick up the phone to call me or Vice-Chair Sandra Rotruck, 505-883-2500, who is leading the search committee. Thank you for your consideration.

Paul M. Fish
Chair, Disciplinary Board
505-848-1871

Please view Request for Applications on page 50
as part of their annual dues. The 

Bar Bulletin 
citations and quotations. State Bar members receive the 

who are solely responsible for the accuracy of their 

Mexico. The views expressed are those of the authors, 

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Bar Bulletin 

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Meetings

July
30
Immigration Law Section BOD
noon, State Bar Center

August
2
Attorney Support Group
5:30 p.m., First United Methodist Church

3
Disability Committee
noon, State Bar Center

4
Real Property, Trust and Estate Section BOD
11:30 a.m., via teleconference

9
Taxation Section BOD
noon, via teleconference

11
Children’s Law Section BOD
noon, Juvenile Justice Center

12
Public Law Section BOD
noon, 4th floor, Reynolds' Building, Santa Fe

12
Intellectual Property Section BOD
noon, Law Office of Diane Albert

12
NREEL BOD
12:30 p.m., State Bar Center

State Bar Workshops

July
28
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

August
25
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

September
8
Lawyer Referral for the Elderly Workshop
10–11:15 a.m., Presentation
1–3 p.m., Clinics

9
Lawyer Referral for the Elderly Workshop
9:45–11 a.m., Presentation
1–4 p.m., Clinics

22
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

From the Cover Artist: Susan Weeks (www.susanweeks.com) is an inactive attorney turned watercolorist. In a hyper-
realistic style, she paints subjects that often come from her travels. 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**

**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., July 30, at the State Bar Center.


The Rules of Criminal Procedure for the District Courts Committee, the Rules for Courts of Limited Jurisdiction Committee, and the Metropolitan Courts Rules Committee have recommended proposed amendments to their respective Rules of Criminal Procedure for the Supreme Court's consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court's website at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

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

Comments will be received on or before Aug. 9 to be considered by the Court. Note that any submitted comments may be posted on the Court's website for public viewing. For reference, see the July 19 (Vol. 49, No. 29) Bar Bulletin.

**First Judicial District Court**

**Reassignment of Domestic Matter and Domestic Violence Cases**

Effective Aug. 2 a reassignment of domestic matters and domestic violence cases will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. Numerous domestic matter cases previously assigned to Division II Judge Sarah M. Singleton and Division VII Judge David K. Thomson will be reassigned to Division VIII Judge Mary L. Marlowe. Numerous domestic violence cases previously assigned to Judge Marlowe will be reassigned to Judge Thomson. For a list of the cases that will be reassigned, visit the court's website at www.firstdistrictcourt.com. Parties who have not previously exercised their right to challenge or excuse will have 19 days from Aug. 2 to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

**Bernalillo County Metropolitan Court**

**Furloughs Begin July 30**

Bernalillo County Metropolitan Court judges approved a furlough plan for court employees that will make up a $674,000 shortfall this fiscal year. Beginning July 30, the court will furlough all employees for two hours per month or one hour per pay period. The court will close two hours early (3 p.m.) on the last working Friday of each month. On months that include three paydays, the court will close three hours early (2 p.m.) on the last working Friday.

**Judicial Investiture**

The legal community is invited to the investiture of Criminal Division 15 Judge Yvette K. Gonzales at 5:15 p.m., July 29, in the rotunda of the Bernalillo County Metropolitan Courthouse.

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**Judicial Records Retention and Disposition Schedules**

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

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<th>Court</th>
<th>Exhibits</th>
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<th>May Be Retrieved Through</th>
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<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic relations, and children's court cases</td>
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<td>Sept. 3</td>
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<td>(505) 455-8275</td>
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<tr>
<td>5th Judicial District Court</td>
<td>Exhibits in civil cases</td>
<td>1992–2009</td>
<td>Oct. 1</td>
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<td>County of Chaves</td>
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<td>(575) 622-2565, x120</td>
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<tr>
<td>11th Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic relations, probate, children's court cases, guardianship and conservatorship and incompetency/mental health cases</td>
<td>1981–2010</td>
<td>Sept. 27</td>
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<td>(505) 334-6151</td>
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STATE BAR NEWS

Attorney Support Group

- Aug. 16, 7:30 a.m.—Morning groups meet regularly on the third Monday of the month.
- Aug. 2, 5:30 p.m.—Afternoon groups meet regularly on the first Monday of the month.

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 Revised Local Rules

The revised local rules for the New Mexico Bankruptcy Court go into effect Aug. 2. Join the Bankruptcy Law Section at noon, Aug. 13, in the Animas Courtroom (13W), Dennis Chavez Federal Building, 500 Gold SW, Albuquerque, for an open forum on the new rules and their effect. The session will be moderated by Jim Jacobsen, chair of the Local Rules Advisory Committee which drafted the proposals that have now, with minor modifications, been adopted. The new rules are available on line, at the court’s website: http://www.nmcourt.fed.us/usbc/files/August2LocalRules.pdf. A redline version showing changes from the soon-to-be replaced current local rules is at http://www.nmcourt.fed.us/usbc/files/March9localrules-redlined.pdf.

Young Lawyers Division Volunteers Needed

YLD Fall Conference, Host Committee

Volunteers are needed to be part of the Host Committee for the 2010 ABA/YLD Fall Conference to be held Oct. 14–16 at the El Dorado Hotel and Spa in Santa Fe. Energetic attorneys and paralegals are needed to help with fundraising and event planning. The registration fee will be covered for volunteers. For more information or to participate, contact Martha Chicoski, mmchicoski@gmail.com.

Wills for Heroes

Volunteer attorneys are needed to draft wills and healthcare powers of attorney, free of charge, for qualified first responders from the Albuquerque Police Academy, 5412 2nd St. NW, Albuquerque. No prior experience with wills or estate planning is needed. This is a great opportunity to honor first responders and provide a valuable service at the same time. Volunteers must have their own laptop computers, but everything else will be provided. For more information or to volunteer, contact Martha Chicoski, mmchicoski@gmail.com, or Samantha Jarrett, jarretts@jacksonlewis.com by Aug. 13.

OTHER BARS

Albuquerque Bar Association

Roast for Hon. William F. Lang

The Albuquerque Bar Association invites the legal community to an evening of laughter, merriment and irreverence as they roast Hon. William F. Lang at 5:30 p.m., July 30, at the Hotel Albuquerque in Old Town, 800 Rio Grande Blvd. NW, Albuquerque. The event is by reservation only by July 26: individual, $75; reserved table of ten with program recognition, $750.

To make reservations:
1. log on to www.abqbar.org;
2. e-mail abqbar@abqbar.org;
3. fax to (505) 842-0287;
4. call (505) 842-1151 or (505) 243-2615; or
5. mail to PO Box 40, Albuquerque, NM 87103.

N.M. Hispanic Bar Association

CLE at UNM

The New Mexican Bar Association is presenting Everything You Wanted to Know About Becoming a Judge but Were Afraid to Ask,” (2.3 general, .80 ethics, and .60 professional CLE credits), from 1–5 p.m., July 30, at the UNM School of Law. Annual elections and a reception will follow from 5:15–7 p.m. The cost for attendance is $100 and a rate of $25 for the entire CLE will be offered for NMHBA members. For additional information, contact Christina Vigil, (505) 242-1796 or christina@vigillawoffices.com.

ABA Retirement Funds

The ABA Retirement Funds program has been providing retirement plan solutions to the legal community for over 45 years. Whether you operate a solo practice or a larger firm, the ABA program can provide a 401(k) or profit sharing plan to meet your needs.

Call (800) 826-8901 or visit www.abaretirement.com for more information.

UNM School of Law

Summer Library Hours to Aug. 22

Building and Circulation

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<td>Sat</td>
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The lower level of the UNM Law Library will be closed July 27 through Aug. 6 to accommodate the installation of new carpet. During that time, there will be no access to the lower level collection. The remainder of the Law Library will remain open (including the reference and circulation desks and the upper floor). The majority of the current materials and several public computers will be available on the upper floors. For questions about accessing materials on the lower level, contact the circulation desk, (505) 277-6236, or the reference desk, (505) 277-0935, as staff may be able to retrieve the requested items, depending on the installation process. Reference questions and document delivery requests sent to the reference desk (libref@law.unm.edu) will be answered during this time period. For further information, contact Ann Hemmens, (hemmens@law.unm.edu or (505) 277-0678.
**LEGAL EDUCATION**

### JULY

26 Annual Workplace Law Seminar  
Santa Fe  
National Rural Electric Cooperative Association  
7.2 G  
(703) 907-5656  
www.nreca.org

26 Best Practices and Ethics in Adult Guardianship Law  
Teleconference  
TRT, Inc.  
1.0 G, 1.0 E  
1-800-672-6253  
www.trtcle.com

27 Good Will in Business Transactions  
Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

27 Annual Legal Seminar  
Santa Fe  
National Rural Electric Cooperative Association  
7.5 G, 1.0 E  
(703) 907-5656  
www.nreca.org

29 When Prosecutors Test the Outer Limits  
Teleconference  
TRT, Inc.  
1.0 E, 1.0 P  
1-800-672-6253  
www.trtcle.com

### AUGUST

3 2009 How to Do Your First Personal Injury Case  
VR–State Bar Center  
Center for Legal Education of NMSBF  
4.0 G, 1.0 E, 1.0 P  
(505) 797-6020  
www.nmbarcle.org

3 Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World—A.M. Session  
VR–State Bar Center  
Center for Legal Education of NMSBF  
2.2 G, 0.5 E  
(505) 797-6020  
www.nmbarcle.org

4 Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World—P.M. Session  
VR–State Bar Center  
Center for Legal Education of NMSBF  
2.0 G, 0.7 E  
(505) 797-6020  
www.nmbarcle.org

4 Kinship Guardianship  
Albuquerque  
Second Judicial District Volunteer Attorney Pool  
2.0 G  
(505) 944-7167

6 Professionalism and Ethics for Pro Bono Attorneys  
Albuquerque  
Second Judicial District Volunteer Attorney Pool  
1.0 E, 1.0 P  
(505) 944-7167

11 Understanding the Rules of Evidence  
State Bar Center Paralegal Division  
1.0 G  
(505) 247-0411 or (505) 222-9356

17 25th Annual Bankruptcy Year in Review  
VR–State Bar Center  
Center for Legal Education of NMSBF  
6.0 G, 1.0 P  
(505) 797-6020  
www.nmbarcle.org

17 Skeptically Determining the Limits of Expert Testimony and Evidence: An Investigation of Scope, Expertise and Process  
VR–State Bar Center  
Center for Legal Education of NMSBF  
4.7 G, 1.0 E, 1.0 P  
(505) 797-6020  
www.nmbarcle.org

G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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<td><a href="http://www.SamaritanNM.org">www.SamaritanNM.org</a></td>
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<td>Lawyer Substance Abuse Addictions: Causes and Results</td>
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<td>Workers’ Compensation Update</td>
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<td>(715) 833-3940</td>
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<td>2009 Ethics Risks Practicing Law (From Surviving to Thriving 2009)</td>
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<td>7th Annual Elder Law Seminar</td>
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<td>7</td>
<td>Attorney’s Guide to Good Lawyering for People With Disabilities (2009 Professionalism)</td>
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<td>2010 Professionalism and Ethics: Responding to Crisis Through Limited Representation</td>
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<td>21</td>
<td>The ‘Write’ Way to Write Persuasively</td>
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<td>Creditor’s Rights, Collections and Bankruptcy</td>
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<td>Lawyer Substance Abuse Addictions: Causes and Results</td>
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<td>Art of Self-Awareness</td>
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<td>(505) 988-7035</td>
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## Writs of Certiorari

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

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

**Effective July 26, 2010**

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

<table>
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<tr>
<th>No.</th>
<th>Case Title</th>
<th>Date Petition Filed</th>
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<tbody>
<tr>
<td>NO. 32,499</td>
<td>State v. Aguilar (COA 29,955)</td>
<td>7/14/10</td>
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<tr>
<td>NO. 32,497</td>
<td>State v. Harrison (COA 28,926)</td>
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<td>NO. 32,447</td>
<td>Mendoza v. Tamaya Enterprises (COA 28,809)</td>
<td>7/13/10</td>
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<td>NO. 32,495</td>
<td>State v. Perkins (COA 28,017)</td>
<td>7/12/10</td>
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<td>NO. 32,493</td>
<td>Byers v. Gartman (12-501)</td>
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<td>NO. 32,486</td>
<td>City of Rio Rancho v. Amrep (COA 28,709)</td>
<td>7/12/10</td>
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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 July 19, 2010**

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

#### Pending Proposed Rule Changes:

| 5-401 | Bail. (Rules of Criminal Procedure for the District Courts) | 8-09/10 |
| 5-406 | Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the District Courts) | 8-09/10 |
| 6-401 | Bail. (Rules of Criminal Procedure for the Magistrate Courts) | 8-09/10 |
| 6-406 | Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the Magistrate Courts) | 8-09/10 |
| 7-401 | Bail. (Rules of Criminal Procedure for the Metropolitan Courts) | 8-09/10 |
| 7-406 | Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the Metropolitan Courts) | 8-09/10 |
| 8-401 | Bail. (Rules of Procedure for the Municipal Courts) | 8-09/10 |
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| 1-023 | Class actions. (Rules of Civil Procedure for the District Courts) | 07-26/10 |
| 5-116 | Witness use immunity. (Rules of Criminal Procedure for the District Courts) | 07-26/10 |
| 5-303 | Arraignment. (Rules of Criminal Procedure for the District Courts) | 07-19/10 |
| 5-304 | Pleas. (Rules of Criminal Procedure for the District Courts) | 07-19/10 |
| 5-821 | Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the District Courts) | 07-19/10 |
| 5-822 | Commencement and continuation of fugitive actions after issuance of a governor's rendition warrant. (Rules of Criminal Procedure for the District Courts) | 07-19/10 |
| 6-502 | Pleas and plea agreements. (Rules of Criminal Procedure for the Magistrate Courts) | 07-19/10 |
| 6-811 | Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the Metropolitan Courts) | 07-19/10 |
| 7-502 | Pleas and plea agreements. (Rules of Criminal Procedure for the Metropolitan Courts) | 07-19/10 |
| 7-811 | Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the Metropolitan Courts) | 07-19/10 |
| 8-502 | Pleas. (Rules of Procedure for the Municipal Courts) | 07-19/10 |
| 9-406 | Guilty plea proceeding. (Criminal Forms) | 07-19/10 |
| 9-406A | Guilty plea or no contest plea proceeding. (Criminal Forms) | 07-19/10 |
| 9-408 | Plea and disposition agreement. (Criminal Forms) | 07-19/10 |
| 9-408A | Plea and disposition agreement. (Criminal Forms) | 07-19/10 |
| 9-806 | Motion to extend time. (Criminal Forms) | 07-19/10 |
| 9-807 | Order granting extension of time. (Criminal Forms) | 07-19/10 |
| 13-200 | Introduction. (UJI–Civil) | 05-24/10 |
| 13-2005 | Human Rights Act violation. Withdrawn; Recompiled as UJI 13-2307] (UJI–Civil) | 05-24/10 |
| 13-2007 | Human Rights Act violation. (UJI–Civil) | 05-24/10 |
| 13-2307A | Race, gender, and other discrimination under the New Mexico Human Rights Act. (UJI–Civil) | 05-24/10 |
| 13-2307B | Bona fide occupational qualification. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307C | Discrimination based on serious medical condition or physical or mental handicap. (UJI–Civil) | 05-24/10 |
| 13-2307D | Failure to accommodate.1 (UJI–Civil) | 05-24/10 |
| 13-2307E | Undue hardship. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307F | Determining whether impairment qualifies as a physical or mental handicap. (UJI–Civil) | 05-24/10 |
| 13-2307G | Determining whether impairment qualifies as a serious medical condition. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307H | Establishing disability by showing an individual has a record of a physical or mental condition. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307I | “Regarded as” defined. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307J | “Otherwise qualified” defined. (UJI–Civil) | 05-24/10 |
| 13-2307K | “Reasonable accommodation” defined. No instruction drafted. (UJI–Civil) | 05-24/10 |
| 13-2307L | Constructive discharge. (UJI–Civil) | 05-24/10 |
| 3-105 | Assignment and designation of judges (Rules of Civil Procedure for the Metropolitan Courts) | 05-03/10 |
| 3-706 | Appeal from metropolitan court on the record (Rules of Civil Procedure for the Metropolitan Courts) | 05-03/10 |
| 6-701 | Judgment (Rules of Criminal Procedure for the Magistrate Courts) | 05-03/10 |
| 6-703 | Appeal (Rules of Criminal Procedure for the Magistrate Courts) | 05-03/10 |
RULE-MAKING ACTIVITY

7-703 Appeal (Rules of Criminal Procedure for the Metropolitan Courts) 05/03/10
8-701 Judgment (Rules of Procedure for the Municipal Courts) 05/03/10
8-703 Appeal (Rules of Procedure for the Municipal Courts) 05/03/10
10-424 Advice of rights by judge (Children’s Court Rules) 04/26/10
10-425 Consent decree (Children’s Court Rules) 04/26/10
10-456A Affidavit of indigency; abuse or neglect (Children’s Court Rules) 04/26/10
10-343 Adjudicatory hearing; time limits; continuances (Children’s Court Rules) 04/17/09

Recently Approved Rule Changes Since Release of 2010 NMRA:

Rules of Civil Procedure for the District Courts
1-079 Public inspection and sealing of court records. 07/01/10
1-071.1 Statutory stream system adjudication suits; service and joinder of water rights claimants; responses. 06/08/10
1-071.2 Statutory stream system adjudication suits; stream system issue and expedited inter se proceedings. 06/08/10
1-071.3 Statutory stream system adjudication suits; annual joint working session. 06/08/10
1-071.4 Statutory stream system adjudication suits; ex parte contacts; general problems of administration. 06/08/10
1-071.5 Statutory stream system adjudication suits; excusal or recusal of a water judge. 06/08/10

Rules of Civil Procedure for the Magistrate Courts
2-112 Public inspection and sealing of court records. 07/01/10
2-105 Assignment and designation of judges. 05/14/10

Rules of Criminal Procedure for the Metropolitan Courts
3-112 Public inspection and sealing of court records. 07/01/10

Civil forms
4-102 Certificate of excusal or recusal. 05/14/10
4-103 Notice of excusal. 05/14/10
4-104 Notice of recusal. 05/14/10

Rules of Criminal Procedure for the District Courts
5-605 Jury trial. 11/30/09
5-704 Death penalty; sentencing. 11/30/09
5-123 Public inspection and sealing of court records. 07/01/10
5-302A Grand Jury Proceedings. 05/14/10

Rules of Criminal Procedure for the Magistrate Courts
6-114 Public inspection and sealing of court records. 07/01/10
6-105 Assignment and designation of judges. 05/14/10

Rules of Criminal Procedure for the Metropolitan Courts
7-113 Public inspection and sealing of court records. 07/01/10
7-201 Commencement of action. 05/10/10
7-504 Discovery; cases within metropolitan court trial jurisdiction. 05/10/10

Rules of Procedure for the Municipal Courts
8-112 Public inspection and sealing of court records. 07/01/10

Criminal forms
9-218 Target notice. 05/14/10
9-219 Grand jury evidence alert letter. 05/14/10

Children’s Court Rules and Forms
10-424 Advice of rights by judge. 08/30/10
10-425 Consent decree. 08/30/10
10-456A Affidavit of indigency; abuse or neglect. 08/30/10
10-166 Public inspection and sealing of court records. 07/01/10
10-313.1 Representation of multiple siblings. 05/11/10

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12-214 Oral argument. 04/12/10
12-305 Form of papers prepared by parties. 04/12/10
12-314 Public inspection and sealing of court records. 07/01/10
12-607 Certification from other courts. 05/11/10

UJI Criminal
14-121 Individual voir dire; death penalty cases; single jury used. 11/30/09
14-121A Individual voir dire; death penalty cases; two juries used. 11/30/09

Rules Governing Admission to the Bar
15-304 Oath. 03/30/10
15-103 Qualifications. 07/04/10

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17-316 Review by the Supreme Court. 11/30/09

Supreme Court General Rules
23-106 Supreme Court rules committees. 05/10/10

Rules Governing Review of Judicial Standards Commission
27-106 Forms of papers. 03/03/10
27-301 Commencement of proceedings. 03/03/10
27-303 Response. 03/03/10

http://nmsupremecourt.nmcourts.gov.
### RULE-MAKING ACTIVITY

http://nmsupremecourt.nmcourts.gov.

#### RULES GOVERNING THE JUDICIAL EVALUATION COMMISSION

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<td>Commission created; members; staff; meetings.</td>
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<td>Judicial proceedings; excusals; recusals and withdrawals.</td>
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<td>Powers and duties of the Commission.</td>
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#### LOCAL RULES FOR THE THIRTEENTH JUDICIAL DISTRICT

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<td>LR13-411</td>
<td>Electronic filing and service pilot project.</td>
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21ST ANNUAL APPELLATE PRACTICE INSTITUTE

Friday, September 10, 2010 • State Bar Center, Albuquerque
5.8 General & 1.0 Professionalism CLE Credits
☐ Standard Fee $ 219  ☐ Appellate Practice Section Member, Government, Legal Services Attorney, Paralegal $189

Co-Sponsor: Appellate Practice Section

8:00 a.m. Registration
8:30 a.m. Introductory Remarks
Scott Davidson, Esq., JustAppeals.Net
Appellate Practice Section, Chair

8:40 a.m. Recent Developments in Appellate Practice
Sue A. Herrmann, Esq., Office of the State Engineer
Edward Ricco, Esq., Rodey Dickason, Sloan, Akin & Robb, P.A.

9:20 a.m. Judicial Insights: How Cases Flow through New Mexico's Appellate Courts
The New Mexico Supreme Court
Hon. Charles W. Daniels, Chief Justice
The New Mexico Court of Appeals
Hon. Cynthia A. Fry, Chief Judge

10:20 a.m. Break
10:35 a.m. Oral Argument: Appearing before the United States Supreme Court
Nancy Hollander, Esq., Freedman Boyd Hollander Goldberg Ives & Duncan, P.A.
Dolph Barnhouse, Esq., Luebben Johnson & Barnhouse LLP
Margaret Katze, Esq., Office of the Federal Public Defender

11:50 a.m. Lunch (provided at the State Bar Center)
1:00 p.m. Appellate Writing: How to Craft Dynamic, Effective Arguments
Professor Timothy Terrell, Emory University School of Law

3:00 p.m. Break
3:15 p.m. Judicial Q&A: An Opportunity to Seek Guidance from a Diverse Panel
Hon. Harris L. Hartz, Tenth Circuit Court of Appeals
Hon. Edward L. Chavez, New Mexico Supreme Court
Hon. Michael D. Bustamante, New Mexico Court of Appeals

4:00 p.m. Professionalism & Appellate Mediation
Robert M. Rambo, Esq., New Mexico Court of Appeals

5:00 p.m. Adjourn

BANKRUPTCY EVIDENCE CLE

Friday, September 17, 2010 • State Bar Center, Albuquerque
Co-Sponsor: Bankruptcy Section

9:00 a.m. Avoiding Evidentiary Pitfalls
Hon. Barry Russell, Chief Bankruptcy Judge Emeritus, Central District of California

10:30 a.m. Avoiding Evidentiary Pitfalls (continued)

10:15 a.m. Break
11:45 a.m. Adjourn

2010 PROBATE INSTITUTE

Thursday, September 23, 2010 • State Bar Center, Albuquerque
Co-Sponsor: Real Property, Trust, & Estate Law Section
### NATIONAL SERIES

**Must register for teleseminars online at www.nmbarcle.org**

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<td><strong>AUGUST</strong></td>
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<td>3 Buy/Sell Arrangements in LLCs</td>
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<td>Important employment and tax law consequences flow from whether a worker is characterized as an employee or independent contractor. This program cover the factors for determining whether a worker is an employee or an independent contractor, common wage and hour traps and income tax consequences depending on the characterization, employment law issues in outsourcing to independent contractors, including theories of liability under federal law, and employment law implications of using independent contractors in lieu of common law employees. 1.0 General CLE Credit</td>
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<td>10-11 Estate Planning for Non-Traditional Families, Parts 1 &amp; 2</td>
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<tr>
<td>Estate planning for non-traditional families is a substantial challenge for estate planners, and the challenges are becoming increasingly common as the number of unmarried couples increases. This program will provide you with a real-world guide to the most important issues for issues for planning for various non-traditional couples and families, including adverse after-death tax consequences, planning for retirement benefits, will substitutes, living trusts and insurance policies, incapacity issues, and issues related to providing for children of multiple marriages. 2.0 General CLE Credits</td>
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<tr>
<td>17 Property Tax Issues in Real Estate</td>
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<tr>
<td>This program will provide you with a guide to property tax planning issues in real estate development, in the financial management of offices and retail complexes, and in negotiations with local taxing authorities. 1.0 General CLE Credit</td>
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<tr>
<td><strong>SEPTEMBER</strong></td>
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<tr>
<td>24 Employees v. Independent Contactors: Employment &amp; Tax Implications</td>
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<tr>
<td>Important employment and tax law consequences flow from whether a worker is characterized as an employee or independent contractor. This program cover the factors for determining whether a worker is an employee or an independent contractor, common wage and hour traps and income tax consequences depending on the characterization, employment law issues in outsourcing to independent contractors, including theories of liability under federal law, and employment law implications of using independent contractors in lieu of common law employees. 1.0 General CLE Credit</td>
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<tr>
<td>31 Tax Pitfalls and Opportunities in Real Estate Workouts</td>
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<tr>
<td>Workouts or bankruptcy of failed commercial real estate deals often results in a partial discharge of indebtedness. Termination of these projects can also result in the loss of valuable tax attributes. This program will serve as a real-world guide to the most important tax problems and opportunities that arise when distressed commercial real estate projects go through workouts with lenders or are in bankruptcy. 1.0 General CLE Credit</td>
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<tr>
<td>41 Selection and Use of Expert Witnesses</td>
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<tr>
<td>The selection and preparation of expert witnesses can be one of the most important parts of preparing litigation. It requires considerable effort and finesse. This program will provide you with a real world guide to selection the best expert witness for your case, preparing him or her for examination, and using them at trial. 1.0 General CLE Credit</td>
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### National Teleseminars continued

#### SEPTEMBER

**8**
- **Health Care & Estate Planning: Vital Issues at Each Stage of Planning Process**
  - Health care issues arise at every stage of estate and trust planning process. This program will discuss major health care issues at all stages of the planning, administration and post-mortem stages of the process, including access to health care information, planning for incapacity, advance medical directives, trust planning and more.
  - 1.0 General CLE Credit
- 2.0G, 0.5E
  - $129

**14**
- **Choice of Entity/Form for Nonprofits**
  - This program will provide a framework for choosing the optimal form of entity for a non-profit venture. Among other topics, the program will cover real-world restrictions on the type of entity, including unrelated business income, obtaining exempt status once the entity has been formed, and what types of nonprofit entities work for different types of underlying charitable or educational activities.
  - 1.0 General CLE Credit
- 2.0G, 0.7E
  - $129

**21**
- **Joint Ventures in Real Estate: Structure and Finance**
  - Most real estate deals that are getting done in the current environment are structured as joint ventures, where two or more entities or investors contribute capital, expertise, personnel or other assets to the venture. With joint ventures comes complexity. The first part of this program will cover important structuring and finance considerations, including choice of entity and working with lenders. The second part of this program will consider operational issues at each stage of the project and after completion, and major tax issues.
  - 1.0 General CLE Credit
- 2.0G, 1.0P, 1.0E
  - $179

**22**
- **Joint Ventures in Real Estate: Operation and Tax**
  - Most real estate deals that are getting done in the current environment are structured as joint ventures, where two or more entities or investors contribute capital, expertise, personnel or other assets to the venture. With joint ventures comes complexity. The first part of this program will cover important structuring and finance considerations, including choice of entity and working with lenders. The second part of this program will consider operational issues at each stage of the project and after completion, and major tax issues.
  - 1.0 General CLE Credit
- 2.0G, 1.0P, 1.0E
  - $179

**28**
- **Art of the Debt Deal for Startup and Growth Companies**
  - When a business does not have ready access to equity investors, or when the owner group does not want to dilute its interests, often the only alternative for growth capital is debt financing. This program will discuss the emerging sources of debt finance in the aftermath of the credit crunch, trends in terms demanded by conventional lenders and other investor funds, and structuring the financing for optimal flexibility.
  - 1.0 General CLE Credit
- 2.0G, 1.0P, 1.0E
  - $179

**29**
- **Art of the Debt Deal for Middle Market Companies**
  - When a business does not have ready access to equity investors, or when the owner group does not want to dilute its interests, often the only alternative for growth capital is debt financing. This program will discuss the emerging sources of debt finance in the aftermath of the credit crunch, trends in terms demanded by conventional lenders and other investor funds, and structuring the financing for optimal flexibility.
  - 1.0 General CLE Credit

### STATE BAR VIDEO REPLAYS

**State Bar Center, Albuquerque**

**AUGUST 3**
- **Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World – AM**
  - 9:00 – 11:45 a.m.
  - 2.2G, 0.5E
  - $129
- **Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World – PM**
  - 12:15 – 3:00 p.m.
  - 2.0G, 0.7E
  - $129
- **2009 How to Do Your First Personal Injury Case**
  - 9:00 a.m. – 3:15 p.m.
  - 4.0G, 1.0R, 1.0E
  - $199

**AUGUST 17**
- **Skeptically Determining the Limits of Expert Testimony and Evidence: An Investigation of Scope, Expertise and Process**
  - 8:30 a.m. – 3:45 p.m.
  - 4.7G
  - $129
- **The 25th Annual Bankruptcy Year in Review**
  - 8:15 a.m. – 3:45 p.m.
  - $219

**SEPTEMBER 7**
- **Multicultural Challenges in NM**
  - 8:00 a.m. – 12:30 p.m.
  - 4.5G
  - $159
- **Attorney’s Guide to Good Lawyering for People With Disabilities**
  - (2009 Professionalism)
  - 1:00 – 2:00 p.m.
  - 1.0P
  - $49
- **2009 Ethics Risks Practicing Law**
  - (From Surviving to Thriving 2009)
  - 1:00 – 2:00 p.m.
  - 1.0E
  - $49
- **7th Annual Elder Law Seminar**
  - 8:00 – 11:30 a.m.
  - 3.7G
  - $149

**SEPTEMBER 21**
- **The ‘Write’ Way to Write Persuasively**
  - 8:30 – 11:30 a.m.
  - 3.0G
  - $129
- **The Zealous Advocate**
  - 12:00 – 3:00 p.m.
  - 3.0G
  - $129
- **Creditor’s Rights, Collections and Bankruptcy**
  - 8:30 a.m. – 2:00 p.m.
  - 4.0G, 1.0E
  - $179
- **2010 Professionalism and Ethics: Responding To Crisis Through Limited Representation**
  - 2:15 – 4:15 p.m.
  - 1.0P, 1.0E
  - $79
**CLE REGISTRATION FORM**

For more information about our programs visit www.nmbarcle.org

**TWO WAYS TO REGISTER:**

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

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

Name _______________________________________________NM Bar # __________________________

Street _________________________________________________________________________________

City/State/Zip ___________________________________________________________________________

Phone ________________________________________ Fax _____________________________________

E-mail _________________________________________________________________________________

Program Title __________________________________________________________________________

Program Date __________________________________________________________________________

Program Location ______________________________________________________________________

Program Cost __________________________________________________________________________

☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ ____________ Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover

Credit Card # __________________________________________________________________________

Exp. Date ______________________________________________________ CVV#___________________

Authorized Signature ____________________________________________________________________

**REGISTER EARLY!** Advance registration is recommended as it guarantees admittance and course materials. If space and materials are available, paid registrations will be accepted at the door.

**CANCELLATIONS & REFUNDS:** If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

**MCLE CREDIT INFORMATION:** Courses have been approved by the New Mexico MCLE Board. CLE of SBNM will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

**ATTENTION PERSONS WITH DISABILITIES:** Our meetings are held at facilities which are fully accessible to persons with mobility disabilities. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBNM office one week prior to the program.

**PROGRAM CANCELLATION:** Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given.

**TAPE RECORDING OF PROGRAMS IS NOT PERMITTED.**

**CLE AUDIT POLICY:** Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $10, space permitting. Course materials, breaks and/or lunch, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance and notify staff of their intent to audit. "Walk-in" auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events.

**SCHOLARSHIPS:** Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to a 50% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6020.
PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS FOR CRIMINAL CASES

The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court’s consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to:

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

Your comments must be received by the Clerk on or before Aug. 16, 2010, to be considered by the Court.

14-1601. Larceny; essential elements.

For you to find the defendant guilty of larceny [as charged in Count [______]1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away2 _________ (describe property), belonging to another, which had a market value3 [over $_____]4;5

2. At the time he took this property, the defendant intended to permanently deprive the owner of it;
3. This happened in New Mexico on or about the ________ day of __________, __________.

USE NOTE

1. Insert the count number if more than one count is charged.
2. See UJI 14-1603 if “asportation” is in issue.
3. See UJI 14-1602 for definition of market value. Use this bracketed provision for property other than money if the value is over $250. State whether the value of merchandise at issue is “over $250,” “over $500,” “over $2,500,” or “over $20,000.” If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.
4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony[7] (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony[7] (over $500), use $100 in the blank. If the charge is a misdemeanor[7] (over $250), use $250 in the blank.

5. This bracketed provision should not be used if: (a) the property is a firearm with a value of less than $2,500; (b) if the property is livestock; (c) if the property has a value of less than $250.00 or less. In [either case] these cases, value is not in issue.
6. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $100 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.

[As amended by Supreme Court Order No. ________ effective ________.


This instruction does not use the words “without consent” or the like to indicate that larceny involves a trespassory taking. See generally Perkins, Criminal Law 24546 (2d ed. 1969). The committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent, UJI 14-141.

The statute provides that larceny of livestock is a third degree felony without regard to the value of the property. The constitutionality of this provision was upheld in State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

14-1610. Shoplifting; conversion of property without payment; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count [______]1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took possession2] of3 _________ (describe merchandise);

2. [This merchandise had a market value4 (over $_____)];5
3. This merchandise was offered for sale to the public in a store);
4. At the time [he] the defendant took this merchandise, the defendant intended to take it without paying for it;
5. This happened in New Mexico on or about the ________ day of __________, __________.

USE NOTE

1. Insert the count number if more than one count is charged.
2. Use UJI 14-130 if “possession” is in issue.
3. Use applicable alternative.
4. See UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of merchandise at issue is “over $250,” “over $500,” “over $2,500,” or “over $20,000.” If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.
5. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $100 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.
6. For use if there is an issue as to whether or not the items taken were merchandise in a store.

[As amended by Supreme Court Order No. ________, effective ________.

Committee commentary. — UJI 14-1610 is to be used when the defendant is accused of taking possession of or concealing merchandise with the intent to convert it without paying for it. UJI 14-1611 is to be used when the defendant is accused of altering a price tag or other marking on the merchandise or transferring the merchandise from one container to another with the intent to deprive the merchant of all or part of its value.

Although the statute, in defining degrees of the offense, uses the term “value,” without specifying how value is to be determined, the statute is interpreted to mean “market value.” State v.
Richardson, 89 N.M. 30, 546 P.2d 878 (Ct. App. 1976). See also commentary to UJI 14-1602.

Section 301622 NMSA 1978 creates two presumptions in the offense of shoplifting. The first is the presumption that one who willfully conceals merchandise intends to convert it. The second is the presumption that merchandise found concealed on a person or in his belongings has been willfully concealed. If the state is relying on either of these presumptions, UJI 14-5061, Presumptions or inferences, should be given.

14-1611. Shoplifting; alteration of label or container; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant [altered a label, price tag or marking upon __________________ (describe merchandise)]2 [transferred __________________ (describe merchandise) from the container [(in) (on)] [in] [on]3 which it was displayed to another container];
2. The [altered]4 [transferred]5 merchandise had a market value5 (over $__________);
3. The [altered]4 [transferred]5 merchandise was offered for sale to the public in a store;5
4. The defendant intended to deprive __________________ (name of merchant) of all or some part of the value of this merchandise;
5. This happened in New Mexico on or about the day of ________________________, ________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. Use applicable alternative.
3. See UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of the merchandise at issue is “over $250,” “over $500,” “over $2,500,” or “over $20,000.” If the charge is a petty misdemeanor ($250 or less), do not use this bracketed alternative.
4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony [over $100], use $100 in the blank. If the charge is a misdemeanor [over $50], use $50 in the blank. If the charge is a misdemeanor [over $50], use $250 in the blank.
5. For use if there is an issue as to whether or not the items were merchandise in a store. [As amended by Supreme Court Order No. ________, effective ________]

Committee commentary.—See commentary to UJI 14-1610.

14-1640. Fraud; essential elements.

For you to find the defendant guilty of fraud [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant, by any words or conduct, [made a promise he had no intention of keeping][2] [misrepresented a fact]2 to ___________________________ (name of victim), intending to deceive or cheat ___________________________ (name of victim);
2. Because of the [promise][2] [misrepresentation] and __________________________’s (name of victim) reliance on it, defendant obtained __________________________ (describe property or state amount of money)3;
3. This __________________________ (property) belonged to someone other than the defendant; [and]4
4. The __________________________ (property) had a market value5 (of over $__________);5
5. This happened in New Mexico on or about the day of ________________________, ________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. Use applicable bracketed phrase.
3. If money is involved, state whether the amount charged is “over $20,000” or over “over $2,500” or “over $500” or “over $250.”
4. See UJI 14-1602 for definition of “market value.”
5. Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is “over $250,” “over $500,” “over $2,500,” or “over $20,000.” If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. ________, effective ________]


Fraudulent intent must exist at the time the defendant obtains the property or the crime is embezzlement. State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App.) cert. denied 83 N.M. 562, 494 P.2d 975 (1972).

“Fraudulent intent” and “fraudulently” are frequently defined as “with intent to defraud” or “with intent to cheat or deceive.” See e.g., State v. Probert, 19 N.M. 13, 140 P. 1108 (1914); State v. Harris, 313 S.W.2d 664 (Mo. 1958); People v. Leach, 168 Cal. App. 2d 463, 336 P.2d 573 (1959); Roderick v. State, 9 Md. App. 120, 262 A.2d 783 (1970); Clark v. State, 287 A.2d 660 appeal dismissed and cert. denied, 409 U.S. 812, 92 S.C. 139, 34 L.Ed. 2d 67 (Del. 1972); Perkins, supra. See also State v. Doster, 88 N.M. 32, 536 P.2d 1088 (Ct. App.) cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

14-1641. Embezzlement; essential elements.

For you to find the defendant guilty of embezzlement [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant was entrusted with ___________________________ (property) to the defendant’s own use. “Converting something to one’s own use” means keeping another’s property rather than returning it, or using another’s property for one’s own purpose [rather than]5 [even though the property is eventually used] for the purpose authorized by the owner;
2. The defendant converted this ___________________________ (property or money) to the defendant’s own use. “Converting something to one’s own use” means keeping another’s property rather than returning it, or using another’s property for one’s own purpose [rather than]5 [even though the property is eventually used] for the purpose authorized by the owner;
3. At the time the defendant converted ___________________________ (property or money), the defendant fraudulently intended to deprive the owner of the owner’s property. “Fraudulently intended” means intended to deceive or cheat;
4. This happened in New Mexico on or about the day of ________________________, ________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. Describe property. If money is involved, state if the amount charged is

- ($100) or less,
- over ($100),
- over ($250),
- over ($500),
- over ($1,000),
- over ($2,500),
- over ($2,000),
- over ($50,000),
- over ($250),
- over ($2,500), or
- over ($20,000).

If the value is over $250, State whether the value alleged to have been embezzled or converted is

- over (one hundred dollars ($100))
- over (two hundred fifty dollars ($250))
- over (twenty five hundred dollars ($2,500)) or
- over (two thousand dollars ($2,000)).

If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

3. See UJI 14-1602 for definition of “market value”.

4. Use this bracketed provision for property other than money if the value is over $250. State whether the value alleged to have been embezzled or converted is

- over one hundred dollars ($100)
- over two hundred fifty dollars ($250)
- over twenty five hundred dollars ($2,500) or
- over two thousand dollars ($2,000).

If the charge is petty misdemeanor ($250 or less), do not use this bracketed provision.

5. Use the applicable bracketed phrase.

   [As amended, effective March 15, 1995; as amended by Supreme Court Order No. __________, effective __________.]

Committee commentary.—See Section 30168 NMSA 1978. Embezzlement, like larceny, is divided into degrees depending on the value of the property. See generally LaFave & Scott, Criminal Law 654 (1972). For the purpose of this crime, money has its face value, and the state need not prove that its value is something else. Territory v. Hale, 13 N.M. 181, 81 P. 583 (1905). The same rule applies to checks. State v. Peke, 70 N.M. 108, 371 P.2d 226 (1962).

In State v. Moss, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971), the court held that the term “entrusted” had an ordinary meaning and need not be defined in the instructions. In State v. Archie, 1997NMCA058 PP89, 123 N.M. 305, 506, 493 P.2d 537, 543, the court determined the term “use” applies when a person having possession of another’s property treats it as their own, whether the person uses it, sells it, or discards it; the details are less important than the interference.

In contrast to the intent to permanently deprive in larceny, this crime requires only intent to deprive the owner of his property, even temporarily. Archie, 1997NMCA058 P4; State v. Gonzales, 99 N.M. 304, 317, 663 P.2d 710, 711 (Ct. App. 1983); Moss, 83 N.M. at 43, 487 P.2d at 1348; State v. Prince, 52 N.M. 18, 89, 189 P.2d 993, 995 (1948). “Fraudulent intent” is defined in this instruction. See State v. Green, 116 N.M. 273, 27879, 861 P.2d 954, 95960 (1993).

Following State v. Brooks, 117 N.M. 751, 877 P.2d 557 (1994), the legislature amended Section 30168 NMSA 1978 to exclude the single criminal intent doctrine (single larceny doctrine) in embezzlement cases by adding the following language: “Each separate incident of embezzlement or conversion constitutes a separate and distinct offense.” See State v. Faubion, 1998NMCA095 P11, 125 N.M. 670; State v. Rowell, 121 N.M. 111, 118, 908 P.2d 1379, 1386 (1995). Prior to this legislative amendment, the single larceny doctrine had allowed a series of takings of property or money from a single victim to be treated as a single offense. See Brooks, 117 N.M. at 75253, 877 P.2d at 55859; State v. Pedroncelli, 100 N.M. 678, 675 P.2d 127 (1974); State v. Allen, 59 N.M. 139, 280 P.2d 298 (1955).

[Commentary revised, June 24, 1999.]

14-1643. Forgery; essential elements.

For you to find the defendant guilty of forgery [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [made up a false ___________________________ (name of writing)] [made a false signature] [made a false endorsement] [changed a genuine ___________________________ (name of writing)] so that its effect was different from the original;

2. At the time, the defendant intended to injure, deceive or cheat ______________________ (name of victim) or another;

3. The damage was over __________.

4. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property.

   (5. This happened in New Mexico on or about the __________ day of __________, __________.)

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative bracketed provisions.

3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use “$2,500” in the blank. If the damage was over $20,000, use “$20,000” in the blank.

4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. See, e.g., Sections 45-1-201 and 46A-1-103 NMSA 1978.

   [As amended by Supreme Court Order No. __________, effective __________.]


The intent to injure or defraud is not limited to economic harm. See, e.g., State v. Nation, supra, where the defendant obtained drugs by use of a forged prescription. The intent to defraud is the same as the element in the crime of fraud, the intent to deceive or cheat. People v. Leach, 168 Cal. App. 2d 463, 356 P.2d 573 (1959). Neither proof of an intent to injure or defraud a specific person (State v. Smith, supra) nor proof that the intent was accomplished (State v. Nation and State v. Weber, supra), is a necessary element of the crime.

14-1644. Issuing or transferring a forged writing; essential elements.

For you to find the defendant guilty of forgery [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant gave or delivered to (name of victim) a (name of writing) knowing it to [be a false ______________ (name of writing)] [have a false signature] [have a false endorsement] [have been changed so that its effect was different from the original or genuine] intending to injure, deceive or cheat ______________ (name of victim) or another;
   [2. The damage was over ______________.]²
   [3. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property;]³
   and
   [2.]⁴ This happened in New Mexico on or about the ______________ day of ______________, __________.

USE NOTES
1. Insert the count number if more than one count is charged.
2. Use applicable alternative bracketed provisions.
3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use "$2,500" in the blank. If the damage was over $20,000, use "$20,000" in the blank.
4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. See, e.g., Sections 45-1-201, 46A-1-103 NMSA 1978.

Committee commentary. — See § 301610B NMSA 1978. Since the writing must be forged, this instruction contains all of the elements of forgery. See commentary to UJI 14-1643. Relying on the Uniform Commercial Code [Chapter 55 NMSA 1978] for definitions, the court of appeals has held that this crime requires an issuing or transfer of an interest and not merely a physical transfer. State v. Tooke, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970). A transfer, etc., which does not come within the commercial law definitions is an attempted forgery. State v. Tooke, supra. The court must determine the commercial law question as a matter of law. See commentary to UJI 14-1643. The instruction requires that the jury make only a determination of the physical transfer.

Knowledge that the writing is forged may be proved by all of the facts and circumstances surrounding the incident. State v. Nation, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

14-1650. Receiving stolen property; essential elements.

For you to find the defendant guilty of receiving stolen property [as charged in Count ________]⁵, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The ____________________ (describe the property in question) had been stolen [by another]²;
2. The defendant [acquired possession]⁶ of [kept] [disposed of] this property;
3. At the time [he] the defendant [acquired possession]⁶ of [kept] [disposed of] this property, the defendant knew or believed that it had been stolen;
4. The property was a firearm;¹⁰
5. The property had a market value⁸ of over $ ______________.⁸
6. This happened in New Mexico on or about the ______________ day of ______________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. This bracketed material must be used for a charge of receiving (acquiring possession of) stolen property. It must not be used for a charge of either retaining (keeping) stolen property or disposing of stolen property.
3. Use UJI 14-130 if possession is in issue.
4. Use only applicable bracketed phrase.
5. Use this element if the stolen property is a firearm
6. See UJI 14-1602 for definition of market value.
7. [If the charge is a third degree felony (over $2,500), use "$2,500" in the blank. If the charge is a fourth degree felony (over $100) use "$100" in the blank.] Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.
8. This bracketed provision need not be used if the property is a firearm with a value of less than $2,500.

[As amended by Supreme Court Order No. , effective ____________]

Committee commentary. — See § 301611 NMSA 1958 Comp.[.] NMSA 1978, § 301611 [NMSA 1978] (2006). This is a general intent crime. See State v. Viscarra, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972). The committee concluded that the statutory provision “unless received, etc. with intent to restore the property to its owner” should be treated as a defense rather than a negative “specific intent” element which must be proved by the state. Knowledge that the goods are stolen may be proven by inference from all of the facts and circumstances. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974).

In State v. Tapia, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976), it was held that a thief, convicted of larceny under Section 30161 NMSA 1978, can also be convicted of receiving stolen property by disposing of it in violation of Section 301611 NMSA 1978. In dicta, the Tapia decision also indicates that the thief may not be convicted of unlawfully retaining the stolen property. The committee was of the view that although the thief may not be convicted of both stealing and acquiring stolen property, he may be convicted of either offense.

In State v. Bryant, 22 N.M. St. B. Bull. 18 (Ct. App. Jan. 6, 1982)) 99 N.M. 149, 655 P.2d 161 (Ct. App. 1982), the court held that, under Section 301611 NMSA 1978, embezzled property does not come within the meaning of stolen property.

[As amended by Supreme Court Order No. , effective ____________]

14-1660. Unlawful taking of vehicle or motor vehicle; essential elements.

For you to find the defendant guilty of unlawfully taking a [vehicle] [motor vehicle] [as charged in Count ________]⁵, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took ______________ (describe vehicle) without the owner’s consent;
2. The value of the vehicle taken was $2,500.00 or more;²
3. This happened in New Mexico on or about the ______________ day of ______________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. The bracketed language is given if there is evidence that the value of the vehicle was $2,500.00 or more. If the value of the vehicle is a disputed issue, a lesser included offense instruction may be appropriate.
1. Insert the applicable bracketed phrase.
14-1689. Fraudulent use of credit cards obtained in violation of law; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card [as charged in Count __________]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card² to obtain ____________________________________________ (describe money, goods or services obtained with the credit card);
2. These goods or services had a market value³ [(value) over $300.00 (___________)]⁴;
3. The defendant intended to deceive or cheat;
4. [The credit card was taken from the person, possession, custody or control of another with the intent to permanently deprive the cardholder of possession of the credit card;]⁵ or [The credit card was stolen, and possession was transferred to another person who intended to use, sell or transfer the credit card;] or [The credit card had been lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and was retained by someone with the intent to use, sell or transfer the credit card to another person other than the cardholder or [issuer [issuer][issuer]]; or [The credit card was given to someone other than the cardholder with the intent to deceive or cheat;] or [The credit card was received by someone who intended to deceive or cheat;] or [The credit card was acquired by the making of a false statement about identity or financial condition;] or [The credit card was forged with the intent to deceive or cheat;] or [The credit card was signed by someone other than the cardholder with the intent to deceive or cheat;]
5. This happened in New Mexico on or about the __________ day of __________, __________.

USE NOTE

1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “credit card,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.
3. See UJI 14-1602 for definition of “market value.”
4. [If the value of all goods or services exceeds $300.00, use bracketed phrase.] Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is “over $250,” “over $500,” "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.
5. Use only the applicable bracketed phrase or phrases.

[As amended by Supreme Court Order No. ___, effective ___]

Committee commentary.—Section 301633 NMSA 1978 deals with the actual use of an illegally obtained, or invalid, credit card. This section also deals with situations where an individual fraudulently represents that he is the cardholder, or is using the card without the cardholder’s consent. While a person may have another’s credit card with the cardholder’s permission, it may be only for a specific use, and any other use without the cardholder’s consent would be a violation of this section.

"[E]ach use of another’s credit card is punishable as a separate offense. . . . [T]he Legislature intended to punish each use of a credit card, not the continuing possession and usage of one card.” State v. Salazar, 98 N.M. 70, 644 P.2d 1059 (Ct. App. 1982). In Salazar, the defendant was convicted of seven counts of fraudulent use of a credit card under Section 301633A(4). The total value of all things received by this fraudulent use was $109.66, therefore, he could not be tried under Subsection B which provides for a third degree felony if the total value is over $300.00. Instead, Salazar received seven separate fourth degree felony convictions under Subsection A.

The committee is of the opinion that Subsection B is not unconstitutional under the ruling in State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969), where totalling provisions of the Worthless Check Act, Section 40495 NMSA 1953 [30365 NMSA 1978] were held to be so vague as to offend due process, and were, therefore, declared void. However, Subsection B to Section 301633, supra, is not so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application.” State v. Ferris, 80 N.M., at 665, 459 P.2d at 464. Moreover, it does not fail to “convey a sufficiently definite warning of the proscribed conduct.” Id. Subsection B is explicit in its language, and no ambiguities are inherent in its interpretation.

Although as of yet there is no case law in New Mexico interpreting the constitutionality of Subsection B, a 1973 Idaho case is on point. In State v. Boyenger, 95 Idaho 396, 509 P.2d 1317 (1973), a similar provision was upheld as being within the police power of the state “to protect the people of Idaho from fraud and deceit by the use of credit cards. . . .” Id. at 1324. The statute in question provided for a misdemeanor penalty for fraudulent use of a credit card, but if the value of goods or services obtained through a violation of . . . this act amounts to the sum of $60.00 or more, or if the value of the goods or services obtained through a series of violations . . . committed within a period not exceeding six (6) months amounts in the aggregate to the sum of $60.00 or more, any such violation or violations shall constitute a felony . . . Idaho Code Section 183119.

In Boyenger, the defendant was charged under the aggregation clause, and he appealed alleging that this provision was unconstitutional. The court upheld the statute stating “the distinction between felony and misdemeanor based on value of goods obtained is a rational distinction based on the police power of the state and therefore is not a violation of equal protection of the laws.” State v. Boyenger, supra, at 1324. This is analogous to our Section 301633B which differentiates between a third and fourth degree felony based on the value of things obtained by the fraudulent use of credit cards. Therefore, the committee is of the opinion, using the reasoning in State v. Salazar, supra, and State v. Boyenger, supra, that if an individual’s fraudulent use of a credit card results in obtaining goods of a value less than $300.00, each individual use should be charged under the applicable subparagraph of Section 301633A. If a single use or the aggregation of amounts
is over $300.00, the charge should be brought under Subsection B. It would seem that if an individual made two separate charges of $350.00 each, he could only be charged with one violation of Subsection B, unless these transactions occurred in a time span of over six months apart.

The committee is of the opinion that more than one of the alternatives set forth in Element 4 may be given. See UJI 14-1686.

14-1690. Fraudulent use of invalid, expired or revoked credit card; essential elements.

For you to find the defendant guilty of fraudulent use of [an invalid] [an expired] [a revoked] credit card [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card to obtain (describe money, goods or services obtained with the credit card);
2. These goods or services had a [value] [value] [value] [value] [over $300.00] [value];
3. At the time the defendant used the credit card, the credit card [was invalid] [had expired] [had been revoked];
4. The defendant intended to deceive or cheat;
5. This happened in New Mexico on or about the __________ day of ______________, __________.

USE NOTE
1. Use applicable alternative.
2. Insert the count number if more than one count is charged.
3. If the jury requests a definition of “credit card,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.
4. See UJI 14-1602 NMRA for a definition of “market value.” Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is “over $250,” “over $500,” “over $2,500,” or “over $20,000.” If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

As amended by Supreme Court Order No. , effective .

Committee commentary.—For general information on credit card crimes, see committee commentary to UJI 14-1680 NMRA. Also see commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

14-1691. Fraudulent use of credit card by person representing that he is the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card by representing that he was the cardholder [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card to obtain (describe money, goods or services obtained with the credit card);
2. These goods or services had a [value] [value] [value] [value] [value] [value];
3. The defendant was not the cardholder;
4. The defendant represented by words or conduct [that he was the cardholder] [that he was authorized by the cardholder to use the credit card];
5. The defendant intended to deceive or cheat;
6. This happened in New Mexico on or about the __________ day of ______________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “credit card” or “cardholder,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.

As amended by Supreme Court Order No. , effective .

Committee commentary.—For general information on credit card crimes, see committee commentary to UJI 14-1680 NMRA. Also see commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

14-1692. Fraudulent use of credit card without consent of the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card without consent, [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card to obtain (describe money, goods or services obtained with the credit card);
2. These goods or services had a [value] [value] [value] [value] [value] [value];
3. The defendant used the credit card without the cardholder’s consent;
4. The defendant intended to deceive or cheat;
5. This happened in New Mexico on or about the __________ day of ______________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “credit card” or “cardholder,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.

As amended by Supreme Court Order No. , effective .

Committee commentary.—For general information on credit card crimes, see committee commentary to UJI 14-1680 NMRA. Also see commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

14-1693. Fraudulent acts by merchants or their employees; fraudulently furnishing something of value; essential elements.

For you to find the defendant guilty of fraudulently furnishing something of value [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. In his capacity as [a merchant] [an employee of

USE NOTE
1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “credit card” or “cardholder,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.

As amended by Supreme Court Order No. , effective .

Committee commentary.—For general information on credit card crimes, see committee commentary to UJI 14-1680 NMRA. Also see commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.
the defendant [furnished] the goods or services,[7] which had a market value of ________;
2. [These goods or services had a market value[8] (over $300.00) (the difference between the represented market value and the actual market value is ______;]
3. The defendant accepted for payment a credit card that he knew was being used to deceive or cheat;
4. The defendant intended to deceive or cheat;
5. This happened in New Mexico on or about the ______ day of __________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “merchant” or “credit card” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.
3. Use applicable bracketed phrase.
4. See UJI 14-1602 NMRA for definition of “market value.”

Committee commentary.—For general information on credit card crimes, see committee commentary to UJI 14-1680 NMRA.

Section 301634A NMSA 1978 deals with the fraudulent furnishing of something of value upon presentation of a credit card which in some way is invalid. Section 301634B NMSA 1978 deals with the situation where a credit slip is filled out, but no merchandise is actually furnished.

In the former situation there seems to be an assumption of collusion between the merchant or employee and the individual presenting the credit card. An example of an offense under Subsection B would be when the merchant or employee accepts a credit card for a valid purchase, and makes two credit slips; the customer signs one not knowing about the second and the merchant or card for a valid purchase, and makes two credit slips; the customer

USE NOTE
1. Insert the count number if more than one count is charged.
2. If the jury requests a definition of “merchant,” “credit card,” “issuer” or “participating party,” the statutory definition set forth in Section 301625 NMSA 1978 is to be given.
3. Use applicable alternative.
4. See UJI 14-1602 for definition of “market value.”
5. Insert the applicable represented or actual value.
6. If the charge is a second degree felony (over $20,000), use “over $20,000” in the blank. If the charge is a third degree felony (over $500), use “over $500” in the blank.
7. This happened in New Mexico on or about the ______ day of __________, __________.

Committee commentary.—See NMSA 1978, § 30-16-34(C) (2006). For general information on credit card crimes, see committee commentary to UJI 14-1680. Also see committee commentary to UJI 14-1673 for a discussion of fraudulent acts by merchants or their employees.

See UJI 14-1640 for a review of the elements of fraud.

14-1701. Arson; with purpose of destroying or damaging property; essential elements.

For you to find the defendant guilty of arson [as charged in Count ______]1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The defendant intentionally or maliciously [started a fire] or[9] [caused an explosion];
2. [He] The defendant did so with the intent to destroy or damage ______ (identify property), which belonged to another and which had a [market] value of over $_______;
3. This happened in New Mexico on or about the ______ day of __________, __________.

USE NOTE
1. Insert the count number if more than one count is charged.
2. Use applicable bracketed phrase.
3. Unless the property has no market value, this bracketed word should be used and UJI 14-1707 also given. If the charge is a second degree felony (over $20,000), use “$20,000” in the blank. If the charge is a third degree felony (over $500), use “$500” in the blank. If the charge is a fourth degree felony (over $2,500), use “$2,500” in the blank.
4. This happened in New Mexico on or about the ______ day of __________, __________.

14-1694. Fraudulent acts by merchants or their employees; representing that something of value has been furnished; essential elements.

For you to find the defendant guilty of fraudulently representing that something of value has been furnished [as charged in Count ______]2, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. In [his] the defendant’s capacity as [a merchant] or [an employee of ______], the defendant falsely represented in writing to ______ (issuer or participating party) that he furnished ______ (describe money, goods or services al-

[36]
or setting fire to” certain structures, was held unconstitutional in State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). Since both the New Mexico statute prior to 1963 (N.M. Laws 1927, ch. 61, § 1) and commonlaw arson required a willful and malicious state of mind, the court concluded that the legislature intended to eliminate that element. The court held that to eliminate this mental element was not a reasonable exercise of the police power by the legislature since the statute then made criminal what could be a burning for innocent and beneficial purposes.

The present statute, enacted in 1970, made six important changes: (1) it substituted the words “maliciously or willfully” for “intentionally”; (2) it added the phrase “with the purpose of destroying or damaging”; (3) it added a provision for arson with intent to defraud an insurer; (4) it added a new substantive crime of negligent arson; (5) it added “occupied structure” to the list of property and defined the term; (6) it divided “regular arson” and “intent to defraud arson” into degrees based on the value of the property. Changes (2) through (5) appear to be derived from the Model Penal Code § 220.1, Proposed Official Draft 1962, but see State v. Atwood, 83 N.M. 416, 422, 492 P.2d 1279, 1285 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972) (dissenting opinion).


—The committee concluded that the concept of willful and malicious is covered as an intentional and deliberate act and limited this instruction to the burning of another’s property. Because arson is a crime requiring criminal intent and U14 14-141 must be given with U14 14-1701, the latter instruction does not include the “intentional” element. To include the element here would result in a confusing duplication.

—The inclusion of the phrase “with the purpose of destroying or damaging any building” in Section 30175A NMSA 1978 adds an additional element to commonlaw arson. The phrase, with the addition of the word “damaging,” is derived from the Model Penal Code. The code commentary says that the requirement of a purpose to destroy makes it clear that the mere employment of fire with more limited purposes is not regular arson but may be negligent arson. Model Penal Code § 220.1, Comment. (Tent. Draft No. 11, 1960).


—The Model Penal Code provision limited “regular” arson to the burning, etc., of a building or occupied structure of another. The New Mexico provision includes an enticement word “property,” apparently extending the crime to arson of personality.

—Arguably, the New Mexico version does not limit the burning of a bridge, utility line, fence or sign to that of another, presumably making it a crime to burn one’s own bridge; etc. (“Another” is defined in Section 3012D NMSA 1978.) That result may make this portion of the statute unconstitutional under the rationale of State v. Dennis, supra. The committee chose to limit this instruction to the burning, etc., of the property of another. If, for example, the defendant is charged with burning his own bridge; this instruction must be modified.

—Although the definition of “occupied structure,” Section 30175C NMSA 1978, applies to this type of arson, as a practical matter it may not be important since all “property” of another is included by statute.—

[As amended by Supreme Court Order No. , effective ]

14-1702. Arson; with purpose of collecting insurance; essential elements.

For you to find the defendant guilty of arson [as charged in Count ], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally or maliciously [started a fire][2] with the intent to destroy or damage (identify property) which had a [market] value of over $________;

2. [He] The defendant did so for the purpose of collecting insurance for the loss;

3. This happened in New Mexico on or about the day of ________, ________.

USE NOTE

1. Insert the count number if more than one count is charged.

2. Use the applicable bracketed phrase.

3. Unless the property has no market value, this bracketed word should be used and U14 14-1701 must also be given. If the charge is a second degree felony (over $20,000), use “$20,000” in the blank. If the charge is a third degree felony (over $2,500), use “$2,500” in the blank. If the charge is a fourth degree felony (over $500), use “$500” in the blank. If the charge is a misdemeanor (over $250), use “$250” in the blank.

[As amended by Supreme Court Order No. , effective ]

Committee commentary.—See § 30175A NMSA 1978. See the commentary to U14 14-1701. Arson with intent to defraud an insurer is a statutory addition to commonlaw arson. See generally 2 Wharton, Criminal Law & Procedure § 402 (Anderson ed. 1957). It is usually stated as a burglary, etc., “with intent to injure or defraud the insurer.” See, e.g., Calif. Penal Code § 450a. With that language, it has been recognized that the intent to defraud is the essence of the crime. People v. Rose, 38 Cal. App. 493, 176 P. 694 (1918); Cf. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

—New Mexico adopted the Model Penal Code language, “with the purpose of destroying [or damaging] any property, whether [the person’s] own or another’s, to collect insurance for such loss.” The

This type of arson is divided into degrees depending on the value of the property, not on the amount of the insurance. This arson applies to all types of property and is not limited to that of another.

14-2201. Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements.¹

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to __________ (name of peace officer) by __________; [6:]². At the time, __________ (name of peace officer) was a peace officer and was performing duties of a peace officer³; [3.]. The defendant knew __________ (name of peace officer) was a peace officer;

[2.−4.]. The defendant’s conduct [threatened the safety of __________ (name of peace officer);]

[or]¹

[challenged the authority of __________ (name of peace officer);]

[5.]. The defendant acted in a rude, insolent or angry manner; [4.]. The defendant intended to touch or apply force to __________ (name of peace officer) by __________; [5.]. The defendant used a [_________]³ [deadly weapon. The defendant used a __________ (name of object). A __________ (name of object) is a deadly weapon only if you find that a __________ (name of object), when used as a weapon, could cause death or great bodily harm)]; [7.]. This happened in New Mexico on or about the __________ day of __________, __________.

USE NOTE
1. If the evidence supports both this theory of assault as well as that found in UJI 14-2202 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.
2. Insert the count number if more than one count is charged.
3. Use ordinary language to describe the touching or application of force.
4. Use only applicable alternative or alternatives.
5. In State v. Padilla, 1969 NMCA 072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 302224 NMSA 1978 requirement that the act be “unlawful” the state must prove “injury or conduct that threatens an officer’s safety or meaningfully challenges his or her authority.” [∗] If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.
6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30112B NMSA 1978.
7. UJI 14-131 NMRA, the definition of “great bodily harm,”[‡] must also be given.
8. This alternative is given only if the object used is not specifically listed in Section 30112B NMSA 1978.

9. “Peace officer” is defined in [Section 30112E] Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2201 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order __________, effective __________.]


This instruction was revised in 1999 to address the issue raised in State v. Montano, 1999 NMCA 023, 126 N.M. 609, 973 P.2d 861 and State v. Bonham, 1998 NMCA 178, 126 N.M. 382, 972 P.2d 154.

[UJI 14-2201, 142202, and 142202 assume that the victim is a peace officer as that term is defined in Section 20112 NMRA 1978. In the event that there is a question of fact as to whether the victim is in fact a peace officer, UJI 14-2216 must be given.] This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[Section 302222A(1) NMSA 1978] NMSA 1978, § 30-22-22(A)(1) (1971) provides that the peace officer must be in the lawful discharge of duty at the time of the assault. If the officer was attempting to make an arrest while not in the lawful discharge of duty, an appropriate defense instruction for “resisting an unlawful arrest” must be prepared. See State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978) for a discussion of “lawful discharge of duties.” [∗]

[As amended by Supreme Court Order __________, effective __________.]

14-2202. Aggravated assault on a peace officer; threat or menacing conduct with a deadly weapon; essential elements.¹

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant __________ (describe unlawful act, threat or menacing conduct);

[6:]². At the time, __________ (name of peace officer) was a peace officer and was performing duties of a peace officer³;

[3.]³. The defendant knew __________ (name of peace officer) was a peace officer;

[2.−4.]. The defendant’s conduct caused __________ (name of peace officer) to believe the defendant was about to intrude on __________ (name of peace officer) bodily integrity or personal safety by touching or applying force to __________ (name of peace officer) in a rude, insolent or angry manner;

[5.]. The defendant’s conduct³ [threatened the safety of __________ (name of peace officer);]

[or]¹

[challenged the authority of __________ (name of peace officer);]

[4.]. A reasonable person in the same circumstances as __________ (name of peace officer) would have believed that the defendant was about to in __________ (name of peace officer) bodily integrity or personal safety by touching or applying force to __________ (name of peace officer) in a rude, insolent or angry manner.

USE NOTE
1. If the evidence supports both this theory of assault as well as that found in UJI 14-2202 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.
2. Insert the count number if more than one count is charged.
3. Use only applicable alternative or alternatives.
4. In State v. Padilla, 1969 NMCA 072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 302224 NMSA 1978 requirement that the act be “unlawful” the state must prove “injury or conduct that threatens an officer’s safety or meaningfully challenges his or her authority.” [∗] If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.
5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30112B NMSA 1978.
6. The definition of “great bodily harm,”[‡] must also be given.
7. This alternative is given only if the object used is not specifically listed in Section 30112B NMSA 1978.
(name of peace officer) would have had the same belief;

1. The defendant used a [ ] (deadly weapon). The defendant used a ____________________ (name of object). A ____________________ (name of object) is a deadly weapon only if you find that a ____________________ (name of object), when used as a weapon, could cause death or great bodily harm[7];

2. This happened in New Mexico on or about the ______ day of ____________, __________.

USE NOTE

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2201 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.

2. Insert the count number if more than one count is charged.

3. In State v. Padilla, 1996NMCA072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 302224 NMSA 1978 requirement that the act be “unlawful” the state must prove “injury or conduct that threatens an officer’s safety or meaningfully challenges his or her authority,”[6] if any other issue of unlawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

4. Use only applicable alternative or alternatives.

5. Use this alternative only if the deadly weapon is specifically listed in Section 30112B NMSA 1978.

6. UJI 14-131 NMRA, the definition of “great bodily harm,”[6] must also be given.

7. This alternative is given only if the object used is not specifically listed in Section 30112B NMSA 1978.

8. “Peace officer” is defined in [Section 30112C] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given.] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.01 NMSA 1978; UJI 14-2202 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order , effective .]

Committee commentary. — See committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2009 to be consistent with State v. Nazie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order , effective .]

14-2203. Aggravated assault on a peace officer; attempted battery or threat of menacing conduct with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count ______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to ____________________ (name of peace officer) by ____________________ ;

2. At the time, ____________________ (name of peace officer) was a peace officer and was performing duties of a peace officer[6];

3. The defendant knew ____________________ (name of peace officer) was a peace officer;

4. The defendant acted in a rude, insolent or angry manner[6];

5. A reasonable person in the same circumstances as ____________________ (name of peace officer) would have had the same belief;

AND

6. The defendant’s conduct[6] [threatened the safety of ____________________ (name of peace officer);][3] [or] [challenged the authority of ____________________ (name of peace officer);][5] The defendant knew ____________________ (name of object). A ____________________ (name of object) is a deadly weapon only if you find that a ____________________ (name of object), when used as a weapon, could cause death or great bodily harm[7];

7. This happened in New Mexico on or about the ______ day of ____________, __________.

USE NOTE

1. This instruction combines the elements of UJI 14-2201 and 142202 NMRA. If the evidence supports both of the theories of assault set forth in [Instructions] UJI 14-2201 and 142202 NMRA, use this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. In State v. Padilla, 1996NMCA072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 302224 NMSA 1978 requirement that the act be “unlawful” the state must prove “injury or conduct that threatens an officer’s safety or meaningfully challenges his or her authority,”[6] if any other issue of unlawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

5. Use only applicable alternative or alternatives.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30112B NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given.] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.01 NMSA 1978; UJI 14-2202 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order , effective .]

Committee commentary. — See committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2009 to be consistent with State v. Nazie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order , effective .]
8. This alternative is given only if the object used is not specifically listed in Section 30112B NMSA 1978.

9. "Peace officer" is defined in [Section 30112C] subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.02 NMSA 1978; UJI 14-2203 SCRA; as amended, effective January 15, 1998; February 1, 2000, as amended by Supreme Court Order ______________, effective ______________.]

Committee commentary. — See committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order ______________, effective ______________.]

14-2204. Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to __________________ (name of peace officer) by __________________; [E.]

   At the time, __________________ (name of peace officer) was a peace officer and was performing duties of a peace officer; [F.]

   The defendant knew __________________ (name of peace officer) was a peace officer; [G.]

   The defendant acted in a rude, insolent or angry manner; [H.]

   The defendant intended to touch or apply force to __________________ (name of peace officer) by __________________; [I.]

   The defendant intended to commit the crime of __________________; [J.]

   This happened in New Mexico on or about the __________ day of __________, __________.

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in [Section 30112C] subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.02 NMSA 1978; UJI 14-2203 SCRA; as amended, effective January 15, 1998; January 3, 1999, as amended by Supreme Court Order ______________, effective ______________.]

Committee commentary. — See committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.02 NMSA 1978; UJI 14-2203 SCRA; as amended, effective January 15, 1998; February 1, 2000, as amended by Supreme Court Order ______________, effective ______________.]

14-2205. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant __________________ (describe unlawful act, threat or menacing conduct); [J.]

   At the time, __________________ (name of peace officer) was a peace officer and was performing duties of a peace officer; [K.]

   The defendant knew __________________ (name of peace officer) was a peace officer; [L.]

   The defendant's conduct caused __________________ (name of peace officer) to believe the defendant was about to intrude on __________________ (name of peace officer) bodily integrity or personal safety by touching or applying force to __________________ (name of peace officer) in a rude, insolent or angry manner; [M.]

   A reasonable person in the same circumstances as __________________ (name of peace officer) would have had the same belief; [N.]

   The defendant intended to commit the crime of __________________; [O.]

   This happened in New Mexico on or about the __________ day of __________, __________.

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

2. Insert the count number if more than one count is charged.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

4. "Peace officer" is defined in [Section 30112C] subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within
the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.04 NMSA 1978; UJI 14-2205 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order __________, effective __________.]

Committee commentary. — See committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order __________, effective __________.]

14-2206. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements.1

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _________2 [as charged in Count _________]3, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried to touch or apply force to _________ (name of peace officer) by _________4;

[5-1]2. At the time, _________ (name of peace officer) was a peace officer and was performing duties of a peace officer;5

3. The defendant knew _________ (name of peace officer) was a peace officer;6

[2;4] The defendant acted in a rude, insolent or angry manner;7

[3;5] The defendant intended to touch or apply force to _________ (name of peace officer) by _________1;

OR

1. The defendant _________ (describe unlawful act, threat or menacing conduct);

2. At the time, _________ (name of peace officer) was a peace officer and was performing duties of a peace officer;2

3. The defendant knew _________ (name of peace officer) was a peace officer;

[2;4] The defendant’s conduct caused _________ (name of peace officer) to believe the defendant was about to intrude on _________’s (name of peace officer) bodily integrity or personal safety by touching or applying force to _________ (name of peace officer) in a rude, insolent or angry manner;

[3;5] A reasonable person in the same circumstances as _________ (name of peace officer) would have had the same belief;

AND

[4;6] The defendant intended to commit the crime of _________;

[6;7] This happened in New Mexico on or about the _________ day of _________, ________.

USE NOTE

1. This instruction combines the essential elements in UJI 14-2204 and UJI 14-2205 NMRA.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

6. “Peace officer” is defined in [Section 30-1-12(C)] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given.] give
UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.06 NMRA 1978; UJI 14-2207 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order _______________, effective _______________.]

Committee commentary. — See [Section 302223(A) NMSA 1978] NMSA 1978, § 30-22-23(A)(1971). Compare UJI 14-311 NMRA, UJI 14-312 NMRA, UJI 14-313 NMRA and commentary. See also, commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order _______________, effective _______________.]

14-2208. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to kill [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant __________________ (describe unlawful act, threat or menacing conduct); 

[5-3]. At the time, __________________ (name of peace officer) was a peace officer and was performing duties of a peace officer;

3. The defendant knew __________________ (name of peace officer) was a peace officer;

[2-4]. The defendant’s conduct caused __________________ (name of peace officer) to believe the defendant was about to intrude on _________’s (name of peace officer) bodily integrity or personal safety by touching or applying force to __________________ (name of peace officer) in a rude, insolent or angry manner;

[2-4]. A reasonable person in the same circumstances as __________________ (name of peace officer) would have had the same belief;

[4-6]. The defendant intended to kill __________________ (name of peace officer);

[6-7]. This happened in New Mexico on or about the ______ day of ______________, ________.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves selfdefense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

3. “Peace officer” is defined in [Section 30112(C)] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.07 NMRA 1978; UJI 14-2208 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order _______________, effective _______________.]

Committee commentary. — See committee commentary for UJI 14-2207 NMRA. See also UJI 14-312 NMRA for aggravated assault by threat or menacing conduct with intent to commit a violent felony. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order _______________, effective _______________.]
5. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.09 NMSA 1978; UJI 14-2210 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order ___________, effective ___________.

Committee commentary. — See committee commentary for UJI 14-2207 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order ___________, effective ___________.]

14-2210. Aggravated assault in disguise on a peace officer; essential elements.

For you to find the defendant guilty of aggravated assault in disguise on a peace officer [as charged in Count ___________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant __________________ (describe unlawful act, threat or menacing conduct); [\(\text{¶}4\)].
   At the time, ___________ (name of peace officer) was a peace officer and was performing the duties of a peace officer; [\(\text{¶}3\)].
2. The defendant __________________ (name of peace officer) was a peace officer; [\(\text{¶}2\)].
   The defendant’s conduct caused __________________ (name of peace officer) to believe the defendant was about to intrude on ___________’s (name of peace officer) bodily integrity or personal safety by touching or applying force to __________________ (name of peace officer) in a rude, insolent or angry manner; [\(\text{¶}3\)].
3. A reasonable person in the same circumstances as __________________ (name of peace officer) would have had the same belief; [\(\text{¶}4\)].
   At the time __________________ (name of defendant) was [wearing a ___________] [or] [disguised] for the purpose of concealing ___________’s (name of defendant) identity; [\(\text{¶}6\)].
4. This happened in New Mexico on or about the ___________ day of ___________, ___________.

USE NOTE

1. Insert the count number if more than one count is charged.

2. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “unlawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

3. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use either or both alternatives.

5. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.09 NMSA 1978; UJI 14-2210 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order ___________, effective ___________.

Committee commentary. — See committee commentary for UJI 14-2207 NMRA. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[“Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given.]

[As amended by Supreme Court Order ___________, effective ___________.]

14-2211. Battery upon a peace officer; essential elements.

For you to find the defendant guilty of a battery upon a peace officer [as charged in Count ___________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally [and unlawfully] touched or applied force to ___________ (name of peace officer) by __________________; [\(\text{¶}4\)].
   At the time, ___________ (name of peace officer) was a peace officer and was performing the duties of a peace officer; [\(\text{¶}3\)].
2. The defendant __________________ (name of peace officer) was a peace officer; [\(\text{¶}2\)].
   The defendant’s conduct caused __________________ (name of peace officer) to believe the defendant was about to intrude on ___________’s (name of peace officer) bodily integrity or personal safety by touching or applying force to __________________ (name of peace officer) in a rude, insolent or angry manner; [\(\text{¶}3\)].
3. A reasonable person in the same circumstances as __________________ (name of peace officer) would have had the same belief; [\(\text{¶}4\)].
   At the time __________________ (name of defendant) was [wearing a ___________] [or] [disguised] for the purpose of concealing ___________’s (name of defendant) identity; [\(\text{¶}6\)].
4. This happened in New Mexico on or about the ___________ day of ___________, ___________.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. In State v. Padilla, 1996NMSC072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 302224 NMSA 1978 requirement that the act be “unlawful” the state must prove “injury or conduct that threatens an officer’s safety or meaningfully challenges his or her authority,” [¶]. If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA. See also State v. Jones, 2000NMC047, ¶ 1, 129 N.M. 165, 3 P.3d 142, cert. denied, 129 N.M. 207, 4 P.3d 35.
Use ordinary language to describe the touching or application of force.

Use only applicable alternative or alternatives.

5. “Peace officer” is defined in [Section 30112(C)] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.10 NMSA 1978; UJI 14-2211 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order _______________, effective _______________.]


The committee believed that it would be seldom, if ever, that a person would be charged with the crime of assisting in assault on a peace officer during a riot or unlawful assembly pursuant to [Section 302226 NMSA 1978] NMSA 1978, § 30-22-26 (1971) and, therefore, provided no instruction for the latter offense. In almost every conceivable situation, the state will probably want to proceed under [Section 302226 NMSA 1978] NMSA 1978, § 30-22-24 (1971), charging one who assists in the battery upon a peace officer as an accessory. See [Section 30113 NMSA 1978] NMSA 1978, § 30-1-13 (1972).

[“Peace officer” is defined in Section 30112(C) NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given.] This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order _______________, effective _______________.]

14-2212. Aggravated battery on a peace officer with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer with a deadly weapon [as charged in Count ___________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully] touched or applied force to ___________ (name of peace officer) by ___________ with a [_______________] (deadly weapon). A ___________ (name of object) is a deadly weapon only if you find that a ___________ (name of object), when used as a weapon, could cause death or great bodily harm. If the state intends to ___________ (name of peace officer) was a peace officer and was performing the duties of a peace officer;

2. The defendant knew ___________ (name of peace officer) was a peace officer;

3. The defendant’s conduct caused injury to ___________ (name of peace officer);

4. Threatened the safety of ___________ (name of peace officer);

5. [challenged the authority of ___________ (name of peace officer)];

[2-5]. The defendant intended to injure ___________ (name of peace officer);[5-6]. This happened in New Mexico on or about the day of ___________.

US NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in [NMSA 1978, Section 30-1-12(D) (1963)] Subsection B of Section 30-1-12 NMSA 1978.

5. UJI 14-131 NMRA, the definition of “great bodily harm,” must also be given.

6. This alternative is given only if the object used is not specifically listed in [NMSA 1978, Section 30-1-12(D) (1963)] Subsection B of Section 30-1-12 NMSA 1978.

7. Use only applicable alternative or alternatives.

8. “Peace officer” is defined in [NMSA 1978, Section 30-1-12(C) (1963)] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.11 NMSA 1978; UJI 14-2212 SCRA; as amended, effective January 15, 1998; February 1, 2000; November 1, 2001; as amended by Supreme Court Order No. 08830060, effective February 2, 2009; as amended by Supreme Court Order _______________, effective _______________.]


This instruction was revised in 1999 to address the issue raised in State v. Montano, 1999-NMCA023, 126 N.M. 609, 973 P.2d 861 and State v. Bonham, 1998-NMCA178, 126 N.M. 382, 970 P.2d 154. This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 08830060, effective February 2, 2009; as amended by Supreme Court Order _______________, effective _______________.]

14-2213. Aggravated battery on a peace officer; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm on a peace officer [as charged in Count ___________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully] touched or applied force to ___________ (name of peace officer) by ___________.

[2-5]. The defendant intended to injure ___________ (name of peace officer);[5-6]. This happened in New Mexico on or about the day of ___________.

US NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in [NMSA 1978, Section 30-1-12(D) (1963)] Subsection B of Section 30-1-12 NMSA 1978.

5. UJI 14-131 NMRA, the definition of “great bodily harm,” must also be given.

6. This alternative is given only if the object used is not specifically listed in [NMSA 1978, Section 30-1-12(D) (1963)] Subsection B of Section 30-1-12 NMSA 1978.

7. Use only applicable alternative or alternatives.

8. “Peace officer” is defined in [NMSA 1978, Section 30-1-12(C) (1963)] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.11 NMSA 1978; UJI 14-2212 SCRA; as amended, effective January 15, 1998; February 1, 2000; November 1, 2001; as amended by Supreme Court Order No. 08830060, effective February 2, 2009; as amended by Supreme Court Order _______________, effective _______________.]
At the time, ________________________ (name of peace officer) was a peace officer and was performing the duties of a peace officer;

3. The defendant knew ________________________ (name of peace officer) was a peace officer;

[±]4. The defendant’s conduct
[caused injury to ________________________ (name of peace officer)];
[or][4]
[threatened the safety of ________________________ (name of peace officer)];
[or][4]
[challenged the authority of ________________________ (name of peace officer)];

[±]5. The defendant intended to injure ________________________ (name of peace officer);

[±]6. The defendant
[caused great bodily harm[7] to ________________________ (name of peace officer)];
[or][4]
[acted in a way that would likely result in death or great bodily harm[7] to ________________________ (name of peace officer)];

[±]7. This happened in New Mexico on or about the _______ day of ______________, __________.

USE NOTE

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5180 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. The definition of “great bodily harm”[7] UJI 14-131 NMRA, must also be given.

6. “Peace officer” is defined in [Section 30-1-12C] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.12 NMSA 1978; § 30-22-25(A) and (C)(1971).] See commentaries to UJI 14-320 NMRA, UJI 14-321 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

[“Peace officer” is defined in Section 30-1-12C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given.] This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order ________________________ , effective _____.]

Committee commentary. — See [Section 30-1-12C] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[UJI 14-2214 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order ________________________ , effective _____.]

Committee commentary. — See [Section 30-1-12C] Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, [UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[As amended by Supreme Court Order ________________________ , effective _____.]
NMRA. UJI 14-2202 NMRA and UJI 14-2203 NMRA.

[“Peace officer” is defined in Section 30112C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given] This instruction was amended in 2009 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order __________, effective ___]  

14-2215. Resisting, evading or obstructing an officer; essential elements.  

For you to find the defendant guilty of resisting, evading or obstructing an officer [as charged in Count _______] 

The defendant knew (name of officer) was a peace officer in the lawful discharge of his duties.  

If there is an issue as to whether or not the victim was a peace officer, you should discuss the reasons why there is disagreement.  

A “peace officer” is any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

USE NOTE  

[1: This instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement officer.]

[2:] The definition of “peace officer” is taken from Section 30112C NMSA 1978. Subsection C of Section 30-1-12 NMSA 1978.  

[Adopted, effective January 15, 1998; as amended by Supreme Court Order __________, effective _____.]  

1. This instruction is to be used only if the defendant is charged under Subsection B or D of Section 30221 NMSA 1978. If a charge is brought under Section 30221(A) or (C) NMSA 1978, the appropriate instruction should be drafted.

2. Insert count number if more than one count is charged.

3. If there is an issue as to whether or not the victim was a peace officer, UJI 14-2216 must be given] give UJI 14-2216 NMRA, which defines “peace officer.” The mistake of fact referred to in prior UJI 16-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[As amended by Supreme Court Order No. __________, effective _____.]  

Committee Commentary. — Pursuant to the court order of February 10, 1986, this instruction is applicable to cases tried after May 1, 1986. This instruction was amended in 2010 to be consistent with State v. Nozie, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. __________, effective _____.]  

14-2216. [Defendant did not know victim was a peace officer]  

“Peace officer” defined.  

Evidence has been presented that the defendant did not know that __________________ (name of victim) was a peace officer.

The burden is on the state to prove beyond a reasonable doubt that the defendant knew that __________________ (name of victim) was a peace officer. If you have a reasonable doubt as to whether the defendant knew that __________________ (name of victim) was a peace officer, you must find the defendant not guilty of the crime of __________________ (name of offense) of a peace officer.

If after reasonable deliberation, you do not agree that the defendant is guilty of __________________ (name of offense) of a peace officer, you should discuss the reasons why there is disagreement.

If after reasonable deliberation, you do not agree that the defendant is guilty of __________________ (name of offense) of a peace officer, you must return a verdict of guilty of __________________ (name of offense). If you unanimously agree that the defendant is guilty of __________________ (name of offense), you will return a verdict of guilty of __________________ (name of offense). If you do not agree, you should discuss the reasons why there is disagreement. If you unanimously agree that the defendant is guilty of __________________ (name of offense), you will return a verdict of guilty of __________________ (name of offense).

You may not find the defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether the defendant committed any one of the crimes, you must determine that the defendant is not guilty of that crime. If you find the defendant not guilty of all of these crimes, you must return a verdict of not guilty.

A “peace officer” is any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

USE NOTE  

[1: This instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement officer.]

[2:] The definition of “peace officer” is taken from Section 30112C NMSA 1978. Subsection C of Section 30-1-12 NMSA 1978.

[Adopted, effective January 15, 1998; as amended by Supreme Court Order __________, effective _____.]  

Committee commentary. — In State v. Reese, 106 N.M. 498, 499, 745 P.2d 1146 (1987), the Supreme Court held as follows:  

We... conclude that scienter is a necessary element of... [assault and battery of a peace officer], and thus indispensable to the jury’s consideration of the case. We base this conclusion not on our reading of the pertinent statutes, but on requirements of constitutionally mandated due process.

Aggravated battery on a peace officer. — This instruction applies to the offense of aggravated battery on a peace officer when there is a question of fact as to whether the defendant knew the victim was a peace officer. State v. Nozie, 2007-NMCA-131, 142 N.M. 626, 166 P.3d 756, cert. granted, 2007-NMCERT-009.

Committee commentary. — The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into UJIs 14-2201 NMRA to 14-2215 NMRA. If some other mistake of fact is raised as a defense, see UJI 14-5120 NMRA.

[As withdrawn and amended by Supreme Court Order No. __________, effective _____.]
14-4511. “Operating” or driving a motor vehicle; defined.  
A person is “operating” a motor vehicle if the person is:

1. whether the vehicle was running;
2. whether the ignition was in the “on” position;
3. where the ignition key was located;
4. where and in what position the driver was found in the vehicle;
5. whether the person was awake or asleep;
6. whether the vehicle’s headlights were on;
7. where the vehicle was stopped;
8. whether the driver had voluntarily pulled off the road;
9. the time of day;
10. the weather conditions;
11. whether the heater or air conditioner was on;
12. whether the windows were up or down;
13. whether the vehicle was operable;
14. any explanation of the circumstances shown by the evidence.

It is up to you to examine all the available evidence in its totality and weight its credibility in determining whether the defendant was simply using the vehicle as stationary shelter or actually posed a threat to the public by the exercise of actual control over it while impaired.

[Adopted by Supreme Court Order No. , effective ]

Committee commentary.—See State v. Sims, 2010-NMSC- , ¶ 26, ___ N.M. ___, ____ P.3d ____ (holding that when a DWI charge is based on the allegation that the defendant was in actual physical control of the vehicle, the state must prove that the defendant had an intent to drive and limiting the holdings of Boone v. State, 105 N.M. 223, 731 P.2d 366 (1986); State v. Johnson, 2001NMSC001, 130 N.M. 6, 15 P.3d 1233). See also State v. Mailman, 2010-NMSC- , ¶ 20, ___ N.M. ___, ____ P.3d ____ (holding that the operability of a vehicle is an additional factor for the jury to consider in determining whether a defendant has the general intent to drive).

[Adopted by Supreme Court Order No. , effective ]

14-210. Second degree murder; voluntary manslaughter lesser included offense; essential elements. 

For you to find the defendant guilty of second degree murder [as charged in Count __] , the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____________ (name of victim);
2. The defendant knew that his acts created a strong probability of death or great bodily harm to __________________ (name of victim) (or any other human being);
3. The defendant did not act as a result of sufficient provocation;
4. This happened in New Mexico on or about the ______ day of __________________ , ______ .

USE NOTE

1. This instruction is to be given only when provocation is an issue.
2. Insert the count number if more than one count is charged.
3. Use this bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following UJI 14-220 NMRA, Voluntary manslaughter lesser included offense.
4. The following instructions must also be given after UJI 14-220 NMRA, voluntary manslaughter, lesser included offense: UJI 14-141 NMRA, General criminal intent; UJI 14-131 NMRA, definition of great bodily harm; UJI 14-222 NMRA, definition of sufficient provocation; and UJI 14-250 NMRA, Jury procedure for various degrees of homicide.

[As amended by Supreme Court Order No. , effective ]

Committee commentary.—See committee commentary to UJI 14-211 NMRA for a discussion of instructions on second degree murder.

Essential Element Number 3, providing for the jury to consider the issue of provocation, is consistent with the requirements of Mullaney v. Wilbur, 421 U.S. 684 (1975). Parties must be aware that an attempt to commit reckless or unintentional murder is “a crime that does not exist.” State v. Carrasco, 2007-NMCA-152, ¶ 7, 143 N.M. 62, 64, 172 P.3d 611, 613. Therefore, to avoid potential confusion, if the charge of attempt to commit second degree murder proceeds to a jury, the instructions should be drafted to take into account the holding below from Carrasco and the specific facts of the case.

Attempt to commit a felony is the commission of “an overt act in furtherance of and with intent to commit a felony and tending...
but failing to effect its commission.” NMSA 1978, § 30-28-1 (1963). It is a specific intent crime. Jernigan, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537. Attempted second degree murder, however, is not a valid crime in all circumstances because second degree murder can be committed either intentionally or unintentionally. See Johnson, 103 N.M. at 368-70, 707 P.2d at 1178-80. When second degree murder is committed as a general intent crime, it requires that the defendant kill the victim with the knowledge that the defendant’s acts “create a strong probability of death or great bodily harm.” Section 30-2-1(B). As a general intent crime, it does not require an intent to kill; a reckless killing satisfies the statutory requirements.

Carrasco, 2007-NMCA-152, ¶ 7.
[As amended by Supreme Court Order No. , effective ]

14-211. Second degree murder; voluntary manslaughter not lesser included offense; essential elements.¹

For you to find the defendant guilty of second degree murder [as charged in Count ________]², the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed __________ (name of victim);
2. The defendant knew that his acts created a strong probability of death or great bodily harm to __________ (name of victim) [or any other human being]³;
3. This happened in New Mexico on or about the __________ day of __________, ________.

USE NOTE

1. This instruction is to be used only when second degree murder is the lowest degree of homicide to be considered by the jury.
2. Insert the count number if more than one count is charged.
3. UJI 14-131 NMRA, the definition of great bodily harm, must be given.
4. Use this bracketed phrase when the intent was directed to someone other than the victim. In such a case, UJI 14-255 NMRA must also be given.
5. UJI 14-141 NMRA, general criminal intent, must also be given.

[As amended by Supreme Court Order No. ; effective ]

Committee commentary — See [Section 3021B NMSA 1978] NMSA 1978, § 30-2-1(B) (1994). Second degree murder is committed when death results from acts which the defendant knew created a strong probability of death or great bodily harm. This was formerly known as “depravedheart” murder, which is also murder in the first degree. See [3021A(2) NMSA 1978] NMSA 1978, § 30-2-1(A)(3) (1994). The intent necessary for this crime was formerly defined by the courts as “implied” or “inferred” malice. See commentary to UJI 14-201 NMRA and 14203 NMRA and State v. Smith, 26 N.M. 482, 488, 194 P. 869 (1921). See generally, Perkins, Criminal Law 3435, 88, 770 (2d ed. 1969) and LaFave & Scott, Criminal Law 529 (1972).

Implied malice, the intent required as an element of the crime, may be inferred from certain facts, for example, the use of a deadly weapon. See, e.g., State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972). Although the New Mexico court in Duran and in other cases refers to the inference as “implying malice,” the committee believed that the inference of malice was more appropriate. See UJI 14-5061 NMRA. See generally Perkins, “A Reexamination of Malice Aforethought,” 43 Yale L.J. 537, 549 (1934). Malice may also be inferred where the defendant does not use a deadly weapon. See State v. Garcia, 61 N.M. 291, 299 P.2d 467 (1956). See generally Annot., 22 A.L.R.2d 854 (1952).

The New Mexico Supreme Court in State v. Welch, 37 N.M. 49, 25 P.2d 211 (1933), a felony murder case, indicated that second degree murder could be found where there is “independent” evidence of an intent to kill. It is assumed that this decision was implicitly overruled by State v. Reed, 39 N.M. 44, 39 P.2d 1005 (1934).

The court in State v. Reed, supra, held that where the evidence clearly indicates a certain means was used, for example, the torture used by the defendants in that case, a conviction for second degree murder could not be sustained and the defendants were discharged. This case supports the approach of the committee to the lesser included offense problem and requires the district judge to exercise careful judgment in submitting second degree murder to the jury. The decision in Reed was sought to be overruled by a statute which says that the defendant cannot complain if convicted of a lesser degree of homicide although the evidence clearly establishes that a higher degree was actually committed. This law has not been repealed but is no longer in the annotated statutes. N.M. Laws 1937, ch. 199, § 1 (formerly compiled as Section 41131 NMSA 1953 Comp.). This law is unconstitutional insofar as it purports to authorize conviction of a lesser included offense when there is no evidence of one or more elements of the lesser offense. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Element 2 of UJI 14-210 NMRA and of UJI 14-211 NMRA was revised in 1981 to be consistent with the 1980 amendments to [Section 3021 B NMSA 1978] NMSA 1978, § 30-2-1 (1980).

Although the 1980 Legislature amended [3021 B NMSA 1978] NMSA 1978, § 30-2-1 (1980) to provide that murder in the second degree is a lesser included offense of the crime of murder in the first degree, an instruction on second degree murder should not be given when the evidence only supports murder in the first degree.

Parties must be aware that an attempt to commit reckless or unintentional murder is “a crime that does not exist.” State v. Carrasco, 2007-NMCA-152, ¶ 7, 143 N.M. 62, 64, 172 P.3d 611, 613. Therefore, to avoid potential confusion, if the charge of attempt to commit second degree murder proceeds to a jury, the instructions should be drafted to take into account the holding below from Carrasco and the specific facts.

Attempt to commit a felony is the commission of “an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.” NMSA 1978, § 30-28-1 (1963). It is a specific intent crime. Jernigan, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537. Attempted second degree murder, however, is not a valid crime in all circumstances because second degree murder can be committed either intentionally or unintentionally. See Johnson, 103 N.M. at 368-70, 707 P.2d at 1178-80. When second degree murder is committed as a general intent crime, it requires that the defendant kill the victim with the knowledge that the defendant’s acts “create a strong probability of death or great bodily harm.” Section 30-2-1(B). As a general intent crime, it does not require an intent to kill; a reckless killing satisfies the statutory requirements.

Carrasco, 2007-NMCA-152, ¶ 7.
[As amended by Supreme Court Order No. ; effective ]
14-2801. Attempt to commit a felony; essential elements.
For you to find the defendant guilty of an attempt to commit the crime of ________1 [as charged in Count ___________2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of ________1;
2. The defendant began to do an act which constituted a substantial part of the ________1 but failed to commit the ________1;
3. This happened in New Mexico on or about the ___________ day of ____________, _____________.

USE NOTE
1. Insert the name of the felony. A separate one of these instructions is required for each of such felonies. The essential elements of the felony must be given immediately following this instruction, unless they are set out in an instruction dealing with the completed offense.
2. Insert the count number if more than one count is charged.


This instruction sets forth the essential elements of an attempt to commit a felony. The instruction should be given only when there is sufficient evidence to establish an attempted crime which failed to be completed. In State v. Andrad, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971), the court rejected the defendant’s claim that a jury should always be instructed on attempt as a lesser offense, stating that when there is no evidence of failure to complete the crime such an instruction presents a false issue.


The essential elements of the attempted felony must be given. In cases where multiple attempts are charged the committee was of the opinion that a separate instruction should be given for each attempt. A combination instruction on attempts to commit a felony is excessively cumbersome and might tend to confuse a jury. Element 1 is included in the essential elements, because attempt requires a specific intent to commit the felony.

There is no crime of attempt to commit a felony when the underlying charge upon which the attempt is based has the element of negligence or recklessness, since the first element has an intent requirement. See committee commentary following UJIs 14-210 NMRA and 14-211 NMRA, second degree murder, which refer to State v. Carrasco, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611.

[As amended by Supreme Court Order __________, effective __________.]

________________________________
Defendant was tried jointly with his co-defendant, David Griego, who is not a party to this appeal.

1 Defendant claims that, due to the public excitement and local prejudice threatened at knife point by Orlando Salas (Orlando). Orlando informed Ruben that his older brother, Defendant, wanted to fight him. It was arranged that Ruben and Defendant would fight after school. Ruben reported to the designated location for the fight, but Defendant never appeared. Ruben went home and later went to sleep in the bedroom that he shared with Victim.

4 That night, Defendant and Orlando picked up Melissa Sanchez (Melissa), a student at Clovis High School. Defendant was driving a white Suburban with a blue pinstripe and carrying a loaded .22 caliber revolver. Defendant drove Orlando, Melissa, and his co-defendant, David Griego, to the Gatewood Apartment Complex, where he asked Melissa to point out the apartment in which Ruben, whom he referred to as a “sewer rat,” lived. Melissa complied by pointing out Ruben’s apartment window.

5 Defendant then drove to Eric Gutierrez’s (Eric) house, which was located approximately two blocks away from Ruben’s apartment. Defendant ordered Orlando and Melissa to get out of the vehicle, explaining that he had to “go do some business” and that he had “a mission.” Soon thereafter, Defendant and Griego returned, acting “hyped up” like “they just got a rush out of something.” Defendant informed Melissa that he had just “blasted nine rounds at that sewer rat’s house.”

6 At this point, Defendant, Griego, Eric, Orlando, and Melissa heard on the police scanner that an eleven-year old boy had been shot and that the police were looking for a “white Suburban with blue lines around [it].” Defendant “started flipping out” and insisted upon parking his Suburban in Eric’s garage. Melissa became upset and reached out toward Defendant, explaining that he had gun powder residue on him. He threatened at knife point by Orlando Salas (Orlando). Orlando informed Ruben that his older brother, Defendant, wanted to fight him. It was arranged that Ruben and Defendant would fight after school. Ruben reported to the designated location for the fight, but Defendant never appeared. Ruben went home and later went to sleep in the bedroom that he shared with Victim.

7 Defendant claims that, due to the public excitement and local prejudice.  

https://www.nmcompcomm.us/
surrounding this case, he could not obtain a fair trial in the Ninth Judicial District, which is composed of Curry County and Roosevelt County. Defendant argues that the trial court, Judge Joe Parker, therefore properly ordered a change of venue to Lea County, which is located in the Fifth Judicial District, and that Judge David W. Bonem improperly reconsidered and modified Judge Parker’s order, resulting in a second change of venue to Roosevelt County in the Ninth Judicial District.

{8} The following additional facts and procedural history are relevant to Defendant’s claim. Prior to trial, Defendant requested a change of venue, claiming that “[t]his case has received extensive publicity” and, therefore, “Defendant cannot receive a fair trial in the County of Curry, State of New Mexico, and this case should be moved to another Judicial District.” Defendant suggested that venue must be changed to a neighboring county outside of the Ninth Judicial District, such as Lea or Chavez County, to preserve Defendant’s right to a fair trial. Judge Parker asked Defendant whether he “[had] any numbers” to support his change of venue motion. Defendant responded that he did not have any numbers because a survey of prospective jurors would have been cost prohibitive.

{9} The State opposed Defendant’s change of venue motion, claiming that (1) Defendant had failed to file an affidavit as required by Section 38-3-3(B), (2) the case had not received extensive publicity, and (3) Defendant had failed to produce any evidence indicating that an impartial jury could not be obtained in Curry County. Alternatively, the State argued that if a change of venue is appropriate, then the case must be moved to another county free from exception within the same judicial district, which in this case, would be Roosevelt County.

{10} Defendant acknowledged that it would be “somewhat easier” to choose a jury in Roosevelt County, but stated that his “instincts tell [him] real clear that people there are going to have a few percentage points less knowledge than people in Curry County.” However, Defendant informed Judge Parker that he would defer to the court’s discretion with respect to whether Roosevelt County is an appropriate venue.

{11} At the conclusion of the hearing, Judge Parker found, based on his own personal experience as a member of the community, that the case had been subject to extensive trial publicity. Judge Parker held that “justice in this matter will be better served by having the jury, the jury pool selected from out of county and having this matter heard in a neighboring county.” Accordingly, Judge Parker ordered venue to be changed from Curry County to Lea County.

{12} Thereafter, the State filed a motion for reconsideration, arguing in relevant part that Defendant had “failed to produce any evidence that [he] would be deprived of a fair and impartial jury if the jurors were selected from Curry County.” Additionally, the State argued that a change of venue to Lea County would impose a considerable burden on the witnesses and the family of Victim, who will have to travel from Curry County to Lea County to attend the trial. The State pointed out that, even if a change of venue is appropriate, then the case should be moved to Roosevelt County, which “[hadn’t] even published an article about this [case] in a long time.”

{13} Judge Parker denied the State’s motion for reconsideration, explaining: “I’m not convinced that I’m without the appropriate discretion to change the venue. It was my opinion at that time and I haven’t abandoned that opinion. . . . I’ll continue in my position that this matter will be tried in Lea County.” The State objected because Judge Parker had failed “to make findings on the record with regard to why we can’t have [the trial] in Roosevelt County.” Judge Parker found that Roosevelt County was an inappropriate venue because of “the sense of excitement about the case” and that Section 38-3-3 provides “sufficient leeway and discretion to make its findings for the trying of this case.”

{14} The State filed a second motion for reconsideration of Judge Parker’s change of venue order. Thereafter, retired District Court Judge Bonem was assigned to serve as Judge Pro Tempore in this case. On August 29, 2007, Judge Bonem held a hearing on the State’s motion. At the outset, Defendant clarified that the State’s motion is “a motion to reconsider a ruling on a motion to reconsider” because the parties “already had the hearing on the Motion to Reconsider.” The State conceded that it had previously filed a motion for reconsideration, but stated that “with all due respect to Judge Parker, [it] did not believe that the Court specifically followed the law in all of the things necessary to consider a change of venue.” At the hearing, both the State and Defendant reiterated the same arguments that they previously had presented to Judge Parker.

{15} Judge Bonem upheld “the previous ruling that the venue from Curry County shall be changed.” However, according to Section 38-3-7, “where a change of venue is granted, the case shall be removed to another county within the same judicial district unless the remaining counties are subject to exception.” Judge Bonem determined that Roosevelt County was not subject to exception because Roosevelt County has received approximately one-half (½) of the trial pre-trial publicity that Curry County has been subjected to. The Court further finds that media coverage of this case has been essentially non-existent in Roosevelt County in the past seven (7) months of the date of this order. The Court further finds that substantial time has passed since the alleged incident in question, approximately one (1) year and eleven (11) months.

Accordingly, Judge Bonem held that “the appropriate venue of this case shall be the Ninth Judicial District, Roosevelt County.”

{16} “This Court reviews a grant or denial of a motion for change of venue under an abuse of discretion standard.” State v. Barrera, 2001-NMSC-014, ¶ 11, 130 N.M. 227, 22 P.3d 1177. “The trial court’s discretion in this matter is broad and will not be disturbed on appeal unless a clear abuse of that discretion can be demonstrated. The burden of establishing an abuse of discretion is borne by the party that opposes the trial court’s venue decision.” State v. House, 1999-NMSC-014, ¶ 31, 127 N.M. 151, 978 P.2d 967 (citation omitted).

{17} Additionally, this Court will uphold the trial court’s ruling on a change of venue motion if it is supported by substantial evidence. See Barrera, 2001-NMSC-014, ¶ 12; House, 1999-NMSC-014, ¶ 32. Substantial evidence consists of relevant evidence that might be accepted by a reasonable mind as adequate to support a conclusion. This Court resolves all disputed facts and draws all reasonable inferences in favor of the successful party and disregards all evidence and inferences to the contrary, viewing the evidence in the light
most favorable to the trial court’s decision. We must be mindful that it is the role of the trial court, and not the appellate court, to weigh the evidence and determine the credibility of witnesses. We do not substitute our own judgment for a determination of the trial court supported by substantial evidence. Barrera, 2001-NMSC-014, ¶ 12 (citations omitted).

[18] We begin our analysis with a brief review of the statutes governing a change of venue motion. Section 38-3-3(B)(3) provides:

The venue in all civil and criminal cases shall be changed, upon motion, to another county free from exception . . . when the party moving for a change files in the case an affidavit of himself, his agent or attorney, that he believes he cannot obtain a fair trial in the county in which the case is pending because . . . of public excitement or local prejudice in the county in regard to the case or the questions involved in the case, an impartial jury cannot be obtained in the county to try the case . . . .

Section 38-3-7 further provides:

In all cases where a change of venue is granted, the case shall be removed to another county within the same judicial district unless the remaining counties are subject to exception, or unless the change of venue is ordered upon any of the grounds relating to the judge. Under these circumstances, the case shall be removed to some county of the nearest judicial district which is free from exception.

To resolve the issue on appeal, we must determine whether Roosevelt County is “subject to exception” under Sections 38-3-3 and 38-3-7.

[19] The record reflects that Defendant failed to adduce any evidence in support of his claim that he could not obtain a fair trial in Roosevelt County. For example, Defendant failed to produce any witnesses, file any affidavits, admit any media articles, or submit any juror questionnaires exhibiting bias or prejudice. Although defense counsel represented to the court that there was extensive public excitement and media coverage surrounding this case, it is well established that “[a]rgument of counsel is not evidence.” State v. Cochran, 112 N.M. 190, 192, 812 P.2d 1338, 1340 (Ct. App. 1991). Accordingly, the evidence was insufficient to establish that Roosevelt County was subject to exception, and Judge Bonem properly ordered venue to “be removed to another county within the same judicial district” as Curry County in accordance with Section 38-3-7.

B. Whether the Trial Court Properly Ruled on the Parties’ Batson Challenges

[20] We next address whether the trial court properly ruled that Defendant’s peremptory strike against a white male venireperson violated Batson, whereas the State’s peremptory strikes against Hispanic venirepersons did not. The following additional facts and procedural history are relevant to this claim. Defendant and his co-defendant, Griego, received a total of fourteen peremptory challenges to exercise against regular jurors and two peremptory challenges to exercise against alternate jurors. The State received the same number of peremptory challenges.

[21] During jury selection, the State raised a Batson challenge, pointing out that Defendant had used nine of his fourteen peremptory challenges to strike “all the white males on [the] jury panel.” In response, the trial court noted that the State had used all of his peremptory strikes to eliminate “one hundred percent of [the] white males” from the jury.

[22] Defendant subsequently exercised his eleventh peremptory challenge on Juror 19, a white male. The State renewed its Batson challenge. The trial court noted that “[d]uring proceedings, [Juror 19 had] indicated that if the case went until the fifth he would be out on a cattle check.” A discussion took place off the record, after which the trial court asked Defendant to provide a race-neutral explanation for striking Juror 19. Defendant explained:

We based it on his questionnaire and his responses and a tactical reason. Because I don’t want him as foreman on this jury. And I don’t think that that has anything to do with his race, it has everything to do with his power. And the other thing, he’s a crime victim.

And counsel for co-defendant in this case - - well, the reason we think he’s going to be foreman is because he’s got a Ph.D., and I don’t want one person controlling this jury, and he will. And that’s our tactical reason, primarily that.

And the other thing is is that, you know, I’m a rancher as well and I know what that stuff means, and I just - - if we’re getting down to the last day and they’re deliberating into that day or two days before, I mean, I think we’ll be finished with our case, but if this case is close and they’re deliberating, he’s going to push this jury to a verdict. I’m not going to like the verdict.

[23] The State questioned the veracity of Defendant’s facially neutral explanation, noting that “every single one” of the other jurors accepted by Defendant “is either a victim of a crime or has served as a juror before.” In particular, the State pointed out that Defendant had accepted Juror 17, “who is a prior foreman of a jury.” The State argued that Defendant’s facially neutral explanation was pretext for a discriminatory motive, noting that Defendant had used all of his peremptory strikes thus far to eliminate “one hundred percent of [the] white males” from the jury.

[24] In response, Defendant explained that his general trial strategy was to exclude crime victims and male venirepersons with prior jury experience because he was afraid that they would end up “taking control of the jury” and that they have all that experience. That’s a real sensitive issue for us with some of these powerful men on this jury.” Defendant further explained that it had been his experience doing a number of trials, especially with jury panels that have been there for a long period of time, they have a tendency to favor the State after they’ve served two or three times. And it’s not based on race, it’s based

2 Because Defendant and Griego exercised their peremptory challenges jointly, we hereinafter refer to Defendant and Griego collectively as “Defendant.”
on prior jury service and the fact that the more they serve, the more convictions the State gets.

Defendant clarified that he was striking “powerful” men with prior jury experience because he feared that they “would end up controlling the jury, particularly against the women on the jury.” Additionally, Defendant noted that “one of the key witnesses in this case is a young woman. And [he happened] to think that frankly fathers have - - don’t judge the credibility of young females as well as mothers do. That’s defining my strategy, it has nothing to do with their race.” The trial court held that Defendant had failed to provide a neutral explanation sufficient to justify the use of a peremptory challenge against Juror 19 and, therefore, struck Defendant’s peremptory challenge and seated Juror 19 on the jury.

Thereafter, the State peremptorily struck three Hispanic venirepersons: Jurors 56, 85, and 28. Defendant raised a Batson challenge, and the State sua sponte provided a race-neutral explanation for each: “[Juror 28] was asleep during my jury selection, so that was a concern that I had, so that’s why we struck her. And [Juror 85], she - - we know her father, but I know her as being involved in crimes that I myself have prosecuted her on. So I struck her.” With respect to Juror 56, the State explained that his “son and granddaughter are defendants - - or were [d]efendants in this district, and that’s the reason we struck him.”

Defendant admitted that the State had provided “a valid reason for striking [the] juror[s],” but objected to the challenges because the information was “only privy to the State.” Defendant argued that the State should have shared the information with the defense so that it “could have dealt with that issue. Because that changes the strategy of picking a jury for us whenever you have three people like that.” In response, the State pointed out that the information was available to Defendant because it was provided in the juror questionnaires.

Defendant complained that, in total, the State had struck “five out of eight” Hispanic venirepersons. The trial court asked the State to provide a race-neutral explanation for the two prior peremptory challenges. The State explained that it had struck Juror 51, a Hispanic female, because “she is familiar with Jonathan Carver in this case. Jonathan Carver is a witness, he’s a potential witness in this case and was assisting David Griego and [Defendant] with a place to stay while he allegedly came up with what they were going to do after the homicides.” With respect to Juror 57, who is also a Hispanic female, the State explained that she was struck because her uncle previously had been represented by defense counsel.

The trial court found that the State had provided a race-neutral explanation for each of its peremptory strikes and, therefore, denied Defendant’s Batson challenge. The trial court pointed out that the explanations provided by the State were “different than striking a person as a male, a person that would be powerful.”

It is well established that neither the State nor a defendant may “during the jury selection process, use [their] peremptory challenges to exclude otherwise unbiased and well-qualified individuals solely on the basis of their race, gender, economic status, or any other similar discriminatory characteristic.” House, 1999-NMSC-014, ¶ 84; see also J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (holding that “gender, like race, is an unconstitutional proxy for juror competence and impartiality”); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination . . . in the exercise of peremptory challenges”). Such invidious discrimination violates the Equal Protection Clause of the United States Constitution and “causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.” J.E.B., 511 U.S. at 140.

The United States Supreme Court has adopted a three-part test to determine whether peremptory challenges have been exercised in a discriminatory manner. First, the opponent of a peremptory challenge bears the burden to establish a prima facie case indicating that the peremptory challenge has been exercised in a discriminatory way (step one). See Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam). To make a prima facie showing, a party must prove that (1) a peremptory challenge was used to remove a member of a protected group from the jury panel, and (2) the facts and other related circumstances raise an inference that the individual was excluded solely on the basis of his or her membership in a protected group. See State v. Bailey, 2008-NMCA-084, ¶ 14, 144 N.M. 279, 186 P.3d 908; State v. Martinez, 2002-NMCA-036, ¶ 11, 131 N.M. 746, 42 P.3d 851.

If the opponent of the peremptory challenge successfully makes a prima facie showing, then the burden shifts to the proponent of the challenge to come forward with a race or gender-neutral explanation (step two). See Purkett, 514 U.S. at 767. “The second step of this process does not demand an explanation that is persuasive, or even plausible.” Id. at 767-68. Rather, the issue is the facial validity of the proffered explanation. “Unless a discriminatory intent is inherent in the [party’s] explanation, the reason offered will be deemed race [or gender]-neutral.” Id. at 768. “If a [race or gender]-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial [or gender] discrimination.” Id. at 767. “[T]he ultimate burden of persuasion regarding racial [or gender] motivation rests with, and never shifts from, the opponent of the strike.” Id. at 768.

We review the trial court’s “factual findings regarding a Batson challenge using a deferential standard of review, as it is the responsibility of the [trial] court to (1) ‘evaluate the sincerity of both parties,’ (2) ‘rely on its own observations of the challenged jurors,’ and (3) ‘draw on its experience in supervising voir dire.’” Bailey, 2008-NMCA-084, ¶ 15 (quoting Martinez, 2002-NMCA-036, ¶ 20). However, we apply a de novo standard of review to the ultimate issue of constitutionality. Jones, 1997-NMSC-016, ¶ 11.

1. Defendant’s Peremptory Challenges

The record reflects that Defendant used his peremptory challenges to strike every single white male from the jury pool. “Courts are in near universal agreement . . . that a party’s decision to strike all the members of a particular race [or gender] establishes a prima facie case of discrimination.” Martinez, 2002-NMCA-036, ¶ 24; see also Batson, 476 U.S. at 97 (noting that “a ‘pattern’ of strikes against black jurors included in the particular venire might give
rise to an inference of discrimination"). Accordingly, the State established a prima
facie case of discrimination.

We next address whether Defendant
provided a facially neutral explanation for
exercising his eleventh peremptory chal-
lenge on Juror 19, a white male. Defendant
explained that he struck Juror 19 because
Juror 19 was a crime victim with prior jury
experience. Additionally, Juror 19 had a
Ph.D., which led Defendant to believe that
he might become the foreperson of the
jury and Defendant did not “want him as
foreperson on this jury” because he might
end up “controlling this jury.” Additionally,
Defendant was concerned that Juror 19
might “push this jury to a verdict” because
of his responsibilities as a cattle rancher.
The reasons proffered by Defendant were
both specific to Juror 19 and facially neu-
tral and, therefore, satisfied step two of the
Batson test. See Jones, 1997-NMSC-016,
¶ 5 (holding that “challenging a juror for
failure to make eye contact and lack of
assertiveness is a racially neutral, spe-
cific reason,” for exercising a peremptory
challenge, which satisfies step two of the
Batson test); Bailey, 2008-NMCA-084, ¶
19 (holding that challenging a potential
juror for unresponsiveness during voir
dire is a racially neutral reason for exercising a
peremptory challenge, which satisfies step
two of the Batson test).

However, the trial court did not find
Defendant’s facially neutral explanation
to be credible and, therefore, held that
Defendant’s peremptory challenge failed
under step three of the Batson test. We
conclude that the record amply supports
the trial court’s factual finding regarding
Defendant’s discriminatory motive. First,
Defendant explicitly acknowledged that
his trial strategy was gender motivated,
stating that he was striking men in lieu of
women because “fathers . . . don’t judge
the credibility of young females as well as
mothers do,” and because he thought that
“an analytical woman would probably give
[Defendant] a fairer shake.” Second, the
trial court reasonably could have found
that Defendant’s trial strategy was racially
motivated. Although Defendant claimed
that he was exercising his peremptory chal-
lenge to strike all male venirepersons with
prior jury experience, regardless of race, the
State pointed out that Defendant previously
had accepted non-white male venirepersons
with prior jury experience. Thus, the trial
court reasonably could have found that
Defendant’s facially neutral explanation
was pretextual. Accordingly, the trial court
did not abuse its discretion by affirming the
State’s Batson challenge and seating Juror
19 on the jury.

The reasons proffered by Defendant were
both specific to Juror 19 and facially neu-
tral and, therefore, satisfied step two of the
Batson test.

Defendant claims that the State failed
to provide a race-neutral reason for striking
five out of eight Hispanic venirepersons
from the jury. Essentially, Defendant claims
that, if his proffered reasons were not race-
neutral, then a fortiori, the State’s proffered
reasons were not race-neutral either.

The State explained that it had struck
Juror 28 because she fell asleep during voir
dire, Juror 85 because she was involved in
crimes prosecuted by the prosecutor, and
Juror 56 because his son and granddaughter
were defendants in the Fifth Judicial Dis-
trict. Additionally, the State struck Juror 51
because she was familiar with a potential
witness in the case and Juror 57 because
her uncle previously had been represented
by defense counsel. The trial court prop-
erly found that the State’s explanations
were neither inherently discriminatory
nor pretextual. The State focused on the
answers provided by each of the venire-
persons and their conduct during voir
dire to provide reasonable and facially neutral
reasons for their exclusion. Nothing in the
State’s answers alluded, either explicitly
or implicitly, to the juror’s gender, race, or
ethnicity. Accordingly, we hold that the trial
court properly rejected Defendant’s Batson
challenge.

Lastly, Defendant claims that the
cumulative impact of the trial court’s erro-
neous rulings resulted in cumulative error,
thereby depriving him of a fair trial. “The
doctrine of cumulative error applies when
multiple errors, which by themselves do
not constitute reversible error, are so seri-
os in the aggregate that they cumulatively
deprive the defendant of a fair trial.” State
v. Roybal, 2002-NMSC-027, ¶ 33, 132
N.M. 657, 54 P.3d 61. “In New Mexico the
doctrine of cumulative error is strictly ap-
plied. It cannot be invoked when the record
as a whole demonstrates that the defendant
received a fair trial.” State v. Trujillo, 2002-
NMSC-005, ¶ 63, 131 N.M. 709, 42 P.3d
814 (internal quotation marks and citations
omitted).

There was no error in this case and,
therefore, Defendant received a fair trial.
Accordingly, Defendant’s cumulative error
claim is rejected. See State v. Martin, 101
(holding that the cumulative error “doc-
trine cannot be invoked if no irregularities
occurred or if the record as a whole dem-
onstrates that a defendant received a fair
trial” (citation omitted)); State v. Casillas,
2009-NMCA-034, ¶ 51, 145 N.M. 783, 205
P.3d 830 (“Because there was no error, . . .
there was no cumulative error.”).

We conclude

For the foregoing reasons, we affirm
Defendant’s convictions.

IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:
CHARLES W. DANIELS,
Chief Justice
PATRICIO M. Serna, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
Certiorari Granted, June 2, 2010, No. 32, 388
Certiorari Granted, June 24, 2010, No. 32, 402
From the New Mexico Court of Appeals
Opinion Number: 2010-NMCA-055

Topic Index:
Appeal and Error: Remand; and Standard of Review
Criminal Procedure: Deposition and Discovery; Expert Witness; and Motion to Suppress
Criminal Law: Criminal Sexual Penetration
Evidence: Deposition; Exclusion of Evidence; Expert Witness; Suppression of Evidence; and Witnesses

STATE OF NEW MEXICO,
Plaintiff-Appellant, versus
CURTIS HARPER,
Defendant-Appellee.
No. 27,830 (filed: April 16, 2010)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
J. MICHAEL KAVANAUGH, District Judge
GARY K. KING
Attorney General
Santa Fe, New Mexico
JACQUELINE R. MEDINA
Assistant Attorney General
Albuquerque, New Mexico
for Appellant

DANIEL M. SALAZAR
Albuquerque, New Mexico
for Appellee

OPINION

RODERICK T. KENNEDY, Judge

[1] In this case, we are presented with another appeal from the consequences of the State’s failure to abide by an order of the district court to complete witness interviews by a certain deadline. Following a motion hearing in which the defense sought witness interviews which had not occurred, the district court set a discovery deadline requiring that all witness interviews in the case against Curtis Harper (Defendant) be completed by January 19, 2007. We concern ourselves with two interviews: An interview with the alleged victim (SV) was scheduled on the day of the deadline, but she was not under subpoena, and she failed to appear. Next, despite the district court’s order, the State persisted in its refusal to schedule an interview with the State’s expert witness, Dr. Renee Ornelas, because the defense had never made arrangements prior to the interview to pay her expert witness fees. The Monday following the missed deadline the State submitted a motion for an extension of time. Defendant responded with a motion opposing the extension and a motion to exclude SV and Dr. Ornelas as witnesses. Defendant’s motion to exclude the witnesses’ testimony was granted, from which the State appeals.

[2] We first consider whether the district court abused its discretion in excluding SV given that the State scheduled her interview on the discovery deadline, and that approximately five months remained before the trial date, and conclude that reversal is in order. Our second inquiry is whether the State’s expert was properly excluded where specifically any necessary [pretrial] interviews, as a basis for the extensions, among other things.

[3] In November 2004 Defendant was indicted and arrested on fifteen counts of criminal sexual penetration of a minor in the first degree. Defendant remained incarcerated over two years while awaiting trial. From his indictment and arraignment in late 2004 until December 11, 2006, Defendant’s trial date was pushed back multiple times through extensions granted under Rule 5-604(C) and (D) NMRA. Each request cited the need to finish discovery, specifically any necessary [pretrial] interviews, as a basis for the extensions, among other things.

[4] Some witnesses, including SV and Dr. Ornelas, had not been interviewed by the trial setting on December 11, 2006. At that setting, the defense requested of the district court a “date certain by which witnesses be made available, and then if they’re not available or they show an unwillingness to cooperate, perhaps we can take it from there.” The State made clear that Dr. Ornelas was an essential witness and her materiality to its case is undisputed. The State offered to set up the interview with SV at any time, but stated that it would not schedule an interview with Dr. Ornelas until payment of her expert witness fees was affirmed by the defense. The district court did not comment on the State’s position, but simply imposed a deadline of January 19, 2007, to complete all witness interviews in preparation for trial. The court specifically stated, “if there’s at least in the [d]efense’s mind some continuing noncompliance, we’ll—the [c]ourt will consider any motions that you have sometime after that and figure out if any remedy is necessary.” At the time, trial was set for February 19. The State did not contest the order, or request that the district court attach any conditions to the scheduling of the interviews. At no time during this case did the State request a ruling as to whether its insistence on pre-payment of a witness fee was proper, nor did it request an order from the district court to either compel Defendant to pay such a fee or facilitate Defendant’s right to payment of the expert witness fee. It did, however, file a Rule 5-604 petition on December 13, alleging that “[t]he defense has still not obtained funding from the Public Defender’s [O]ffice to interview the medical personnel that the State intends to call.” On January

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2, 2007, the extension was granted until March 24, 2007.

{5} An interview was scheduled with SV on the January 19 deadline, but she failed to appear. An interview with Dr. Ornelas was never scheduled by the State. On January 22, 2007, the State filed a motion to extend the time to produce witnesses, asserting that “[t]he interview of [Dr. Ornelas] has never been set as it requires notification by defense that payment has been authorized.” The defense responded with a motion to exclude the State’s witnesses, and a motion opposing an extension to produce them, asserting that the State had declined to schedule Dr. Ornelas’ interview despite having been ordered to do so on December 11 by the district court. The State responded on February 12 that it was under no inherent obligation to provide interviews, and that the defense, in the face of a witness’ refusal should issue a notice of statement, or seek to depose the recalcitrant witness. Since SV had also failed to attend her interview, the State explained that SV was not subpoenaed because there was no reason to believe that she would not attend. The State also explained that it scheduled the interview with her on the deadline because it was the only day she was available and because it wanted to give Defendant time to consider a plea bargain. The State explained that it had a policy of withdrawing any potential plea bargain once a defendant interviewed a minor victim. It asserted again that the “defense has been informed many times that they must pay for [Dr. Ornelas’ interview and we would not set it until they confirmed that the Public Defender’s Office had approved payment.” The State filed another Rule 5-604 petition with the Supreme Court on February 15, 2007, alleging a failure to arrange payment for Dr. Ornelas’ interview as a reason for the failure to complete discovery, but did not mention the existence or terms of the January 19 deadline. This petition resulted in an extension of the trial deadline to June 24, 2007.

{6} The district court set both motions for hearing at which it denied the State’s requested extension and granted Defendant’s motion to exclude based on the fact that the interviews had not been completed by the deadline. At the hearing, the State again asserted that Defendant had “no absolute right to an interview” and told the court that while it had been taken by surprise by SV’s lack of cooperation, it had made no effort to schedule an interview with the expert because “Dr. Ornelas is an expert witness. She won’t give an interview until payment is arranged.” Defense counsel pointed out that Defendant had been in custody for twenty-eight months up to that point and asserted the lack of contact with the two important witnesses and its impact on preparing a defense as prejudicial to his rights.

{7} The district court stated that its “setting of a deadline was unambiguous.” In support of its ruling, the court found that SV had not exhibited a willingness to cooperate. The State told the court that it would be their intention to proceed to trial even if SV stated in her interview that she remembered nothing. With regard to Dr. Ornelas, the district court stated from the bench, “[w]hether it’s a reimbursement issue or a contractual issue or something else of that nature is certainly an issue that can be pursued, but to simply throw up a roadblock of refusing to participate . . . turns the system on its head[,] and this [c]ourt is not going to accept that that was proper.” In its written order, the district court found that Dr. Ornelas was a “combination fact/expert witness” and that she could not “refuse an interview to the defense based upon pay.” The court further found that the defense’s inability to interview these witnesses by the deadline prevented the defense from providing effective assistance, performing due diligence, and from adequately confronting the witnesses.

{8} The district court also had a motion to dismiss before it. The court postponed ruling on the motion to dismiss pending the outcome of this appeal.

STANDARD OF REVIEW


{10} The district court ruled that as a result of its missed deadline, defense counsel was prevented from providing effective assistance, performing due diligence, and adequately confronting witnesses. The district court ruling presents a mixed question of fact and law. Id. ¶ 18. We defer to the district court with respect to the finding of facts so long as they are supported by substantial evidence, but application of the law to those facts is reviewed de novo. Id.

DISCUSSION

{11} The State did not at the time and does not now contest the propriety of the district court’s order setting the discovery deadline, but only the sanction imposed for its failure to abide by it. “[U]pon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances.” State v. Layne, 2008-NMCA-103, ¶ 13, 144 N.M. 574, 189 P.3d 707 (alteration in original) (internal quotation marks and citation omitted). We will not disturb a district court’s order imposing sanctions absent an abuse of discretion. State v. Ortiz, 2009-NMCA-092, ¶ 35, 146 N.M. 873, 215 P.3d 811. As the Appellant, it is the State’s burden to establish an abuse of discretion. Layne, 2008-NMCA-103, ¶ 10. Unless we can say that the district court’s ruling was clearly untenable or unjustified by reason, we cannot say it abused its discretion. Id. ¶ 6.

{12} Exclusion is proper where there is culpability based on an intentional refusal to comply with an order and where such culpable conduct is prejudicial to the opposing party. In Ortiz, despite an order to produce personal cell phone records that the district court determined to be material to the preparation of the defense, the state persisted in refusing to comply with the order citing the police officer’s privacy right. 2009-NMCA-092, ¶ 33. In Layne, the district court ordered production of records showing the ongoing relationship between the state and its informant, and the state violated a discovery order by refusing to disclose the information citing concerns about its confidential informant’s safety. 2008-NMCA-103, ¶ 3. Similarly here, the State attempted to justify its noncompliance in producing a concededly “essential” witness of its for a pretrial interview asserting her right to payment of expert fees. As a result, the district court excluded the informant as a witness. In Ortiz, we upheld the dismissal of the case with prejudice, and in Layne, we upheld the exclusion of the informant who was the only eyewitness to the crime. In both cases, we reasoned that the remedy was proper based on the state’s intentional refusal and the resulting prejudice to the defense; in Ortiz, accounting for a police officer’s actions during a six-minute gap in his police car’s video of his interaction with the defendant, and in Layne, providing information in the state’s possession that might be relevant to impeaching the informant as required under Rule 5-503(C) NMRA. Here, the order was to make SV and the State’s “essential
expert witness, Dr. Ornelas, available by a certain date irrespective of the State’s argument that the expert witness should receive a witness fee prior to the interview. As to SV, weak safeguards to ensure the presence of a witness whose recalcitrance is known does not rise to a refusal by the State to meet its obligation. It becomes a different matter when we evaluate the refusal to even schedule an interview with Dr. Ornelas.

After the deadline had expired, in its motion to extend time, and again in the March 2007 hearing, the State never asserted (nor do they assert now) that the order or deadline was beyond the district court’s power or an abuse of discretion. Nor did it request any change or other relief from the order save an extension of time because the fees still needed to be paid. On appeal, they do not argue that the order compelling interviews was an abuse of discretion. We hold that this constitutes an abandonment of any objection to the district court’s original order. Mathis v. State, 112 N.M. 744, 747, 819 P.2d 1302, 1305 (1991) (holding that failing to make a specific objection to the propriety of the ordered discovery at the time of its issue results in abandonment of the issue on appeal). In such a situation, we regard the district court’s order as fully in effect, and the State’s position to be no more than an irrelevant contrary preference that was unpursued. It is a strong foundation for our view that the State’s ignoring the deadline was intentional and in disregard of any consequences to come from violating the order. In such a case, exclusion of Dr. Ornelas’ testimony would be within the proper exercise of the district court’s discretion.

Exclusion of SV was Improper

With regard to the missed interview with SV, any culpability on the part of the State with respect to her not appearing for an interview is minimal. The prosecution presented an arguably valid reason to have run the date for the interview with SV out to the deadline—postponing the drop-dead date for a plea offer. The State at no time refused to make SV available for an interview with the defense and it at least attempted to comply with the court’s discovery order by scheduling an interview with SV before the deadline. SV was contacted personally to set the interview date and received a reminder the day previous to the interview to attend. After SV failed to appear, the State expressed a willingness to reschedule this time under subpoena. This attention paid by the State and its willingness to reschedule mollifies the culpability that may be allocated to the State, rendering it much less than that which justified exclusion in Layne or Ortez.

This does not mean that we ignore the State’s taking no action, save requesting extensions, between the expiration of the deadline and the motion hearing two months later. The State had obtained an extension of the trial date to March 24, 2007, had submitted a request for an extension of the discovery deadline on January 22, and yet filed another request for extension of the trial date to the Supreme Court on February 15 without disclosing the court’s order. The trial deadline was again extended on February 28 to June 24. The hearing on exclusion occurred on March 29. Although the State ran scheduling of the interview up to the deadline, several months yet remained before the trial deadline to eventually reschedule the interview and prepare for trial.

At the hearing on exclusion, defense counsel pointed to Defendant’s preceding twenty-eight months’ incarceration as the number one sign of prejudice. The speedy trial issue was discussed at the March 2007 hearing and reserved for later hearing. Defense counsel also pointed out that SV’s memory may have faded and that the delay was thus prejudicial. However, absent any evidence in support of this assertion, the statement itself is insufficient to show prejudice. State v. McDaniel, 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701 (stating that prejudice must be more than speculative); see Jackson, 2004-NMCA-057, ¶ 19 (holding that an allegation that memories fade with the passage of time did not justify dismissal in a delayed discovery case). Furthermore, SV had given a safe house interview, thus making it ultimately possible at trial to compare any changes or discrepancies in her testimony against prior statements. Therefore, even allocating some level of culpability to the State, we hold that the prejudice demonstrated by Defendant was insufficient to warrant exclusion as to SV. Despite the delay in bringing SV to an interview, which was related to the State’s policy of plea offers expiring upon the interview of child victims, Defendant’s incarceration was more related to serial appointment of defense counsel and delay of other witness interviews, than the failure of any interview with SV. Absent a refusal to disclose by the State, nothing suggests that defense counsel was prevented by the State from effectively preparing for an eventual June trial deadline with regard to interviewing SV. Id. ¶ 19. In the absence of any intentional withholding by the State of access to SV for an interview, and the tenuous relationship between the interview and delaying trial, we hold that SV’s testimony should not have been excluded by the district court.

Exclusion of Dr. Ornelas For Violating the Court’s Order Was Proper

Resolving the issue as to SV’s interview reflects the State’s acting to comply with the court’s order. With regard to the portion of the district court’s order to make Dr. Ornelas available for an interview, the State’s conduct stands in great contrast, as the State refused to comply with the district court’s order and to schedule an interview.

The State argues on appeal that Dr. Ornelas was entitled to a witness fee, that Defendant was entitled to funds to pay for interviewing expert witnesses, that the district court somehow failed to ascertain whether Defendant had attempted to receive such funds, and that Defendant’s failure to independently seek Dr. Ornelas’ interview has resulted in the State’s being unfairly punished for the defense’s inaction. The State never objected to the district court’s order as improperly compelling an interview without the fees being paid. Never did it request a ruling from the district court concerning the propriety of a witness fee for a pretrial witness interview. It requested no order to assist in obtaining or compelling the payment of Dr. Ornelas’ witness fees in any way. We previously held that the State failed to preserve the issue for our review. State v. Lucero, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986) (stating appellant must specifically apprise trial court of claimed error and invoke intelligent ruling thereon in order to preserve issue for appellate review). These issues are not properly before us for consideration, nor properly addressed in the dissent.

The issue is that for more than two

1Granted, the State was aware that SV was not the most willing of witnesses and had been approached by her aunt and asked not to give a statement against Defendant; a careful prosecutor might at that point have investigated the extent of the aunt’s likely influence or issued a subpoena just to be safe.
years, the State refused to make a witness available for an interview and maintained its refusal despite a court’s order to the contrary. The district court voiced its similar disdain for the State’s excuse after it had violated the court’s order, stating that once the State violated the court order the issue was no longer the witness fee, but that in light of the State simply throwing “up a roadblock of refusing to participate,” such action “turns the system on its head and this [c]ourt is not going to accept that that was proper.” It is in this context that the district court then found the impairment to Defendant’s case. Once the order was intentionally disobeyed, the district court was entitled to fashion the remedy it saw fit under the circumstances.

The Court’s Order, Once Issued, Mooted the State’s Objection Absent Further Proceedings

{20} The order was, in the words of the district court, “unambiguous.” Its entry followed a hearing in which Defendant had asserted a failure to make Dr. Ornelas available for an interview. The State clearly enunciated at that time its decision to not make Dr. Ornelas available for an interview. The State clearly had asserted a failure to make Dr. Ornelas available for an interview and maintained its refusal despite a court’s order to the contrary. The State clearly had asserted a failure to make Dr. Ornelas available for an interview and maintained its refusal despite a court’s order to the contrary.

Rule 5-503 Unconditionally Requires the Giving of Pretrial Statements by Any Witness at the Request of a Party

{21} We begin with a general proposition, as expressed in Rule 5-503(A), “[a]ny person, other than the defendant, with information which is subject to discovery shall give a statement.” There is no dispute in this case that Dr. Ornelas was an “essential” witness who would be called by the State and that her statement would be of great importance to preparing the defense in this case. Rule 5-503(C) allows a criminal defendant to “obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person,” without regard to its admissibility at trial, so long as the “information sought appears [to be] reasonably calculated to lead to the discovery of admissible evidence.” Id. This rule approaches the liberal civil discovery standard in its breadth. See Mary Prosser, Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities, 2006 Wis. L. Rev. 541, 581 (contrasting old standards of discovery with liberal civil rules). Obtaining discovery under this liberal rule includes obtaining the required statement from the witness. There is no provision in the rule subjecting this cooperation to preconditions. The committee commentary to Rule 5-503 is explicit that “Paragraph A . . . requires witnesses to cooperate in the giving of a statement. A witness may not refuse to give a statement because defense counsel or the prosecuting attorney may not be able to be present during the taking of the statement.” Dr. Ornelas was in any case obligated to give a statement under Rule 5-503; the witness interview ordered by the court was the vehicle to accomplish that end.

The State, Having Undertaken To Provide Witness Interviews, Must Follow Through

{22} In a criminal case, there are three levels of pretrial investigative contacts with witnesses to obtain statements. In the event of procedural involvement, they are: (1) informal contacts and interviews conducted outside the Rules of Criminal Procedure; (2) statements taken pursuant to the rules; and (3) depositions. See Rule 5-503. The Rules of Criminal Procedure command the state to identify its witnesses to the defense and turn over any statements made by those witnesses to the defense. Rule 5-501(A)(5) NMRA. Often, as the State pled in this case, “the State . . . [aids] in setting up these interviews for the convenience of the parties, as well as for the convenience and protection of the witness, particularly in child abuse proceedings.” This description falls short of the reality, however, because the State’s “aid” must generally be requested, and the State then notifies the witnesses to appear for interviews. This process is more than just a courtesy and has acquired more formality than the State indicates here. In the past, we have declined to let the State off the hook when it undertakes this responsibility and fails to follow through; and we have generally held that such a failure constitutes a collapse of the State’s duty to progress a case to trial. State v. Johnson, 2007-NMCA-107, ¶ 15, 142 N.M. 377, 165 P.3d 1153 (holding that refusal to schedule requested interviews counts against the state in speedy trial calculation); State v. Talamanca, 2003-NMCA-135, ¶ 13, 134 N.M. 539, 80 P.3d 476 (holding that an excessive delay in the state’s “producing its witnesses for defense interviews was unreasonable and cannot be condoned”). What is more, by setting interviews with its witnesses at which its own representatives are present, the State benefits by observing the questions put to its witnesses, hearing their answers, and having them present to clarify any questions the State may have about the evidence. This system, by which the State undertakes to control when witnesses are scheduled to meet with the defense, offers the State a measure of control and benefit it would not otherwise enjoy if the defense sought interviews on its own, without regard for the “convenience of the parties.”

{23} The “right of defendants to interview witnesses without prosecutorial interference is grounded in the constitutional guarantee of due process and notions of elemental fairness.” State v. Guzman, 71 P.3d 468, 470 (Idaho Ct. App. 2003) (internal quotation marks and citation omitted). Our Supreme Court adopted the holding in State v. Orona, 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979) (holding that witnesses “to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them”) (internal quotation marks and citation omitted). In Orona, the district court’s order prohibiting defense access to witnesses was held to be an impediment to the defendant’s right to due process, and the Supreme Court held that “there was unquestionably a suppression of the means by which the defense could obtain evidence.” Id. (internal quotation marks and citation omitted). It should be no different when the district court imposes an obligation to make an essential witness available to the defense for a pretrial interview. Returning to the State’s contention that it takes on the responsibility of setting up interviews “for the convenience of the parties, as well as for the convenience and protection of the
witness, particularly in child abuse prosecutions,” this protection does not extend to allowing any impediment to the interviews of a victim by counsel. Id. at 453, 589 P.2d at 1044. It should be less so with regard to the medical expert who examined and evaluated the victim after the trial. In Guzman, the informant/witness refused to speak with the defense prior to trial having been told by the prosecutor that he did not have to talk to the defense at all; no prosecutorial overreaching was found. 71 P.3d at 470. In this case, the impediment to a witness interview was the State’s refusal to honor the district court’s order to make the witness available. The due process interest is undiminished, but in this case, the State is directly prohibiting the interview despite the district court’s order to make the witness available. The due process interest in a witness available. The due process interest in a witness available. The due process interest in a witness available. The due process interest in a witness available. The due process interest in a witness available.

{24} No witness list containing Dr. Ornelas’ name appears in the record before us; there is no affirmative indication in the record that Dr. Ornelas herself insisted upon up-front payment save the assertions of the prosecutor. Ortiz v. Shaw, 2008-NMCA-136, ¶ 20, 145 N.M. 58, 193 P.3d 605 (“Generally, statements of counsel are not evidence.”). The order prepared by the State excluding the witness’ testimony, however, found that “[t]he parties were aware that Dr. Ornelas would only give the interview after receiving payment even on fact issues[,]” and we accept the fact that the non-payment of fees was what derailed her interview. However, either on her own behalf, or through the State whose witness she was, the Rules of Criminal Procedure provide the witness an opportunity to petition the court for redress of any untoward consequences that may arise as a result of being required to give a statement or deposition. Rule 5-507 NMRA. From the record, the State’s expert witness had no discernable need for protection.2 There is also a provision in the rules for a party or a witness to claim and seek relief for any undue burden that might result from being required to give a statement but such relief must be sought of the court. Rule 5-503(G) and Rule 5-507. Presumably, if a witness wishes to receive payment for his or her time, either on a per diem or hourly basis, that witness may ask the court for reimbursement. None of these provisions were invoked, however, and none apply in the face of the district court’s order with which we are concerned. Even if Dr. Ornelas herself had refused to comply with the district court’s order based on her fee, we reject this as an adequate basis for the State’s noncompliance with the district court’s order absent further action by it to obtain further relief from the court based specifically on the need for payment, which it never sought.

{25} The concern was raised in the hearing to compel interviews and apparently rejected by the district court as it entered its order. The State was therefore unjustified in pursuing its “policy” once the interview was ordered. We have previously held that a witness not under court order or other legal process may refuse an interview and enjoys the right to dictate the terms of any interviews with defense counsel. State v. Williams, 91 N.M. 795, 799, 581 P.2d 1290, 1294 (Ct. App. 1978). However, in Williams, we also clearly stated that to the extent a witness’ desires interfere with a court order, questions concerning the witness’ or parties’ desires evaporate. Id.

{26} Very little difference exists therefore between this case and Ortiz, 2009-NMCA-092, ¶ 24, where we made it plain that we accord great deference to an order of the district court. There, as here, the order was unambiguous, in place, and the state intentionally refused to comply. We held there that where the state failed to invoke a ruling on the court’s order on the basis that the evidence was outside the court’s purview to order discovery, the issue was not preserved for appeal. Id. ¶ 32. Here, the State has consistently chosen to eschew the question of whether the district court had the power to order that the State arrange an interview with Dr. Ornelas irrespective of any expert witness fee. There, as here, the state had adhered to a position that for reasons of its own, and irrespective of an order of the court, it would not provide access to discovery.

{27} We have seen hints previously that the Second Judicial District Attorney’s Office restricts access to its experts until payment is arranged. See, e.g., State v. Schoonmaker, 2008-NMSC-010, ¶ 7, 143 N.M. 373, 176 P.3d 1105 (“[D]efense counsel . . . testified that the state had demanded payment for the state’s physician experts if the defense wanted to interview them.”). There, because of the district court’s refusal to grant withdrawal of counsel so the defendant could have access to his own experts (and implicitly the state’s) for an interview, the Supreme Court found ineffective assistance and reversed. See State v. Brown, 2006-NMSC-023, ¶ 16, 139 N.M. 466, 134 P.3d 753; see also Schoonmaker, 2008-NMSC-010, ¶ 36 (failure to interview prosecution experts may be ineffective assistance). Schoonmaker left unanswered, however, whether the state could use expert witness fees to impede access to witness interviews, a question of first impression that we answer here in the negative, since mechanisms exist to deal with the problem outside of a prosecutor acting as a preemptive guarantor of the fee.

No Discernable Basis Exists to Allow the State to Deny Access to a Witness Based on Defendant’s Failure to Pay an Expert Witness Fee

{28} There is no provision in the Rules of Criminal Procedure requiring the pre-payment of fees to an expert witness not subpoenaed. Those rules do not allow a district attorney’s office to, in the words of the court below, “hold hostage” a witness interview by unilaterally acting as the guarantor of witness fees.

{29} Such a prosecutor’s office, which refuses to make a witness available when ordered to do so by the court, may expect to see its case suffer the consequences of disobedience. Here, as in Ortiz, 2009-NMCA-092, the State stood on its refusal and took no further action with regard to the court’s order. As Ortiz, Schoonmaker, and other cases demonstrate, this Court should concern itself with clarifying the law governing how district attorney’s offices should conduct themselves when making witnesses available for interviews. The State conceded that it attempted to control the nature of access to witnesses for its own benefit as well as the mutual convenience of all parties. But the State cannot assert itself as the source of access to its witnesses and thereafter argue that its refusal to do so does not arise from any “legal” obligation to do so. Instead, the State’s obligation is to do what it promises to do and schedule the interviews. This becomes all the more imperative when memorialized in an order of the court.

{30} As the State points out, the defense never sought a statement under Rule 5-503. At the point the district court ordered the interview to take place by January 19, 2007, though, such an argument disappeared.

2 A cursory Westlaw survey also reveals that Dr. Ornelas has been a witness in cases that have resulted in close to a dozen published state and federal opinions since 1996, all involving cases of child welfare and abuse. She is no stranger to the judicial system.
The State was then under judicial order to schedule the interview with Dr. Ornelas, and the defense had no further obligation to seek an interview by other methods. In Ortiz, we rejected the state’s position that the district court should have ordered the defense to seek by subpoena the evidence the state later argued it was wrongly ordered to produce. 2009-NMCA-092, ¶¶ 33-34. We hold similarly in this case. In the absence of any assertion by the State that the court had no power to order an interview irrespective of the defense paying a witness fee, the district court’s order requiring the State to arrange the interview must prevail.

The District Court Properly Sanctioned the State for Disobeying its Order

[31] From Defendant’s indictment and arraignment in late 2004 until December 11, 2006, Defendant’s trial date was extended four times. In each petition to extend, the State alleged that “necessary” witness interviews had not been completed. At the trial setting on December 11, 2006, the State informed the district court that it would not schedule Dr. Ornelas’ interview until the defense had first arranged payment of her fees. Likewise, on that date the defense requested a “date certain by which witnesses be made available, and then if they’re not available or they show an unwillingness to cooperate, perhaps we can take it from there.” The State asserted that “[Dr. Ornelas has] never been attempted because we’ve got to get payment set up before that can be done.” The State made clear that Dr. Ornelas was an essential witness and her materiality is undisputed.

[32] The district court set trial for February 19, 2007, and instructed the parties that interviews were to be completed by January 19. The court specifically stated, “if there’s at least in the [d]efense’s mind some continuing noncompliance, we’ll—the [c]ourt will consider any motions that you have sometime after that and figure out if any remedy is necessary.” The order was thus clear and unequivocal: having been asked by the defense to assist in setting interviews, the State was ordered to set the interviews, or the court would entertain further remedies. Two days later, the State filed another request for a rule extension asserting the defense’s failure to pay for the witness. However, the State never requested any assistance with payment from either the district court or the Supreme Court, nor did it request any other relief from having to schedule the interview. In this regard, we believe the State waived any objection to the district court’s order to make the witness available for an interview. Id. ¶ 32 (holding that where the state did not litigate its objection to a discovery order, the argument was waived). Accordingly, we believe that the State is incorrect in relying upon any theory of waiver on the part of the defense.

[33] Ortiz also analyzed the issue of waiver. In that case, the state refused to obey an order of the district court to turn over documents to the defense. The state argued, as in the instant case, that the defendant bore an independent responsibility to seek the evidence. This Court held, first, that the state improperly attempted to place the burden on the defense to seek what it had already requested. Id. ¶ 36. Second, this Court upheld the right of the lower court to impose a most extreme sanction, noting that the state never sought protection from the court’s order. Id. ¶ 38. We also noted that there, as here, the state changed its position on discovery. Id. ¶ 38. Indeed, in this case, the State went from an original refusal based solely on non-payment to a more general assertion that providing interviews is not its responsibility in the first place. In Ortiz, as here, the state “approached the issue . . . as one of policy—a firm stand that the [s]tate” would not change. Id. In that case, we affirmed the district court’s sanction of dismissal based on its conclusion that the state acted in bad faith. Id. ¶ 39. Likewise in this case, the district court concluded that the State had held the defense hostage with the imposition of the witness fee in intentional violation of its unambiguous order, and we should affirm that decision. The exclusion of a material witness, whose interviews have been intentionally prevented in direct contravention of a court order, is a much lesser sanction than the one countenanced in Ortiz.

[34] With respect to whether or not Defendant was prejudiced by the missed interview deadline, we apply the same considerations from our analysis of the exclusion of SV. Defendant potentially had access to expert witness funds through the Public Defender Department, the district court could have intervened to help secure such funds, the trial deadline had been extended to June, and there were other less severe options to address Defendant’s prolonged incarceration. Again, other than the mere occurrence of delay, and given that the defense could have attempted to compel the interview itself or obtain funding, pursuant to Jackson, no actual evidence suggests that defense counsel was prevented from effectively preparing for a June trial deadline. For these reasons, we conclude that any prejudice to Defendant resulting from the missed deadline was minimal and did not justify exclusion.

CONCLUSION

[35] For the foregoing reasons, we affirm in part and reverse in part the decision of the district court and remand for further proceedings pursuant to this opinion.

[36] IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

I CONCUR:

MICHAEL D. BUSTAMANTE, Judge (specially concurring in part and dissenting in part)

BUSTAMANTE, Judge (specially concurred in part and dissenting in part)

[37] I concur in the result of the majority opinion with regard to SV. I dissent from the majority’s resolution of the issue concerning Dr. Ornelas. Were I in the majority as author, I would resolve the case in an opinion constructed as follows:

[38] “The district court set a discovery deadline requiring that all witness interviews in the case against Curtis Harper (Defendant) be completed by Friday, January 19, 2007. An interview with the alleged victim, SV, was scheduled for the day of the deadline, but she was not under subpoena and she failed to appear. An interview with the State’s expert witness, Dr. Ornelas, was never scheduled ostensibly because the State had not been provided with assurances that her expert witness fees would be paid. The Monday following the missed deadline the State submitted a motion for an extension of time. Defendant responded with a motion opposing the extension and a motion to exclude SV and Dr. Ornelas as witnesses. Defendant’s motion to exclude was ultimately granted, and the State appeals.

[39] We first consider whether the district court abused its discretion in excluding SV given that the State scheduled her interview on the discovery deadline and that approximately five months remained before the trial date. Our second inquiry is whether the State’s expert was properly excluded where the defense failed to affirm that it would pay witness fees, the prosecution refused to schedule an interview until the defense affirmed it would pay the fees, and the district court did not intervene. We reverse and remand concluding that exclusion of the
witnesses under these circumstances was an abuse of discretion.

BACKGROUND

[40] In November 2004 Defendant was indicted and arrested on fifteen counts of criminal sexual penetration of a minor in the first degree. Defendant remained incarcerated for nearly three years while awaiting trial. Defendant’s trial date was scheduled multiple times through extensions granted under Rule 5-604(C) and (D) NMRA. Each request cited as a basis for the extensions, among other things, the need to finish discovery; “specifically any necessary [pretrial] interviews.” The last extension occurred on February 28, 2007, and resulted in a trial deadline of June 24, 2007.

[41] In December 2006 the district court imposed a deadline of January 19, 2007, to complete all witness interviews in preparation for trial. At the time, trial was set for February 19. The State offered to set up the interview with SV at any time, but stated that it would not schedule an interview with Dr. Ornelas until payment of her expert witness fees was affirmed by the defense. An interview was scheduled with SV on the Friday, January 19 deadline, but she failed to appear. An interview with Dr. Ornelas was never scheduled.

[42] In its motion for an extension of time to complete witness interviews, the State explained that SV was not subpoenaed because there was no reason to believe that she would not attend. The State also explained that it scheduled the interview with her on the deadline because it was the only day she was available, and because it wanted to give Defendant time to consider a plea bargain. The State asserted that it had a policy of withdrawing any potential plea bargain once a defendant interviewed a minor victim. With respect to Dr. Ornelas, the State explained that it never set up the interview because the defense failed to confirm that it would pay her expert witness fees.

[43] Defendant opposed the State’s request for an extension of time and requested that both witnesses be excluded. The district court denied the State’s requested extension and granted Defendant’s motion to exclude based on the fact that the interviews had not been completed by the deadline. In support of its ruling, the court found that SV had not exhibited a willingness to cooperate. With regard to Dr. Ornelas, the district court found that she was a “combination fact/expert witness” and that she could not “refuse an interview to the defense based upon pay.” The court also found that the defense’s inability to interview these witnesses by the deadline prevented the defense from providing effective assistance, performing due diligence, and from adequately confronting the witnesses.

[44] The district court also had a motion to dismiss before it. The court postponed ruling on the motion to dismiss pending the outcome of this appeal. However, the State conceded that dismissal would be proper if this Court were to affirm the exclusion of its two key witnesses, or that it would not continue to prosecute.

STANDARD OF REVIEW


[46] The district court ruled that as a result of the missed deadline, defense counsel was prevented from providing effective assistance, performing due diligence, and adequately confronting witnesses. The district court’s ruling presents a mixed question of fact and law. Jackson, 2004-NMCA-057, ¶ 18. We defer to the trial court with respect to the finding of facts so long as they are supported by substantial evidence, but application of the law to those facts is reviewed de novo. Id.

DISCUSSION

[47] “[U]pon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances.” State v. Layne, 2008-NMCA-103, ¶ 13, 144 N.M. 574, 189 P.3d 707 (alteration in original) (internal quotation marks and citation omitted). However, “[a] defendant is not entitled to a dismissal or other sanctions upon a mere showing of violation of a discovery order.” Bartlett, 109 N.M. at 680, 789 P.2d at 628. Our Supreme Court has held in the analogous area of exclusion of evidence that whether or not a sanction should be imposed “depends in large measure upon the extent of the Government’s culpability . . . weighed against the amount of prejudice to the defense.” State v. Chouniard, 96 N.M. 658, 661, 634 P.2d 680, 683 (1981) (internal quotation marks and citation omitted). In order to justify exclusion, a “defendant must establish prejudice resulting from the violation.” Bartlett, 109 N.M. at 680, 789 P.2d at 628. “The prejudice must be more than speculative.” State v. McDaniel, 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701.

[48] Exclusion is proper where there is culpability based on an intentional refusal to comply with an order, and where such culpable conduct is highly prejudicial to the opposing party. In Layne, for example, the state refused to disclose information about its confidential informant in violation of a discovery order. 2008-NMCA-103, ¶ 3. As a result, the district court excluded the informant as a witness. Id. ¶ 1. Under those facts, exclusion was proper given the state’s willful refusal to comply with the order, and because the non-disclosure prevented the defense from discovering potentially impeaching evidence. Id. ¶ 13. We reasoned that impeachment is crucial to effective cross-examination, and cross-examination is part of the constitutional right to confront witnesses. Id. Thus, exclusion was proper based on the state’s intentional refusal and the resulting prejudice to the defense.

[49] Exclusion is normally improper where a party may be charged with some amount of culpability but the resulting prejudice is minimal. In Bartlett, the district court dismissed a case against a defendant where the state failed to produce a video tape of an interview with one of its witnesses. 109 N.M. at 680, 789 P.2d at 628. The circumstances leading to loss of the tape were murky and the trial court in Bartlett did not determine the degree of fault attributable to the state for the loss. For purposes of analysis, we presumed “some degree of deliberate fault on the part of the state was present.” Id. at 681, 789 P.2d at 629. Nonetheless, we concluded that dismissal was improper because the defense was able to vigorously raise and pursue defenses relating to the video tape even without it being produced, and thus any prejudice was minimal. Id. at 682, 789 P.2d at 630.

[50] In cases of delayed disclosure, prejudice is shown if the delay prevented a party from preparing for trial. In Jackson, the district court dismissed a case against a criminal defendant based on delays in discovery. 2004-NMCA-057, ¶ 18. There, we noted the difference between cases dealing with delayed disclosure versus those dealing with non-disclosure and stated that, for the prior, “the test is whether [the defendant’s counsel was prevented by the delay from using the . . . material effectively in preparing . . . the defendant’s case.” Id. ¶ 19 (second alteration
Exclusion of SV was Improper

[51] Here, any culpability on the part of the State with respect to the failed SV interview is minimal. The State at no time refused to make SV available for an interview with the defense, and it at least attempted to comply with the court’s discovery order by scheduling an interview with SV before the deadline. After SV failed to appear, the State expressed a willingness to reschedule, this time under subpoena. Any culpability that may be allocated to the State is far less than that which justified exclusion in Layne.

[52] Furthermore, any prejudice to Defendant was minimal given that the time frame for trial deadline had been extended. The State submitted its request for an extension of the discovery deadline on January 22, the hearing on exclusion occurred on March 29, and the ultimate trial deadline was extended to June 24. Several months remained before the trial deadline to reschedule the interview and prepare for trial. Other than the delay, and absent a refusal to disclose by the State, nothing suggests that defense counsel was prevented from effectively preparing for a June trial deadline. Jackson, 2004-NMCA-057, ¶ 19.

[53] At the hearing, defense counsel pointed to Defendant’s incarceration as the number one sign of prejudice. However, exclusion—or effective dismissal—was a severe sanction where there were other options for addressing the issue of prolonged incarceration, including the one later taken by the court: reevaluating terms of release, and release on bond.

[54] Defense counsel also pointed out that the witness’ memory may have faded, and that the delay was thus prejudicial. However, absent any evidence in support of this assertion, the statement itself is insufficient to show prejudice. See McDaniel, 2004-NMCA-022, ¶ 6 (stating that prejudice must be more than speculative); see also Jackson, 2004-NMCA-057, ¶ 19 (holding that an allegation that memories fade with passage of time did not justify dismissal in a delayed discovery case). Furthermore, SV had been interviewed on a prior occasion, thus making it possible to compare any changes or discrepancies in her testimony against her prior statements. Therefore, even allocating some level of culpability to the State, any resulting prejudice was insufficient to warrant exclusion.

Exclusion of Dr. Ornelas was Improper

[55] The State and defense counsel share culpability for the failed interview with Dr. Ornelas. The State openly refused to schedule an interview with Dr. Ornelas until such time that the defense affirmed payment. Such an open refusal to comply with the court’s discovery order is clearly analogous to Layne, where the State refused to provide information on its informant. 2008-NMCA-103, ¶ 3.

[56] However, we cannot overlook the fact that, even after having notice of the State’s position, the defense posed no objection to payment of Dr. Ornelas’ fees until after the deadline expired. Unlike the defense in Layne, defense counsel in this case had options available to compel discovery within the court’s deadline. For example, defense counsel acknowledged he could have subpoenaed the witness, but declined based on his understanding that scheduling was an obligation of the State. This understanding does not excuse defense counsel’s failure to act given the State’s position that it would not schedule anything absent agreement as to the expert witness fees.

[57] Defense counsel could have requested that the Public Defender Department pay Dr. Ornelas’ expert witness fees. An indigent defendant is entitled to obtain funding for expert witness fees. Brown, 2006-NMSC-023, ¶ 31. Access to these funds is part of an indigent defendant’s Sixth Amendment right to “the basic tools of an adequate defense.” Id. ¶¶ 16, 25. As a contract public defender, defense counsel in this case could have applied for such funding for Dr. Ornelas’ fees. Id. ¶ 28. Whether the defense would have received funding is, of course, unknown. But as we understand the record, the defense never requested it.

[58] This case highlights the advantages and disadvantages attached to the practice in the Second Judicial District—and perhaps others—of having the district attorney provide and yet control access to the State’s witnesses. The practice can be convenient for the defense and utilitarian for the State when it operates smoothly. When it does not, however, the practice creates difficulties for all parties, but particularly for the trial courts when they are called on to sort out the cause of the failure—which it must do in order to decide what its response should be. When the parties know they are at loggerheads—as they were with regard to Dr. Ornelas—the practice cannot be relied upon by anyone. The defense can and should resort to the formal discovery methods provided for in the Rules of Criminal Procedure. Resort to the rules here would have created an opportunity for all parties and Dr. Ornelas to openly litigate the question of fees for experts in these circumstances, including whether, when, and how they were to be paid. This Court would then have a proper record to assess rather than the vague morass of what he said/she said assertions we are dealing with.

[59] Finally, the district court should have considered its role in securing Dr. Ornelas’ expert witness fees. Where funding has not been secured or made available to pay expert witness fees for indigent defendants, the court as the “ultimate guardians of an indigent defendant’s . . . rights,” may take action to obtain the necessary funding. Id. ¶ 23. The district court was put on notice that Dr. Ornelas’ witness fees were an issue at the time it ordered the discovery deadline. However, it took no action to fulfill its obligation of protecting Defendant’s rights by addressing the funding issue before resorting to exclusion of the witness.

[60] We agree with the district court that the State could not refuse to schedule an interview with its expert based on payment. However, we cannot agree that exclusion was justified where the defense failed to raise the issue of funding before the discovery deadline and apparently failed to seek funding, and where the court itself failed to intervene. Exclusion of a witness which will ultimately result in dismissal “punishes the public, not the prosecutor, and results in a windfall to the defendant.” Jackson, 2004-NMCA-057, ¶ 15 (internal quotation marks and citation omitted). Therefore, exclusion of Dr. Ornelas based on the State’s conduct was an abuse of discretion when viewed in light of all the surrounding circumstances.

[61] With respect to whether or not Defendant was prejudiced by the missed interview deadline, we apply the same considerations from our analysis of the exclusion of SV. Defendant potentially had access to expert witness funds through the Public Defender Department, the district court could have intervened to help secure such funds, the trial deadline had been extended to June, and there were other less severe options to address Defendant’s prolonged incarceration. Again, other than the mere occurrence of delay, and given that the defense could have attempted to compel the interview itself or obtain funding, pursuant to Jackson, no actual evidence suggests that defense counsel was prevented from effectively preparing for a June trial deadline. For these reasons, we conclude that any prejudice to Defendant resulting from the missed deadline was minimal and did not justify exclusion.”

MICHAEL D. BUSTAMANTE, Judge
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