BAR BULLETIN

Official Publication of the State Bar of New Mexico

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Kelley S. Hestir Curry County Courthouse, Clovis, NM

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Professionalism Tips

With respect to the public and to other persons involved in the legal system:

I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications

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BAR BULLETIN

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Meetings

March

8
Taxation Section Board of Directors
noon, via teleconference

11
Public Law Section Board of Directors,
noon, NM Municipal League, Santa Fe

Business Law Section Board of Directors,
3:30 p.m., State Bar Center

13
Ethics Advisory Committee,
10 a.m., Dines & Gross, P.C.

16
Solo and Small Firm Practitioners Section,
noon, Albuquerque Petroleum Club

17
Membership Services Advisory Committee,
11:30 a.m., State Bar Center

18
Health Law Section Board of Directors,
7:30 a.m., State Bar Center

19
Family Law Section Board of Directors,
9 a.m., via teleconference

Prosecutors Section Board of Directors,
2 p.m., State Bar Center

State Bar Workshops

March

11
Lawyer Referral for the Elderly Program Workshop & Clinic
11 a.m., Quemado Senior Center
Quemado, NM

18
Consumer Debt/Bankruptcy Workshop
6 - 8 p.m., New Mexico Highlands University
University Ave., Las Vegas, NM

24
Family Law Workshop
5 - 7 p.m. ENMU Campus
(Vowell Classroom) Ruidoso, NM

For more information call Marilyn Kelley 505) 797-6048 or (800) 876-6227; or visit www.nmbar.org.

NOTICES

MCLE 2003 – Annual Compliance Reports

The 2003 Annual Compliance Reports have been mailed to all active licensed New Mexico attorneys. The reports include all information for courses taken by Dec. 31, 2003.

All noncompliant attorneys have been assessed a late compliance fee, and the invoice for payment of the fee is included with the Annual Report. Noncompliant attorneys must complete their requirements immediately. On April 1, a second late compliance fee will be assessed for those attorneys who continue to be in noncompliance.

On May 1, the MCLE office will submit to the Supreme Court a list of all attorneys who have not completed their 2003 requirements and/or failed to pay assessed late compliance fees. The Supreme Court will then begin to initiate the suspension process for those attorneys on the list. For more information, call MCLE at (505) 797-6015; e-mail **mcle@nmbar.org,** or write to MCLE, PO Box 92860, Albuquerque, NM 87199-2860.

COURT NEWS

N.M. Supreme Court

Attorney Notice

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848. Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque NM 87199-2860. The State Bar keeps both mailing and Directory addresses. Contact the State Bar for more information.

Request for Comments on Differentiated Case Management Rules

In 2000 the Supreme Court approved the use of differentiated case management (DCM) rules as a pilot project for the Third and Eighth judicial districts. Both the Third and Eighth judicial districts have requested that the court permanently approve these rules. The rules of Civil Procedure Committee is requesting comments from members of the New Mexico bar on its experience with the DCM programs in these districts and whether these rules should be permanently adopted.

The District Court Civil Rules Committee would like to receive comments from the bench and bar on the Differentiated Case Management Rules of the Third and Fifth judicial districts. These rules are published as LR3-501 to LR3-503, LR3-2.12 to LR3-2.15 NMRA and LR8-401 to LR8-405 and LR8-Forms 1 to 5 NMRA. Send written comments by March 12 to: Rules of Civil Procedure Committee, New Mexico Supreme Court, PO Box 848, Santa Fe NM, 87504-0848.

Judicial Performance Evaluation Commission

Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing 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 commission's next meeting will be from 8 a.m. to 5 p.m., March 26 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

First Judicial District Court

Family Law Brownbag Meeting

The First Judicial District Court has cancelled the March family law brownbag meeting. The next meeting will be held in April at the usual time. For more information, contact Sharon L. Pino, sharonpino@pinolawoffice.com, or (505) 982-0199.

Second Judicial District Court

Destruction of Exhibits, Domestic Cases, 1986-91

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the domestic cases for years 1986 to 1991 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through April 12. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/8767 from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). 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.

Thirteenth Judicial District Court

Destruction of Exhibits, 1983 to 2003

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Thirteenth Judicial District Court will destroy exhibits filed with the court in civil cases, criminal cases, domestic cases, probate cases and children's cases for the years 1983 to 2003 (excluding cases on appeal.) Counsel for parties are advised that exhibits may be retrieved through April 19. Attorneys who may have cases with exhibits may verify exhibit information with the Sandoval County District Court (505) 867-2376, ext. 29, Monday through Friday from 8 a.m. to noon and from 1 to 5 p.m. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). 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.

Bernalillo County Metropolitan Court

Monthly Judges Meeting

The Bernalillo County Metropolitan court judges will conduct their monthly judges' meeting beginning at noon, March 9 in the Judicial/Administrative Conference Room (room 849) of the Metropolitan Court Building, 401 Lomas NW, Albuquerque. The meeting is open to the public. Pursuant to the Americans with Disabilities Act, the court will make reasonable accommodations for individuals with a disability. Should accommodations be needed, contact the Court Administrator's Office, (505) 841-8106.

U.S. Bankruptcy Court

Attorney, Staff Training

The U.S. Bankruptcy Court will offer two sessions to learn how to use the newest video and audio equipment for trial proceedings. Session times are 1:30 p.m., March 12 and March 22. Attorneys and their staff are invited to participate. To reserve a spot, call Chris Wilson, (505) 348-2545.

State Bar News

Center for Legal Education

Seminar on NLRA Representation Matters

The State Bar Center for Legal Education and the Employment and Labor Law Section will present "Inside the NLRA-Representation Matters" from 3 to 5 p.m., March 9, at the State Bar Center. This course offers 2.4 general CLE credits.

The featured speaker is George Cherpelis, trial attorney, Seventh Region, National Labor Relations Board, (Detroit, Michigan); labor relations attorney, General Motors legal staff; director, legal staff and senior labor counsel, Burroughs Corp., (since merged with Sperry Rand to form UNISYS). Cherpelis has concentrated in labor relations law for more than 45 years, serving as the management member of the city of Albuquerque Labor Relations Board for 20 years, and as the management member of the Bernalillo County Labor Relations Board for five years.

The costs for the seminar are $69 (standard and non-attorney fee); $49 for members of the Employment and Labor Law Section; and $39 for government attorney and paralegals. To register, visit the State Bar Web site, www.nmbar.org; e-mail, cle@nmbar.org; fax, (505) 797-6071; or call (505) 797-6020, 9 a.m. to 4 p.m.

Did You Know?

Discussion groups are available on the State Bar's Web site, www.nmbar.org, and provide members the opportunity to network and share useful information. The groups function similar to listserves, minus the annoying feature of filling members' e-mail inboxes with unwanted replies to the entire group. Members may post questions and answers to the online discussion groups or simply comment on issues. The series of exchanges is viewable by all who subscribe to the group.

Discussion groups currently exist for practice sections and other State Bar entities are encouraged to request this communication tool. Discussion groups may also be created by topic. For example, the most recent groups are designed for the sharing of law office management tips with regard to QuickBooks, Timeslips and other software programs.

Visit www.nmbar.org and click on the link entitled "Discussion Groups" to participate in current topics. To create a new topic, contact Veronica Cordova, vcordova@nmbar.org or (505) 797-6039.

Commission on Professionalism

Articles Sought for Publication

The State Bar of New Mexico's Commission on Professionalism is accepting submissions of articles to be published in the *Bar Bulletin* and submitted to various newspapers. The commission is requesting articles on good deeds of lawyers or judges and "Be a Pro" articles that demonstrate professionalism in action. The articles will be reviewed and selected for publication by the Communications Subcommittee of the Commission on Professionalism. Contact Kris Becker, (505) 797-6038 or kbecker@nmbar.org, to request editorial guidelines and/or to submit articles. Articles may also be mailed on disk to the Commission on Professionalism Communications Subcommittee, c/o Kris Becker, SBNM, PO Box 92860, Albuquerque, NM 87199-2860.

Prosecutors' Section

Annual Awards

The State Bar Prosecutor's Section will be presenting awards to five prosecutors at the District Attorney's spring conference.

Nominations should be submitted by March 19 to Julie Ann Meade, section chair, PO Box 1508, Santa Fe, NM 87504-1508; or jmeade@ago.state.nm.us. The nominees will be presented to a committee for selection.

For a complete list of award categories, see the Feb. 19 (Vol. 43, No. 7) *Bar Bulletin*.

Public Law Section

Board Meeting

The Public Law Section board meeting will be held at noon, March 11, at the New Mexico Municipal League, 1229 Paseo de Peralta (across from the state capitol), Santa Fe. For a map or driving instructions, contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000.

Solo and Small Firm Practitioners' Section

2004 Luncheon Speaker Schedule

The State Bar Solo and Small Firm

2004-2005 Bench & Bar Directory
Deadline Approaches for Address Changes

The State Bar staff will be updating information for the *2004-05 Bench & Bar Directory*. Address changes will be accepted through May 1. Information submitted to the State Bar beyond that date is not guaranteed to be in the new membership directory. Changes in information should be submitted in writing to Chris Baum, Systems Manager, PO Box 92860, Albuquerque, NM 87199-2860; faxed to (505) 828-3755; or e-mailed to address@nmbar.org.

Practitioners' Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque.

For all new, first-time members, the first lunch is free. Contact Helen Stirling at the number below to make a free reservation.

Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The charge is $14 in advance and $16 at the door.

Reservations are required. Contact Helen Stirling, Esq., (505) 345-2800. Make the check payable to "State Bar of New Mexico," c/o Helen Stirling, 6125 Fourth St. NW, Ste. A, Albuquerque, NM 87107.

March 16, noon: "Unification of City and County Government – What's Next?," David S. Campbell, Albuquerque attorney, Vogel, Campbell & Blueher, P.C.

Upcoming luncheon dates are: April 20 and May 18.

OTHER BARS

American Bar Association

Tax Section Pro Bono Committee

This year, the Pro Bono Committee of the American Bar Association's Tax Section is raising the level of participation in the IRS's Volunteer Income Tax Assistance ("VITA") program.

The VITA Program is available for taxpayers who are in need of assistance in preparing and filing their returns. The complexities of the tax laws can frustrate many low-income, elderly, disabled and limited English proficient taxpayers' effort to complete their own return.

Because commercial tax preparers may not be a viable option for low-income taxpayers, the VITA Program provides a location where these taxpayers can come for assistance. Members of the community – including professionals, students and other volunteers – donate their time to help taxpayers complete their returns. Local legal and tax professionals are asked to check www.abanet.org/tax/vita for VITA location information, including when and how to volunteer at those locations.

For more information on this and other tax pro bono projects, visit www.abanet.org/tax/groups/probono.

Hispanic National Bar Association

Midyear Conference

The Hispanic National Bar Association is hosting a Midyear Conference, along with the Ninth Annual National Moot Court Competition, in Albuquerque March 26 and 27. The conference will be conducted by the Anti-Racism Training Center of the Southwest and the Institute of Public Law, and will provide information in the areas of immigration, criminal, corporate, government, civil and social justice law.

The National Moot Court Competition will include teams from 22 law schools from across the country who will compete for the top prize of HNBA National Champion. State Supreme Court justices will preside over final arguments.

The registration fee of $35 for students and $150 for attorneys includes a single ticket to the Thursday and Friday evening mixers and the Saturday keynote dinner. For more information, visit www.hnba.com.

N.M. Defense Lawyers Association

Quarterly Luncheon

New Mexico Defense Lawyers Association members are invited to participate in the quarterly members' lunch at noon, March 25 at the State Bar Center in Albuquerque. Lunch will be available at a cost of $10 per person. At 12:30 p.m., Richard Minzner, a former state legislator, current lobbyist and shareholder at the Rodey Law Firm will be the featured guest speaker. Minzner will brief the group on the 2004 legislative session. Anyone interested in attending should RSVP to Rhonda Dahl by March 15. (505) 797-6021, or nmdefense@nmdla.org.

OTHER NEWS

Advocacy Inc.

Statewide Training – Children's Court Practice

Advocacy Inc. is sponsoring three statewide trainings on Children's Court Practice. They are scheduled in Grants on April 23, in Farmington on May 7 and in Silver City on May 21. These trainings will be specially directed to the needs of guardians ad litem, but will include information that will assist respondents' lawyers, New Mexico Children Youth and Families Department, Children's Court attorneys, judges, social workers, Court-Appointed Special Advocates and Citizens' Review Board members in their work in Children's Court proceedings. There is no charge to attend, however, attorneys will be required to pay for CLE filing fees. Registration information will be available at the end of March.

Just for Members

State Bar Lending Library

A Free Membership Service

Visit the State Bar's Lending Library at the State Bar or online at www.nmbar.org and obtain advice on the following topics:

- **Client Materials**
- **Client Relations**
- **Law Office Management**
- **Law Practice**
- **Legal Careers**
- **Marketing**
- **Risk Management and Professionalism**
- **Solo and Small Firm Practice**
- **Technology**

Books and Tapes
may be borrowed for two weeks; shipping is available for members who reside outside the Albuquerque area.

Browse Materials
alphabetically or by topic on **www.nmbar.org.** Click on "Attorney Services/Practice Resources" in the top navigation bar and select "Lending Library."

Place an Order
by using the e-mail link **membership@nmbar.org,** visiting the State Bar Center or by calling (505) 797-6033.

www. nmbar.org

FROM THE NEW MEXICO SUPREME COURT

PROPOSED REVISIONS TO DISTRICT COURT CIVIL RULES AND CIVIL FORMS

The Supreme Court is considering proposed amendments to the Rules of Civil Procedure for the District Courts relating to service of process. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

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

Your comments must be received by the Clerk on or before March 19, 2004, to be considered by the Court.

1-001. Scope of rules; definitions.

A. **Scope.** These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity except to the extent that the New Mexico Rules of Evidence or existing rules applicable to special statutory or summary proceedings are inconsistent herewith. These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

B. **Definitions.** As used in these rules and the civil forms approved for use with these rules:

(1) "defendant" includes a respondent;

(2) "plaintiff" includes a petitioner;

(3) "process" is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:

(a) summons and complaint;

(b) summons and petition;

(c) writ or warrant; and

(d) mandate; and

(4) "service of process" means delivery of a summons or other process in the manner provided by Rule 1-004 NMRA of these rules.

RULE 1-004 NMRA HAS BEEN AMENDED SO EXTENSIVELY PUBLISHED AS A NEW RULE

1-004. Process.

A. **Summons; issuance.** Upon the filing of the complaint, the clerk shall issue a summons and deliver it to the plaintiff for service. Upon the request of the plaintiff, the clerk shall issue separate or additional summons. Any defendant may waive the issuance or service of summons.

B. **Summons; execution; form.** The summons shall be signed by the clerk, issued under the seal of the court and be directed to the defendant. The summons shall be substantially in the form approved by the Supreme Court and must contain:

(1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;

(2) a direction that the defendant serve a responsive pleading or motion within thirty (30) days after service of the summons and file a copy of the pleading or motion with the court as provided by Rule 1-005 NMRA;

(3) a notice that unless the defendant serves and files a responsive pleading or motion, the plaintiff may apply to the court for the relief demanded in the complaint; and

(4) the name, address and telephone number of the plaintiff's attorney. If the plaintiff is not represented by an attorney, the name, address and telephone number of the plaintiff.

C. **Service of process; return.**

(1) If a summons is to be served, it shall be served together with any other pleading or paper required to be served by this rule. The plaintiff shall furnish the person making service with such copies as are necessary.

(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court in accordance with the provisions of Paragraph L of this rule.

D. **Process; by whom served.** Process shall be served as follows:

(1) if the process to be served is a summons and complaint, petition or other paper, service may be made by any person who is over the age of eighteen (18) years and not a party to the action;

(2) if the process to be served is a writ of attachment, writ of replevin or writ of habeas corpus, service may be made by any person not a party to the action over the age of eighteen (18) years designated by the court to perform such service or by the sheriff of the county where the property or person may be found;

(3) if the process to be served is a writ other than a writ specified in Subparagraph (2) of this paragraph, service shall be made as provided by law or order of the court.

E. **Process; how served; generally.**

(1) Process shall be served in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

(2) Service may be made, subject to the restrictions and requirements of this rule, by the methods authorized by this rule or in the manner provided for by any applicable statute, to the extent that the statute does not conflict with this rule.

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this subparagraph. For purposes of this rule "signs" includes the electronic representation of a signature.

F. **Process; personal service upon an individual.** Personal service of process shall be made upon an individual by delivering a copy of a summons and complaint or other process:

(1)

(a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business.

G. **Process; service on corporation or other business entity.**

(1) Service may be made upon:

(a) a domestic or foreign corporation, a limited liability company or an equivalent business entity by serving a copy of the process to an officer, a managing or a general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

(b) a partnership by serving a copy of the process to any general partner;

(c) an unincorporated association which is subject to suit under a common name, by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association.

(2) If a person described in Subparagraph (a), (b) or (c) of this subparagraph refuses to accept the process, tendering service as provided in this paragraph shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge.

(3) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

H. **Process; service upon state and political subdivisions.**

(1) Service may be made upon the State of New Mexico or a political subdivision of the state:

(a) in any action in which the state is named a party defendant, by delivering a copy of the process to the governor and to the attorney general;

(b) in any action in which a branch, agency, bureau, department, commission or institution of the state is named a party defendant, by delivering a copy of the process to the head of the branch, agency, bureau, department, commission or institution and to the attorney general;

(c) in any action in which an officer, official, or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, by delivering a copy of the process to the officer, official or employee and to the attorney general;

(d) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered or served on the defendant employee in the manner and priority provided on Paragraph F of this rule;

(e) service of process on the governor, attorney general, agency, bureau, department, commission or institution may be made either by serving a copy of the process to the governor, attorney general or the chief operating officer of an entity listed in this subparagraph or to the receptionist of the state officer. A cabinet secretary, a department, bureau, agency or commission director or an executive secretary shall be considered as the chief operating officer;

(f) upon any county by serving a copy of the process to the county clerk;

(g) upon a municipal corporation by serving a copy of the process to the city clerk, town clerk or village clerk;

(h) upon a school district or school board by serving a copy of the process to the superintendent of the district;

(i) upon the board of trustees of any land grant referred to in Sections 49-1-1 through 49-10-6 NMSA 1978, process shall be served upon the president or in the president's absence upon the secretary of such board.

(2) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

I. **Service upon minor, incompetent person, guardian or fiduciary.**

(1) Service shall be made:

(a) upon a minor, if there is a conservator of the estate or guardian of the minor, by serving a copy of the process to the conservator or guardian in the manner and priority provided in Paragraph F, G or J of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

(b) upon an incompetent person, if there is a conservator of the estate or guardian of the incompetent person, by serving a copy of the process to the conservator or guardian in the manner and priority provided by Paragraph F of this rule. If the incompetent person does not have a conservator or guardian, process may be served on a person designated by the court.

(2) Service upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner and priority for service as provided in Paragraphs F, G or J of this rule as may be appropriate.

J. **Service in manner approved by court.** Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances

to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. **Service by publication.** Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the defendant notice of the pendency of the action, the court shall also order that a notice of pendency of the action be published in a newspaper of general circulation in the county which reasonably appears is most likely to give the defendant notice of the action.

(2) The notice of pendency of action shall contain:

(a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested;

(b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought;

(c) the name, address and telephone number of plaintiff's attorney; and

(d) a statement that a default judgment may be entered if a response is not filed.

(3) If the cause of action involves real property, the notice shall describe the property as follows:

(a) If the property has a street address, the name of the municipality or county address and the street address of the property.

(b) If the property is located in a Spanish or Mexican grant, the name of the grant.

(c) If the property has been subdivided, the subdivision description or if the property has not been subdivided the metes and bounds of the property.

(4) In actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the "unknown heirs of the following named deceased persons" followed by the names of the deceased persons whose unknown heirs are sought to be served. As to parties named in the alternative, the notice shall be given to "the following named defendants by name, if living; if deceased, their unknown heirs" followed by the names of the defendants.

L. **Proof of service.** The party obtaining service of process or that party's agent shall promptly file proof of service. When service is made by the sheriff or a deputy sheriff of the county in New Mexico, proof of service shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff of a New Mexico county, proof of service shall be made by affidavit. Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the defendant's signature receipt. Proof of service by publication shall be by affidavit of publication signed by an officer or agent of the newspaper in which the notice of the pendency of the action was published. Failure to make proof of service shall not affect the validity of service.

M. **Service of process in the United States, but outside of state.** Whenever the jurisdiction of the court over the defendant is not dependent upon service of the process within the State of New Mexico, service may be made outside the State as provided by this rule.

N. **Service of process in a foreign country.** Service upon an individual, corporation, limited liability company, partnership, unincorporated association that is subject to suit under a common name, or equivalent legal entities may be effected in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(b) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by the laws of the United States or the law of the foreign country, in the same manner and priority as provided for in Paragraph F, G or J of this rule as may be appropriate.

Committee Comments
2004 Amendments to Rule 1-004

Introduction

New Mexico Rule 1-004 has its origins in an act of the first Legislature of the State of New Mexico. 1912 N.M. Laws Ch. 26. When the New Mexico Supreme Court revamped the rules of civil procedure in 1942, 46 N.M. xix-lxxxiv (1942), largely using the 1938 Federal Rules as a model, the provisions of New Mexico Rule 4 continued to reflect some aspects of the service of process provisions of the former New Mexico provisions. Since then piecemeal amendments have occurred but there has been no previous attempt to restructure Rule 1-004 NMRA in light of evolving principles of due process and modern means of communication. The 2004 amendment to Rule 1-004 seeks to accomplish this goal.

Summons; issuance; Rule 1-004(A)

"Plaintiff" includes "Petitioner" and "Defendant" includes "Respondent". See Rule 1-001(B)(1) and (2). The "Complaint" referred to in Rule 1-004(A) includes "Petition". *See* Rule 1-001(B)(3).

Rule 1-004(A) previously provided that the clerk shall "forthwith" issue a summons upon filing of the complaint. The word is omitted from the 2004 Amendment because it was redundant; the rule already provides that the clerk "shall" issue a summons "[u]pon the filing of the complaint".

Rule 1-004(A) previously provided that separate or additional summons may be issued "against any defendants". Because it may be necessary to serve a summons on persons not formally denominated as a defendant, for example, upon a third-party defendant under Rule 1-014, the rule has been modified to eliminate the implication that additional summons may issue only against defendants.

The committee considered but did not provide that a person other than the plaintiff or petitioner could request issuance of a

summons.

Summons; execution; form; Rule 1-004 (B)

Rule 1-011 NMRA requires that all "paper" shall contain the telephone number of the attorney or the pro-se litigant. Except for the provision requiring that the summons include the telephone number as well as the name and address of the plaintiff's attorney or the pro se plaintiff, only technical changes have been made in this section.

A form summons approved by the New Mexico Supreme Court may be found at NMRA 4-206 NMRA.

Service of Process; return; Rule 1-004(C)

"Process" is defined in Rule 1-001(B)(3) NMRA.

Sometimes a summons is not served in conjunction with the pleading instituting an action. For example, writs, warrants and mandates are not accompanied by a summons. *See* Rule 1-001((B)(3)(c) and (d) NMRA. Rule 1-004(C)(1) acknowledges that service of process sometimes does not include the service of a summons.

Rule 1-004(C)(2) is new. Unlike Federal Rule 4(m), which contains a specific time limit within which service of the summons and complaint ordinarily must be made, Rule 1-004(C)(2) provides only that service shall be made "with reasonable diligence". This reflects the standard established in New Mexico case law. *E.g.*, *Romero v. Bachicha*, 2001 NMCA-048 Par. 23-25, 130 N.M. 610, 616, 28 P.3d 1151, 1157.

Process; by whom served; Rule 1-004(D)

Rule 1-004(D) formerly provided that process could be served by a sheriff of the county where the defendant could be found, or by any person over the age of eighteen and not a party to the action. Because the latter category necessarily includes the sheriff of a county, the reference to service by the sheriff has been omitted.

Rule 1-004(D)(2) carries over, unchanged, former Rule 1-004(D)(2).

Rule 1-004(D)(3) is new. It provides a means for determining who shall service process when the process is a writ other than those mentioned in Rule 1-004(D)(2).

Process; how served; generally; Rule 1-004(E)

Rule 1-004(E)(1) makes explicit in the rule the general test for constitutionally-adequate service of process established in *Mullane v. Central Hanover Bank, & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".).

Rule 1-004(E)(2) accepts the premise that matters of procedure are for the judiciary to determine but that legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. The section thus provides that service of process shall be made in accordance with Rule 1-004 NMRA, or in accordance with applicable statutes but shall not be accomplished by a means authorized by a statute that conflicts with Rule 1-004.

Rule 1-004(E)(3) provides a much-simplified method of service by mail. It is no longer necessary that the defendant open the mailed packet containing the summons and complaint and then voluntarily choose to accept service by returning a signed Receipt of Service of Summons and Complaint as formerly was required. Instead, service is accomplished when the summons and complaint are mailed to the named defendant in a manner that calls for the recipient to sign a receipt upon receiving the envelope containing the summons and complaint and the defendant-recipient or a person authorized by appointment or by law to accept service of process on behalf of the defendant signs the receipt upon receiving the mailed envelope or package.

Service by mail need not be at the home address or usual place of abode of the defendant. Service is complete when the receipt is signed.

This section also provides the same mechanism for service of the summons and complaint when a "commercial courier service" is utilized instead of the mails. The phrase, though not entirely self-explanatory, has been used in this context by other states without apparent problems. *See*, *e.g.*, Kansas Rules of Civil Procedure, KSA 60-303 (c)(1); Utah Rules of Civil Procedure 4(d)(2)(A)and (B). The Advisory Committee Note to Utah Rule 4 provides that "[t]he term 'commercial courier service' refers to businesses that provide for the delivery of documents. Examples of 'commercial courier service' include Federal Express and United Parcel Service". The committee endorses the definition provided in the Utah Advisory Committee Note.

In this context, "signs" and "signed" is equivalent to "signature" which "means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law". Rule 1-011 NMRA.

Process; personal service upon an individual; Rule 1-004(F)

In General The 2004 Amendment makes substantial changes in Rule 1-004(F). The "post and mail" method found in the former rule has been eliminated. A provision for service at the place of work of the defendant has been added. The provision for mail service has been simplified and the rule now authorizes the use of commercial courier services as well as mail for service of process. A hierarchy of methods of service has been established. In some cases, a listed method of service cannot be used until other methods of service are attempted unsuccessfully.

Rule 1-004(F)(1)(a) This section remains the same as in the former Rule.

Rule 1-004(F)(1(b) This section authorizes service by mail or commercial courier service as provided in Rule 1-004(E)(3).

Rule 1-004(F)(2) The means of service provided in this section may only be used if there first was an attempt to serve process "by either of the methods of service provided by Subparagraph (1) of this paragraph". This means that the person serving process need only attempt one of the two methods—personal service or mail/commercial courier service before using the alternative provided in this section.

This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and compliant mails a copy of the summons and complaint to the defendant at the defendant's last known mailing address. This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and compliant mails a copy of the summons and complaint

to the defendant at the defendant's last known mailing address. This mailing address will often, but not always, be the usual place of abode of the defendant. The cost of mailing is minimal and increases the likelihood that the defendant will get actual, timely notice of the institution of the action.

Rule 1-004(F)(1) formerly provided that if no qualified person was at the usual place of abode to accept service of process, service could be made by posting process at the abode and then mailing a copy of the process to the last known mailing address. This alternative method of service has been omitted in the 2004 amendment.

Rule 1-004(F)(3) is new. It may be used only when service of process has been attempted, unsuccessfully, in accordance with Rule 1-004(F)(1) and Rule 1-004(F)(2). Rule 1-004(F)(3) provides that service may be made by delivering a copy of the summons and complaint to the person apparently in charge of the actual place of business of the defendant and mailing a copy of the summons and complaint to the defendant both at the defendant's last known mailing address and also the defendant's actual place of business.

Colorado, R.C.P. 4(e)(2), Oregon, R.C.P. 7(d)(2)(c) and New York, N.Y. CPLR Sec. 308(2), also provide for work place service of process. The Fair Debt and Collection Practices Act, 15 U.S.C. Sec. 1692 ff, contains a provision allowing service of process at the workplace of the defendant by "any person while serving or attempting to serve legal process in connection with judicial enforcement of any debt". 15 U.S.C. Sec. 1692(a)(6)(D).

Process; Service on corporation or other business entity; Rule 1-004(G)

In addition to providing for service of process on corporations, Rule 1-004(G)(1) now includes limited liability companies as well as any "equivalent business entity" to a corporation or limited liability company. Courts should construe that phrase to assure that Rule 1-004 provides appropriate guidance about proper service of process upon legislatively-created variations on the traditional corporation.

The substance of the former provisions concerning service of process on partnerships and unincorporated associations have been carried over unchanged in Rule 1-004(G)(1)(b) and (c) of the 2004 amendment.

Process; Service upon state and political subdivisions; Rule 1-004(H)

Subparagraphs (a), (b), (c), (d) and (e) or Rule 1-004(H)(1) are substantively the same as former Rule 1-004(F) (3) and (4). They are derived from and do not vary materially from Section 38-1-7 NMSA 1978.

Subparagraphs (f), (g) and (i) are substantively the same as former Rule 1-004(F)(4), (5) and (6).

Subparagraph (h), dealing with service of process on a school district or school board is new. Former Rule 1-004 provided no guidance on the proper manner of service to such entities.

Rule 1-004(H)(2) allows service of process to the persons designated in Rule 1-004(H)(1) by means of mail or commercial courier service as provided in Rule 1-004(E)(3).

Process; Service upon minor, incapacitated person or conservator; Rule 1-004(I)

Subparagraph 1; Service on minors The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G, or L as appropriate, rather than, as formerly, only "by delivering a copy … to the conservator or guardian".

The provision for service upon person or persons having legal authority over a minor who does not have a guardian or conservator is new as is the provision requiring resort to the court to formulate a method of service where the minor has no guardian, conservator or person with legal authority over the minor.

Subparagraph 2; Service on Incompetent persons Rule 1-004(F)(7) formerly used the phrase "incapacitated person" to describe the party for whom a special means of service of process was appropriate. Rule 1-0017(C) uses the phrase "incompetent persons" and this subparagraph adopts the language of Rule 1-017 NMRA for consistency. *See* Rule 10-104(L) NMRA (defining an "incompetent" person).

The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G or L as appropriate, rather than, as formerly, only "by delivering a copy . . . to the conservator or guardian".

The provision requiring resort to the court to formulate a method of service where the incompetent person has no guardian or conservator is new. Former Rule 1-004(F)(8) provided that if no conservator or guardian had been appointed for an incapacitated person, service upon the incapacitated person would suffice. This provided inadequate assurance that the incapacitated person would have a meaningful opportunity to defend the action. To remedy this, this subparagraph requires the court to fashion a constitutionally-adequate means of service upon the incapacitated person not represented by a guardian or conservator.

Subparagraph 3; Service on Fiduciaries This provision is carried over from former Rule 1-004(F)(9). Fiduciaries may be served in the same manner as individuals and business entities who are defendants.

Service in manner approved by court; Rule 1-004(J)

This provision is carried over, unchanged, from former Rule 1-004(L). The goal of service of process is to achieve actual notice by means that are reasonable under the circumstances. Rule 1-004(E)(1). The specific methods of service authorized in Rule 1-004 provide standard methods by which this can be accomplished, but there are myriad specific circumstances in which ad-hoc determination of the most appropriate means for serving process is called for. This rule provides broad authority for the court to fashion a constitutionally-adequate method of service under any circumstances.

Where service can be accomplished pursuant to Rule 1-004(F)(G)(H) or (I), there will seldom be need for resort to Rule 1-004(K). Where the court orders service by publication, the court should consider, pursuant to this Paragraph, whether supplemental means of service should accompany notice by publication. Where no method of service specifically provided for by Rule 1-004 is likely to satisfy or achieve the goal of actual notice, this Paragraph authorizes the court to create a method of service suited to the circumstances of the particular facts presented.

Service by Publication; Rule 1-004(K)

This Paragraph requires that no service by publication take place without a prior court order authorizing service by publication. This is a significant modification of prior practice in situations where statutes authorized publication without prior court approval. *See, e.g.*, Section 41-2-7(B) NMSA 1978 (authorizing service by publication in condemnation proceeding "[i]f the name or residence of any owner be unknown…".); Section 45-1-401 NMSA 1978 (authorizing service by publication in probate proceedings under some circumstances and providing that the court for good cause can provide a different manner of service). Pub-

lication notice is seldom likely to achieve actual notice and thus its use should be monitored carefully by the courts. The Supreme Court is authorized to modify statutes providing for notice by publication by requiring prior court approval for service by publication. Legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978.

This paragraph also provides the required content of the notice to be published, the frequency of publication and the place of publication. Omitted from the 2004 amendment is the former provision (Rule 1-004(H)(3)) requiring that publication be "in some newspaper published in the county where the cause is pending" and providing for publication in a newspaper of general circulation in the county only when "no newspaper [was] published in the county". Publication now always will include publication in a paper of general circulation in the county where the action is pending whether or not the newspaper is published in that county. Where appropriate to the goal of achieving actual notice, the court is free to require, in addition, that publication also be in a newspaper not of general circulation that is published in the county where the cause is pending.

Where the court determines that actual notice by publication is more likely to be achieved by publishing the notice elsewhere, the court must provide for additional published notice in the county that the court deems such notice is most likely to achieve the goal of actual notice to the defendant.

Former Rule 1-004(H)(7), dealing with the required content of repeated publications due to misnomers in the initial publication, has been omitted. The court that orders additional publication will craft an appropriate order concerning its content.

Former Rule 1-004(I) calling for publication to be accompanied by mail notice to persons whose residence is known has been omitted. The court that orders publication has the obligation to fashion means of service reasonably calculated to provide actual notice, Rule 1-004(E)(1), and thus can provide for mailed notice to accompany service of process by publication where reasonable. *See* Rule 1-004(J).

Proof of service; Rule 1-004(L)

The person obtaining service of process rather than the person serving process is now responsible for filing proof of service.

The means of proof of service when service is accomplished by mail or commercial courier service pursuant to Rule 1-004(F)(1)(b) and when service is made by publication pursuant to Rule 1-004(J) or (K) are provided in those paragraphs.

Service outside the state but in the United States; Rule 1-004(M)

This provision replaces former Rule 1-004(J) (Service of summons outside of state equivalent to publication). Where, as in the case of long arm jurisdiction pursuant to Section 38-1-16 NMSA 1978, service of process can be made outside of New Mexico, this rule requires that service be accomplished in the manner and priority provided in this rule. The Committee considered but rejected a proposal that the method of service need not meet the requirements of this rule so long as it met the requirements for service of process in the place where service occurred.

Service in a foreign country; Rule 1-004(N)

Service in foreign countries is sometimes subject to treaties or other international agreements. This rule, adopted from Federal Rule 4(f) and Rule 4(h)(2) takes into account the special considerations required by international law.

[Committee comments approved, January 16, 2004.]

4-206

[District Court Civil 1-004]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT
No. _____
_____, Plaintiff
v.
_____, Defendant

SUMMONS

THE STATE OF NEW MEXICO

[~~TO: _____, Defendant(s)~~]
To the above-named Defendant:
ADDRESS: _____

You are [~~hereby directed~~] required to serve [~~a pleading~~] upon _____ *(name of plaintiff or plaintiff's attorney)* an answer or motion in response to the complaint which is attached to this summons within thirty (30) days after service of this summons [~~and file the same, all as provided by law~~] upon you, exclusive of the day of service, and file a copy of your answer or motion with the court as provided in Rule 1-005 NMRA. [~~You are notified that, unless you serve and file a responsive pleading or motion, the plaintiff will apply to the court for the relief demanded in the complaint.~~] If you fail to file a timely answer or motion, default judgment may be entered against you for the relief demanded in the complaint.

Attorney or attorneys for plaintiff:

_____
Address and telephone number of attorneys for plaintiff: *(or of plaintiff, if no attorney)*

_____
(Street or P.O. box)

_____
(City, state and zip code)

_____
(Telephone number)

WITNESS the Honorable _____, district judge of the _____ judicial district court of the State of New Mexico, and the seal of the district court of _____ County, this ____ day of _____, _____.

_____
Clerk of court
By _____
Deputy

Dated: _____

RETURN[1]

STATE OF NEW MEXICO)
) ss
COUNTY OF _____)

I, being duly sworn, on oath, state that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served [~~within~~] this summons in [~~said~~] _____ county on the _____ day of _____, _____, by delivering a copy [~~thereof~~] of this summons, with a copy of complaint attached, in the following manner:

(**check one box and fill in appropriate blanks**)

[ ] to the defendant _____ *(used when defendant accepts a copy of summons and complaint or refuses to accept the summons and complaint)*

[ ] to the defendant by [mail] [courier service] as provided by Rule 1-004 NMRA *(used when service is by mail or commercial courier service)*.

After attempting to serve the summons and complaint on the defendant by personal service or by mail or commercial courier service, by delivering a copy of this summons, with a copy of complaint attached, in the following manner:

[ ] to _____, a person over fifteen (15) years of age and residing at the usual place of abode of defendant _____, [~~who at the time of such service was absent therefrom~~] *(used when the defendant is not presently at place of abode)* and by mailing by first class mail to the defendant at _____ *(insert defendant's last known mailing address)* a copy of the summons and complaint.

[~~[ ]~~ ~~by posting a copy of the summons and complaint in the most public part of the premises of defendant _____ (used if no person found at dwelling house or usual place of abode).~~]

[ ] to _____, [the defendant] [person apparently in charge of the business of defendant] at the actual place of business of the defendant and by mailing by first class mail to the defendant at _____ *(insert defendant's business address)* and by mailing the summons and complaint by first class mail to the defendant at _____ *(insert defendant's last known mailing address).*

[ ] to _____, an agent authorized to receive service of process for defendant _____.

[ ] to _____, [parent] [guardian] [custodian] [conservator] [guardian *ad litem*] of defendant _____ *(used when defendant is a minor or an incompetent person).*

[ ] to _____ *(name of person),* _____, *(title of person authorized to receive service. Use this alternative when the defendant is a corporation or an association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision).*

Fees: _____

_____
Signature of person making service

_____
Title *(if any)*

Subscribed and sworn to before me this _____ day of _____, _____[2]

_____
Judge, notary or other officer
authorized to administer oaths

_____
Official title

USE NOTES

1. Unless otherwise ordered by the court, this return is not to be filed with the court prior to service of the summons and complaint on the defendant.

2. If service is made by the sheriff or a deputy sheriff of a New Mexico county, the signature of the sheriff or deputy sheriff need not be notarized.

_____

4-207
[District Court Civil 1-004]
NOTICE AND RECEIPT OF SUMMONS AND COMPLAINT
[PROPOSED TO BE WITHDRAWN]

_____

4-209A
[District Court Civil 1-004]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT
No. _____
_____, Plaintiff
v.
_____, Defendant

ORDER FOR SERVICE OF PROCESS[1] BY PUBLICATION IN A NEWSPAPER

[Plaintiff] [Petitioner] has filed a motion requesting that the court approve service of process upon _____ *(name of each person to be served)* by publication in a newspaper of general circulation.

The court finds that the [plaintiff] [petitioner] has made diligent efforts to make personal service, but has not been able to complete service of process. The last known address of _____ *(name of person to be served)* is _____.

The court further finds that the newspaper of general circulation in this county is _____ *(name of newspaper)* [and that this newspaper is most likely to give the defendant notice of the pendency of the action][1] [and in the county of _____, State of _____, a newspaper most likely to give notice of the pendency of this proceeding to the person to be served is: _____ (*name of newspaper)*].

THEREFORE, IT IS HEREBY ORDERED that the petitioner serve process on _____ by publication once a week for three consecutive weeks in the _____ *(newspaper)* [and one a week for three consecutive weeks in _____ *(newspaper)* in _____ *(county)*][1]. The [plaintiff] [petitioner] shall file a proof of service with a copy of the affidavit of publication when service has been completed.

Dated this ____ day of _____, _____.

_____
District Judge

USE NOTE

1. Use applicable alternative. Unless the newspaper of general circulation in the county where the action is pending is most likely to give notice of the pendency of the action to the person to be served, the notice must also be published in a newspaper of general circulation in the county where the person to be served is most likely to get notice.

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 Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE MARCH 4, 2004

continued from page 12

CERTIORARI GRANTED AND UNDER ADVISEMENT:

NO. 28,225	Huntley v. Cibola General Hospital (COA 23,916) 9/15/03
NO. 28,234	State v. Blea (COA 24,032) 9/16/03
NO. 28,228	State v. Sharpe (COA 23,742) 10/10/03
NO. 28,253	Miller v. Brock (COA 24,124) 10/10/03
NO. 28,249	Miller v. Brock (COA 24,125) 10/10/03
NO. 28,237	State v. McDonald (COA 22,689) 10/10/03
NO. 28,261	State v. Dedman (COA 23,476) 10/10/03
NO. 28,272	Lester v. City of Hobbs (COA 22,250) 10/10/03
NO. 28,270	State v. Paredez (COA 24,082) 10/27/03
NO. 28,286	State v. Graham (COA 22,913) 11/3/03
NO. 28,210	Cassidy-Baca v. County Comm'r (COA 24,046) 11/3/03
NO. 28,317	Turner v. Bassett (COA 22,877) 11/6/03
NO. 28,321	State v. Heinrich (COA 23,215) 12/2/03
NO. 28,337	Colonias Dev. Council v. Rhino Envtl. Svcs. (COA 22,932) 12/2/03
NO. 28,353	State v. Villa (COA 23,229) 12/2/03
NO. 28,359	State v. Moses M. (COA 23,250) 12/2/03
NO. 28,380	Angel Fire v. Wheeler (COA 24,295) 12/3/03
NO. 28,369	State v. Beltron (COA 24,234) 12/5/03
NO. 28,379	State v. Cooley (COA 23,253) 12/9/03
NO. 28,386	State v. Flores (COA 24,067) 12/16/03
NO. 28,383	Blake v. Public Service Company (COA 23,671) 12/19/03
NO. 28,376	Ryan v. Highway Dept. (COA 22,615) 12/19/03
NO. 28,374	Smith v. Bernalillo County Commissioners (COA 22,766) 12/19/03
NO. 28,402	State v. Stewart (COA 23,137) 1/13/04
NO. 28,408	Federal Express v. Abeyta (COA 23,519) 1/13/04
NO. 28,414	State v. O'Kelley (COA 23,272/23,364) 1/13/04
NO. 28,416	Blancett v. Blancett (COA 24,282) 1/13/04
NO. 28,423	Marquez v. Allstate (COA 23,385) 1/13/04
NO. 28,410	State v. Romero (COA 22,836) 1/20/04
NO. 28,441	Gormely v. Coca Cola (COA 22,722) 1/26/04
NO. 28,431	Albuquerque v. Park & Shuttle (COA 24,221) 1/30/04
NO. 28,446	Mercado v. Miller (COA 23,756) 2/3/04
NO. 28,438	Marquez v. Allstate (COA 23,385) 2/9/04
NO. 28,480	Maso v. State (COA 23,218) 2/16/04
NO. 28,481	Jouett v. Growney (COA 23,669) 2/16/04
NO. 28,486	Jouett v. Growney (COA 23,669) 2/16/04
NO. 28,477	State v. Smith (COA 24,253/24,254/24,258) 2/16/04
NO. 28,462	State v. Ryon (COA 23,318) 2/17/04
NO. 28,426	Sam v. Sam (COA 23,288) 2/17/04
NO. 28,482	Jouett v. Growney (COA 23,669) 2/23/04
NO. 28,468	Bruhn v. The Hartford (COA 23,501) 2/23/04
NO. 28,485	State v. Eubanks (COA 23,006) 2/25/04

PETITIONS FOR WRIT OF CERTIORARI DENIED:

NO. 28,463	State v. Shafer (COA 24,209) 2/17/04
NO. 28,475	City of Sunland Park v. PRC (COA 23,238) 2/17/04
NO. 28,424	Cowan v. Velasquez (COA 22,819) 2/18/04
NO. 28,439	Gonzales v. LeMaster (12-501) 2/18/04
NO. 28,459	State v. Montano (COA 24,111) 2/18/04
NO. 28,458	Parson v. Snedeker (12-501) 2/18/04
NO. 28,479	State v. Juan V. (COA 22,930) 2/18/04
NO. 28,478	Weiss v. SW Counseling (COA 24,289) 2/20/04

ADVANCE OPINIONS

FROM THE NEW MEXICO SUPREME COURT AND COURT OF APPEALS

FROM THE NEW MEXICO SUPREME COURT

Opinion Number: 2004-NMSC-005

JESUS CELAYA,
Plaintiff-Respondent,
versus
LIN HALL,
Defendant-Petitioner.
No. 28,076
(filed: January 29, 2004)

ORIGINAL PROCEEDING ON CERTIORARI
DANIEL W. SCHNEIDER,
District Judge

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for Petitioner

JOHN WAYNE HIGGINS
JOHN WAYNE HIGGINS
& ASSOCIATES
Albuquerque, New Mexico
for Respondent

OPINION

RICHARD C. BOSSON, JUSTICE

{1} Lin Hall ("Defendant") appeals from an opinion of the Court of Appeals reversing a grant of summary judgment entered in his favor. The Court of Appeals found genuine issues of material fact concerning two issues arising under the Tort Claims Act: (1) whether Defendant, a volunteer chaplain for the Bernalillo County Sheriff's Department ("the Department"), was a public employee, and if so, (2) whether Defendant was acting within the scope of his duties when he ran over the foot of Plaintiff Celaya with his automobile while driving in the parking lot at Wal-Mart. *Celaya v. Hall*, 2003-NMCA-086, 134 N.M. 19, 71 P.3d 1281. We reverse in part, holding as a matter of law that Defendant was a public employee at the time of the incident. We also affirm in part, agreeing with the Court of Appeals that a genuine issue of fact exists for the fact finder to decide whether Defendant was acting within the scope of his duties at the time of the incident.

BACKGROUND

{2} In November 1996, Plaintiff was a sixteen-year-old, part-time employee at Wal-Mart. Early in the evening of Saturday, November 16, Plaintiff was collecting shopping carts from the parking lot when Defendant drove over his foot, causing Plaintiff to suffer various injuries. Defendant, a volunteer chaplain with the Department, was driving a Department vehicle at the time.

{3} Defendant is an ordained minister and has been a volunteer chaplain with the Department since 1988. His duties as a volunteer chaplain include providing spiritual counseling to crime victims and their families, counseling sheriff's deputies, presiding over ceremonies like weddings and graduations, and providing support services at crime scenes. Defendant does not maintain regular hours, but is on call twenty-four hours a day, seven days a week. The Department has provided Defendant with an unmarked, take-home vehicle equipped with a sheriff's radio. The Department also provided a pager and business cards that identify Defendant as the Department chaplain. Independently, Defendant also maintains a full-time, compensated position as a minister with Teen Challenge of New Mexico.

{4} Defendant concedes that his trip to Wal-Mart was a personal errand. He frequently shops there because the store is close to his home. Through the course of pre-trial discovery, Defendant has been unable to remember what he was doing just prior to his trip to Wal-Mart, but states under oath that it was his custom to drive the Department vehicle only in connection with his official chaplain duties.

{5} Plaintiff filed a complaint to recover damages in October 1999, 2 years and 11 months after the incident. The complaint named as defendants the County of Bernalillo, the Department, and Defendant. In response, all defendants filed a motion to dismiss due to Plaintiff's failure to comply with the two-year statute of limitations in NMSA 1978, Section 41-4-15 (1977) of the Tort Claims Act ("TCA"). Thereafter, on Plaintiff's motion, the claims against Bernalillo County and the Department were dismissed. Plaintiff filed an amended complaint against Defendant, in his individual capacity, claiming that at the time of the incident Defendant was not acting either as a Department employee or within the scope of his official duties and, therefore, was not protected by the TCA two-year statute of limitations.

{6} Defendant then filed a motion for summary judgment, claiming that the TCA applied because, based upon the undisputed material facts, Defendant was a public employee acting within the scope of his duties at the time of the incident. The district court agreed with Defendant and granted summary judgment in his favor. On Plaintiff's appeal, the Court of Appeals reversed the summary judgment, finding genuine issues of material fact regarding both questions: Defendant's status as an employee and whether he was acting within the scope of his duties at the time of the incident that injured Plaintiff. *Celaya*, 2003-NMCA-086, ¶ 1. We granted Defendant's petition for certiorari to determine whether either question, or both, should have been decided in Defendant's favor as a matter of law.

DISCUSSION

Standard of Review

{7} We review the grant of summary judgment de novo and construe reasonable inferences from the record in favor of the party opposing the motion. *See Rummel v. St. Paul Surplus Lines Ins. Co.*, 1997-NMSC-042, ¶ 9, 123 N.M. 767, 945 P.2d 985.

Public Employee Status Under the TCA

{8} Liability of public employees acting within their scope of duty is governed by the TCA, NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2003). The TCA delimits the scope of liability for government entities and their employees by: (1) retaining immunity for torts not waived by the TCA, *see* Section 41-4-2(A) (1976); and (2) waiving immunity and recognizing liability, subject to certain protections, for employees acting within their scope of duty, *see* § 41-4-4 (1996). The TCA specifically provides that it is "the exclusive remedy . . . for any tort for which immunity has been waived." *See* § 41-4-17(A) (1982). The TCA enumerates who qualifies as a "public employee," and excludes most categories of

independent contractors. Section 41-4-3(F)(3) (1995) specifically defines "public employee" as "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." Therefore, the TCA explicitly contemplates that volunteers acting on behalf of the government may become public employees, thereby entitled to the protections of the TCA and subject to reliability of the same.

{9} We are struck by the express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the TCA. *See* § 41-4-3(F)(3). The legislature made an express choice to include volunteers in the TCA, presumably in recognition of the important contribution volunteers can provide through government service. In so designating uncompensated persons working on behalf of the government, the legislature took action to protect both the volunteer and the public. The law protects the volunteer by providing immunity for an act not included within the TCA, and by affording the volunteer indemnification and a defense when immunity has been waived. *See* § 41-4-4. Either way, the TCA treats the volunteer the same as any other employee, thereby encouraging volunteer participation in government. The TCA also protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty commit certain torts and injure innocent members of the public. Mindful of these purposes to protect both the volunteer and the public, we interpret the TCA so as to give life to legislative intent.

{10} Despite taking a contrary position in his original pleadings, Plaintiff now contends that Defendant was an independent contractor, not a public employee, when the incident occurred. If Defendant was an independent contractor, he would not fall within the purview of the TCA. Potentially, this determination could render Defendant personally liable for the damages resulting from the incident, because the TCA two-year statute of limitations and the provisions for indemnification under the TCA would not apply.

{11} New Mexico courts have employed an agency analysis to determine whether an individual is acting as an independent contractor or as an employee. In *Harger v. Structural Services, Inc.*, 121 N.M. 657, 664, 916 P.2d 1324, 1331 (1996), we adopted the Restatement (Second) of Agency § 220 (1958) to identify an independent contractor for purposes of workers' compensation. Under an agency analysis, the principal's right to control the individual performing the work often distinguishes an employee from an independent contractor. *See, e.g., Harger*, 121 N.M. at 663, 916 P.2d at 1330; *Armijo v. Dep't of Health & Env't*, 108 N.M. 616, 620, 775 P.2d 1333, 1337 (Ct. App. 1989) (applying the agency right to control test to a TCA claim).

{12} A right to control analysis focuses on whether the principal exercised sufficient control over the agent to hold the principal liable for the acts of the agent. With the right of control, an employer-employee relationship usually exists. *Harger*, 121 N.M. at 667, 916 P.2d at 1334. However, the right to control approach may not always be the most appropriate test, particularly for a professional. In a case concerning whether a hospital was bound by the acts of an emergency room physician, the court observed, "[t]he use of the right to control test in determining whether a professional is an employee has been criticized." *Houghland v. Grant*, 119 N.M. 422, 426, 891 P.2d 563, 567 (Ct. App. 1995).

{13} In the case before us, the Court of Appeals applied the right to control test by identifying an independent contractor as an individual whose overall work product, but not the details of work performance, is controlled. *Celaya*, 2003-NMCA-086, ¶ 7. The court then relied upon the affidavits of Ray Gallagher, Bernalillo County Sheriff from 1991 to 1994, and his successor, Joe Bowdich, Bernalillo County Sheriff from 1995 to 2002, to determine whether there was a genuine issue of material fact concerning the Department's exercise of control over the details of Defendant's work performance. *Id.* ¶ 8. Sheriff Gallagher states in his affidavit that "[t]he Sheriff's Department does not control the manner in which the details of [Defendant] Lin Hall's work is performed." Sheriff Bowdich's affidavit states the contrary, that he supervised Defendant's chaplain duties. As a result of this apparent conflict, the Court of Appeals concluded "[t]here is a genuine issue of fact as to whether Defendant was an independent contractor because of the Department's lack of actual control over, or right to control, the details of his work." *Id.* ¶ 8.

{14} We question this conclusion. Our case law indicates that the right to control analysis is more complex, and demands a more nuanced approach, than simply determining the degree of control over the details or methods of the work. *Harger*, 121 N.M. at 667, 916 P.2d at 1334. In *Harger*, this Court recognized the inconsistency that can result from applying the right to control test in its simplest form, when identifying an independent contractor for purposes of the Workers' Compensation Act. *Id.* at 663-64, 916 P.2d at 1330-31. To address this inconsistency, we adopted the approach taken in the Restatement (Second) of Agency § 220, which incorporates many factors into the calculus of employee versus independent contractor. *Harger*, 121 N.M. at 664, 916 P.2d at 1331. This approach is well-suited to a similar analysis under the TCA.

{15} The Restatement suggests a number of considerations for determining whether an individual is acting as an employee or independent contractor, only one of which is the degree of control the principal exercises over the details of the agent's work. Restatement (Second) of Agency § 220(2)(a-j). Other considerations include: 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business. *Id.* Furthermore, a complete analysis may require an assessment not only of the relevant factors enumerated in the Restatement, but of the circumstances unique to the particular case. *See Harger*, 121 N.M. at 667, 916 P.2d at 1334.

> [N]o particular factor should receive greater weight than any other, except when the facts so indicate, nor should the existence or absence of a particular factor be decisive. Rather, the totality of the circumstances should be considered in determining whether the employer has the right to exercise essential control over the work or workers of a particular contractor.

Id.

{16} As a result, our determination must reach beyond the competing affidavits of Sheriffs Gallagher and Bowdich. The es-

sential facts are not in dispute. At the time of the incident with Plaintiff, Defendant had been an official Department chaplain for eight years. As part of his official duties, Defendant was summoned to crime and accident scenes by the Department on an as-needed basis where he provided counseling and support services to civilians. He also maintained regularly scheduled duties, including giving invocations and benedictions at graduations, presiding over weddings, and providing spiritual counseling to deputies and their families at their request.

{17} Thus, Defendant was not "self-directed," as maintained by Plaintiff. To the contrary, he was assigned particular duties by the Department, to be performed at both specific, pre-arranged times and on an as-needed basis. The Department alerted Defendant when chaplain services were requested. In addition, a deputy requesting spiritual counseling could contact Defendant directly, and Defendant was authorized to assist stranded motorists he might encounter while in the Department vehicle. Other than those two situations, Defendant acted primarily at the Department's request. When Defendant saw the need for chaplain's services, he would alert the Department and request permission to proceed. And, at all times, the Department provided Defendant with the instrumentalities necessary to carry out the regular business of the employer, including a vehicle, pager, radio, and official departmental business cards.

{18} Importantly, the degree of supervision the Department exercised over Defendant was proportionate to the professional nature of Defendant's position. Defendant is a career minister. Many of Defendant's official duties are focused upon providing spiritual counseling and support to accident survivors, crime victims, and departmental personnel and their families. These services, like those of the emergency room physician in *Houghland*, require special skills and a private setting; they are not amenable to detailed performance management.

{19} We reject Plaintiff's assertion that the lack of detailed supervision of Defendant's duties renders him an independent contractor. Inherently, many jobs, particularly those at a professional level, must be performed with a certain degree of latitude and even independence. The Restatement contemplates just such an arrangement and its consequences. *See* Restatement (Second) of Agency § 220(2)(c) (calling for consideration of "the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision").

{20} Applying all the factors in the Restatement to Defendant's job, and in light of the totality of the circumstances, we conclude that at the time of the incident Defendant undoubtedly was an employee of the Department. Considered in context, the Department exercised sufficient control over Defendant's activities in a manner consistent with the status of employee. As we stated earlier, the TCA specifically provides that volunteers can be employees. We discern no genuine issue of material fact on any of these questions. Thus, the district court properly entered summary judgment in Defendant's favor on this question.

{21} Parenthetically, the Court of Appeals also looks to the apparent authority doctrine to distinguish employees from independent contractors and suggests the presence of an issue of fact on this question. *Celaya*, 2003-NMCA-086, ¶ 7. We disagree. Apparent authority is created when a principal represents to a third party that another is his agent, and the third party believes in the agent's authority. *See* Restatement (Second) of Agency: *Apparent Authority* § 8 (1958). However, Plaintiff was not receiving services from the Department at the time of the incident; he was given no information on which to rely regarding Defendant's status as an agent of the Department. Plaintiff had no relationship with Defendant, other than as a result of this incident. Therefore, the apparent authority doctrine is no help to the legal analysis of this case and cannot create a genuine issue of material fact.

Scope of Duties

{22} The TCA compensates victims for certain tortious acts committed by public employees while acting within their "scope of duties." *See* § 41-4-3(G). The TCA defines "scope of duties" as "performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." Section 41-4-3(G). By adopting the phrase "scope of duties," the legislature "created and defined a unique standard to be applied to TCA claims based upon acts of public employees." *Risk Mgmt. Div. v. McBrayer*, 2000-NMCA-104, ¶ 8, 129 N.M. 778, 14 P.3d 43. The legislative choice of this phrase sets the standard apart from the common-law concept of "scope of employment." *Id.* The distinction between the two terms, "scope of duties" and "scope of employment," was first discussed in *Medina v. Fuller*, 1999-NMCA-011, ¶¶ 9-10, 126 N.M. 460, 971 P.2d 851.

{23} We find *Medina* helpful to our analysis because the facts are analogous to the case before us. A deputy sheriff was driving a department vehicle home from work when she stopped for a personal errand and became involved in a traffic accident. *Id.* ¶ 2. The deputy was on-call and prepared to respond when the accident occurred. *Id.* ¶ 5. In analyzing the deputy's scope of duties under the TCA, the Court of Appeals noted that she was authorized to use the department vehicle to travel to and from work. *Id.* ¶ 11. The deputy's continuous use of an official vehicle was a benefit to the sheriff's department; it was "permitted, if not required . . . in order to facilitate her investigative duties." *Id.* The court concluded that the deputy's use of the vehicle to travel home from work was "within the literal definition of [her] 'scope of duties.'" *Id.* ¶ 12. With one exception to be discussed shortly, the record in *Medina* supports a similar conclusion in Defendant's case.

{24} In a more recent opinion, *McBrayer*, 2000-NMCA-104, ¶¶ 8, 17, the Court of Appeals examined the reach of the "scope of duties" clause in even more detail, and again concluded that it represents a departure from the "scope of employment" standard and extends beyond officially authorized or requested acts. In *McBrayer*, a New Mexico State University instructor assaulted a student who had visited the instructor's apartment to obtain class assignments. Although of course the attack was unauthorized, the court identified a nexus between the instructor's authorized duties and his after-class interaction with a student seeking class assignments. *Id.* ¶¶ 3-4. This connection was sufficient to conclude that the unauthorized attack might fall within the instructor's "scope of duties" of the TCA. "Because it appears that [the instructor] used this authorized duty as a subterfuge to accomplish his assault, we find that a reasonable fact finder could determine that his actions were within the scope of the duties that NMSU requested, required or authorized him to perform." *Id.* ¶ 20.

{25} In *McBrayer*, the court refused to limit "scope of duties" to only those *acts* officially requested, required or authorized because, contrary to legislative intent, it would render

all unlawful acts, which are always unauthorized, beyond the remedial scope of the TCA. *Id.* The *McBrayer* opinion further observed that excluding all unauthorized criminal or tortious acts by public employees is irreconcilable with the indemnification provisions of the TCA, *see* §§ 41-4-4(E), -17(A) (1982), which permit the state to recover defense and settlement costs from employees who have "acted fraudulently or with actual intentional malice." Thus, the TCA clearly contemplates including employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity.

{26} We find the two opinions instructive. In both *Medina* and *McBrayer*, there was a connection between the public employee's actions at the time of the incident and the duties the public employee was "requested, required or authorized" to perform. Section § 41-4-3(G). In the case at bar, Defendant must also demonstrate such a connection for his actions to fall within the TCA. The undisputed record shows that, as part of his duties and for the benefit of the Department, Defendant was "requested, required or authorized" to travel between work and home in an official vehicle. Further, like *Medina*, a minor deviation in the form of an incidental personal errand, does not take Defendant outside the scope of his official duties. Unlike Medina, however, Defendant does not recall his activities prior to the incident at Wal-Mart. Due to the passage of time, Defendant apparently cannot confirm that he was traveling home from a Department function or describe how much had passed since his last Department-related activity, when he made his stop at Wal-Mart. Thus, Defendant has not yet established the kind of nexus between incident and duty that was present in *Medina*. Merely being on-call, without more, is insufficient. Although Defendant has not yet proven that nexus, he has managed to create an issue of fact as to its existence.

{27} Defendant claims that even though he is unable to recall his activities prior to the incident, it was his custom to drive the vehicle only when he was performing his chaplain's duties for the Department. In an affidavit, Defendant states that "I would occasionally stop in a store and run a personal errand on the way to or from a chaplain assignment, but I never drove the vehicle exclusively for my own personal use." This evidence of habit is the only indication in the record of what Defendant may have been doing prior to the incident. Because Defendant never drove his Department vehicle exclusively for personal use, and because he was driving it at the time of the incident, then he must have been coming from a "chaplain assignment" when he stopped off at Wal-Mart. Defendant is correct that this evidence, if believed by the fact-finder, could establish the necessary nexus between incident and "scope of duties" under the TCA. But the Court of Appeals properly held that "habit evidence alone cannot establish that no material fact issues existed regarding what Defendant was doing at the time of the accident." *Celaya*, 2003-NMCA-086, ¶ 12 (citing *Sanchez v. Shop Rite Foods*, 82 N.M. 369, 370, 482 P.2d 72, 73 (Ct. App. 1971)). The fact-finder must decide whether to accept Defendant's contention; the court may not do so on summary judgment.

{28} Whether an employee is acting within the scope of duties is a question of fact, and summary judgment is not appropriate unless "only one reasonable conclusion can be drawn" from the facts presented. *Medina*, 1999-NMCA-011, ¶ 22. Because habit evidence is insufficient to resolve the factual issue for purposes of summary judgment, we remand this case to the district court for trial and specifically for a determination of whether Defendant was acting within his official scope of duties when the incident occurred. Only the fact-finder can decide whether to believe Defendant when he states, according to his custom or habit, that he was "on the way to or from a chaplain assignment" and that he "never drove the vehicle exclusively for [his] own personal use." Only the fact-finder can determine the weight, if any, to be given Defendant's testimony in regard to the purported nexus between the incident and Defendant's official duties.

CONCLUSION

{29} We reverse in part and affirm in part and remand to the district court for further proceedings consistent with this opinion.

{30} **IT IS SO ORDERED.**

RICHARD C. BOSSON,
Justice

WE CONCUR:
PETRA JIMENEZ MAES,
Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
EDWARD L. CHAVEZ, Justice

Certiorari Granted, No. 28,480, February 16, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-025

RAPHAEL MASO,
Petitioner-Appellant,
versus
STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION,
Respondent-Appellee
No. 23,218
(filed: January 12, 2004)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NEIL CANDELARIA,
District Judge

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OPINION

CYNTHIA A. FRY, JUDGE

{1} Appellant Raphael Maso (Driver) raises due process concerns about the notice that he received of his right to request a hearing prior to the revocation of his driver's license under the Implied Consent Act (the Act). NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2003). Driver concedes that he received notice and also that his subsequent request for a hearing was untimely. He asserts, however, that he did not understand the notice because it was in English and he understands only Spanish. He therefore contends that the notice did not comport with due process and that he should have been granted a hearing despite his untimely request.

{2} The procedural posture of this case presents an opportunity for us to clarify the correct approach for litigating due process claims that are beyond the scope of Motor Vehicles Division (MVD) license revocation hearings. We hold that such claims must be considered in the first instance by the district court pursuant to its original jurisdiction. In this case, in the interest of judicial economy, we construe the proceedings below as consistent with this framework.

{3} On the merits of Driver's constitutional argument, we agree with the district court that the notice received by Driver comported with procedural due process requirements for administrative revocation of a driver's license. We therefore affirm.

BACKGROUND

{4} In December 2001, Driver was stopped, cited, and arrested for driving under the influence of alcohol contrary to NMSA 1978, § 66-8-102 (1999). He submitted to a single breath test that showed an alcohol concentration of .17. He refused additional breath tests. Subsequent to the test, the arresting officer personally served Driver with an English-language notice of revocation of his driving privileges pursuant to the Act. The notice stated that a request for a hearing to contest the revocation "must be made in writing within ten (10) days from date of service of this notice." According to Driver, he and the arresting officer had conversed in Spanish prior to service of the notice, but the officer did not explain in Spanish the contents of the English-language notice.

{5} Approximately one month after his arrest, Driver requested a revocation hearing. In his letter to MVD, Driver acknowledged that his request was untimely but asked that he be provided a hearing anyway because his lateness was attributable to his inability to understand the contents of the notice. Driver contends that he is a Spanish speaker who understands no English. MVD denied Driver's request in a form letter on the basis that "[t]he request was not made within the time prescribed by law."

{6} Driver appealed to the district court under Rule 1-074 NMRA 2003, which governs appeals from administrative agencies to the district courts when there is a statutory right of review. He argued that the denial of an administrative hearing amounted to a denial of due process of law. The district court considered and rejected Driver's due process argument. Driver petitioned this Court for a writ of certiorari and we granted the petition.

DISCUSSION

{7} In this opinion we first set out the relevant statutory provisions in order to supply context. Then, because of the procedural posture of this case, we address implied questions regarding subject matter jurisdiction and the reviewing role of the district court. Finally, we consider the merits of Driver's due process claims.

Relevant Statutory Provisions

{8} Under the Act, when a driver refuses a breath test or submits to a breath test that shows an illegal blood alcohol concentration, the officer is required to immediately serve the driver with a written notice of revocation and notice of the driver's right to request a hearing. § 66-8-111.1. The notice states that the driver's license will be revoked within twenty days, but that the driver may request a hearing on the revocation "in writing within ten (10) days from date of service of this notice." Section 66-8-112(B) provides that "[f]ailure to request a hearing within ten days shall result in forfeiture of the [driver's] right to a hearing."

{9} Assuming a driver timely requests a hearing, the Act narrowly defines the scope of a driver's license revocation proceeding. § 66-8-112(E). The legislature specified that the sole issues to be considered are (1) whether there were reasonable grounds for law enforcement to stop the driver; (2) whether the driver was arrested; (3) whether the hearing is held within 90 days of the driver's receipt of notice of revocation; and (4) whether the driver refused a blood alcohol test and was advised of the consequences or, alternatively, whether the driver took a blood alcohol test that showed an alcohol concentration above the legal limit. *Id.* In the context of the State's compelling interest in removing all intoxicated drivers from the highways, these summary revocation proceedings represent a permissible exercise of the legislature's authority. *Bierner v. State Taxation & Revenue Dep't*, 113 N.M. 696, 699, 831 N.M. 995, 998 (Ct. App. 1992). The expedited hearings comport with due process as well as notions of fairness for a civil, administrative proceeding. *Id.* In short, the hearings are clearly intended as "summary administrative proceeding[s] designed to handle license revocation matters quickly." *State v. Bishop*, 113 N.M. 732, 735, 832 P.2d 793, 796 (Ct. App. 1992).

Procedural Posture and Inherent Issues Regarding Subject Matter Jurisdiction

{10} The limited nature of the revocation proceeding, in combination with the procedural posture of this case, give rise to is-

sues of subject matter jurisdiction. *See Masterman v. State Taxation & Revenue Dep't*, 1998-NMCA-126, ¶ 9, 125 N.M. 705, 964 P.2d 869 ("[A]n appellate court may raise a jurisdictional issue sua sponte."). We address these issues before considering the merits of Driver's due process claims.

{11} Driver initiated this case as an appeal to district court from MVD pursuant to Rule 1-074 and Section 66-8-112(G). Ordinarily, under such circumstances, the district court, acting as an appellate court, would determine "whether reasonable grounds exist[ed] for revocation or denial of the person's license or privilege to drive based on the record of the administrative proceeding." *Id.* Here, however, there was no record of an administrative proceeding because Driver had not requested a hearing in a timely fashion. Consequently, there was, in theory, nothing for the district court to review.

{12} However, even if Driver had timely requested a hearing, MVD could not have considered the issue he asked the district court, and now asks this Court, to determine—whether failure to serve him with a Spanish-language notice constituted a denial of due process. Because Section 66-8-112(E) specifies the issues that MVD can consider in a revocation proceeding, MVD cannot adjudicate constitutional questions. *See id.* (providing that hearing "shall be limited" to enumerated issues). MVD lacks subject matter jurisdiction to consider matters beyond the scope of the statute and could not resolve a due process issue even with a driver's consent. *See Martinez v. N.M. State Eng'r Office*, 2000-NMCA-074, ¶ 22, 129 N.M. 413, 9 P.3d 657 (stating that because the State Personnel Board is a statutorily created administrative body, it is limited to authority expressed or implied by statute); *see also Gonzales v. Surgidev Corp.*, 120 N.M. 133, 138, 899 P.2d 576, 581 (1995) (explaining that "subject matter jurisdiction cannot be waived"). Because the constitutional question raised by Driver cannot be handled at the administrative level, we now turn to the role of the district court.

{13} Our legislature has designated the district court as the exclusive forum for appeals from MVD hearings. NMSA 1978, § 39-3-1.1 (1999); § 66-8-112(G). In its role as an appellate tribunal, however, the district court is limited by the scope of appellate review. *See N.M. State Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244 ("When acting in its appellate capacity, the district court's scope and standard of review is limited in the same manner as any other appellate body."); *Martinez*, 2000-NMCA-074, ¶ 48 (stating that "in administrative appeals the district court is a reviewing court, not a fact-finder"). This limit appears to be jurisdictional insofar as an appeal from a court or agency that lacks subject matter jurisdiction "confers no jurisdiction on the appellate court." *Nesbit v. City of Albuquerque*, 91 N.M. 455, 459, 575 P.2d 1340, 1344 (1977). Consequently, where MVD lacked authority to consider a due process argument, the district court lacked appellate jurisdiction to resolve the matter even if Driver had erroneously been given the opportunity to raise it below.

{14} The district court's original jurisdiction, in contrast, has no such limits. *See* N.M. Const. art. VI, § 13 ("The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law."); *Ottino v. Ottino*, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37 (recognizing presumption of jurisdiction in district courts). Without question, the district court has the authority to consider constitutional claims in the first instance. *See Marchman v. NCNB Tex. Nat'l Bank*, 120 N.M. 74, 84, 898 P.2d 709, 719 (1995) ("The district court . . . has jurisdiction over all matters not expressly consigned to other courts.").

{15} In this case, the district court's opinion purports to exercise appellate jurisdiction pursuant to Rule 1-074(Q), but it is clear from the substance of the six-page opinion that the district court fully considered the parties' arguments on the due process issue, unconstrained by the statutory limits on appellate review. Consistent with the district court's approach, we construe the opinion and order as properly issuing pursuant to the district court's original jurisdiction. *See State Highway & Transp. Dep't v. City of Sunland Park*, 2000-NMCA-044, ¶¶ 8-12, 129 N.M. 151, 3 P.3d 128 (holding that district court may simultaneously exercise its Rule 1-074 appellate jurisdiction and its original, equitable jurisdiction). Similarly, we construe Driver's appeal to the district court as in the nature of a petition for writ of mandamus to require MVD to conduct a hearing, and we construe the district court's opinion and order as a denial of that petition. We do this for two reasons. First, it makes no sense to view the district court's opinion and order as the result of an on-record appeal when there was no proceeding below and therefore no record from which to appeal and, moreover, where the issues addressed by the district court could not have been adjudicated in an MVD license revocation hearing even if one had occurred. Second, remanding for additional proceedings below would serve no purpose when the parties agree on the relevant facts, namely, that Driver received an English-language notice of revocation with no accompanying translation, and that his request for a hearing was untimely. In short, both logic and judicial economy suggest that we consider this an appeal from the denial of a petition for writ of mandamus.

{16} We recognize that, on the surface, this result may appear to be contrary to the rule that when the district court sits as an appellate tribunal, in the absence of a statutory exception, it is limited to consideration of the record below. *Zamora v. Vill. of Ruidoso Downs*, 120 N.M. 778, 783, 907 P.2d 182, 187 (1995). As explained above, however, this case does not fit under the ordinary appellate framework because Driver's due process claims could not be considered at an administrative proceeding. *See Moriarty Mun. Schs. v. N.M. Pub. Schs. Ins. Auth.*, 2001-NMCA-096, ¶ 35, 131 N.M. 180, 34 P.3d 124 (clarifying that appellate jurisdiction does not preempt original jurisdiction where there were no adjudicatory proceedings below). To hold otherwise would effectively foreclose any due process challenges to the administrative process, which would impermissibly constrain the right of access to the courts. *See Jiron v. Mahlab*, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983) (holding that right of access to courts is guaranteed by United States Constitution); *cf. Bd. of Educ. of Carlsbad Mun. Schs. v. Harrell*, 118 N.M. 470, 480, 882 P.2d 511, 521 (1994) (stating that an evidentiary hearing that comports with due process satisfies right of access to courts).

{17} For future reference, we reiterate that the district court can simultaneously exercise its appellate and original jurisdiction. *See Sunland Park*, 2000-NMCA-044, ¶¶ 8-12; *see also Moriarty Mun. Schs.*, 2001-NMCA-096, ¶ 31 n.2 (suggesting that "the district court is authorized to issue writs in

the exercise of its original jurisdiction and its appellate jurisdiction"). Thus, if a driver appeals issues that are within the statutory limits of an MVD hearing, and the driver also states claims that are beyond the scope of such a hearing, the district court should consider each claim according to its appropriate standard of review and maintain the distinction between the court's appellate and original jurisdiction in rendering its decision. In the interest of judicial economy and to avoid a multiplicity of lawsuits, we encourage attorneys for drivers in these situations to file only an appeal, as opposed to an appeal and a petition for writ of mandamus. *See Sunland Park*, 2000-NMCA-044, ¶ 12 (indicating approval of the district court's exercising both its appellate and equitable jurisdiction where the issues involved "the same parties and same general subject matter"). However, counsel should indicate in the statement of appellate issues filed with the district court that the driver is requesting the court to exercise its original as well as appellate jurisdiction, and which issues are brought under each.[1]

Due Process Requirements for Notice of Revocation of Driver's License

{18} We turn now to the merits of Driver's due process claims. Driver argues that because he understands only Spanish, the English-language notice amounted to a violation of his right to procedural due process. The issue of whether his due process rights were violated presents a question of law that we review de novo. *See Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-002, ¶ 12, 128 N.M. 423, 993 P.2d 740 (holding that interpretation of state constitution is reviewed de novo). For the reasons that follow, we hold that the arresting officer's personal service of the English-language notice comported with due process.

{19} Without question, procedural due process requirements apply to administrative revocation of a driver's license. *Bell v. Burson*, 402 U.S. 535, 542 (1971). MVD must provide drivers with notice that is "appropriate to the nature of the case." *City of Albuquerque v. Juarez*, 93 N.M. 188, 190, 598 P.2d 650, 652 (Ct. App. 1979) (internal quotation marks and citation omitted), *overruled on other grounds by State v. Herrera*, 111 N.M. 560, 565, 807 P.2d 744, 749 (Ct. App. 1991). More particularly, due process mandates "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (indicating that "reasonableness under the circumstances" is the measure of the adequacy of notice). In an administrative context, due process does not necessarily require actual notice. *Juarez*, 93 N.M. at 190, 598 P.2d at 652 (explaining that "actual notice is not necessary for an administrative suspension"); *see also Dusenbery*, 534 U.S. at 171 (noting in context of notice to federal prisoner regarding pending forfeiture proceeding, that "our cases have never required actual notice"). Thus, the question in this case is not whether Driver understood the notice that he received, but whether personal service of an English-language notice is reasonably calculated to inform drivers of the ten-day time limit for contesting administrative revocation of a driver's license.

{20} Driver was arrested for allegedly driving while intoxicated, and the arresting officer personally served Driver a form clearly labeled "Notice of Revocation," with the seal of the State of New Mexico printed on top. This satisfies due process, regardless of whether Driver understood English, because under the circumstances a reasonable driver who did not understand the contents of the notice would inquire further. *See Bogan v. Sandoval County Planning & Zoning Comm'n*, 119 N.M. 334, 341, 890 P.2d 395, 402 (Ct. App. 1994) (stating that "where circumstances are such that a reasonably prudent person should make inquiries, that person is charged with knowledge of the facts reasonable inquiry would have revealed"); *see also Nazarova v. Immigration & Naturalization Serv.*, 171 F.3d 478, 483 (7th Cir. 1999) (approving of English-language notice to a non-English speaker who faced deportation so long as the notice would trigger further inquiry by a reasonable recipient); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2nd Cir. 1983) (holding that English-language notice to Spanish-speaking social security claimants complied with due process because it communicated to recipients the need for further inquiry). This conclusion, that the form received by Driver amounted to "inquiry notice" that satisfied due process, is consistent with the result reached by other jurisdictions that have considered similar factual situations. *See, e.g., Guerrero v. Carleson*, 512 P.2d 833, 835-37 (Cal. 1973) (finding no due process violation where the state sent to Spanish-speaking recipients an English-language notice informing them that their public benefits were going to be reduced or terminated); *People v. Villa-Villa*, 983 P.2d 181, 182-83 (Colo. Ct. App. 1999) (holding in the context of a criminal conviction for driving with a suspended license, that English-language letter of revocation put defendant on notice that he should have the letter translated); *Alonso v. Arabel, Inc.*, 622 So. 2d 187, 188 (Fla. Dist. Ct. App. 1993) (holding that English-language notice satisfied due process even if state was aware that recipients were not fluent in English); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (finding that English-language notice of denial of unemployment benefits comported with due process even where non-English speaking recipient sought translation from a friend who completely mistranslated the notice); *Vasquez v. State*, 700 N.E.2d 1157, 1159 (Ind. Ct. App. 1998) (rejecting the argument that the state must provide notice of driver's license suspensions in Spanish and English).

{21} We do not agree with all of the reasoning relied upon by these foreign authorities, such as the California Supreme Court's reliance on the supposition that "[t]he United States is an English speaking country." *Guerrero*, 512 P.2d at 835; *see* NMSA 1978, § 14-11-11 (1923) (requiring publication of all local government proceedings to be in Spanish if the local population "is not less than seventy-five percent Spanish-speaking"). However, we agree with the conclusion that in an administrative context, it is possible for English-language notice to provide constitutionally adequate notice to a non-English speaker. Whether English-language notice suffices in a particular situation depends on the circumstances. *See Mullane*, 339 U.S. at 314-15

[1] We recognize that this procedure in district court may cause confusion when an appellant wants to appeal from a decision the district court has made in the exercise of both its appellate and its original jurisdiction. Because the question is not before us in this case, we do not decide whether such an appeal would be made by filing a notice of appeal pursuant to Rule 12-202 NMRA 2003, or by filing a petition for writ of certiorari pursuant to Rule 12-505 NMRA 2003, or by filing both pleadings.

(stating that constitutional requirements are measured with regard to the "practicalities and peculiarities of the case"); *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000) (clarifying that notice aspect of procedural due process is subject to "fact-specific analysis" that takes into account all the circumstances of the case). Our holding today is simply that English-language notice regarding administrative revocation is compatible with due process when it is personally delivered to a driver during the course of his arrest for driving under the influence.

{22} We are not persuaded by Driver's contention that he was denied due process because he did not knowingly or voluntarily waive his right to a hearing. The law does not require a knowing or voluntary waiver of a right to an administrative hearing. Driver relies on case law regarding criminal defendants and their waiver of Miranda rights or their consent to a search. The cited authorities are inapplicable because they involve fundamental rights that are not at issue in the context of the notice required for license revocation.

{23} In summary, personal service of inquiry notice on Driver satisfied due process.

CONCLUSION

{24} For the foregoing reasons, we affirm.

{25} **IT IS SO ORDERED.**

CYNTHIA A. FRY, Judge

WE CONCUR:
JAMES J. WECHSLER, Chief Judge
JONATHAN B. SUTIN, Judge

Certiorari Denied, No. 28,475, February 17, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-024

CITY OF SUNLAND PARK,
Plaintiff-Appellant,
versus
THE NEW MEXICO PUBLIC REGULATION COMMISSION,
Defendant-Appellee.
No. 23,238
(filed: December 22, 2003)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Jerald A. Valentine, District Judge

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OPINION

MICHAEL D. BUSTAMANTE, JUDGE

{1} The City of Sunland Park (City) appeals a district court Order Vacating Alternate Writ of Mandamus and granting the Public Regulation Commission (PRC) jurisdiction to regulate a utility which the City had condemned in an earlier action.[1] We reverse the district court, insofar as the Order held that an automatic stay in the condemnation appeal operated to prevent title in the utility from passing to the City, thereby allowing the PRC to retain ratemaking jurisdiction over the utility.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Following the condemnation of the Santa Teresa Services Company (Utility) by the City, the City twice sought to increase the utility rates it charged customers. The first rate increase occurred after the City took possession of the Utility. The customers (Petitioners) filed a petition with the PRC to oppose the rate increase. The PRC subsequently issued an Order Docketing Declaratory Order, in which the PRC concluded that the City had not yet met the "owned and operated" requirements of NMSA 1978, Section 62-6-4(A) (2003) (providing the PRC with exclusive jurisdiction to regulate and supervise public utilities, except utilities "owned and operated" by a municipal corporation), and therefore any rate increases required PRC approval. According to the PRC, although the City was in possession of the Utility, it was not yet the owner because it had not yet paid for the Utility's assets pursuant to NMSA 1978, Section 42A-1-27 (1981) (vesting title in the condemnor after the condemnation payment is deposited in the district court registry and the certification of deposit is recorded). Hence, the PRC concluded that until the City paid for the Utility's assets, the PRC retained jurisdiction to regulate rates. Complying with the PRC order, the City refunded Petitioners the excess amount charged over PRC-approved rates.

{3} On May 24, 2001, the City deposited the condemnation payment in the court registry pursuant to the Amended Condemnation Judgment and a stipulated order modifying the judgment. Payment was recorded in the district court registry on June 11, 2001. Although the record does not give any detail, the payment was initially made subject to a constructive trust at the City's request. The district court ordered the funds to be disbursed to the condemnee on July 5, thereby dissolving the constructive trust. The money was never disbursed, however, because the County obtained an automatic stay on the disbursement when the Intervenors appealed the condemnation action on July 9, 2001. Rule 1-062(E) NMRA 2003; NMSA 1978, § 39-3-23 (1966). On July 24, the City filed notice with the PRC that it intended to increase rates.

{4} In response to the second rate increase, the PRC issued an order requiring the City to comply with the previously issued Declaratory Order, refund any money collected in excess of the PRC-approved rate, and show cause why it should not be sanctioned. The City applied for and received an Alternate Writ of Mandamus in the district court to quash the order on the ground that the PRC lacked jurisdiction to control rates because the City "owned and operated" the Utility. However, after considering the PRC's answer and oral arguments, the district court entered an Order Vacating Alternate Writ of Mandamus, concluding that because of the stay on the disbursement of funds, the City did not yet own the Utility and the utility rates were, therefore, subject to PRC approval. It is from this Order which the City appeals. We first

[1] For an in depth recitation of the factual and procedural history of the condemnation action, *see City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶¶ 1-34, 134 N.M. 243, 75 P.3d 843.

address a few preliminary procedural issues before turning to the merits of the appeal.

I. Mootness

{5} After the appeal was taken in this matter, this Court affirmed the district court decision in the condemnation action. *City of Sunland Park v. Santa Teresa Servs. Co.*, 2003-NMCA-106, ¶ 96, 134 N.M. 243, 75 P.3d 843. Certiorari was denied by the Supreme Court on August 18, 2003, at which time the automatic stay expired. Thereafter, this Court requested oral argument and briefs from the parties to address the issue of mootness. In response, the PRC concedes that it has "permanently lost jurisdiction to proceed in [this matter]" and represents that it "will not entertain any matter attempting to invoke that jurisdiction." Despite these representations, the City opposes a dismissal for the simple reason that the Petitioners in the declaratory action have not abandoned their claims. Thus, the City argues that the underlying dispute over whether the PRC had jurisdiction during the two year, one month period in which the stay was in effect, and necessarily by implication, whether the City owes a substantial refund to the petitioners for the rate increase in effect during that time, is alive.

{6} We agree that the retroactivity issue is not moot. If the district court's order that the PRC had jurisdiction to prevent the City from increasing rates during the stay was left standing, it could affect the City's obligation to the Petitioners during that period. *See Atchison, Topeka & Santa Fe Ry. Co. v. State Corp. Comm'n*, 79 N.M. 793, 794, 450 P.2d 431, 432 (1969); *Massengill v. City of Clovis*, 33 N.M. 394, 396, 268 P. 786, 786 (1928) (holding that where appellant has material question left unresolved in the litigation, the appeal will not be dismissed as moot); *Littlefield v. N.M. Taxation & Revenue Dep't*, 114 N.M. 390, 392, 839 P.2d 134, 136 (Ct. App. 1992). Principles of res judicata could also affect the City's rights and liabilities in other proceedings in which title during this time period is at issue. Since the City and other persons have a clear stake in the outcome of this appeal, we will not dismiss this action as moot.

II. Procedural Issues

{7} The PRC argues that the district court decision to vacate the writ was proper, because the City did not meet the technical requirements for obtaining an alternative writ of mandamus. The PRC contends first that the writ was legally insufficient because it did not contain any factual allegations necessary to authorize relief, as required by NMSA 1978, Section 44-2-6 (1953). Ordinarily, when an alternative writ is granted, "the application is functus officio, and the alternative [writ] becomes the initial pleading in the case and should state a cause of action within itself." *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 579-80, 249 P. 242, 244 (1926). Together, the writ and the answer form the issues that are before the court. *State ex rel. State Highway Comm'n v. Quesenberry*, 72 N.M. 291, 295, 383 P.2d 255, 257 (1963) ("The issues in mandamus are created solely by and are limited to the allegations of the writ and the answer thereto."). As a general rule, the "allegations of fact in the [application] form no part of the writ and cannot be considered in determining the legal sufficiency of a writ." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 20, 124 N.M. 698, 954 P.2d 763.

{8} The legal sufficiency of an alternative writ, however, is properly raised in the respondent's answer. *See Quesenberry*, 72 N.M. at 295, 383 P.2d at 257-58 (reviewing court will not consider defenses or objections that are not pled in respondent's answer to a writ of mandamus); *State ex rel. Burg*, 31 N.M. at 580, 249 P. at 244. Even where the legal sufficiency of the writ is challenged by the respondent, defects in the pleadings can be waived, and the allegations in the application may be considered, where the respondent answers the allegations as if they were set forth in the writ. *Brantley Farms*, 1998-NMCA-023, ¶ 20; *State ex rel. Burg*, 31 N.M. at 582, 249 P. at 245.

{9} The PRC did not raise the legal sufficiency of the writ in its answer below. Therefore, the district court did not consider its legal sufficiency and the City did not have an opportunity to amend it. Moreover, the answer does not deny the factual allegations set forth in the application, except to deny the City's interpretation of our Order on Motion for Clarification regarding the stay. *See Quesenberry*, 72 N.M. at 294, 383 P.2d at 257 (deeming admitted, any factual allegations that were not denied in answer to the alternative writ of mandamus). Rather, the answer addresses, and hence preserves, the legal issue regarding the effect of the stay on the City's legal right to hold title. Since the factual allegations were not contested, either below or for that matter, on appeal, we conclude that the PRC admitted the factual allegations and waived its right to any defects in the writ. Hence, we decline to affirm the district court's decision on the sufficiency of the writ, and we will consider the allegations in the application and the attachments that were submitted in the record proper.

{10} The PRC next argues that the City had an adequate remedy at law since it enjoyed the right to appeal the Commission's order directly to our Supreme Court. Ordinarily, this is true when a party appeals a final order issued by the PRC. NMSA 1978, § 62-11-1 (1993); 17 NMAC § 1.2.39(H) (2001). However, where it is alleged, as it is here, that the PRC is acting outside the scope of its jurisdiction or refusing to perform under the Public Utility Act, NMSA 1978, Section 62-12-2 (1953) expressly allows any interested party to "bring suit by mandamus, prohibition, injunction or other appropriate remedy against the . . . commission . . . in the district court of the county in which the complaint or controversy arose." We, therefore, decline to affirm the district court's decision on this ground, as well.

{11} Finally, the PRC maintains that the City did not have a clear legal right to enforce since no court had ever ruled that it owned the Utility. "Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act." *Brantley Farms*, 1998-NMCA-023, ¶ 16; *Laumbach v. Bd. of County Comm'rs*, 60 N.M. 226, 232, 290 P.2d 1067, 1069 (1955). A ruling by a court on the City's ownership interests was not necessary. By statute, title vested in the City after it made "payment in full to the clerk of the district court in accordance with the judgment in the condemnation action" and "[a] copy of the judgment showing payment [was] recorded in the office of the county clerk." § 42A-1-27(A), (B). Once the City satisfied the requirements of Section 42A-1-27, the City had a clear legal right to enforce. Although this Court does not adjudicate rights on mandamus, we have never held that a legal right must be evidenced by court order before an action in mandamus can be brought. We find that the district court's decision to vacate the writ cannot be affirmed on this ground either.

{12} To the extent that the PRC now argues that *full payment* was not made and title did not pass because the money was deposited into the court's registry subject to the terms of the constructive trust, we find this argument is without merit under

the facts of this case. The constructive trust was dissolved by the district court's order authorizing the disbursement of the funds on July 5, 2001. The City's notice of intent to increase the utility rates and the automatic stay came about after this court ordered disbursement of the funds. Thus, assuming that "full payment" under Section 42A-1-27 means "unconditional payment in full," as the PRC argues, there were no conditions on the money when the stay went into effect.

{13} Further, to the extent that the district court may have interpreted Section 47A-1-27 to require disbursement of the funds to the condemnee before title passed, this interpretation is not supported by the plain language of the statute. Section 42A-1-27(A) plainly requires "payment in full to the clerk" not to the condemnee. Title vests, according to Subsection (B), when the certification of deposit is recorded in the district court, not when the money is disbursed to the condemnee.

III. The Effect of the Automatic Stay

{14} In its Order Vacating the Alternate Writ of Mandamus, the district court ruled:

> But for the Stay issued by the Court of Appeals, this Court would conclude that title to the [Utility] has transferred to the City, making it the owner of the [Utility]. Because of the stay, the City is not yet the owner and the [PRC] has jurisdiction to proceed in [the declaratory action].

The City argues that since title to the Utility passed to it by operation of law when it recorded the certification of deposit, the district court decision gave the stay improper retroactive effect to divest the City of title. According to the City, the plain language of Section 39-3-23 and Rule 1-062(E) provide that an automatic stay is effective as of the time the notice of appeal is filed. Although it cites no New Mexico authority in support, the City does cite several jurisdictions that have declined to give retroactive effect to stays. Finally, the City argues that the decision is contrary to clear legislative intent to provide certainty in condemnations, frustrates the City's efforts in running the Utility, and creates a risk to public safety and welfare.

{15} The PRC responds that the stay had retroactive effect under *Quintana v. Knowles*, 113 N.M. 382, 827 P.2d 97 (1992), by placing the parties in the position they enjoyed before the district court's decision. As further support, the PRC cites to other jurisdictions that follow this rule. The PRC also urges this Court to disregard the arguments and supporting documents raised by the City in its Motion for Reconsideration below, since the district court did not consider them in denying the motion.

A. Motion for Reconsideration

{16} As an initial matter, we address whether it is proper for this Court to consider the material provided in the City's motion for reconsideration. In the motion, as on appeal, the City argues that the district court's decision was injurious to public safety and welfare. An affidavit was attached to the motion describing how the Utility was in violation of state and federal waste water disposal standards which required immediate action. After filing the motion, the City requested, and was granted, an extension of time in which to file a notice of appeal. The City supplemented the motion with additional material, but filed a notice of appeal before the motion was heard. Ultimately, the district court denied the motion, finding it lacked jurisdiction because of the appeal. *Wagner Land & Inv. Co. v. Halderman*, 83 N.M. 628, 630, 495 P.2d 1075, 1077 (1972) (filing notice of appeal divests trial court of jurisdiction). The City replies that the order denying the motion indicates that the district court *considered* the motion, but was *prevented* from ruling on it because it lost jurisdiction.

{17} Under these facts, it is irrelevant that the district court "considered" the motion under these facts. Generally, this Court considers additional material attached in support of a motion for reconsideration *only when the district court considers or relies on the material to make its final determination*. *In re Estate of Keeney*, 121 N.M. 58, 60, 908 P.2d 751, 753 (Ct. App. 1995). Normally, an appellate court may not consider the documents if the district court's decision is not based on that material. *Selby v. Roggow*, 1999-NMCA-044, ¶¶ 10-11, 126 N.M. 766, 975 P.2d 379 (declining to consider additional information in motion for rehearing because trial court did not consider it in ruling it was without jurisdiction to rule on motion); *In re Estate of Keeney*, 121 N.M. at 60, 908 P.2d at 753 ("Because the trial court in *Schmidt [v. St. Joseph's Hosp.*, 105 N.M. 681, 684-85, 736 P.2d 135, 138-39 (Ct. App. 1987)] did not consider the affidavits when making its determination as to summary judgment, this Court could not review them as they were not among the affidavits upon which the trial court's decision was based."). In this case, the affidavit and other material had no impact on the district court's decision to deny the motion. Because the district court did not consider or rely on the material in reaching its decision, we find that it is not properly before this Court on appeal. As such, we will not consider the material. However, under the standard of review applicable to this appeal, we are free to consider de novo the legislative intent behind a statute.

B. Standard of Review

{18} The focal issue is whether the County's automatic stay under Section 39-3-23 and Rule 1-062(E) in the condemnation case meant that the City could not be considered to be in title of the Utility, even though it paid the judgment per Section 42A-1-27, thus allowing the PRC to assert jurisdiction over the City's rate-making under Section 62-6-4(A). This is a question of law that we review de novo. *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-007, 121 N.M. 272, 274, 910 P.2d 906, 908 (concluding that the scope of former PUC's jurisdiction, which is defined by statute, is a question of law). Reviewing courts "accord little deference to [an] agency's own interpretation of its jurisdiction." *Id.* at 275, 910 P.2d at 909 (internal quotation marks and citation omitted); *El Vadito de los Cerrillos Water Ass'n v. N.M. Pub. Serv. Comm'n*, 115 N.M. 784, 787, 858 P.2d 1263, 1266 (1993).

C. The Stay had no Retroactive Effect on the Title Held by the City

{19} The PRC is a creature of statute that derives its authority and jurisdiction from the New Mexico Public Utility Act. *See* NMSA 1978, §§ 62-3-1 to -5 (1953, as amended through 2003); *El Vadito de los Cerrillos Water Ass'n*, 115 N.M. at 787, 858 P.2d at 1266. Under the Act, the PRC has no jurisdiction over public utilities that are owned and operated by a municipal corporation, unless they agree otherwise. § 62-6-4(A). As stated above, the City took title of the Utility, by statute, when it deposited the condemnation payment in the court registry and recorded the certification of deposit. The moment it did so, the PRC lost jurisdiction over the Utility, and could not regain jurisdiction, unless the automatic stay retroactively divested the City of its right to hold legal title.

{20} The Eminent Domain Code does not address the effect of a stay in condemna-

tion appeals. *See* NMSA 1978, §§ 42A-1-1 to - 34 (1981, as amended through 2001). Where the Code is silent, the Rules of Civil Procedure are applicable, unless application of the rules would be inconsistent with it. § 42A-1-15. In New Mexico, filing an appeal by the State or its political subdivision triggers the automatic stay provisions of Section 39-3-23 ("When the appellant . . . [is] a county . . . , the taking of an appeal . . . operates to stay the execution of the judgment, order or decision of the district court without bond.") and Rule 1-062(E) ("When an appeal is taken by the state or . . . any political subdivision, . . . the taking of an appeal shall . . . operate as a stay."). *Cf.* Rule 1-062(D) ("The stay is effective when the supersedeas bond is approved by the district court."). Under the plain language of the statute and the rule, a stay is generally prospective rather than retroactive, unless otherwise specified.[2] *State v. Davis*, 2003-NMSC-022, ¶ 6, ___N.M.____, 74 P.3d 1064 (interpreting legislative intent is primarily gleaned through plain language of a statute, unless language is ambiguous or meaning would render it absurd, unjust, or contrary to legislative spirit).

{21} Our courts have also consistently held that a stay merely halts proceedings "without destroying the force and effect of the judgment and leaves the proceedings in the condition in which it finds them." *Higgins v. Fuller*, 48 N.M. 215, 217, 148 P.2d 573, 574 (1943) (internal quotation marks and citation omitted); *Michaluk v. Burke*, 105 N.M. 670, 675, 735 P.2d 1176, 1181 (Ct. App. 1987) ("A stay stops any future executions on the specific judgment appealed from."). When the automatic stay issued, the district court's order had been executed: the City was in possession of the Utility, and it had deposited and recorded the condemnation payment in the district court registry. The only act left undone by the district court was to release the funds to the trustee and the intervenors. Hence, the stay merely prevented the final disbursement of the money. The stay had no effect on the title since title had already vested.

{22} Our conclusion that a stay is generally not retroactive is also consistent with the prevailing common law rule, as well as several other jurisdictions that generally decline to give retroactive effect to a stay. *See Secure Eng'g Servs., Ltd. v. Int'l Tech. Corp.*, 727 F. Supp. 261, 264 (E.D. Va. 1989) (surveying jurisdictions that follow the common law rule enunciated in *Freeman Trustee v. Dawson*, 110 U.S. 264, 270 (1884), that a supersedeas bond generally does not retroactively defeat an executed judgment). The jurisdictions that give retroactive effect to a stay, and upon which the PRC relies, have done so through legislative enactment. *Id.* As indicated above, New Mexico law appears to give prospective effect to stays, unless otherwise provided.

{23} The PRC contends that *Quintana* is controlling. Despite New Mexico law to the contrary, the PRC cites *Quintana* for the broad proposition that a stay "restores the parties to and maintains them in the status they enjoyed prior to the judgment or decree in the trial court." 113 N.M. at 382-83, 827 P.2d at 97-98. *Quintana* is inapposite. *Quintana* was a direct appeal, involving a party who quieted title to land he did not possess. Appellant was in possession of the land at the time of the decision, but did not request a stay on appeal. *Id.* at 382, 827 P.2d at 97. The only issue before the Court was whether the right to appeal a decision involving title to property was conditioned on posting a supersedeas bond. *Id.* at 383-84, 827 P.2d at 98-99. When an appellant in possession of land loses the land to an adversary but desires to maintain the status quo by remaining in possession of it during the appeal, a bond would normally protect appellee's interests and compensate appellee for any damage incurred to the property during the appeal. *See id.* at 383, 827 P.2d at 98. The Court held that a bond was not required under the plain language of the property supersedeas bond statute, even though it left appellee in a perilous position. *Id.* at 384, 827 P.2d at 99. Hence, the quoted language is not only dicta, it is not controlling.

{24} We read *Quintana* to stand for the broad proposition that "[a] *bond* is designed to protect the appellee against loss and preserve the status quo while the case is appealed" where appellant is in possession of the disputed land. *Khalsa v. Levinson*, 2003-NMCA-018, ¶ 21, 133 N.M. 206, 62 P.3d 297 (citing *Quintana*, 113 N.M. at 382-83, 827 P.2d at 97-98); *see Higgins*, 48 N.M. at 217, 148 P.2d at 574 (interpreting property supersedeas bond statute to require appellant who is in possession of land granted to another, to post a bond to maintain the status quo). Consequently, we find it has no applicability to the present case. The PRC has made no claim of title to the Utility, and, further, it withdrew from the condemnation action prior to trial. *City of Sunland Park*, 2003-NMCA-106, ¶ 5. The County had only a monetary interest in the condemnation appeal. *Id.* ¶ 6. Indeed, none of the Intervenors even had standing to challenge the passing of title to the City. *See id.* ¶ 48. Hence, the only purpose the stay could serve in the condemnation action was to prevent the funds from being disbursed.

{25} Our reading of Section 39-3-23 and Rule 1-062(E) as they pertain to appeals in condemnation actions is consistent with the legislative intent and policies behind the Public Utility Act and Eminent Domain Code. The legislature has allowed municipalities to condemn and operate utilities, without being subject to PRC regulation and control. *See United Water N.M., Inc.*, 121 N.M. at 277-78, 910 P.2d at 911-12. The PRC was created to serve as a watchdog for the public interest. *See id.* (citing Public Utility Act policy statement, Section 62-3-1(B), that the combined interests of the public, consumers, and investors requires the regulation and supervision of public utilities). Nonetheless, the legislature clearly believed that municipally owned and operated utilities did not need PRC supervision. *Id.* at 278, 910 P.2d at 912 (finding the legislature concluded that municipalities were fully capable of protecting the citizens' interests without commission oversight); *see also Fleming v. Town of Silver City*, 1999-NMCA-149, ¶ 11, 128 N.M. 295, 992 P.2d 308 ("Although a municipality operates within its propriety function when it owns and operates a water utility, it nevertheless is a governmen-

[2] We can envision only rare instances where a stay might have retroactive effect in condemnation actions, such as under the terms of the stay itself or where there was a direct appeal challenging the condemnation. Nothing in our orders regarding the stay provided for a retroactive effect. To the contrary, as we stated in our Order on Motion for Clarification of Court Order, the Orders "were directed solely at the district court's July 5, 2001, Order Authorizing Disbursement of Funds." We further declined to expand the stay and suggested that such requests be directed to the district court. There is no indication in the record that the parties ever did that. Moreover, as we explain below, the PRC and the Utility did not appeal the condemnation judgment. The other Intervenors had no standing to do so. Thus, we find no basis for the argument that the stay affected the City's title on these limited grounds.

tal entity which otherwise performs governmental functions[.]").

{26} The legislature also recognizes a need to provide certainty in condemnation actions where both public and private rights and interests are at stake. *See generally* §§ 42A-1-1 to - 34 (setting forth procedure and rights in condemnation actions); *see also* § 42A-1-22 (providing for immediate possession prior to judgment); § 42A-1-27 (vesting title in condemnor immediately upon recording certification of deposit in court registry); *see also City of Sunland Park*, 2003-NMCA-106, ¶¶ 43-44; 46-47 (discussing constitutional provisions touching public and private interests at stake in condemnation, as well as procedure in condemnations set forth by the legislature).

{27} In light of the clear legislative intent to protect the public, as well as private interests in these areas, it would be unreasonable to find that the stay operated to restore jurisdiction to the PRC, while leaving the rights of both the City and the Utility in limbo. *See United Water N.M., Inc.*, 121 N.M. at 276, 910 P.2d at 910 ("Our interpretation of the statute[s] must be consistent with legislative intent, and our construction must not render the statute[s'] application absurd, unreasonable, or unjust.") (internal quotation marks and citation omitted).

{28} Inherent in these observations is the principle that dual supervision of a municipally owned and operated utility by an outside agency such as the PRC is not only contrary to, but potentially frustrating to, the public interest. If the stay were to retroactively divest the City of title and allow the PRC to regulate it as appellees urge, the PRC would be regulating a utility wholly paid for and operated by a municipality, and ultimately, interfering in City budget and management decisions, as well as the City's ability to provide adequate services to the public. Surely, our legislature did not intend such a result.

{29} The PRC's argument is particularly unpersuasive in this case, where the City met every statutory condition required to gain title and so divest the PRC of jurisdiction, and the condemnation judgment was upheld on appeal.

CONCLUSION

{30} Accordingly, we reverse the district court decision and find that the stay did not operate retroactively to give the PRC jurisdiction over the Utility during the condemnation appeal.

{31} **IT IS SO ORDERED.**
MICHAEL D.
BUSTAMANTE, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge

Certiorari Granted, No. 28,482, February 16, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-023

JAMES JOUETT,
Worker-Appellant,
versus
TOM GROWNEY EQUIPMENT COMPANY, ACE USA, PATTERSON DRILLING, CLEARNAN INSURANCE, BIG DOG DRILLING, and HIGHLAND INSURANCE COMPANY,
Employer/Insurer-Appellees.
No. 23,669 (filed: December 16, 2003)

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
Gregory D. Griego, Workers' Compensation Judge

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OPINION

MICHAEL VIGIL, JUDGE

{1} In this worker's compensation case, James Jouett (Worker) suffered an accidental injury to his shoulder. He received medical treatment and continued working, but with pain to the injured shoulder. Worker was then employed by subsequent employers, and the pain to his injured shoulder became progressively more painful, until he could no longer work. The Workers' Compensation Judge (WCJ) denied medical and compensation benefits to Worker from Tom Growney Equipment Company (First Employer) on the ground that his work activity with the subsequent employers "materially aggravated Worker's shoulder condition" which "constituted an independent intervening event" that relieved First Employer of any further responsibility. We reverse, holding that there was no independent intervening cause. We also hold that if appropriate, First Employer is entitled to seek contribution from the subsequent employers.

FACTS AND PROCEEDINGS

{2} Worker injured his left shoulder on January 19, 1999, while working for First Employer as a mechanic's helper. The compensation order found that this injury was accidental, arose out of and in the course of Worker's employment and that First Employer had legally sufficient notice. These findings are not challenged on appeal.

{3} The parties stipulated before trial that Worker saw Steven Hood, M.D. for the original shoulder injury in January 1999, and Dr. Hood had x-rays taken, which appeared normal. Dr. Hood diagnosed the problem as muscle strain. Worker did not lose any time from work for First Employer as a result of the original injury and continued working for First Employer until May 2000, when he left to take another job that paid more.

{4} From May 10-23, 2000, Worker worked for Patterson Drilling (Second Employer), a drilling company. On June 6, 2000, Worker went to work for Big Dog Drilling (Third Employer). There were short periods of time during which Worker was not employed by Third Employer. During one of these periods, Worker was employed by Key Drilling. However, with the exception of these short interruptions, Worker worked for Third Employer from June 6, 2000, until he stopped working on December 14, 2001.

{5} Frank P. Maldonado, M.D. was the only treating physician whose deposition was taken and admitted into evidence at the formal hearing. He first saw Worker on May 15, 2001. After he received the results of several diagnostic tests, the doctor tentatively diagnosed Worker as suffering from shoulder pain caused by a bone spur that was impinging on the space between the shoulder joint and the shoulder blade. In his opinion, to a reasonable medical probability, Worker never reached maximum medical improvement after the original injury of January 19, 1999. On May 31, 2001, Dr. Maldonado recommended that Worker see Dr. Victor Brown for an arthroscopic evaluation based on his diagnosis of painful left shoulder, cause unknown, attributable to the January 19, 1999, injury to a reasonable degree of medical probability. If the arthroscopic evaluation showed an impingement syndrome, it was to be corrected during the evaluation itself.

{6} First Employer's insurer refused to pay for the arthroscopic evaluation or any further medical treatment, so Worker filed a claim against First Employer and its insurer. First Employer filed a response to Worker's claim, disclaiming all responsibility for medical or compensation benefits and alleging that Second or Third Employer or both were wholly responsible. At the mediation conference, Worker and First Employer agreed that Worker would file an amended complaint naming Second and Third Employers and their respective insurers as additional respondents. An amended complaint was then filed. At the time of trial, Worker still had not had the arthroscopic evaluation.

{7} While this was happening, Worker continued to work, first for Third Employer and then for Key Drilling in July 2001, and then for Third Employer again. By December 14, 2001, Worker's shoulder had become so painful and weak that he could no longer do the heavy labor required at his job for Third Employer. Worker stopped working for Third Employer and he again amended his claim seeking temporary total disability benefits as well as medical treatment.

ISSUES ADDRESSED

{8} We address: (1) whether the WCJ erred as a matter of law in determining that the work activity with the subsequent employers constituted an independent intervening cause which relieved First Employer of all responsibility for benefits, and (2) whether First Employer may seek contribution from any subsequent employers for benefits paid to worker. In light of our disposition of these issues, we do not address the remaining issues on the merits.

1. First Employer Is Responsible for Worker's Medical Expenses and Payments for Worker's Temporary Total Disability

{9} Worker argues that the WCJ erroneously concluded as a matter of law that under *Aragon v. State Corrections Department*, 113 N.M. 176, 824 P.2d 316 (Ct. App. 1991), Worker's subsequent work activities with Second and Third Employer constituted an independent intervening cause, thereby relieving First Employer from a duty to provide benefits to Worker. First Employer argues that substantial evidence supports the determination. However, the question is not one of substantial evidence; it is whether the law was correctly applied to the facts. Thus, we review this issue de novo. *Hise v. City of Albuquerque*, 2003-NMCA-015, ¶ 8, 133 N.M.133, 61 P.3d 842 (stating application of law to the facts is reviewed de novo on appeal); *see also Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶¶ 14, 21, 127 N.M. 729, 987 P.2d 386 (stating independent intervening cause a question of policy, foreseeability and remoteness and holding that no instruction on independent intervening cause to be given in cases involving multiple acts of negligence); *Edens v. N.M. Health & Soc. Servs. Dep't*, 89 N.M. 60, 62, 547 P.2d 65, 67 (1976) (applying principle of de novo review to a determination of whether an accidental injury "arose out of and in the course of the employment"). We agree with Worker that the subsequent work activities with Second and Third Employers do not constitute an independent intervening cause under *Aragon* and reverse.

{10} After a worker is injured on the job, the employer is statutorily required to provide "in a timely manner reasonable and necessary health care services from a health care provider." NMSA 1978, § 52-1-49(A) (1991). The statute requires those services to be provided "as long as medical or related treatment is reasonably necessary." *Id.* This is true even if the worker is not entitled to compensation benefits because the accidental injury never becomes disabling or because the worker's claim for compensation benefits is barred by the statute of limitations. *See Nasci v. Frank Paxton Lumber Co.*, 69 N.M. 412, 415, 367 P.2d 913, 916 (1961); *Barela v. Midcon of N.M. Inc.*, 109 N.M. 360, 365, 785 P.2d 271, 276 (Ct. App. 1989). The employer at the time of the accidental injury remains responsible for medical and related treatment even if the original accidental injury is later aggravated when the worker returns to work. *McMains v. Aztec Well Serv.*, 119 N.M. 22, 24-25, 888 P.2d 468, 470-71 (Ct. App. 1994); *Beltran v. Van Ark Care Ctr.*, 107 N.M. 273, 276, 756 P.2d 1, 4 (Ct. App. 1988).

{11} *Aragon* does not alter these duties. In *Aragon*, the worker suffered a herniated disc at L5-S1 when he was injured on the job in 1983. He received medical treatment and compensation benefits and eventually returned to full duty work without restrictions. *Aragon*, 113 N.M. at 177, 824 P.2d at 317. Under the law in effect at that time, Aragon was no longer disabled when he returned to work with no restrictions. *See* 1963 N.M. Laws ch. 295, § 19, repealed. Five years later, Aragon injured his back while working on his personal vehicle at his home. *Aragon*, 113 N.M. at 177, 824 P.2d at 317. He filed a claim for medical expenses and disability compensation for this second, non-industrial injury. *Id.* The medical evidence showed that Aragon's new pain resulted from a herniation of the L3-4 disc, which was caused entirely by the second, non-industrial accident. *Id.* at 181-82, 824 P.2d at 321-22. The WCJ denied the claim and this Court affirmed. *Aragon* addressed whether and to what ex-

tent a non-industrial event that causes a new injury or disability may be compensable.

{12} In *Aragon*, we stated that a worker could recover for a disability that results from a non-industrial event if the non-industrial event was in some way related to or caused by the earlier work-related injury. We gave the example of a worker whose ankle is impaired as the result of a work-related accidental injury and who later falls at home. If the non-industrial event, the fall at home, was caused by a residual weakness in the worker's ankle, an industrial cause, the worker would be entitled to additional medical and possibly compensation benefits. *Id.* at 179, 824 P.2d at 316. We reaffirm that holding. *Cf. Gomez v. Bernalillo County Clerk's Office*, 118 N.M. 449, 882 P.2d 40 (Ct. App. 1994) (holding that a worker who fell at work, injuring her wrist and elbow, was not entitled to compensation for a later shoulder injury that was caused by a fall at home).

{13} We went on to say that "our holding today would *not* bar recovery for disability resulting from aggravation of a work-related injury by the normal physical stresses of everyday life." *Aragon*, 113 N.M. at 179, 824 P.2d at 319 (emphasis added). This Court is well aware that some conditions caused by work-related injuries deteriorate over time. *See, e.g., Henington v. Technical-Vocational Inst.*, 2002-NMCA-025, ¶ 5, 131 N.M. 655, 41 P.3d 923 (affirming increased benefits award for knee injury that doctor testified would ultimately require a knee replacement surgery at some point in the future); *Baca v. Complete Drywall Co.*, 2002-NMCA-002, ¶ 17, 131 N.M. 413, 38 P.3d 181 (addressing the situation that occurs when multiple disabilities are connected to one accidental injury; holding that a subsequent disability that is the result of the original injury and the normal events of everyday life is compensable); *Brewster v. Cooley & Assocs.*, 116 N.M. 681, 687, 866 P.2d 409, 415 (Ct. App. 1993) (awarding worker medical benefits for back surgery that she would eventually need). Our statement in *Aragon* was simply a reference to that type of situation. We also reaffirm that holding of *Aragon.*

{14} First Employer also argues that this case is more like *Salinas-Kendrick v. Mario Esparza Law Office*, 118 N.M. 164, 879 P.2d 796 (Ct. App. 1994), and therefore Second or Third Employer or both should be liable. We disagree. At first glance, *Salinas-Kendrick* may appear similar to this case, because the on-the job accident occurred more than a year before the disability and there were two insurers, one that covered the risk at the time of the accident and a second that took over the coverage four months later and covered the risk for the ten months before the worker became disabled. In *Salinas-Kendrick*, we held that the insurer who covered the risk at the time the worker became disabled was responsible for medical and compensation benefits. However, there was no medical testimony in *Salinas-Kendrick* that the initial accident was causally connected to the subsequent need for medical treatment or to the subsequent disability. Such medical testimony is present in this case, making *Salinas-Kendrick* inapplicable.

{15} In summary, we hold that First Employer is liable for medical treatment and for the period of temporary total disability that began on December 15, 2001. Consequently, we reverse that portion of the compensation award and remand for entry of an order directing First Employer's insurer to immediately begin paying for medical and related services for Worker's shoulder, as well as temporary total disability benefits from December 15, 2001, forward. As we discuss below, nothing in this portion of our opinion precludes the WCJ on remand from determining that Second or Third Employer or any other subsequent employer is responsible to First Employer for a portion of the medical expenses or temporary total disability payments and related benefits.

2. Contribution

{16} We address this issue as a matter of judicial economy because it may arise on remand. We confine our discussion to whether, as a matter of law, the WCJ is barred from allocating responsibility for medical treatment or compensation and related benefits to any employer of Worker subsequent to the First Employer.

{17} We have already held that First employer is liable for medical treatment and for the period of temporary total disability that began on December 15, 2001. The WCJ also determined that the work activity with the subsequent employers "materially aggravated Worker's shoulder condition." We construe this to mean that Worker's shoulder pain increased while working for the subsequent employers. To this extent, we affirm the WCJ determination. However, until it becomes disabling, pain by itself is not compensable. *See Tallman ABF (Arkansas Best Freight)*, 108 N.M. 124, 131, 767 P.2d 363, 370 (Ct. App. 1988) (noting worker suffered pain since 1977, but when he could no longer work in 1986, date of disability fixed); *Casias v. Zia Co.*, 93 N.M. 78, 80, 596 P.2d 521, 523 (Ct. App. 1979) (stating compensation not payable until work-related accident produces an injury which becomes disabling).

{18} In this case, the physical condition of Worker's shoulder is unknown because the arthroscopic evaluation has not been performed. We address whether First Employer must remain liable for the entire cost for medical treatment, temporary total disability, and related benefits if the results of the arthroscopic study demonstrate that Worker's present disability is causally connected to his work for Second or any other subsequent employer. NMSA 1978, §52-1-47(D) (1999) allows a *second* employer to reduce its payments to the extent payments would otherwise overlap payments made by a first employer. *Garcia v. Mora Painting & Decorating*, 112 N.M. 596, 599, 817 P.2d 1238, 1241 (Ct. App. 1991); *Gonzales v. Stanke-Brown & Assocs.*, 98 N.M. 379, 386, 648 P.2d 1192, 1199 (Ct. App. 1982). We refer to this remedy as "apportionment." However, this statute is of no assistance to First Employer and there is no similar provision giving relief where the First Employer is held initially responsible.

{19} The principle behind apportionment is to treat the employers and their insurance companies equitably when two successive injuries combine to produce the final disability. *See Powers v. Riccobene Masonry Const., Inc.*, 97 N.M. 20, 25, 636 P.2d 291, 296 (Ct. App. 1980); *Silva v. Maplewood Care Ctr.*, 582 N.W.2d 566, 568 (Minn. 1998). Under this concept, the successive employers and their insurers are each required to contribute their proportionate share of the total responsibility for benefits when those benefits are awarded on the basis of a single rating of disability resulting from more than one compensable injury. *Id.* We hold that the same remedy is available to the First Employer and refer to it as "contribution." We do so to avoid the harsh result of making First Employer assume the entire cost for medical treatment or compensation and related benefits when subsequent injuries may have combined to produce a single disability. *See Grubelnik v. Four-Four, Inc.*, 2001-NMCA-056, ¶ 22, 130 N.M. 633, 29 P.3d 533 (stating situations exist in which Workers' Compensa-

tion Act does not provide all answers, and without an "explicit answer" to the question, "fundamental fairness" is to be the guide) (internal quotation marks omitted); *Lackey v. Darrell Julian Const.*, 1998-NMCA-121, ¶ 20, 125 N.M. 592, 964 P.2d 153 (making same statement).

{20} Our holding is consistent with other provisions of the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2003), which require the allocation of fault and responsibility in other specific circumstances. *See* § 52-1-10.1 (providing that employer's right to reimbursement from third-party action brought by worker is to be diminished by percentage of fault attributed to employer); § 52-1-47(D) (providing second employer is entitled to reduction for compensation payments made by first employer to avoid duplication of benefits); § 52-1-65 (providing for credit for benefits furnished or paid under laws of other jurisdictions). It is also consistent with the public policy of New Mexico to apportion responsibility in proportion to the result caused by one's actions. *See Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981) (adopting pure comparative negligence).

{21} We emphasize three points. First, contribution does not affect the obligation of the First Employer to pay worker all benefits he is entitled to. The claim for contribution is to be decided separate and apart from the compensation claim. In this way, Worker promptly gets the benefits he is entitled to without delay. *See Hammonds v. Freymiller Trucking, Inc.*, 115 N.M. 364, 369, 851 P.2d 486, 491 (Ct. App. 1993) (stating a purpose of the Workers' Compensation Act is to ensure prompt compensation to a worker). Second, in order to obtain contribution, the First Employer must establish as to the subsequent employer that worker sustained an accidental injury arising out of and in the course of his employment; that the accident was reasonably incident to his employment; and that some portion of the disability is a natural and direct result of the accident. *See* § 52-1-28 (setting forth statutory requirements for a worker's compensation claim); *Garcia*, 112 N.M. at 601, 817 P.2d at 1243 (finding no apportionment due from first employer when worker was completely healed from first injury when he suffered second injury). Finally, the First Employer's claim for contribution is completely separate from and therefore not subject to the notice requirements and statute of limitations applicable to a worker's claim. *See* § 52-1-29(A) (stating worker claiming compensation from employer must give notice of accident to employer within fifteen days after worker knew, or should have known, of its occurrence); § 52-1-31 (stating claim must be filed not later than one year after failure or refusal of employer or insurer to pay compensation). Because the contribution claim is a third-party action brought by an employer against other employers that may be deemed liable for contribution, the general statute of limitations for contribution actions shall apply.

{22} In future cases raising similar issues, we suggest that an employer seeking contribution file third-party claims against any other potentially liable employers. However, in the present case, the potential employers are already parties. Therefore, First Employer may choose to file cross-claims against the successive employers if the medical evidence provides a good faith basis for such claims.

3. Remaining Issues

{23} Worker named Second and Third Employers as respondents after First Employer alleged in its response that it was not responsible and one or both of them were responsible. Second and Third Employers have raised other issues relating to the claim made against them by Worker. We hold that Worker's claims against them were premature because the arthroscopic evaluation has not been performed and the condition of Worker's shoulder is unknown. Under these circumstances, we direct that all findings and conclusions made by the WCJ that relate to Second and Third Employer be vacated. This is to be without prejudice to any rights or claims that might arise after the arthroscopic evaluation is performed.

{24} Second Employer asserts that his motion to dismiss Worker's claim for failure to join Key Drilling was improperly dismissed. We do not consider this argument because Worker does not have the obligation to file a claim against any employer, except the employer who is responsible for the first injury. On remand, First Employer may file cross-claims or third-party complaints against any employer who may be liable for contribution.

CONCLUSION

{25} In summary, we hold that First Employer is responsible for payment of medical expenses and related services and compensation for temporary total disability. On remand, an order shall be entered directing First Employer to immediately begin paying for Worker's medical expenses and related services and to bring payment of temporary total disability benefits current. The WCJ may also conduct further proceedings consistent with this opinion, if requested, to determine the extent, if any, to which any subsequent employer shall share responsibility for Worker's medical expenses or compensation and related benefits. Finally, all findings and conclusions made by the WCJ relating to Second and Third Employer shall be vacated without prejudice to any rights or claims that might arise after the arthroscopic evaluation is performed.

{26} **IT IS SO ORDERED.**

MICHAEL E. VIGIL, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

CELIA FOY CASTILLO, Judge

Certiorari Granted, No. 28,477, February 16, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-026

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
KATHLEEN SMITH,
Defendant-Appellant,

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
ROY GONZALES,
Defendant-Appellant,

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RICHARD MONTOYA,
Defendant-Appellant.
Nos. 24,253, 24,254, and 24,258
(filed: January 12, 2004)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
Thomas J. Hynes, District Judge

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OPINION

RODERICK T. KENNEDY, JUDGE

{1} In these three consolidated appeals, we consider the effect of successive amendments to the driving while under the influence of liquor (DWI) statute on a felony DWI sentencing. *See* NMSA 1978, § 66-8-102 (1953, as amended through 2003). We hold that the last amendment of the statute that was enacted by the legislature governs the sentencing of Defendants herein, and accordingly reverse and remand for resentencing under the proper statute.

BACKGROUND

{2} On March 19, 2003, HB 250, 2003 N.M. Laws Ch. 51, became law when signed by the Governor pursuant to its emergency clause. This law did not change the existing provision of Section 66-8-102(G).

{3} On March 28, 2003, the Governor signed into effect HB 117, 2003 N.M. Laws Ch. 90, § 3, that extensively amended the sentencing provisions of the DWI statute by increasing the penalties for felony offenses for those who have committed four through seven offenses. Section 66-8-102. The law contained an emergency clause, making it effective upon its passage and signature by the Governor on March 28, 2003.

{4} On April 5, 2003, the Governor signed another amendment to Section 66-8-102. In HB 278, the Legislature amended Section 66-8-102(G) yet again, eliminating the amendments that HB 117 created as subsections (H) through (J), and returning felony DWI sentencing to its original language. 2003 N.M. Laws Ch. 164 §10. This amendment contained no emergency clause and became law on July 1, 2003. This is the law currently appearing in New Mexico Statutes Annotated.

{5} This case comes to the Court pursuant to its summary calendar disposition. We issue this formal opinion for two reasons: (1) the issue presented is clearly governed by existing law; and (2) clarifying the issue is one of immediate importance to the courts and practitioners concerned with which felony DWI sentencing regime should apply after July 1, 2003. The issue in this case is one concerning statutory enactment and compilation. That the controversy arises in the context of a pressing social problem (DWI) or has collateral consequences to federal highway funding issues is secondary to our role in determining this case.

{6} We issued a calendar notice proposing to hold that Defendants should have been sentenced under HB 278 pursuant to a statutory provision requiring imposition of a lesser punishment if a defendant is sentenced after the effective date of an amendment reducing the sentence. The State responded with a memorandum in opposition. For the reasons that follow, we are unpersuaded and hold that HB 278 is the controlling law after July 1, 2003, and should have been applied in all three cases.

DISCUSSION

{7} We hold that the sentences here are controlled by NMSA 1978, §12-2A-16(C) (1997) which provides: "If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed under the statute or rule as amended." As Defendants had not been sentenced on July 1, 2003, the effective date of HB 278, we hold that the sentencing provisions contained therein should apply to Defendants' sentences.

{8} In its memorandum in opposition, the State argues that a close review of the amendments to Section 66-8-102 during the 2003 legislative session indicate that the changes to the felony DWI provisions contained in HB 117 were intended to remain in effect beyond the July 1, 2003, effective date of HB 278. The Legislature made three independent changes to the DWI statute during the 2003 session. In drafting these amendments, the Legislature prefaced each amendment with language providing the statute section which was to be amended followed by the full text of the statute as amended. The first, titled "New Mexico Commercial Driver's License Act," and designated HB 250, was signed into law on March 19, 2003. *See* 2003 N.M. Laws Ch. 51. The bill retained the preexisting felony DWI punishment contained in Section 66-8-102(G):

> Upon a fourth or subsequent conviction pursuant to this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement.

Ch. 51, § 10(G).

{9} The second related bill to pass in the 2003 legislative session was HB 117. The bill substantially rewrote Section 66-8-102, including the following changes to the felony provisions of the statute:

> G. Upon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of eighteen months, six months of which shall not be

> suspended or deferred or taken under advisement.
>
> H. Upon a fifth conviction pursuant to this section, an offender is guilty of a fourth degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of two years, one year of which shall not be suspended, deferred or taken under advisement.
>
> I. Upon a sixth conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of thirty months, eighteen months of which shall not be suspended, deferred or taken under advisement.
>
> J. Upon a seventh or subsequent conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of three years, two years of which shall not be suspended, deferred or taken under advisement.

{10} HB 117 also included an emergency clause, declaring: "It is necessary for the public peace, health and safety that this act take effect immediately." Ch. 90, § 10. The bill was approved on March 28, 2003, and immediately signed into law by the Governor. Ch. 90, § 10.

{11} The third bill to pass in the 2003 legislative session was HB 278, titled "An Act Relating to Motor Vehicles; Authorizing Intergovernmental Agreements For Exchange of Motor Vehicle Offense Information Between Tribes and the State." Among other things, HB 278 included a new provision recognizing DWI offenses that were committed on tribal lands, and authorized intergovernmental agreements for exchange of information. HB 278, Ch. 164, § 8 (codified as NMSA 1978, § 66-5-27.1 (2003)). With respect to Section 66-8-102 specifically, language was added reflecting the application of its provisions to tribal lands. HB 278, Ch. 164, § 10(M) (codified as NMSA 1978, § 66-8-102(M) (2003)). Critical to our analysis, HB 278 restates the felony DWI language that existed prior to the effective date of HB 117:

> Upon a fourth or subsequent conviction pursuant to this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement.

Ch. 164, § 10(G) (codified as NMSA 1978, § 66-8-102(G) (2003)). HB 278 was approved on April 4, 2003, and given an effective date of July 1, 2003. HB 278, Ch. 164, § 11.

{12} In its memorandum in opposition, the State initially observes that the chronology of events listed above indicates that all three bills complied with procedural requirements to become good law. In such circumstances, the Legislature has provided the following guidance in NMSA 1978, § 12-1-8 (1977), for purposes of the compilation of statutes:

> In carrying out the duties provided by law and contract, absent an expressed contrary legislative intent, the secretary of the New Mexico compilation commission and the advisory committee of the supreme court shall be governed by the following rules:
>
> A. if two or more acts are enacted during the same session of the legislature amending the same section of the NMSA, regardless of the effective date of the acts, the act last signed by the governor shall be presumed to be the law and shall be compiled in the NMSA. The history following the amended section shall set forth the section, chapter and year of all acts amending the section. A compiler's note shall be included in the annotations setting forth the nature of the difference between the acts or sections; and
>
> B. if two or more irreconcilable acts dealing with the same subject matter are enacted by the same session of the legislature, the last act signed by the governor shall be presumed to be the law. The act last signed by the governor shall be compiled in the NMSA with an annotation following the compiled section setting forth in full the text of the conflicting acts.

Indeed, the New Mexico Compilation Commission has followed this mandate, and HB 278 is contained in Pamphlet 105 of the 2003 Cumulative Supplement to Section 66-8-102.

{13} This legislative guidance reflects long-standing rules of judicial interpretation of statutes, including that the legislature is presumed to know existing law when it enacts a statute, *see, e.g.*, *State v. Alderette*, 111 N.M. 297, 299, 804 P.2d 1116, 1118 (Ct. App.1990), and that the latest statute controls when there is irreconcilable conflict. *See State v. Montiel*, 56 N.M. 181, 182-83, 241 P.2d 844, 845 (1952) (noting the "familiar rule" that when two statutes are passed in same session, the latter statute governs); *Clothier v. Lopez*, 103 N.M. 593, 595, 711 P.2d 870, 872 (1985) (same).

{14} Additional guidance is found in the Uniform Statute and Rule Construction Act, under the provision titled "Irreconcilable statutes or rules," NMSA 1978, § 12-2A-10(A) (1997), wherein the Legislature reiterates the "last-enacted" rule:

> If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute governs. However, an earlier-enacted specific, special or local statute prevails over a later-enacted general statute unless the context of the later-enacted statute indicates otherwise.

{15} Here, not only was HB 278 the later-enacted statute, but it was given an effective date of July 1, 2003, thereby assuring that it would replace any version of Section 66-8-102 that was in effect at that time. Because we presume the legislature was aware of the sequential nature and effect of its actions, we are bound to give full force and effect to HB 278.

{16} The State argues that the above-noted rules for resolving the conflict between HB 117 and HB 278 should not end the inquiry, because the overriding goal of any statutory construction is to give effect to the legislature's intent. *State v. Martinez*, 1998-NMSC-023, ¶ 8, 126 N.M. 39, 966 P.2d 747. With this in mind, the State maintains that it would be absurd for the Legislature to give emergency effect to the heightened

punishments for DWI based on public safety, and then turn around and restate the lesser punishments with a statute that takes effect a mere three months later. *Cf. State v. Johnson*, 1998-NMCA-019, ¶ 19, 124 N.M. 647, 954 P.2d 79 (noting that statutes will not be construed in a manner that leads to an absurd result). Again, however, this is not a case where we are asked to interpret statutory language that is troublesome when given its plain meaning. *See id.* HB 278 is not absurd on its face, and we are therefore left with irreconcilable conflict which must give effect to the latter bill. To do otherwise interjects courts into the legislative process to correct perceived legislative error.

{17} The State argues that this Court has previously been willing to correct legislative error in similar circumstances. In *Quintana v. New Mexico Dep't of Corrections*, 100 N.M. 224, 226, 668 P.2d 1101, 1103 (1983), *construction of state law held violative of due process by*, *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339 (10th Cir. 1989) (reversing denial of federal habeas relief; holding that the New Mexico Supreme Court's construction of state law in *Quintana* unforeseeably and retroactively enhanced habeas petitioner's punishment), the Legislature repealed a parole statute, and thereafter in the same session passed an amendment to the repealed statute. In refusing to give effect to the later-enacted bill, the Supreme Court noted that Section 12-1-8 is not an end to the inquiry, concluding that "[i]t is not logical for the Legislature to repeal the law and then amend it." *Id.* We note that Section 12-2A-10, which does not characterize the later-enacted rule as a mere presumption of legislative intent, was not in effect at the time *Quintana* was decided. There is no doubt that the language of HB 117 evidences an intent to address the serious public policy issue at stake, but the subsequent re-enactment of prior law could just as well be construed as a legislative backing-off of the heightened punishments. Although we can agree with the State that there is some likelihood that the Legislature simply erred in this case, and that the Governor's office did not review later legislation for inconsistencies with prior bills signed into law, we do not know with certainty that they were errors, and even if they were, our power to undo them is properly constrained by the law itself. Our concern about interjecting the courts into the arena of legislative process to correct what may or may not have been an intended political calculus is inherent to the doctrine of separation of powers.

{18} Finally, the State argues that Defendants should have received punishments under the law in effect at the time the crimes were committed. The State refers us to the following language in NMSA 1978, § 30-1-2 (1963): "Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed." We note that the DWI statute is part of the Motor Vehicle Code, and not the Criminal Code. Specifically, the DWI statute's sentencing provisions for felony DWI exempt it from the Criminal Procedure Act's sentencing provisions with the language "notwithstanding the provisions of Section 31-18-13 NMSA 1978." Section 66-8-102(G). DWI sentencing is plainly governed by Section 66-8-102, and not the Criminal Code or Criminal Procedure Act. *State v. Greyeyes*, 105 N.M. 549, 553, 734 P.2d 789, 793 (Ct. App. 1987) (holding that DWI is outside sentencing provisions of the criminal code).

CONCLUSION

{19} We hold that Section 66-8-102(G) as enacted by HB 278, effective July 1, 2003, and currently codified in our statutes governs the sentencing of Defendants in this case. Because Defendants should have been sentenced pursuant to this law and were not, we reverse the district court and remand for resentencing.

{20} **IT IS SO ORDERED.**

RODERICK T. KENNEDY, Judge

I CONCUR:
A. JOSEPH ALARID, Judge
LYNN PICKARD, Judge (dissenting).
PICKARD, Judge (dissenting).

{21} I respectfully dissent from the majority's holding that the increased sentences enacted by the Legislature in HB 117, which was passed as an emergency measure to address a problem that has plagued New Mexico over the years, were repealed or amended by the later-enacted HB 278, which addressed a relatively less important issue concerning intergovernmental agreements. In my view, more accurate indicators of legislative intent mandate that all three DWI bills passed by the Legislature in 2003 should be given effect.

{22} First, I believe that we should bear in mind the backdrop against which the Legislature enacts DWI legislation and the courts interpret it. Numerous cases have recognized the severity of New Mexico's DWI problem. *See, e.g., City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 18, 132 N.M. 187, 46 P.3d 94 ("In New Mexico, the elimination of driving while intoxicated and its related offenses is a matter of grave concern to society in general, and to our courts and Legislature in particular."); *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 624, 904 P.2d 1044, 1049 (1995) ("New Mexico has a serious problem with drunk drivers, with one of the highest rates in the nation of DWI-related fatalities. Our citizens are obviously concerned by this dangerous situation[.]").

{23} Second, in my view, the majority's reliance on Section 12-2A-10(C) begs the question. That statute applies only when there has been an "amendment" to a statute. The issue before the Court in these cases is whether there has been such an amendment.

{24} Third, the way to determine that issue is not by an examination of how laws are supposed to be compiled, but instead by an effort to ascertain the intent of the Legislature. *See Quintana*, 100 N.M. at 226, 668 P.2d at 1103 (indicating, after reciting the laws on compilation, that "[a]ll rules of statutory construction are but aids in arriving at the true legislative intent"). Moreover, the statute governing compilation, §12-1-8, creates only a presumption that the last act signed by the Governor is the law and expressly requires the compiler to set forth the history and full text of any conflicting enactments in an annotation, thereby indicating a legislative intent to provide easy access to all enactments for the obvious purpose of facilitating a court interpretation of what is the applicable statute. Finally, on this issue, the statute on construction of apparently conflicting statutes, § 12-2A-10(A), instructs that effect should be given to each if possible.

{25} The leading case on legislative intent in a situation such as confronts the Court in these cases is *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 871 P.2d 1352 (1994). In that case, as in these cases, the Court was presented with facts indicating the possibility of a legislative mistake: in *Helman*, the potential mistake was in referring to a particular fiscal year in the legislation concerning purchase of retirement service credit, *id.* at 353-55, 871 P.2d at 1259-61; in these cases, the potential mis-

take was in passing several amendments to the same statute in the same year in bills that mostly repeated the original statutory language for the parts that were not amended in the individual bills. Both this Court in *Helman*, *see id.* at 353, 871 P.2d at 1259, and the majority herein, at ¶ 16, were concerned with issues of separation of powers and intruding on legislative prerogatives. The Supreme Court's response to this view in *Helman* and my response to the majority in this case are the same: "we believe it to be the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose[.]" *Id.* at 353, 871 P.2d at 1259. Thus, it is imperative to look to see what the Legislature was trying to accomplish in its passage of the three bills at issue here.

{26} The majority deems it "critical" that HB 278 restated all of the pre-existing language from the DWI sentencing law as it existed prior to the HB 117 amendment. Yet this fact is entirely unremarkable. Restating the whole statute that is proposed to be amended is required by Article IV, Section 18 of the New Mexico Constitution as part of its prohibition against so-called "blind legislation," that is, legislation passed in such a way that the legislators might be unaware of the existing provisions of the statutes they are amending. *See, e.g., Yeo v. Tweedy*, 34 N.M. 611, 628, 286 P. 970, 977 (1930). Article IV, Section 18 states, "No law shall be revised or amended . . . by reference to its title only; but each section thereof as revised [or] amended . . . shall be set out in full." N.M. Const. art. IV, § 18. Thus, the existence of pre-HB 117 language in amendments to Section 66-8-102 says little about any legislative intent to return the law to its pre-HB 117 status.

{27} In addition, the amendments to Section 66-8-102 enacted by HB 117 were not expressly repealed by HB 278. Thus, the repeal would of necessity be by implication. Repeals by implication are not favored. *Hall v. Regents of Univ. of N.M.*, 106 N.M. 167, 168, 740 P.2d 1151, 1152 (1987).

{28} What does speak volumes about the Legislature's intent are the facts that the first two bills were passed as emergency measures, the content of all three bills for the most part address different issues, and the third bill signed by the Governor on which the majority relies was the least important bill and was not passed as an emergency measure. In short, the bills are not irreconcilable or in conflict once all of these facts, together with the constitutional requirement of setting out in full the entirety of the section that is proposed to be amended, are considered.

{29} The majority characterizes HB 250 (Chapter 51) by its short title, the New Mexico Commercial Driver's License Act, but otherwise does not describe it or its impact on Section 66-8-102, except to say that it did not change the penalty provisions. In fact, HB 250, as evidenced by its title, was enacted for the purpose of complying with federal law on grade crossing violations and blood or breath alcohol concentrations for commercial drivers. *See State ex rel. Sedillo v. Sargent*, 24 N.M. 333, 337, 171 P. 790, 792 (1918) (indicating that title of statute may be used to construe statute's meaning); *see also* 49 U.S.C.A. §§ 31102, 31310(a), 31311(a) (1997) and 49 C.F.R. § 384.203 (2002) (indicating that federal monies will be withheld from states that do not enact legislation concerning grade crossing violations and prohibiting commercial drivers from driving with a blood or breath alcohol concentration of .04 or greater). Thus, much of HB 250, given Article IV, Section 18 of the New Mexico Constitution, is devoted to commercial licenses in general and grade crossings, but for purposes of this case, an important change to Section 66-8-102 was the change in Subsection (C), which lowered the legal limit to .04 for commercial drivers. This act was passed and signed as an emergency measure, no doubt due to the federal consequences of not so acting.

{30} The second bill signed by the Governor (HB 117 or Chapter 90) is the one that primarily concerns us in this case. By its title, its purpose was to increase penalties and require treatment for DWI, but it was also passed for the purpose of complying with federal law regarding blood or breath alcohol concentrations for commercial drivers, and it retains the .04 limit in Section 66-8-102(C). It was also passed as an emergency measure.

{31} The third bill, HB 278 or Chapter 164, was enacted, according to its title, to authorize intergovernmental agreements for the exchange of motor vehicle offense information between Indian tribes and the state. The relevant change to Section 66-8-102 was to include tribes in the listing of jurisdictions having DWI offenses that may be used for purposes of determining whether a conviction is a second or subsequent offense. As the majority points out, the penalties stated in HB 278 were the same as what existed prior to HB 117. Importantly, too, for my views, the compliance with federal law was also removed, as Section 66-8-102(C) reverted to its pre-HB 250 state and did not include the .04 level for commercial drivers. This enactment was not subject to any emergency clause and became law according to its terms on July 1, 2003.

{32} This specific history indicates that each bill has a different purpose. But for the restatement of earlier law required by the Constitution, each bill could be reconciled one with the other as enacting a law limited to the actual changes it makes to pre-2003 law in accordance with its title. When read against New Mexico's legislative backdrop of continuing concern for the DWI problem, it is inconceivable to me that the Legislature was engaged in "backing-off." The majority's construction nullifies the fact that HB 117 was passed as an emergency measure, as was HB 250. The majority's construction puts the state at jeopardy for receiving federal funding. The Legislature and public might find it absurd that, by enacting a provision in the ordinary course of dealing with intergovernmental agreements regarding DWI, the Legislature intended to repeal two emergency measures, one critical to the state's finances and the other intended to do something about one of the state's most intractable problems.

{33} The majority believing otherwise, I respectfully dissent. I would uphold Defendants' sentences and instruct the compiler to compile all three laws as a synthesized whole in accordance with what was obviously the Legislature's intent.

LYNN PICKARD, Judge