BAR BULLETIN
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June 28, 2017 • Volume 56, No. 26

West of West, by Randall V. Biggers (see page 3)

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28
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

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5
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
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6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

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Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m., Mosquero Senior Center, Mosquero, 1-800-876-6657

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About Cover Image and Artist: Randall V. Biggers is a legal assistant in the Donald Vigil Nick Stiver Law Office. He was born in Roswell and is a returned Peace Corp. volunteer (Afghanistan 1974–1976) and served 21 years in the Foreign Service. He has been actively painting for the past 10 years. The majority of his work is non-objective. In addition to painting with acrylics, Biggers makes collages and does photography. To schedule a private viewing, email nmrvb2@gmail.com or call 505-366-3525.

Notices

Court News

New Mexico Judicial Compensation Committee

Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, July 5, in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe. The Committee will discuss fiscal year 2019 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for fiscal year 19 compensation to the Legislature prior to the 2018 session. The meeting is open to the public. For an agenda or more information call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Sixth Judicial District Court

Notice of Right to Excuse Judge

Governor Susana Martinez appointed Timothy L. Aldrich to fill the vacant position and to take office on June 19 in Division I of the Sixth Judicial District Court. All pending and reopened civil, domestic, domestic violence, guardianship, lower court appeals, abuse and neglect and adoption cases previously assigned to the Hon. Henry R. Quintero, District Judge, Division I, shall be assigned to Hon. Aldrich. All pending criminal, juvenile, mental and probate cases previously assigned to the Hon. Quintero shall be assigned to Hon. J.C. Robinson, District Judge, Division III. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Aldrich or Judge Robinson.

Eighth Judicial District Court

Notice of Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, the Eighth Judicial District Court, Taos County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) all unmarked exhibits, oversized poster boards/maps and diagrams; 2) exhibits filed with the court, in civil cases for the years 1994–2010 and probate cases for the years 1989–2010. Counsel for parties are advised that exhibits may be retrieved through July 31. For more information or to claim exhibits, contact Bernabe P. Struck, court manager, at 575-751-8601. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Professionalism Tip

With respect to the courts and other tribunals:

I will communicate with opposing counsel in an effort to avoid litigation or to resolve litigation.

12th Judicial District Court

Judicial Vacancy

A vacancy on the 12th Judicial District Court will exist as of Sept. 4 due to the retirement of Hon. Jerry H. Ritter effective Sept. 1. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the 12th Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications can be found at lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m. July 13. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The 12th Judicial District Court Judicial Nominating Commission will meet at 9 a.m. on Aug. 3, to interview applicants for the position at the Otero County Courthouse located at 1000 New York Avenue in Alamogordo. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Bernalillo County Metropolitan Court

Volunteer for Bernalillo County Metro Court Clinic

The Bernalillo County Metropolitan Court Legal Clinic takes place on the second Friday of each month. The YLD is co-sponsoring the Clinic from 10 a.m.-1 p.m. on July 14 on the Court's ninth floor and seeks volunteers to help pro se individuals with civil legal advice including: landlord/tenant, consumer rights, trial preparation, employee wage, debts/bankruptcy, discovery and more. Volunteers are also needed to provide this service electronically at the Court to New Mexico residents outside of Albuquerque. Contact Renee Valdez at metrrmv@nmcourts.gov for more information and to volunteer.

State Bar News

Attorney Support Groups

- July 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- July 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- July 17, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Board of Bar Commissioners

Compensation Survey Results

Visit www.nmbar.org/nmbardocs/pubres/reports/2017LawyerCompensationSurvey.pdf to read the summary results of recent membership compensation survey conducted by Research & Polling. In addition to income, billing rates and methods for various types of practice, the recent results provide information regarding what services are generally charged to clients, perceived barriers to practicing law in New Mexico and career satisfaction. Six lucky survey takers won the drawing for several $200 and $100 gift certificates! For more information about the survey and the results, email rspinello@nmbar.org.

Young Lawyers Division

Lunch with Judges Program

Join the YLD, Judge Briana Zamora, Judge Jane Levy and Judge Alan Malott of the Second Judicial District Court and Justice Charles Daniels of the New Mexico Supreme Court for lunch from 11:30 a.m.-1 p.m., July 11, at the Modrall Sperling Law Firm located at 500 Fourth Street NW, Suite 1000 in Albuquerque. The YLD Lunch with Judges program is designed to allow YLD members to meet

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28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Best and Worst Practices in Ethics and Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

2–6 **CLE at Sea**
10.0 G, 2.0 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Protecting Consumers Against Fraudulent or Unfair Practices**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27-29 **24th Annual Advanced Course: Current Developments in Employment Law**
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Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002

27–29 **2017 Annual Meeting—Bench & Bar Conference**
12 total CLE credits (with possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective June 16, 2017

PUBLISHED OPINIONS

No. 35348	8th Jud Dist Taos LR-15-11, TOWN OF TAOS v E WISDOM (affirm)	6/14/2017
No. 35616	6th Jud Dist Luna JQ-13-6, CYFD v RAYMOND D (affirm)	6/15/2017

UNPUBLISHED OPINIONS

No. 34900	8th Jud Dist Taos CV-14-399, G DIAZ v LA BUENA VIDA CONDO (affirm in part, reverse in part and remand)	6/12/2017
No. 35798	2nd Jud Dist Bernalillo CR-14-1203, STATE v L ASHCRAFT (affirm)	6/12/2017
No. 35965	11th Jud Dist McKinley DM-10-33, E HENGEL v C BUTLER (affirm)	6/12/2017
No. 36097	2nd Jud Dist Bernalillo CV-10-5636, CARRINGTON v M PADILLA (affirm in part, reverse in part)	6/13/2017
No. 34543	2nd Jud Dist Bernalillo CR-14-3978, STATE v S NAIRN (reverse and remand)	6/14/2017
No. 35814	WCA-13-52389, R MATA v PANHANDLE OILFIELD SERVICES (affirm)	6/14/2017
No. 34457	5th Jud Dist Eddy CR-13-228, STATE v S BANDA (affirm)	6/15/2017
No. 34463	5th Jud Dist Chaves CR-13-388, STATE v V VACCA (reverse and remand)	6/15/2017
No. 35998	1st Jud Dist Los Alamos DM-14-53, S HAMOOD v H MALIK (affirm in part,dismiss in part)	6/15/2017
No. 36102	5th Jud Dist Chaves LR-16-7, STATE v J CLARK (affirm)	6/15/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

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with local judges in an informal setting, ask questions of the judges and receive advice relating to their career paths in the legal profession. R.S.V.P. to Allison Block-Chavez at ablockchavez@abqlawnm.com by July 5. Lunch will be provided.

Wills for Heroes Event in Farmington

YLD is seeking volunteer attorneys for its Wills for Heroes event in Farmington. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Join the YLD from 9 a.m.-noon, July 8, at the 11th Judicial District Attorney's Office located at 335 S Miller Ave in Farmington. Volunteers should arrive at 8 a.m. for breakfast and orientation. Contact YLD Region 1 Director Evan Cochnar at ecochnar@da.state.nm.us to volunteer. Indicate if you are able to bring a Windows laptop or if you will need on provided for you. Paralegal and law student volunteers are also needed to serve at witnesses and notaries.

UNM

Public Citator Notice

As of July 1, UNM's University Libraries will no longer provide LexisNexis Academic, a publicly accessible version of Lexis that includes Shepard's citator. The UNMSOL Library will continue to provide Westlaw PRO on select library computer terminals. Westlaw PRO is a public patron version of Westlaw that includes KeyCite.

Other Bars

New Mexico Defense Lawyers Association

Nominations for Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2017 NMDLA Outstanding Civil Defense Lawyer and the 2017 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is July 28. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 29, at the Hotel Chaco, Albuquerque.

New Mexico Women's Bar Association

Annual Meeting and Presentation

The New Mexico Women's Bar Association with hold its annual meeting at 1:30 p.m., July 14, at the State Bar Center in Albuquerque. At noon, the same day, the Women's Bar will host a luncheon presentation by Elizabeth Lynch Phillips. Phillips is a member of the State Bar and a certified personal coach. She will talk about how to learn to recognize the three primary internal voices we all use to tell about and relate to, the circumstances in our lives. She will explain how we can become aware of which voice has the microphone in each of our stories and how to consciously choose to speak from the most powerful and effective voice – that of an empowered adult. More information about Phillips can be found at lawyersevolving.com. Contact Sharon Shaheen at 505-986-2678, sshaheen@montand.com, to register for the presentation. There is no charge to attendees who register by July 10.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

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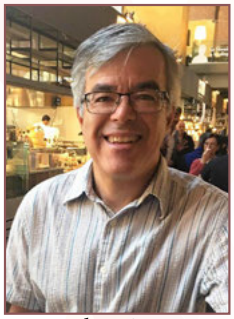
Judges 888-502-1289

www.nmbar.org/JLAP

Volunteer Attorney Program

VOLUNTEER SPOTLIGHT

By Aja Brooks, Pro Bono Coordinator, Volunteer Attorney Program, ajab@nmlegalaid.org



Robert Scott

New Mexico Legal Aid and the VAP (Volunteer Attorney Program) recognize with great admiration and gratitude the commitment of attorney **Robert Scott** (Bogardus & Scott). In a recently resolved pro bono case co-counseled with New Mexico Legal Aid, Mr. Scott donated well over 100 hours of his time and considerable expertise to serve one of New Mexico's most vulnerable and downtrodden workers. The case resolution sends ripples of hope to our state's poorest laborers that someone was willing to fight for them against all odds.

Thank you Mr. Scott for your hard work!

Volunteer Attorney Program
A Program of New Mexico Legal Aid

LSC | America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

www.newmexicolegalaid.org

Champions for Women

New Mexico Women's Bar Association Honors Local Leaders

Photos and story by Evann Kleinschmidt

On May 4, the New Mexico Women's Bar Association honored two women and one group for exemplary contributions to the causes of women in the legal profession. Judge Wendy York and Shona Zimmerman were presented with the Henrietta Pettijohn Award. Judge York works as a mediator and arbitrator with Sheehan & Sheehan PA. Previously, she served as a judge with the Second Judicial District Court. She works diligently to support qualified of women running for office.

Zimmerman is currently in private practice at Zimmerman & Simon LLC where she focuses on civil litigation and domestic matters. In addition to providing comprehensive and high-quality pro bono representation to women and families, she frequently represents victims of domestic abuse in domestic and protective order proceedings. The Henrietta Pettijohn Award is named after and presented annually in honor of the first female attorney admitted to the State Bar in 1982.

The inaugural Supporting Women in the Law Award was presented to the University of New Mexico Office of University Counsel. OUC was chosen for the award because of its inclusive culture and strong history of mentoring of women. Elsa Kircher Cole accepted the award on behalf of the University's law office.

The Women's Bar Association's mission is to provide resources to empower women in the legal profession. Learn more at www.nmwba.org. For more photos of the event, visit www.nmbar.org/photos.

Judge Bill Lang and Judge Wendy York

University of New Mexico Office of University Counsel

Ethan Simon and Shona Zimmerman

Louren Oliveros and Barbara Koenig

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective June 28, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

10-166	Public inspection and sealing of court records	03/31/2017

Rules of Appellate Procedure

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Certiorari Denied, February 24, 2017, No. S-1-SC-36280

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-033

No. 35,006 (filed December 29, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSEPH MONTOYA, aka JOSEPH E. MONTOYA, aka JOSEPH EMETERIO MONTOYA, aka JOSE MONTOYA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
GERALD E. BACA, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
ELIZABETH ASHTON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

L. HELEN BENNETT
Albuquerque, New Mexico
for Appellant

Opinion

Jonathan B. Sutin, Judge

{1} This case turns on whether Defendant's conviction for his robbery of the victim he earlier robbed and killed can stand given that the victim was already dead at the time of the second robbery. The question presented to us is one of "personhood," Defendant contends. He asserts that just as one cannot kill a person already dead, one cannot rob a person already dead. We hold that under the facts of this case, the robbery statute was properly applied, and Defendant was properly convicted of robbery despite the posthumous—by several hours—nature of the second robbery.

BACKGROUND

{2} Defendant Joseph Montoya, with the assistance of others, robbed and then killed Angel Arroyo. Defendant then left the scene of these crimes. Returning a few hours later, Defendant, again with the aid of others, emptied Arroyo's pocket of any remaining cash, poured gasoline throughout the residence and on Arroyo's body, then set the residence on fire. Convicted of multiple crimes and sentenced to 104.5 years of incarceration, Defendant challenges the application of the robbery statute when the robbery commenced and concluded on a person dead for several hours. He also raises ineffective assistance of counsel because his attorney did not request an instruction on theft as a lesser included offense of robbery.

DISCUSSION

Personhood

{3} We start with whether Defendant's conviction for the second robbery was lawful. We review this issue de novo, since it involves statutory interpretation. *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50; *see State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183.

{4} NMSA 1978, Section 30-16-2 (1973), reads: "Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." The jury was instructed that in order to find Defendant guilty of robbery, the State was required to prove Defendant took cash from Arroyo's pocket by force or violence, intending to deprive Arroyo of the cash. *See* UJI 14-1620 NMRA. "[R]obbery is distinct from larceny because it requires, and is designed to punish, the element of force." *State v. Bernal*, 2006-NMSC-050, ¶ 28, 140 N.M. 644, 146 P.3d 289.

{5} Defendant contends that there was insufficient evidence to convict him of robbery after he returned to the scene of the killing because "a robbery conviction is improper when the robbery both commences and concludes on a dead person." He relies on language in *Stephenson v. State*, 29 N.E.3d 111, 116 (Ind. 2015), that states, "[w]hile a robbery conviction may not be proper when a robbery both commences and concludes on a dead person, the crime is committed when part of the robbery occurs before the victim's death and the other part occurs after the death." Defendant argues that just as attempting to kill someone who is already dead is a legal impossibility, "one cannot rob a corpse." He further argues that Arroyo did not have immediate control over the cash in his pocket when Arroyo was already dead, as required under Section 30-16-2. And he argues that the Legislature did not intend the robbery statute to apply to circumstances, such as those here, in which the victim was no longer a "person." Defendant asserts that "[t]he temporal and relational gap between the first robbery and shooting and killing of Arroyo, and the subsequent, second theft of money from Arroyo's body before the arson is simply too large, and was broken by [Defendant's] flight from the scene intending to go elsewhere." The bottom line, according to Defendant, "[p]ersonhood ceases upon the death of the individual." He cites articles that medically and philosophically wax on life as fundamental to the term "person," as a term that ceases to apply upon death. *See, e.g.*, John D. Arras, *The Severely Demented, Minimally Functional Patient: An Ethical Analysis*, 36 JAGS 938, 940 (1988) (arguing that patients who lack all fundamental human capacities have ceased to be persons in any meaningful sense); Amir Halevy & Baruch Brody, *Brain Death: Reconciling Definitions, Criteria, and Tests*, 119 Annals of Internal Med. 519, 523 (1993) (noting that while there are many different views of personhood, all, except those that identify personhood with simple biologic functioning, require cortical activity).

{6} The application of a robbery statute to theft from a dead person has been addressed in several cases. Our Supreme Court in *State v. Barela*, No. 32,506, 2013 WL 1279111, at *19-20, dec. (N.M. Sup.

Ct. Mar. 28, 2013) (non-precedential), upheld a robbery conviction "where the killing and the taking of the property are part of the same transaction of events[]" and adopted the following view, quoted from *James v. State*, 618 S.E.2d 133, 138 (Ga. Ct. App. 2005).

> Although, as an abstract principle of law, one ordinarily cannot be guilty of robbery if the victim is a deceased person, this principle does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable. If the taking was made possible by an antecedent assault, the offense is robbery regardless of whether the victim died before or after the taking of the property.

Barela, 2013 WL 1279111, at *20 (alteration, internal quotation marks, and citation omitted). *Barela* also relied on *People v. Navarette*, 66 P.3d 1182, 1207 (Cal. 2003), for the similarly stated view that "while it may be true that one cannot rob a person who is already dead when one first arrives on the scene, one can certainly rob a living person by killing that person and then taking his or her property[.]" *Barela*, 2013 WL 1279111, at *20 (alteration, internal quotation marks, and citation omitted).

{7} At least two less-recent cases came to the same or similar conclusion. *See*, *e.g.*, *Smothers v. United States*, 403 A.2d 306, 313 n.6 (D.C. 1979) ("It is settled law in this jurisdiction that a dead person can be a robbery victim, at least where the taking and the death occur in close proximity."); *State v. Coe*, 208 P.2d 863, 866 (Wash. 1949) (holding that a robbery conviction was appropriate when the defendant killed the victim in a vehicle, then took the body from the vehicle, and "conveyed it a distance from the road and took the property from the clothing" of the victim, and stating that it was "not a case where the only act was the taking of property from the person of one deceased" but rather "[t]he robbery commenced with the first overt act on the part of [the co-defendant]").

{8} We interpret Section 30-16-2 to apply to the circumstances here and hold that Defendant was properly convicted under Section 30-16-2 for the second robbery that occurred after the killing. It is reasonable to conclude that the second robbery and the subsequent arson were "clean-up" activities directly connected with the original robbery and killing, and therefore the second robbery can rationally be linked to the murder that enabled the robbery.

Ineffective Assistance

{9} "Normally, a claim of ineffective assistance of counsel is established by a showing of error by counsel and prejudice resulting from the error." *State v. Grogan*, 2007-NMSC-039, ¶ 11, 142 N.M. 107, 163 P.3d 494. An error is found if the "attorney's conduct fell below that of a reasonably competent attorney." *State v. Baca*, 1997-NMSC-059, ¶ 24, 124 N.M. 333, 950 P.2d 776. The defendant has the burden to show both incompetence and prejudice. *See id.*

{10} Defendant contends that his counsel was ineffective for failing to request the district court to give a lesser included offense instruction on "theft." Defendant does not refer to the particular statute, but presumably intends application of NMSA 1978, Section 30-16-1 (2006) (defining "larceny"). We cannot agree. Counsel may have consciously determined that the better strategy was to defeat the second robbery conviction leaving no step-down charge. *See Bernal*, 2006-NMSC-050, ¶ 35 (stating that the defendant's claimed errors "may implicate tactical decisions made by counsel . . . and are best evaluated during habeas corpus"). Further, Defendant has not shown prejudice. *See Grogan*, 2007-NMSC-039, ¶ 11; *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (requiring, for a prima facie case, proof of both lack of reasonable competence and prejudice).

{11} Even assuming that the lesser included offense had been requested, we do not hold that there existed a reasonable probability that, but for counsel's error, the result would have been different. *See Bernal*, 2006-NMSC-050, ¶ 32 ("With regard to the prejudice prong, generalized prejudice is insufficient. Instead, a defendant must demonstrate that counsel's errors were so serious, such a failure of the adversarial process, that such errors undermine judicial confidence in the accuracy and reliability of the outcome." (alteration, internal quotation marks, and citations omitted)). "A defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotation marks and citation omitted).

{12} Defendant is free to pursue his ineffective assistance claim in a habeas corpus proceeding. *See Grogan*, 2007-NMSC-039, ¶ 9; *Herrera*, 2001-NMCA-073, ¶ 37.

CONCLUSION

{13} We affirm Defendant's second robbery conviction.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
J. MILES HANISEE, Judge

Certiorari Granted, March 16, 2017, No. S-1-SC-36308

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-035

No. 34,620 (filed January 24, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
BENJAMIN SEIGLING,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CHARLES W. BROWN, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
for Appellant

BENNETT J. BAUR
Chief Public Defender
BECCA SALWIN
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellee

Opinion

J. Miles Hanisee, Judge

{1} The State appeals the district court's March 11, 2015 order excluding witnesses and suppressing evidence the State planned to present at Defendant Benjamin Seigling's trial for alleged separate acts of commercial burglary and larceny at Valley High School in Albuquerque, New Mexico. The district court's order was premised on the case management pilot rule locally implemented by Supreme Court Order No. 16-8300-001 in Bernalillo County, LR2-400 NMRA (2014)[1] (the local rule). The local rule permits, and often requires, sanctions based on the State's failure to comply with discovery and timeliness requirements contained therein. *See* LR2-400(D)(4), (I) (2014).

{2} Called upon by this appeal to reconcile application of our Supreme Court's precedent limiting district courts' discretion to sanction with the local rule's language that "existing case law on criminal procedure continue[s] to apply to cases filed in the Second Judicial District Court, but only to the extent [it] do[es] not conflict with this pilot rule[,]" LR2-400(A) (2014), this Court certified this matter to our Supreme Court. But our Supreme Court quashed certification, stating that "the Court is confident that the Court of Appeals is fully capable of applying this Court's textual direction in LR2-400(A) that prior procedural precedents apply to cases governed by the new procedural case management rule only 'to the extent they do not conflict with' LR2-400[.]" Now having considered the text of the local rule alongside what we perceive to be the non-conflicting mandates of prior New Mexico Supreme Court decisions governing criminal procedure, we reverse the district court's order excluding the State's witnesses and suppressing all audio and visual evidence.

{3} At the outset, we note that since the enactment of the original version of the local rule on November 6, 2014, our Supreme Court has promulgated a revised version altering various provisions and containing the same, identically worded non-conflict provision. *See* LR2-308. Thus, *all* criminal cases filed or pending in the Second Judicial District Court are subject to new case management deadlines based on one of three currently existing rules. The amended version of the local rule is effective for all cases pending or filed on or after February 2, 2016, in addition to any cases filed prior to February 2, 2016, where the track assignment was not made until February 2, 2016, or later. *See* LR2-308 (stating that "as amended by Supreme Court Order No. 16-8300-001, effective for new cases filed and for pending cases in which a track assignment is made on or after February 2, 2016"). The original version of the local rule, which became effective on February 2, 2015, applies to this and all cases filed with the district court between July 1, 2014, and February 2, 2016. *See* LR2-308(B)(1) (stating that "[c]riminal cases filed on or after July 1, 2014," shall be assigned to the new calendar). Finally, cases filed before July 1, 2014, are subject to a special calendar rule enacted by the Second Judicial District Court pursuant to the requirements of the local rule. *See* LR2-400.1 NMRA (2015) (special calendar rule); *see also* LR2-400(B)(1) (2014) (requiring implementation of special calendar rule); LR2-308(B)(1) (same).

BACKGROUND

{4} Defendant was indicted on September 5, 2014. After the original version of the local rule became effective on February 2, 2015, a scheduling conference was held on February 16, 2015. Defendant had previously filed a motion to exclude witnesses based, in large part, on the State's refusal to assist in scheduling witness interviews in the four months since Defendant had been arraigned. Defendant's motion was denied, and the case was assigned to Track 1 under the local rule. A scheduling order was entered on February 20, 2015, and trial was scheduled for July 20, 2015, "within 180 days of the triggering event in this case." The scheduling order set other deadlines but did not denote a date by which the completion of witness interviews was required.

{5} On February 24, 2015, Defendant filed two motions. The first was a second motion to exclude witnesses because Defendant's counsel had subpoenaed four officers via Albuquerque Police Department Court Services and only one appeared to be interviewed. Defendant contended that two of the officers ignored the subpoena, and one was on military leave. The State responded and offered to accept responsibility for scheduling the officers' interviews rather than having their testimony excluded.

{6} The second motion Defendant filed was a motion to dismiss or, as a lesser alternative sanction, to suppress based upon the State's failure to comply with its discovery

[1]Pursuant to Supreme Court Order No. 16-8300-015, former LR2-400 (2014) was recompiled and amended as LR2-308 NMRA, effective December 31, 2016. Any reference to the current Rule in this opinion will be cited as LR2-308.

obligations. That motion asserted that the State had not provided (1) lapel recordings, (2) the detective's first interview with Defendant, and (3) the detective's second interview with Defendant. Defendant argued that the State failed to satisfy the new discovery requirements of the local rule, which requires the State to provide documentary, audio, and video evidence at a defendant's arraignment or within five days of when a written waiver of arraignment is filed. *See* LR2-400(D)(1) (2014).[2] To this motion, the State responded that a speed letter was provided on November 21, 2014, "that would permit counsel's access to this evidence for copying," but stated also that Defendant's attorney was notified on March 4, 2015, that the recordings were available to pick up from the district attorney's office. The State added that due to the lack of a pretrial interview deadline and the fact that the motions deadline was not until May 29, 2015, there was no prejudice to Defendant.

{7} Following a hearing on March 11, 2015, the district court granted Defendant's motion to exclude witnesses and suppressed all audio and video evidence. The district court entered a form order the same day.[3] The State appeals.

DISCUSSION

{8} The State raises six issues on appeal challenging the exclusion of witnesses and the suppression of audio and video evidence. To resolve them, this Court must reconcile any conflicts between the provisions of the local rule, pre-existing rules of criminal procedure, and related case law governing the district court's discretionary use of such sanctions. We begin with a discussion of pertinent requirements of the local rule, and then turn to restrictions on the district court's exercise of discretion established by case law. We conclude by examining the specific facts of this case.

I. The Local Rule's Provisions

{9} The local rule creates clear and limited time frames for the progression of criminal cases in the Second Judicial District Court. Both the original and amended versions of the local rule contain specific requirements that govern the exchange of discovery and the scheduling of various events that mark the progression of a criminal case and contemplate the imposition of sanctions in the event the new discovery and scheduling requirements are not adhered to.

A. Discovery Provisions

{10} Under the local rule, the State is required to make all initial disclosures described in Rule 5-501(A)(1)-(6) NMRA "at the arraignment or within five (5) days of when a written waiver of arraignment is filed[.]" LR2-400(D)(1) (2014); *see also* LR2-308(D)(1) (same). Additional disclosures also then due include "phone numbers and email addresses of witnesses if available, copies of documentary evidence, and audio, video, and audio-video recordings made by law enforcement officers or otherwise in possession of the state," and "a 'speed letter' authorizing the defendant to examine physical evidence in the possession of the state." LR2-400(D)(1) (2014).[4] The state may only withhold the requisite witness contact information if it first "seek[s] relief from the court by motion, for good cause shown . . . if necessary to protect a victim or a witness" and then must "arrange for a witness interview or accept at its business offices a subpoena for purposes of [a] deposition under Rule 5-503 NMRA." LR2-400(D)(2) (2014); *see also* LR2-308(D)(2) (same). The state is further assigned "a continuing duty to disclose additional information to the defendant within five (5) days of receipt of such information[.]" LR2-400(D)(3) (2014); *see also* LR2-308(D)(3) (same). The continuing duty encompasses later-obtained evidence "in the possession of a law enforcement agency or other government agency." LR2-400(D)(3) (2014).[5]

{11} The original version of the local rule states that the district court *may* sanction the State if it violates these discovery provisions. Specifically, the local rule provides:

> If the state fails to comply with any of the provisions of this rule, the court may enter such order as it deems appropriate under the circumstances, including but not limited to prohibiting the state from calling a witness or introducing evidence, holding the prosecuting attorney in contempt with a fine imposed against the attorney or the employing government office, and dismissal of the case with or without prejudice. If the case has been re-filed following an earlier dismissal, dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule.

LR2-400(D)(4) (2014).[6]

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[2]Rule 5-501(A) NMRA (2007), in effect during the four months prior to the applicability of the local rule, requires production of these materials within ten (10) days of arraignment.

[3]The district court's form order indicates that Defendant's motion to exclude was granted and Defendant's motion to dismiss was denied. But it was within his motion to dismiss that Defendant sought suppression of all audio and video evidence—relief the State maintains was granted orally by the district court. Generally, we consider oral rulings only to the extent they do not conflict with written rulings of the district court. *See Enriquez v. Cochran*, 1998-NMCA-157, ¶ 25, 126 N.M. 196, 967 P.2d 1136 ("Formal written orders filed of record normally supersede oral rulings, and oral rulings cannot normally be used to contradict written orders."); *see also State v. Morris*, 1961-NMSC-120, ¶ 5, 69 N.M. 89, 364 P.2d 348 ("An oral ruling by the trial judge is not a final judgment. It is merely evidence of what the court had decided to do but he can change such ruling at any time before the entry of a final judgment."). Here, the form order appears to be ambiguous. In this Court's calendar notice we proposed to accept the State's assertion in its docketing statement as true, *see State v. Calanche*, 1978-NMCA-007, ¶ 10, 91 N.M. 390, 574 P.2d 1018 (stating that the factual recitations in the docketing statement are accepted as true unless the record on appeal shows otherwise), and directed Defendant to inform us if the State was incorrect that the audio and video evidence had been suppressed. Given that Defendant raised no challenge to this fact in his memorandum in opposition, we rely on the State's assertion.

[4]*But see* LR2-308(D)(1) (amending the disclosure provision to require the state to "provide addresses, and also phone numbers and email addresses if available, *for its witnesses that are current as of the date of disclosure*" (emphasis added)).

[5]*But see* LR2-308(D)(4) (amending the definition of what is in the possession of the state to "evidence [that] is in the possession or control of any person or entity *who has participated in the investigation or evaluation of the case*" (emphasis added)).

[6]*But see* LR2-308(I) (governing the use of sanctions and replacing the language previously set forth in LR2-400(D)(4) (2014) with that set forth in LR2-308(I)(1), which provides that "[i]f a party fails to comply with any provision of this rule or the time limits imposed by a scheduling order entered under this rule, the court *shall* impose sanctions as the court *may* deem appropriate in the circumstances and taking into consideration the reasons for the failure to comply" (emphases added)).

B. Scheduling Provisions

{12} Pursuant to the local rule, cases must be placed on one of three tracks (Track 1, Track 2, or Track 3), based on a consideration of the complexity of the case and the number of witnesses and time needed to address evidentiary issues. *See* LR2-400(G)(3) (2014); LR2-308(G)(3). The presumption, according to the local rule, is that "most cases will qualify for assignment to [T]rack 1" and that "written findings are required to place a case on [T]rack 3." LR2-400(G)(3)(a), (c) (2014); *see also* LR2-308(G)(3)(a)-(b) (same).

{13} To this end, the district court is required to issue a scheduling order that "assigns the case to one of three tracks and identifies the dates when events required by that track shall be scheduled[.]" LR2-400(G)(4) (2014); *see also* LR2-308(G)(4) (same). According to the original version of the local rule, Track 1 requires that trial commence within 180 days of arraignment, waiver of arraignment, or other applicable triggering event. LR2-400(G)(4)(a), (H) (2014) (identifying other applicable triggering events to be any determination of competency, mistrial order, mandate following appeal, date of arrest after failure to appear, date removed from pre-prosecution, and date case was severed where previously joined). Track 2 requires that trial commence within 270 days of a triggering event, LR2-400(G)(4)(b) (2014), and Track 3 within 365 days, LR2-400(G)(4)(c) (2014).[7] Within each of these tracks, the local rule provides deadlines for plea agreements; pretrial conferences; notices of need for a court interpreter; pretrial motions, responses, and hearings; witness interviews; and the disclosure of scientific evidence. *See* LR2-400(G) (2014); *see also* LR2-400(G)(4)(a). With respect to witness interviews, in particular, the deadline under Track 1 is 60 days prior to trial. *See* LR2-400(G)(4)(a)(vii) (2014). The same deadline for Track 2 cases is 75 days, LR2-400(G)(4)(b)(vii) (2014), and for Track 3 is 100 days, LR2-400(G)(4)(c)(vii) (2014). *See* LR2-400(G)(4)(a)-(c) (same).

{14} The district court must impose sanctions for the failure to comply with any of the scheduling provisions of the local rule. *See* LR2-400(I) (2014), *see also* LR2-308(I) (modifying the structure of the mandatory sanction provision of the local rule). Specifically, as required by the original version of the local rule, the district court "shall impose sanctions as the court may deem appropriate in the circumstances, including but not limited to reprimand by the judge, dismissal with or without prejudice, suppression or exclusion of evidence, and a monetary fine imposed upon a party's attorney or that attorney's employing office with appropriate notice to the office and an opportunity to be heard." LR2-400(I) (2014); *see also* LR2-308(I)(3) (identifying witness exclusion and the imposition of civil or criminal contempt as sanctions which a district court "may impose").

II. Preexisting Limitations on the Exercise of Sanction Discretion

{15} Prior to enactment of the local rule, our Supreme Court set out clear limitations on the exercise of a district court's discretion to exclude witnesses in *State v. Harper*, 2011-NMSC-044, ¶¶ 16-20, 150 N.M. 745, 266 P.3d 25. *Harper* held that "the exclusion of a witness is improper absent an intentional refusal to comply with a court order, prejudice to the opposing party, and consideration of less severe sanctions." *Id.* ¶ 15. In reaching this determination, our Supreme Court noted that "[a] court has the discretion to impose sanctions for the violation of a discovery order that results in prejudice to the opposing party" but that "[e]xtreme sanctions such as dismissal are to be used only in exceptional cases." *Id.* ¶ 16 (internal quotation marks and citation omitted). Our Supreme Court pointed out that "[t]he trial court should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." *Id.* (alteration, internal quotation marks, and citation omitted). Moreover, our Supreme Court stated that "the refusal to comply with a district court's discovery order only rises to the level of exclusion or dismissal where the [s]tate's conduct is especially culpable, such as where evidence is unilaterally withheld by the [s]tate in bad faith, or all access to the evidence is precluded by [s]tate intransigence." *Id.* ¶ 17. And that "even when a party has acted with a high degree of culpability, the severe sanctions of dismissal or the exclusion of key witnesses are only proper where the opposing party suffered tangible prejudice." *Id.* ¶ 19; *see id.* ¶ 16 (stating that "prejudice must be more than speculative; the party claiming prejudice must prove prejudice—it is not enough to simply assert prejudice"). Finally, our Supreme Court stated that "[p]rejudice does not accrue unless the evidence is material and the disclosure is so late that it undermines the defendant's preparation for trial." *Id.* ¶ 20. Therefore, to reiterate, *Harper* requires that in order for the district court to exclude material witnesses there must be: (1) "an intentional refusal to comply with a court order[,]" (2) "prejudice to the opposing party[,]" and (3) "consideration of less severe sanctions[.]" *Id.* ¶ 15.

{16} Regarding *Harper*'s requirement that the opposing party demonstrate that it has been prejudiced in order to attain sanctions, *Id.* ¶ 16, and in particular the sanction of witness exclusion, *id.* ¶ 15, we take this opportunity to note that prejudice is not a prerequisite to the imposition of sanctions under the local rule given the mandatory nature of sanctions. *See* LR2-400(I) (2014); *see also* LR2-308 (I) (same). Consequently, to the extent the local rule diverges from *Harper* in this regard, the local rule controls. *See* LR2-400(A) (2014); *see also* LR2-308(A) (same). But nothing in the local rule can be read to eliminate the analytic role of prejudice to a defendant in determining the severity of a sanction imposed on the state, and we continue to rely on *Harper* in this regard, even in circumstances where no showing of prejudice is required.

{17} Even when not discussing the exclusion of witness testimony in particular, our appellate decisions have placed limitations on the exercise of a district court's discretion to stringently sanction by excluding or suppressing evidence. While this Court's review of a district court's imposition of sanctions is for an abuse of discretion, we still look to "the nature of the conduct and level of culpability found by the trial court and whether the trial court's sanction appears more stern than necessary in light of the conduct prompting the sanction." *Enriquez*, 1998-NMCA-157, ¶ 20. "[P]art of our calculus includes a review of the trial court's exploration of alternatives to the sanctions ultimately imposed." *Id.* ¶ 21 (also describing the consideration of lesser sanctions as "a generally useful exercise both on appeal and for the trier in the first instance"); *see id.* ¶ 48 (affirming the imposition of sanctions that deprived the defendant of affirmative defenses when the trial court "explicitly considered other lesser alternatives and found them wanting"); *see also Gonzales v. Surgidev Corp.*,

[7] *But see* LR2-308(G)(4)(a)-(c) (amending the time for trial on Tracks 1, 2, and 3, to 210, 300, and 455 days, respectively, from arraignment or other triggering event).

1995-NMSC-047, ¶ 33, 120 N.M. 151, 899 P.2d 594 ("The court need not exhaust all lesser sanctions, although meaningful alternatives must be reasonably explored before the sanction of dismissal is granted." (internal quotation marks and citation omitted)).

{18} We view our precedent, including our Supreme Court's most recent expression of it in *Harper*, to bind New Mexico courts to the requirement that lesser sanctions be considered when fashioning a proper remedy for a party's failure to abide by the orders and rules of a court. Therefore, we assess the applicability or inapplicability of our case law only from the standpoint of whether it is in direct conflict with any specific provision of the local rule.

III. No Case Law Conflicts Presented Under Specific Facts of This Case

A. District Court's Exclusion of Witnesses

{19} Having considered the provisions of the local rule and the requirements of *Harper*, we conclude that under the facts of the present case, no conflict is presented and, therefore, *Harper* still limits the district court's ability to exclude witnesses. As we explain below, our holding does not disregard the local rule's requirement that sanctions be imposed for failure to comply with the time requirements of the local rule. *See* LR2-400(I) (2014). We observe first that while imposition of sanctions is mandatory, the type of sanction imposed is still within the discretion of the Second Judicial District Court. *See id.* (providing that "the court shall impose sanctions as the court may deem appropriate"). As such, the exercise of discretion to sanction remains subject to the prudential limitations enunciated in *Harper*, 2011-NMSC-044, ¶ 16. Additionally in the present case, we conclude that no deadline imposed by LR2-400(G)(4)(a) (2014) was violated, and thus, no mandatory sanction was required pursuant to LR2-400(I) (2014).

{20} Defendant's case began on September 5, 2014, and a scheduling conference was held on February 16, 2015, soon after the local rule went into effect on February 2, 2015. While the scheduling order did not include a deadline for the completion of witness interviews, the case was placed on Track 1 and the trial was set for July 20, 2015. The district court judge could have set a shorter time frame for the conclusion of witness interviews, *see* LR2-400(G)(5) (2014), but because no deadline for witness interviews was included in the scheduling order, the deadline for pretrial interviews was May 20, 2015, based on the requirements of the local rule. *See* LR2-400(G)(4)(a)(vii) (2014) ("Witness interviews will be completed sixty (60) days before the trial date[.]").

{21} In the present case, Defendant scheduled four interviews to take place on February 24, 2015; two officers failed to attend without providing justification for their absence. The same day, Defendant moved to exclude those witnesses based on their failure to appear. We calculate that at that point in the proceedings, there were roughly three months left within which to reschedule the interviews; thus, it would appear that sanctions other than exclusion of the witnesses could have still remedied any violation that may have occurred. Additionally, we conclude that because mandatory sanctions were not required under the local rule as no deadline had been violated, and because the local rule does not mandate exclusion as a discovery sanction pursuant to LR2-400(D)(4) (2014), under the facts of this case, *Harper* still applies.

{22} Defendant argues that the local rule supersedes *Harper* given the comprehensive nature of the local rule. Defendant contends that under NMSA 1978, Section 12-2A-10(D) (1997), "[i]f a rule is a comprehensive revision of the rules on the subject, it prevails over previous rules on the subject, whether or not the revision and the previous rules conflict irreconcilably." While this argument may be persuasive under other circumstances, here, our Supreme Court has specified that "existing case law on criminal procedure continue[s] to apply to cases filed in the Second Judicial District Court . . . to the extent [it] do[es] not conflict with th[e] pilot rule." LR2-400(A) (2014). While "the Legislature may enact rules affecting practice and procedure," the Supreme Court may "exercise[] its inherent power to supersede any conflicting statutory provisions." *Grassie v. Roswell Hosp. Corp.*, 2008-NMCA-076, ¶ 10, 144 N.M. 241, 185 P.3d 1091. Thus, to the extent the textual directive contained in LR2-400(A) (2014) conflicts with Section 12-2A-10(D), we conclude the local rule controls and, therefore, the comprehensive nature of the local rule does not require that it prevail over prior rules even where no conflict exists.

{23} Defendant also argues that the local rule directly and irreconcilably conflicts with *Harper*. Defendant contends that the local rule and *Harper* cannot be reconciled because the local rule "makes sanctions mandatory upon *any* violation, while *Harper* . . . all but forbade sanctions." However, what Defendant fails to acknowledge is that *Harper* does not apply to all sanctions, but only to those sanctions, such as exclusion of witnesses, that bar further prosecution by the State or that are the "functional equivalent of dismissal." *Harper*, 2011-NMSC-044, ¶ 21. Thus, under the facts of this case, even if we were to conclude that there was a violation of the timeline provisions of the local rule, there are still avenues available to the district court that allow it to choose an appropriate sanction that remedies the violation, but that does not effectively bar the continuation of prosecution by the State. For instance, the local rule clearly contemplates that dismissals without prejudice will be utilized by the Second Judicial District Court to enforce compliance. *See* LR2-400(I) (2014) (including dismissal without prejudice as one of the sanctions that may be utilized and providing that, "[i]f the case has been re-filed following an earlier dismissal [without prejudice], dismissal with prejudice is the presumptive outcome for a repeated failure to comply with this rule"); *see also* LR2-308(I)(2) (same). A dismissal without prejudice would permit new deadlines to be established to allow Defendant the meaningful opportunity to interview the witnesses against him, while warning the State that further failures to adhere to the requirements of the local rule may result in the State being disallowed from prosecuting Defendant.[8]

{24} Moreover, to the extent Defendant contends that the local rule and *Harper* cannot be reconciled because the local rule "gives judges wide discretion to select among sanctions, while *Harper* severely limited a judge's choice[,]" we disagree. Defendant characterizes the local rule as

[8]We note that this avenue is curtailed to some degree by the revisions to the local rule. *See* LR2-308(I)(4) (amending the local rule to prohibit the sanction of dismissal, with or without prejudice, where "the state proves by clear and convincing evidence that the defendant is a danger to the community" and "the failure to comply with th[e] rule is caused by extraordinary circumstances beyond the control of the parties").

"requir[ing] mandatory sanctions, without restriction"; however, we note that the local rule does not provide the district court with a blanket discretion to impose any sanction it chooses, but qualifies the district court judge's choice of sanction by requiring that it be "appropriate in the circumstances." LR2-400(I) (2014). We do not interpret the broad language allowing for the choice of an "appropriate sanction" to mean the district court has unfettered discretion; rather, we interpret this broad language as allowing this Court to reconcile the requirements of *Harper* with the local rule under the facts of this case. *Cf.* § 12-2A-10(A) ("If statutes appear to conflict, they must be construed, if possible, to give effect to each."). Given that our Supreme Court has specifically articulated in the local rule that the provisions of the rule and prior case law should be reconciled where possible, *see* LR2-400(A) (2014), we interpret the rule's use of broad strokes in discussing sanctions to allow for the continued application of *Harper* to the sanction to which it applies, rather than intending *Harper*'s upending in only the Second Judicial District. Given this Court's role as an intermediate court, we conclude that such a path is appropriate and sensible under these unique circumstances that require us to apply the local rule, adhere to non-conflicting precedent, consider the interests of defendants and the state, and arrive at a workable methodology that district judges in the Second Judicial District can incorporate into the pre-trial litigation ongoing currently under LR2-308.

{25} In this case, and given the circumstances that preceded the sanctions imposed, it does not appear that the criteria established in *Harper* of (1) intentional, bad faith conduct, (2) consideration of lesser sanctions, and (3) tangible prejudice to the Defendant were considered by the district court. We therefore reverse the district court's order excluding the witnesses from testifying and remand for consideration of these factors.

B. District Court's Suppression of Audio-Visual Evidence

{26} We posit similar concerns as those explained above with regard to the district court's decision to exclude all audio and visual evidence in the present case. With respect to the suppression of audio and visual evidence, however, we note the State's clear violation of Rule 5-501(A) and the local rule. Thus, while we conclude that some sanctions were appropriate, under our precedent all options should have demonstrably been considered. *See Enriquez*, 1998-NMCA-157, ¶¶ 20-21; *Bartlett*, 1990-NMCA-024, ¶ 4.

{27} As we have stated, the local rule requires that "copies of documentary evidence, and audio, video, and audio-video recordings made by law enforcement officers or otherwise in possession of the state" be provided to Defendant at the time of arraignment or within five days of a written waiver of arraignment. LR2-400(D)(1) (2014). Here, Defendant was arraigned before the effective date of the local rule and, thus, Rule 5-501 governed until the local rule took effect. The State's assertion as to the deadline for providing copies of the evidence is resolved by its failure to timely provide them under either Rule 5-501(A) or the local rule. We conclude that it is not necessary to determine which date was required because, in the present case, the State failed to meet either of these deadlines.

{28} Moreover, to the extent the State contends that the requirements of LR2-400(D) (2014) are satisfied by the provision of a speed letter, we disagree. The language contained in the local rule resolves this issue:

> The state shall disclose or make available to the defendant all information described in Rule 5-501(A)(1)-(6) . . . at the arraignment or within five (5) days of when a written waiver of arraignment is filed under Rule 5-303(J) NMRA. In addition to the disclosures required in Rule 5-501(A) . . . , at the same time the state shall provide phone numbers and email addresses of witnesses if available, copies of documentary evidence, and audio, video, and audio-video recordings made by law enforcement officers or otherwise in the possession of the state, and a "speed letter" authorizing the defendant to examine physical evidence in the possession of the state.

LR2-400(D)(1) (2014). The language contained in this rule requires physical[9] copies of documentary and audio-visual evidence *in addition* to the provision of a speed letter. *See Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 46, 333 P.3d 947 ("New Mexico courts have long honored [the] statutory command [that the text of a statute or rule is the primary, essential source of its meaning] through application of the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)); *Frederick v. Sun 1031, LLC*, 2012-NMCA-118, ¶ 17, 293 P.3d 934 ("When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes." (internal quotation marks and citation omitted)). Moreover, pursuant to the language of the local rule, a speed letter is intended to allow the inspection of physical evidence—such as a gun or a knife. It is not intended to allow the State to avoid providing actual copies of the documentary and audio-visual evidence as required by the local rule.

{29} Thus, for the reasons discussed above, the State was required to provide Defendant copies of the lapel camera recording and the two interviews between Defendant and detectives. Having failed to do so, the State was in violation of LR2-400(D)(1) (2014) and subject to sanctions pursuant to LR2-400(D)(4) (2014). Unlike the sanction provision governing violations of track deadlines, sanctions pursuant to LR2-400(D)(4) (2014) are purely discretionary. *Id.* ("If the state fails to comply with any of the provisions of this rule, the court may enter such order as it deems appropriate under the circumstances, including but not limited to prohibiting the state from calling a witness or introducing evidence.").[10] Given the discretionary nature of such sanctions, we do not discern any conflict between the local rule and the case law limiting the district court's exercise of discretion when excluding evidence as a sanction, at least not under the facts of this case. We conclude again that the principles set out

[9]Copies may be provided electronically or in print. LR2-400(D)(5) (2014).

[10]We note again that the amended version of the rule eliminated the district court's discretion in whether to sanction for discovery violations, replacing LR2-400(D)(4) (2014) with LR2-308(I), applicable to any discovery or timeline violation of the local rule. Thus, our conclusion on this issue is of limited applicability.

above, requiring consideration of lesser sanctions and prejudice to Defendant, still apply. Given that lesser sanctions are available but were not considered, and that Defendant received the discovery four months prior to trial and two months prior to the pre-trial motions deadline, we reverse the district court's order excluding all audio-visual evidence. We remand for consideration of an appropriate sanction.

{30} We continue to observe, however, that the State cannot blithely disregard the requirements of the local rule, turn things over late, argue that there was no prejudice to a defendant's case because the pre-trial motion deadline has not run, and avoid repercussions. The local rule requires that a defendant be provided copies of evidence against him at the time of arraignment. Moreover, the time frames set forth in the local rule are short, and delay is certain to impact the ability of the case to proceed in accordance with the track deadlines. While "[c]ourts should apply the extreme sanction of exclusion of a party's evidence sparingly[,]" *State v. Guerra*, 2012-NMSC-014, ¶ 33, 278 P.3d 1031, we specifically note the availability of lesser sanctions, such as dismissal without prejudice, that may help to curtail the late disclosure of evidence in the future.

CONCLUSION

{31} Our ruling today incorporates our understanding of the overarching purpose of the local rule, that being to facilitate the progression of cases in the Second Judicial District and lessen the duration of pending criminal proceedings. We do not believe that the local rule was designed to serve as a technical mechanism by which important witnesses in criminal cases are excluded, core evidence suppressed as a matter of first resort, or cases themselves abruptly dismissed with prejudice. Nor do we think our Supreme Court intended to, barring direct conflict with a specific provision of the local rule, render *Harper* wholly inapplicable in but one of the thirteen judicial districts in New Mexico. For these reasons, we reverse the district court's order excluding witnesses and audio-visual evidence. While we note that there may be situations in which the new case management pilot rule will conflict with case law limiting the discretion of the district court to exclude witnesses, suppress evidence, and dismiss with prejudice, we conclude that the facts of this case present no such conflict.

{32} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JULIE J. VARGAS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-036

Nos. 34,257/34,564 (consolidated (filed February 2, 2017)

COLETTE C. JURY,
Petitioner-Appellant,
v.
VICTOR R. JURY,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DEBORAH DAVIS WALKER, District Judge

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Opinion

James J. Wechsler, Judge

{1} This case arises from the district court's denial of Petitioner Colette C. Jury's motion to modify the child support decree (the 2010 decree) that resulted from the dissolution of the marriage between Petitioner and Respondent Victor R. Jury. After considering evidence of the parties' updated financial information, the district court ruled that the 2010 decree was not subject to modification because neither party demonstrated material and substantial changes in circumstances affecting the welfare of the children.[1]

{2} Petitioner claims that the district court's ruling resulted from its erroneous determination of the parties' gross monthly incomes and, by extension, child support obligations. Respondent argues that, even if the district court miscalculated the parties' gross monthly incomes, its determination that no material and substantial changes in circumstances affecting the welfare of the children occurred is dispositive.

{3} District courts have discretion to deviate from the child support guidelines, NMSA 1978, § 40-4-11.1 (2008), as provided in NMSA 1978, Section 40-4-11.2 (1989). However, such discretion does not extend to the process of calculating the parties' gross monthly incomes. Calculation of the parties' gross monthly incomes must conform to the child support guidelines or precedential appellate court interpretation of the child support guidelines. Therefore, to the extent that the district court improperly deviated from the child support guidelines in calculating the parties' gross monthly incomes, we reverse and remand for recalculation.

{4} We recognize, however, that recalculation alone does not resolve the central issue raised on appeal. Petitioner asks this Court to conclude that changes in income indicated by the parties' updated financial information entitled her to a modification of the 2010 decree as a matter of law. Because the testimony and evidence offered at trial does not support a modification at common law, we are unable to so conclude. However, if recalculation of the parties' gross monthly incomes results in a deviation upward of more than twenty percent of the existing child support obligation, Petitioner is entitled to "a presumption of material and substantial changes in circumstances" as provided by NMSA 1978, Section 40-4-11.4(A) (1991).

{5} The district court's deviation from the child support guidelines in calculating the parties' gross monthly incomes potentially deprived Petitioner of a presumption of material and substantial changes in circumstances to which she was entitled as a matter of law. If, on remand, the district court's recalculation of the parties' gross monthly incomes results in a presumption of material and substantial changes in circumstances under Section 40-4-11.4, the district court shall reconsider whether Petitioner is entitled to a modification of the 2010 decree in light of this opinion.

{6} Petitioner additionally argues that the district court lacked evidence to support its prospective reduction of the amount of child support awarded in the 2010 decree. Respondent argues that the reduction was appropriate but agrees that the district court's failure to articulate how it determined the recalculated amount requires remand. Because Respondent agrees that error occurred, we decline to provide additional legal analysis. On remand, the district court shall determine whether, and to what extent, the 2010 decree was subject to modification given the changes in circumstances occurring on or around June 1, 2015.

{7} Because our reversal and remand undermines the district court's rationale for awarding certain attorney fees, such awards to Respondent in the amounts of $15,000 and $750 are reversed. However, we affirm the district court's award of attorney fees arising from post-judgment proceedings in the amount of $1,500 to Respondent.

BACKGROUND

A. The 2010 Decree

{8} On September 11, 2006, Petitioner filed a petition to dissolve her marriage to Respondent. The district court's February 22, 2010 judgment and order finalized numerous matters between the parties, including the child support obligation. At the time of the 2010 decree, the parties had two minor children of the marriage, ages thirteen (Son) and nine (Daughter). Respondent derived the majority of his income from his employment at, and shareholder interest in, Summit Electric Co., Inc. (Summit Electric) and his shareholder interest in Jury & Associates, LLC (Jury & Associates). Petitioner did not work outside the home.

{9} Substantial testimony and evidence related to the parties' income and financial resources was offered at trial. Exhibits 16 and 16A, which were filed as supplemental exhibits to the appellate record on July 14,

[1]Respondent also filed a motion to modify the 2010 decree, which was denied. Respondent does not appeal this denial.

2016, appear to have featured prominently in the district court's 2010 determination. Exhibits 16 and 16A contained statements of Respondent's gross income, cash received, income taxes paid, and net income for the years 2001 through 2009. Applying the financial information in these exhibits, the district court concluded that Respondent had an "earning capacity" of $750,000 per year. In its ruling from the bench, the district court explained that $750,000 was not Respondent's actual gross annual income, but instead represented a conscious deviation downward. While discussing specific evidence of Respondent's then-current year earnings, the district court stated "I think, if anything, the $750[,000] is low."

{10} After arriving at an annual income of $750,000, the district court subtracted $120,000 paid by Respondent to Petitioner in spousal support. It then divided the total amount by twelve, resulting in a gross monthly income for Respondent of $52,500.

{11} The district court calculated Petitioner's income by combining her spousal support award and $4,000 per month of imputed earning capacity. It then divided the total amount by twelve, resulting in a gross monthly income for Petitioner of $14,000.

{12} Having calculated the parties' combined gross monthly income to be $66,500, the district court calculated the percentage of combined gross monthly income. It credited Respondent with seventy-nine percent of the parties' combined gross monthly income and Petitioner with twenty-one percent of the parties' combined gross monthly income.

{13} The district court then determined the basic child support obligation to be $10,707. Although the child support guidelines in effect in February 2010 did not allow for basic calculation of a combined gross monthly income of $66,500, the district court elected to apply the historical formula to determine the basic child support amount.[2]

{14} The district court also calculated the total child support obligation, the retained portion based upon custody, and the parties' individual child support obligations. The custodial calculation was based upon the children residing with Petitioner fifty-five percent of each month and residing with Respondent forty-five percent of each month. The district court calculated Petitioner's monthly obligation to be $1,518 and Respondent's monthly obligation to be $6,978. It reconciled these obligations to result in $5,460 owed by Respondent to Petitioner each month. It reduced this amount by twenty-one percent of additional expenses, including the cost of the children's health care insurance and private school tuition. After these reductions, Respondent's total monthly child support obligation was $4,872. In accordance with Section 40-4-11.4(B), the district court ordered that the parties exchange updated financial information each year. The merits of the 2010 decree are not on appeal or subject to reconsideration by this Court.

B. The 2014 Denial of the Parties' Motions to Modify the 2010 Decree

{15} Respondent provided updated financial information to Petitioner on November 14, 2011. On December 6, 2011, Petitioner filed a motion to modify the 2010 decree based upon a "deviation upward of greater than twenty percent of the existing child support obligation[.]" Respondent filed a motion in opposition on April 16, 2013, as well as his own motion to modify the 2010 decree on January 7, 2014. He based his motion to modify the 2010 decree upon allegations of substantial changes in circumstances to the custodial time sharing and changes in the parties' incomes.

{16} On January 30, 2012, the district court appointed James W. Francis, CPA, as a Rule 11-706 NMRA expert in the case. He prepared a report that (1) analyzed the parties' 2011 gross incomes and (2) updated Exhibit 16A from the November 2009 trial with Respondent's financial information from 2009 through 2011.

{17} The trial was conducted between April 30, 2014 and May 2, 2014. Francis testified as to his conclusions about the district court's previous determination of Respondent's gross income, stating,

> [In 2009] the judge . . . took an average of the prior eight or nine years [of] after-tax cash income, averaged those out, and it came up to about $750,000. . . . The court then . . . subtracted from that $750,000, $120,000, which was the spousal support that [Respondent] was paying, $10,000 a month. That left a balance of $630,000, which the court divided by twelve, and said that [Respondent's] monthly income for child support purposes was $52,500. So, if the court were to follow the exact same model . . . [Respondent's] income for 2011, using the deviations that I described, would be $2,785,363. But that's just for 2011.

{18} Francis additionally testified that Respondent's 2011 gross income was comprised of salary from Summit Electric and pass-through earnings proportionate to his ownership shares in Summit Electric and Jury & Associates. On direct examination, counsel for Petitioner implied that the 2010 decree resulted from an improper application of the child support guidelines because the district court deducted income taxes paid from Respondent's gross income. Francis replied that pass-through income from certain corporate entities is, sometimes, subtracted from gross income by courts as cash not received by the party. On cross-examination, Francis agreed with counsel for Respondent that S-corporations frequently pass through profits to shareholders for the purpose of paying income taxes.

{19} The parties testified as to the welfare of their children, essentially agreeing that the children lack for nothing and are well provided for by both parents. The parties also agreed that Son, of his own volition, currently resided with Respondent full-time, but disputed the date on which this transition occurred. Based upon motions filed during 2012, the district court ruled that Son ceased residing with Petitioner in late 2011.

{20} The district court denied both parties' motions to modify the 2010 decree. As rationale for its denial, the district court offered the following statements:

> I did the best job I could [in 2009]. And I think it's very interesting to note that, according to the report that you both stipulated into evidence and you both essentially agreed with, number-wise, that [Respondent's] income after deduction for the tax

[2]Prior to the 2008 amendment of Section 40-4-11.1, the child support guidelines provided a formula for the calculation of basic child support to an infinite amount of combined gross monthly income. *See* § 40-4-11.1(K) (1995) (providing that "[f]or gross monthly income greater than $8,000, multiply gross by the following percentages: 11% [for one child,] 16.1% [for two children,] 18.8% [for three children] . . ."). Application of the pre-amendment formula to the parties' combined gross monthly income results in $10,707 per month.

payment was $711,562 [in 2009], and I put his income at $750,000. I think, all things considered, that was pretty close. I estimated that [Petitioner's] earning capacity, in addition to her spousal support, was about $4,000, based on the testimony that I heard and I think it's still at that point.

. . . .

And I said at the time, I don't want to see you back in a year, or two years. I knew that [Respondent] . . . by all accounts, he's a very capable businessman. He runs a very successful company. The income fluctuates up and down, through the last eleven years. There is a huge variation from year to year. So I was well aware at the time that I could pick a number and then the next year the numbers would be twice that much.

. . . .

Now, under the statute, and there was a quote from *Spingola* [*v. Spingola*, 1978-NMSC-045, 91 N.M. 737, 580 P.2d 958,] the court can only modify child support if there is a material and substantial change in circumstances which would, since the last order was entered, which would warrant the modification of the child support.

. . . .

I picked what I thought was a reasonable number [in 2009]. If [Petitioner] didn't like that number, she should have appealed at the time. I can't now go back and fix that number.

. . . .

[Petitioner] did argue that [Respondent's] income has increased. Maybe, maybe not. If you look at, you know, we don't even have the number for this year. I don't have the numbers for 2013. I don't even have the numbers for 2012; 2011, the numbers were good. And I'm looking . . . at the numbers that were calculated based on the method that was recently approved by the Court of Appeals in the *Clark* [*v. Clark*, 2014-NMCA-030, 320 P.3d 991] decision[.]

. . . .

If I look at 2011, it's one thing; if I look at the last three years, it's something; if I look at the last ten, it's one thing; if I look at the last eleven, it's something totally different. So I don't know if his income has gone up, because of . . . again, when a judge hears numbers from zero to a million, I have discretion to pick any number I want in that range. And there is evidence to support my decision. I thought under the circumstances a ten-year average was appropriate. So I arrived at income figure for [Respondent's] earning capacity at $813,463.

. . . .

If you take . . . the deduction for the spousal support, that brings it down to $693,463; that puts it at $57,788 a month, as opposed to $52,500 a month[.] . . .

That's not to me something that is statistically significant. It's not a twenty percent change in his income. If we use the old worksheets, which I really don't want to do because there are no worksheets that apply to this current situation.

. . . .

But if we put this number on the old guidelines, there wouldn't be a twenty percent change in that bottom baseline child support amount.

. . . .

So basically, what I'm finding is that neither side carried his or her burden of proof to show that there's been a change, a substantial change materially affecting the welfare of the children. So we don't get to the cap issue. We don't get to the *Spingola* [, 1978-NMSC-045] analysis. Both motions are denied. The child support remains the same.

{21} The district court reiterated its rationale and the income calculation methodology in a subsequent hearing on May 16, 2014. That hearing resulted in an order, entered on June 10, 2014, which provided that (1) a hearing on attorney fees would be held on August 28, 2014 and (2) the parties must submit proposed findings of fact and conclusions of law as to all appellate issues within fifteen days after the hearing on attorney fees. Petitioner orally indicated that she would not appeal.

C. Attorney Fees and Findings of Fact and Conclusions of Law

{22} The August 28, 2014 hearing on attorney fees resulted in an award of $15,000 to Respondent. In support of its award, the district court stated, "[Petitioner's] initial motion was to increase child support. She did not get an increase in child support. [Respondent] prevailed on that issue. That's how I can decide [that Respondent is entitled to attorney fees]." Additionally, the district court's ruling included a reduction in Respondent's child support obligation, effective June 1, 2015, based on Son's pending eighteenth birthday and graduation from high school. Both parties indicated that they would not appeal.

{23} On September 30, 2014, the district court held a hearing to present the final order. During this hearing, Petitioner raised a perceived inconsistency between the district court's oral rulings on May 2, 2014 and August 28, 2014 and requested a deadline for findings of fact and conclusions of law. The district court refused, stating, "We're done. I've already ruled. You've already stated on the record that nobody's appealing. We can't at this point." The district court entered separate orders on the merits and for attorney fees.

{24} On October 24, 2014, Petitioner filed a motion to reconsider numerous issues, including the district court's (1) denial of the motion to modify the 2010 decree on the merits; (2) sua sponte reduction of Respondent's child support obligation effective June 1, 2015; (3) award of attorney fees to Respondent; and (4) refusal to allow the submission of findings of fact and conclusions of law. The district court held a hearing on Petitioner's motion to reconsider on October 29, 2014. This hearing resulted in a partial grant and partial denial of Petitioner's motion. With respect to findings of fact and conclusions of law, the district court ruled that "[b]oth sides waived their right to submit findings and conclusions under Rule [1-052 NMRA] and pursuant to my [June 10, 2014] order." The district court awarded $750 in attorney fees to Respondent for defending the motion.

{25} Petitioner filed a timely appeal to this Court. During the pendency of this appeal, Respondent made efforts to depose Petitioner in accordance with Rule 1-069 NMRA and to gather information related to enforcement of the district court's award of attorney fees from other sources. Petitioner filed various motions seeking protection from Respondent's enforcement efforts. On February 2, 2015, the district court awarded Respondent $1,500 in attorney fees for costs incurred in defending Petitioner's motions and filing related

motions. Petitioner appealed this award of attorney fees. Petitioner's two appeals were consolidated by order of this Court.

STANDARD OF REVIEW

{26} Child support determinations are made at the discretion of the district court and are reviewed for abuse of discretion. *Styka v. Styka*, 1999-NMCA-002, ¶ 8, 126 N.M. 515, 972 P.2d 16. That discretion, however, "must be exercised in accordance with the child support guidelines." *Id.* A district court abuses its discretion if "it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." *Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 4, 136 N.M. 693, 104 P.3d 559 (internal quotation marks and citation omitted). In determining whether a deviation from the child support guidelines resulted from a mispprehension of law, we apply de novo review. *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{27} As an initial matter, we address the notable absence of findings of fact and conclusions of law supporting the district court's ruling. Neither Petitioner nor Respondent requested or submitted proposed findings of fact or conclusions of law prior to the district court's deadline of September 12, 2014. Rule 1-052(A) provides that "[i]n a case tried by the court without a jury, . . . the court shall enter findings of fact and conclusions of law when a party makes a timely request." As a general rule, a party's failure to make such a request within ten days, or as otherwise ordered by the district court, operates as a waiver of the right to specific findings of fact and conclusions of law. *See* Rule 1-052(B); *Wagner Land & Inv. Co. v. Halderman*, 1972-NMSC-019, ¶¶ 7, 11, 83 N.M. 628, 495 P.2d 1075. However, the absence of findings of fact and conclusions of law does not operate as a bar to appellate review. *See Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 22, 287 P.3d 318 ("Rule 1-052 was rewritten in 2001, and the current version omits reference to preservation of error as this is a matter for the appellate rules." (internal quotation marks and citation omitted)). Petitioner argues on appeal that the district court's misapprehension of Section 40-4-11.1 resulted in its conclusion that the 2010 decree was not subject to modification and asserts that the 2010 decree is subject to modification as a matter of law. This Court may review Petitioner's arguments on the record before us.

APPLICATION OF THE CHILD SUPPORT GUIDELINES AND RELATED STATUTES

A. Determination of Child Support Obligations

{28} The codification of child support guidelines arose in response to a lack of uniformity of support awards across the country. Charles J. Meyer et al., *Child Support Determinations in High Income Families—A Survey of the Fifty States*, 28 J. Am. Acad. Matrim. Law. 483, 484-85 (2016). In 1988, our Legislature enacted Section 40-4-11.1, which significantly limited the discretion of the district courts in making determinations of child support obligations. *See Perkins v. Rowson*, 1990-NMCA-089, ¶ 13, 110 N.M. 671, 798 P.2d 1057 ("[I]t is apparent that Section [40-4-]11.1 is a substantial change in the substance of the law, and a significant restriction of the trial court's formerly broad discretion in determining the amount of a parent's support obligation."); *see also Leeder v. Leeder*, 1994-NMCA-105, ¶ 6, 118 N.M. 603, 884 P.2d 494 ("[T]he guidelines are presumed to provide the proper amount of child support[.]"). The scope of this limitation is expressed in Section 40-4-11.1(A), which states, in pertinent part, "[i]n any action to establish or modify child support, the child support guidelines . . . *shall* be applied to determine the child support due . . . Every decree or judgment of child support that deviates from the guideline amount *shall* contain a statement of the reasons for the deviation." (Emphasis added.)

{29} While "deviation from the child support guideline *amounts* set forth in Section 40-4-11.1" is permitted, no such deviation is authorized with respect to the district court's calculation of the parties' gross monthly incomes. Section 40-4-11.2 (emphasis added); *see* § 40-4-11.1(C)(2), (K) (describing the inputs and methodology used to calculate gross income for purposes of determining child support obligations). Section 40-4-11.1(C)(2) defines "gross income" as "income from salaries, wages, tips, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, significant in-kind benefits that reduce personal living expenses, prizes and alimony or maintenance received[.]" Certain sources of income, such as means-tested public assistance and child support payments received for other children, are exempted from gross income. Section 40-4-11.1(C)(2)(a). Certain expenditures, such as spousal and child support actually paid, result in a reduction of gross income. Section 40-4-11.1(C)(2)(c), (d).

{30} In circumstances in which income is derived from proprietorship of a business or joint ownership of a partnership or closely held corporation, " 'gross income' means gross receipts minus ordinary and necessary expenses[.]" Section 40-4-11.1(C)(2)(b). As a practical matter, this Court is "more concerned with a parent's actual cash flow than we are with income as represented on tax returns." *Major v. Major*, 1998-NMCA-001, ¶ 5, 124 N.M. 436, 952 P.2d 37. An example of this "actual cash flow" principle arose in *Clark*, in which this Court concluded that "Subchapter-S corporation funds actually distributed to the shareholder-spouse must be attributed to the shareholder-spouse as [gross] income" unless the distribution "was used for business purposes or to offset the payment [of] income taxes resulting from any K-1 allocations." 2014-NMCA-030, ¶ 12. The rationale underlying *Clark*—that cash passed to a shareholder for the express purpose of paying income taxes is not "available to apply toward the support of [the] children"—is consistent with our child support jurisprudence. *Major*, 1998-NMCA-001, ¶ 9. To a certain extent, allowing for the deduction of taxes paid on K-1 allocations muddles the definition of "gross income" in Section 40-4-11.1(C). However, taxes paid on W-2 earnings are not deducted from gross income for purposes of calculating child support obligations. *See Boutz v. Donaldson*, 1999-NMCA-131, ¶ 25, 128 N.M. 232, 991 P.2d 517 ("We can discern no clear intent in the statute to consider hypothetical tax consequences of reported income before it is inserted into the child support tables. From a survey of the statutory language used in defining 'gross income,' we see that the Legislature has included all kinds of income without any express regard for the varying effect of taxes.").

{31} Just as Section 40-4-11.1(C) provides the sources of, and allowable deductions from, gross income, Section 40-4-11.1(K) provides temporal direction for calculating gross income, stating, "Use current income if steady. If income varies a lot from *month to month*, use an average of the last twelve months, if available, *or last year's income tax return*." (Emphasis added.) Our appellate interpretations are consistent with the statutory language. *See*

Spingola, 1978-NMSC-045, ¶ 13 (holding that a child support determination "requires that evidence of [an obligor's] *current* financial resources be fully considered" (emphasis added)); *Boutz*, 1999-NMCA-131, ¶ 10 (holding that it was error to use "income from other than the year in question"). While no New Mexico appellate court has expressly considered the appropriateness of multi-year averaging, other jurisdictions allow multi-year averaging when self-employment or business income is subject to fluctuation. *See, e.g.*, *In re Marriage of Garrett*, 785 N.E.2d 172, 178 (Ill. App. Ct. 2003) (affirming the district court's use of a three-year average of self-employment income as a physician); *Roberts v. Roberts*, 924 So. 2d 550, 553 (Miss. Ct. App. 2005) (affirming the district court's use of a three-year average of self-employment income from pharmaceutical sales); *Gress v. Gress*, 743 N.W.2d 67, 74-75 (Neb. 2007) (affirming the district court's use of a three-year average of self-employment income from farming and stating "it appears that both here and elsewhere, a [three]-year average tends to be the most common approach in cases where a parent's income tends to fluctuate [and] even among the jurisdictions which permit an average of more than [three] years, courts appear reluctant to use more than a [five]-year average"); *see also Zimin v. Zimin*, 837 P.2d 118, 123 (Alaska 1992) (affirming the district court's use of current self-employment income from commercial fishing and stating "although income averaging is clearly appropriate [when income fluctuates], a ten-year average is generally not a reliable indicator of an obligor parent's current earning capacity").

{32} After calculating each party's gross monthly income, that amount is combined and entered into Section 40-4-11.1(K), Worksheet B. Using the parties' combined gross monthly income and each party's percentage of combined income, the district court must determine the basic monthly support by reference to the basic child support schedule. Section 40-4-11.1(K). The basic child support schedule provides the presumptive amount of child support for combined gross monthly income up to $30,000. Section 40-4-11.1(A), (K). Unlike other jurisdictions, our Legislature has not specifically authorized district courts to use discretion in calculating child support obligations when gross monthly income exceeds the maximum amount on the basic child support schedule. *Cf.* Colo. Rev. Stat. § 14-10-115(7)(E) (2016) ("The judge may use discretion to determine child support in circumstances where combined adjusted gross income exceeds the uppermost levels of the schedule of basic child support obligations[.]"); *see also* Meyer, *supra*, at 500 n.68 (noting that "New Mexico does not have any high income instruction"). In the absence of direction from our Legislature with respect to the calculation of child support obligations when the parties' combined gross monthly income exceeds $30,000, we presume that a district court retains broad discretion.[3] *See Peterson v. Peterson*, 1982-NMSC-098, ¶ 9, 98 N.M. 744, 652 P.2d 1195 ("Child support determinations are an area of the law in which trial court are allowed broad discretion."). As such, if the parties' combined gross monthly income exceeds $30,000, the district court must determine the basic monthly support after considering

> [(1)] the total financial resources of both parents, including their monetary obligations, income, and net worth; [(2)] the life-style the children would be enjoying if the father and the mother were together and the non-custodial parent had his [or her] present income level; and [(3)] whether the income, surrounding financial circumstances, and station in life demonstrated an ability by the father [or mother] to provide additional advantages to [their] children above their actual needs.

Padilla v. Montano, 1993-NMCA-127, ¶ 36, 116 N.M. 398, 862 P.2d 1257 (citing *Spingola*, 1978-NMSC-045, ¶ 24).

{33} After calculating the basic monthly support, whether using the basic child support schedule or otherwise, the district court must continue to apply Worksheet B of Section 40-4-11.1 to determine (1) the amount transferable from the obligor to the obligee and (2) any reduction of this amount based upon the obligee's contribution to health and dental premiums, work-related child care, and extraordinary costs including, but not limited to, extraordinary medical, dental, and counseling costs, extraordinary educational expenses, and transportation and communication expenses necessary to implement custodial arrangements. Section 40-4-11.1(H), (I), (K). The previously determined percentage of combined income figures prominently in this series of calculations. *See* § 40-4-11.1(K) (applying the percentage of combined income to determine each party's share of the basic monthly support and each party's share of additional payments and expenses).

{34} Numerous precedential opinions hold that a district court's failure to calculate gross income as per Section 40-4-11.1(A) and Section 40-4-11.1(K) is error. For example, in *Boutz*, the obligor's gross income included dividend earnings from investments that fluctuated from year to year. 1999-NMCA-131, ¶ 9. At trial, the district court rejected evidence indicating the amount of dividend earnings in the first half of 1996 and instead used dividend earnings from 1995. *Id.* This Court concluded that the use of 1995 dividend earnings was error. *Id.* ¶ 10. In so holding, we noted that "[t]he [district] court did not explain its . . . reliance on what was arguably stale information" and that the error was compounded by the district court's use of 1996 income calculations for the obligee. *Id.* ¶¶ 9-10; *see also id.* ¶ 10 ("Calculating [the parties'] dividend earnings by different methods violates one of the express goals of the statute: making awards more equitable[.]" (alteration, internal quotation marks, and citation omitted)). Similarly, in *Klinksiek*, the district court excluded rental income from the obligee's gross income. 2005-NMCA-008, ¶ 2. This Court reversed, holding that Section 40-4-11.1(C)(2) requires calculation of "income from any source." *Klinksiek*, 2005-NMCA-008, ¶¶ 7, 12. Additionally, in *Tedford v. Gregory*, the petitioner filed for retroactive child support from her alleged natural father. 1998-NMCA-067, ¶ 1, 125 N.M. 206, 959 P.2d 540. The district court awarded petitioner $50,000 but failed to explain how it calculated that amount. *Id.* ¶ 32. This Court reversed, holding that "the [district] court should

[3]Relevant legal scholarship indicates that enacted child support guidelines provide a presumptive minimum amount of child support in high-income scenarios. *See* Laura W. Morgan, *The High-Income Parent, Child Support Guidelines Interpretation & Application* § 8.07 (2016) ("[W]here the guidelines do not contain an express formula, some states use a presumption that the highest amount provided for in the guidelines is the correct amount. . . . [T]hese states allow deviation. Thus, a court must first presumptively determine support as the highest amount provided in the guidelines, but the court may deviate upward from the presumed amount based on the specific needs of the child[.]" (emphasis added)).

first determine both the mother's and the father's income during the applicable time periods [and s]uch findings should be made before applying any deviation from the standard child support guidelines." *Id.* ¶¶ 31, 34.

{35} In summary, *Klinksiek* and *Boutz* hold that a district court may not deviate from Section 40-4-11.1 in calculating the parties' gross incomes. *Klinksiek*, 2005-NMCA-008, ¶ 7; *Boutz*, 1999-NMCA-131, ¶ 10. *Boutz* additionally implies that the district court must, to the degree possible, calculate the parties' gross incomes during the same time period. 1999-NMCA-131, ¶ 10. *Clark* and *Boutz* outlined the intersection between gross income and income taxes in the child support context. *Clark*, 2014-NMCA-030, ¶ 12; *Boutz*, 1999-NMCA-131, ¶ 25. And *Tedford* clarified that gross income must be calculated prior to any allowable deviations from the child support guidelines. 1998-NMCA-067, ¶ 31. These holdings, along with the plain language of the relevant statutes, guide our analysis of the present case.

B. Deviation From the Child Support Guidelines

{36} Section 40-4-11.2 provides that "[a]ny deviation from the child support guideline *amounts* set forth in Section 40-4-11.1 . . . shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate." (Emphasis added.) As we have already clarified, it is error to deviate from the child support guidelines in calculating the parties' gross incomes except as authorized by statute or appellate case law. However, it is also error to deviate from the child support guidelines in any manner without providing written justification for such deviation. *See* § 40-4-11.2; *Tedford*, 1998-NMCA-067, ¶ 33 ("[W]e conclude that the trial court erred . . . in failing to specify the reasons for the trial court's decision in deviating from the child support guidelines."). As indicated in Section 40-4-11.2, acceptable reasons for deviation include circumstances in which "application of the guidelines would be unjust or inappropriate" as indicated by "substantial hardship in the obligor, obligee or subject children[.]"

C. Modification of Child Support Obligations

{37} A district court may modify a child support obligation upon a showing of material and substantial circumstances subsequent to the adjudication of the pre-existing child support order. Section 40-4-11.4(A). As indicated by our Supreme Court in *Spingola*, a petitioner must demonstrate a substantial change in circumstances affecting the welfare of the children to justify a modification. *See* 1978-NMSC-045, ¶ 16 ("The issue before the trial court on a petition to modify the amount of child support is whether there has been a showing of a change in circumstances. The change must be substantial, materially affecting the existing welfare of the child, and must have occurred since the prior adjudication where child support was originally awarded."). This requirement is referred to as "the traditional changed circumstances requirement" and governs the vast majority of child support modification determinations. *Perkins*, 1990-NMCA-089, ¶ 4.

{38} However, in 1990, our Legislature enacted Section 40-4-11.4, which provided "a court may modify a child support obligation *without* showing material and substantial change in circumstances if application of the child support guidelines in Section 40-4-11.1 . . . would result in a deviation upward or downward of more than twenty percent of the existing child support obligation." (Emphasis added.) This Court limited Section 40-4-11.4 (1990), at least impliedly, in *Perkins*, which held that "a showing of a substantial change in circumstances is still required before the trial court can modify a parent's child support obligation." 1990-NMCA-089, ¶ 3. After *Perkins*, our Legislature amended Section 40-4-11.4 to provide that "[t]here shall be a presumption of material and substantial changes in circumstances if application of the child support guidelines in Section 40-4-11.1 . . . would result in a deviation upward or downward of more than twenty percent of the existing child support obligation[.]" Section 40-4-11.4(A) (1991). This Court has subsequently viewed Section 40-4-11.4 to supersede *Perkins* and to abrogate the traditional changed circumstances doctrine under the circumstances contemplated. *See Boutz*, 1999-NMCA-131, ¶ 2 (concluding that a proposed increase of more than twenty percent in the father's child support obligation constituted a change in circumstances "sufficient in an amount to justify a court-ordered modification of child support").

{39} We conclude that *Boutz* is consistent with the legislative intent embodied in Section 40-4-11.4. "[T]he Legislature, as the policy-making branch of government, can alter or abrogate the common law[.]" *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297. Our Legislature has *twice* enacted legislation designed to limit the application of the traditional changed circumstances requirement in favor of determining a petitioner's entitlement to a modification based upon "a deviation upward or downward of more than twenty percent of the existing child support obligation[.]" *Compare* § 40-4-11.4 (1990), *with* § 40-4-11.4 (1991); *see also Rhinehart v. Nowlin*, 1990-NMCA-136, ¶ 56, 111 N.M. 319, 805 P.2d 88 (Hartz, J., concurring in part and dissenting in part) ("If the [L]egislature has spoken on a matter of public policy, the judiciary should respect that policy in matters of statutory interpretation and common-law jurisprudence."). As such, we reiterate that, in cases in which application of the parties' updated financial information to the child support guidelines results in a deviation upward or downward of more than twenty percent of the existing child support obligation, the party seeking modification is entitled to a presumption of material and substantial changes in circumstances justifying a modification.

{40} Of course, legal presumptions are generally rebuttable, and we agree with Respondent that the *Spingola* factors provide analytical support for denying a motion to modify child support even when application of Section 40-4-11.4(A) results in a presumption of material and substantial changes in circumstances justifying a modification. *See Spingola*, 1978-NMSC-045, ¶ 24 (providing considerations relevant to determinations of child support obligations, including "what life-style the children would be enjoying if the father and mother were not divorced and the non-custodial parent had [their] level of income" and the "ability of [a parent] to furnish additional advantages to his [or her] children above their actual needs"). For example, if the updated financial information resulted in the obligor's child support obligation increasing by twenty percent, but the obligee failed to offer any additional evidence justifying modification, the statutory presumption could be rebutted.

{41} However, *Spingola* also outlined principles that govern the use of judicial discretion on a motion to modify child support. These principles include "judicious consideration, honesty, common sense, and regular procedure *for arriving at an equitable solution for all*[.]" *Id.* ¶ 20

(emphasis added). This language indicates that determinations of child support obligations are intended to be equitable as between the parties. *See DeTevis v. Aragon*, 1986-NMCA-105, ¶ 26, 104 N.M. 793, 727 P.2d 558 (holding that issues of child support are subject to "a fair balancing of the equities in light of the best interests and welfare of the children"); *see also* § 40-4-11.2 (allowing deviation from the child support guidelines if application "would be unjust or inappropriate").

{42} In summary, the child support guidelines limit the need for judicial discretion in the vast majority of child support determinations. However, Section 40-4-11.4 requires that the district court use discretion when faced with a statutory presumption of material and substantial changes in circumstances. *Spingola* limits this discretion. A child support determination must "arriv[e] at an equitable solution for all[.]" *Spingola*, 1978-NMSC-045, ¶ 20. Therefore, when faced with a presumption of material and substantial changes in circumstances arising under Section 40-4-11.4, a district court does not have discretion to deny modification of the existing child support obligation if doing so would perpetuate inequities as between the parties.

THE DISTRICT COURT PROCEEDINGS AND RULING

A. The Basic Child Support Amount

{43} Although the issue is not expressly raised on appeal, the district court's calculation of $10,707 as the basic amount of child support appears legally sound under the circumstances. Both parties testified at trial that the children are well-provided for. Petitioner testified that she "did not need more than [the adjusted amount of] $4,872" to provide for the children. In cases in which the parties' combined gross monthly income exceeds $30,000, the district court has discretion to calculate the appropriate basic child support amount, including by reference to the historical formula as occurred here. *Peterson*, 1982-NMSC-098, ¶ 9 ("Child support determinations are an area of the law in which trial court are allowed broad discretion.").

B. *Spingola* Analysis

{44} In light of the testimony described immediately above, a *Spingola* analysis does not trigger a modification of the 2010 decree as a matter of law. We therefore disagree with Petitioner's argument that Respondent's "enhanced financial position" necessarily requires modification of the 2010 decree.

{45} *Spingola* holds that a "dramatic increase" in the obligor's income may imply a substantial change in circumstances and trigger a modification of child support. 1978-NMSC-045, ¶¶ 13-14. In so concluding, our Supreme Court noted that "[i]t is ridiculous to assume that the welfare of the children would not have improved considerably . . . [if] the father's income had doubled." *Id.* ¶ 13. However, in *Spingola*, the father's gross annual income increased from $42,000 to $87,000 over a period of three years. *Id.* ¶ 3. This increase in income resulted in a potential increase in the father's monthly child support obligation from $1,000 to $3,000. *Id.*

{46} Neither the level of income nor the proposed modification of the existing child support obligation in *Spingola* is analogous to the present case. In 1978, an additional $2,000 per month in child support certainly would have positively impacted the welfare of the parties' three children. This potential for positive impact is emphasized in the second and third *Spingola* factors that direct district courts to consider the "welfare" of the children in the context of (1) "what life-style the children would be enjoying if the father and mother were not divorced and the [father] had his present level of income" and whether (2) "the father demonstrates an ability . . . to furnish additional advantages to his children above their actual needs[.]" *Id.* ¶ 24. We are, however, unable to conclude that these factors weigh against Respondent in this case. Respondent's gross income appears to have increased substantially from the $750,000 calculated for purposes of the 2010 decree. But Respondent provides child support, after adjustments, of $4,872 each month for his two children. Petitioner testified at trial that her children "have far more privilege than the majority of children." Both she and Respondent testified as to the luxuries afforded to the children with respect to housing, education, travel, vehicles, and other material possessions. In *Spingola*, the father argued at trial and on appeal that his obligation to support his children extended only to "necessities." *Id.* ¶ 21. That is not the case here. Instead, we conclude that a *Spingola* analysis does not favor Petitioner's position on appeal under the circumstances of this case. *Cf. Downing v. Downing*, 45 S.W.3d 449, 456 (Ky. 2001) ("[N]o child, no matter how wealthy the parents, needs to be provided more than three ponies.").

C. Calculation of Gross Income

{47} Although the district court has discretion to determine $10,707 as the basic child support amount, our review of the proceedings and record evidence reveals that the district court improperly deviated from the child support guidelines in its calculation of the parties' gross incomes for 2011. This miscalculation, which potentially deprived Petitioner of the "presumption of material and substantial changes in circumstances" provided by Section 40-4-11.4, constitutes an abuse of discretion requiring reversal and remand.

{48} We discern three distinct issues with the district court's calculation of the parties' gross incomes: (1) the subtraction of taxes paid from Respondent's gross income; (2) the use of a ten-year average to calculate Respondent's gross income; and (3) the failure to calculate Petitioner's current income. We discuss each issue in turn.

1. After Tax Income (Respondent)

{49} Gross income is calculated using pre-tax income. *See* § 40-4-11.1(K) ("Gross Monthly Income: Includes all income[.]"); *Boutz*, 1999-NMCA-131, ¶ 25 ("We can discern no clear intent in the statute to consider hypothetical tax consequences of reported income before it is inserted into the child support tables."). However, in its May 2, 2014 oral ruling, the district court expressly indicated that the 2010 decree was based upon Respondent's income after deduction of tax payments. For 2011, the district court gave no indication whether gross income was calculated pre- or post-tax in the present case, but it stated that it was "looking at the numbers that were calculated based on the method that was recently approved [in] *Clark*[.]" As discussed above, *Clark* held that funds distributed to a shareholder constitute gross income unless they are used to "offset the payment [of] income taxes resulting from any K-1 allocations." 2014-NMCA-030, ¶ 12. While *Clark* justifies certain modifications to Respondent's gross income, we question the degree to which the district court may have done so. Petitioner's Exhibit One provides various financial data, including: "Respondent's Cash Received [From All Sources]," " Total Taxes Paid," and "After Tax Cash Income." Petitioner's Exhibit One differentiates between income received from Respondent's shareholder interests in Summit Electric and Jury & Associates and from salary. Petitioner's Exhibit One does not, however, differentiate between taxes paid on shareholder income and salary income. This differentiation is important given the distinction drawn above between the treat-

ment of pass-through income used for payment of income taxes under *Clark* and the treatment of traditional W-2 earnings. For example, Petitioner's Exhibit One provides the following data for 2011: $4,219,841 of cash received from all sources; $1,434,478 of total taxes paid; and $2,785,363 of after tax cash income. Respondent's "After Tax Cash Income" results from subtracting $1,434,478 from $4,219,841. However, even applying *Clark*, this calculation incorrectly applies Section 40-4-11.1(K). "Cash Received [From All Sources]" details Respondent's 2011 earnings: $2,610,309 from his ownership interest in Summit Electric; $262,929 from his ownership interest in Jury & Associates; $1,014,055 from salary; and $332,548 from other income. The taxes paid on these four amounts are then blended together as "Total Taxes Paid." This calculation improperly combines income taxes paid on Respondent's income from his ownership interests in Summit Electric and Jury & Associates with income taxes paid on his income received as salary and other income. In short, any taxes paid that are attributable to Respondent's salary and other income must be incorporated into gross income.

2. Multi-Year Averaging (Respondent)

{50} Section 40-4-11.1(K) requires that gross income be calculated based on "current income if steady[,]" or, if not steady, by reference to "last year's income tax return." As discussed above, other jurisdictions allow multi-year averaging in cases in which the obligor's income fluctuates. However, we are aware of no other jurisdiction that permits the use of a ten-year average in calculating current income. *See Zimin*, 837 P.2d at 123 (stating "a ten-year average is generally not a reliable indicator of an obligor parent's current earning capacity"). In the present case, after stating that it did not have "the numbers for 2013" or "for 2012," the district court used a ten-year average to calculate Respondent's gross income, arriving at a total of $813,463 per year for 2011. Unfortunately, we are unable to recreate the district court's calculation using Petitioner's Exhibit One. Our ten-year average for the years 2002-2011 results in after tax cash income for Respondent of $976,155—a difference of more than $160,000 from the district court's total of $813,463. This disparity emphasizes the rationale behind requiring the district court to explain deviations from the child support guidelines in writing. *See Tedford*, 1998-NMCA-067, ¶¶ 32-33 (describing the failure to "clearly indicate" how it determined the child support award as error). Because we do not have the benefit of briefing on the topic, we decline to expressly decide whether and to what extent multi-year averaging is allowable when calculating a party's gross income for purposes of determining child support obligations. Absent such a decision, Respondent's actual gross income for 2011 remains unclear. As such, on remand, the district court shall, in light of this opinion and other persuasive sources, make such a determination and clearly indicate in its order the exact calculations used in determining the parties' gross incomes.

3. Current Income (Petitioner)

{51} Section 40-4-11.1(C)(1) defines "income" as "actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed." This subsection empowers district courts to impute income as needed in order to accurately derive the parties' gross monthly incomes. *See State ex rel. Human Servs. Dep't v. Kelley*, 2003-NMCA-050, ¶ 13, 133 N.M. 510, 64 P.3d 537 ("The child support guidelines require the imputation of income to an unemployed or underemployed parent to the level of employment at full capacity."). In 2010, the district court estimated Petitioner's earning capacity to be $4,000 per month and continued to impute that amount in the present case. However, the record evidence includes Petitioner's 2011 tax returns. In 2011, Petitioner reported an adjusted gross income of $109,089 on her federal tax returns. Dividing $109,089 by twelve provides a more accurate gross monthly income for Petitioner than the amount imputed for the 2010 decree. We can discern no reason for the continued imputation of income when evidence of actual gross income has been provided. Because the district court calculated Respondent's gross annual income through 2011, Petitioner's 2011 tax return is the most appropriate source from which to determine Petitioner's gross income. *See Boutz*, 1999-NMCA-131, ¶ 10 (holding that the district court must, to the degree possible, calculate the parties' gross incomes during the same time period).

D. Inequities as Between the Parties

{52} Because we do not have the benefit of a Rule 11-706 expert on appeal, we are unable to determine to any degree of certainty the extent to which recalculation of the parties' gross monthly incomes will affect Respondent's child support obligation. While $10,707 appears to be an appropriate basic child support amount, the district court could reconsider that amount on remand. Nevertheless, because the parties' gross monthly incomes and the percentage of combined income are non-discretionary determinations, we provide the following model to demonstrate the potential inequity that results from an incorrect calculation of gross income.

{53} The 2010 decree, which applies Petitioner's gross annual income of $168,000 and Respondent's annual after-tax cash income of $750,000, operates as follows: *[Editor's Note: see Table 1]*

{54} If we recalculate for 2011 assuming that (1) $10,707 remains the basic child

Table 1

Part 1 Basic Support	**Mother**	**Father**	**Combined**
1. Gross Monthly Income	$14,000	$52,000	$66,500
2. Percentage of Combined Income	21%	79%	100%
3. Number of Children			2
4. Basic Support from Table			$10,707
5. Shared Custody Basic Obligation			$16,060
6. Each Parent's Share	$3,373	$12,688	
7. Number of 24 Hour Periods with Each Parent	201	164	365
8. Percentage with Each Parent	55%	45%	100%
9. Amount Retained	$1,855	$5,710	
10. Each Parent's Obligation	$1,518	$6,978	
11. Amount Transferred		$5,460	
Part 2 Additional Monthly Payments			
12. Children's Health and Dental		$300	
13. Work-Related Child Care (NA)			
14. Additional Expenses (Tuition)		$2,500	
Petitioner's Contribution (21%)	$588		
Respondent's Actual (Transferred) Obligation		$4,872	

support amount, (2) Respondent's gross income is calculated using a post-tax three-year average for the years 2009, 2010, and 2011, which results in a total of $1,344,139,[4] and (3) Petitioner's gross income of $109,089 is determined using her 2011 tax returns, the impact on Respondent's child support obligation is as follows:

[Editor's Note: see Table 2]

The $7,549 basic amount transferred represents a thirty-eight percent increase over Respondent's basic amount transferred of $5,460 in the 2010 decree. The $7,325 actual obligation represents a fifty percent increase over Respondent's total amount transferred of $4,872 in the 2010 decree. Such increases result in "a presumption of material and substantial changes" as contemplated by Section 40-4-11.4(A).

{55} We understand that these numbers are, to a degree, hypothetical. However, we believe that the impact on Petitioner's percentage of combined monthly income, which was twenty-one percent in the 2010 decree, requires consideration. This percentage has an obvious effect on each party's basic child support obligation. It also figures into the additional payments and expenses portion of Worksheet B. The 2010 decree required Petitioner to pay twenty-one percent of the costs for the children's health and dental insurance and private school tuition. If Petitioner's gross monthly income actually amounts to approximately eight percent of the parties' combined gross monthly income, an order that results in Petitioner's overpayment is inequitable as between the parties.

{56} At oral argument before this Court, Respondent argued that inequities arising from arguably incorrect percentages of combined income are mitigated by informal understandings between the parties. As an example, Respondent implied that increases in the children's tuition have gone unaccounted for since entry of the 2010 decree. This may be the case. However, a motion to modify child support focuses on the period between the previous adjudication and the filing of a motion to modify by either party. Section 40-4-11.4(B)(1) contemplates "an annual exchange of financial information . . . for the year preceding the request [to modify.]" Regardless of practical, but non-judicially recognized or mandated alterations to the 2010 decree, it is the terms of the 2010 decree that are at issue on remand.

{57} We recognize that the district court is empowered to deviate from the child support guidelines as provided in Section 40-4-11.2. Because the parties' combined gross monthly income, by any measure, exceeds $30,000, the district court could make gross income and percentage of combined income calculations exactly as described above and then elect to reduce the basic child support amount as a matter of discretion. However, when faced with a statutory presumption of material and substantial changes in circumstances, the district court does not have discretion to deny a motion to modify if doing so would perpetuate an objectively incorrect determination of the parties' percentage of combined income.

{58} On remand, if the district court's recalculation of the parties' gross monthly incomes results in a deviation upward or downward of more than twenty percent such that Petitioner is entitled to a statutory presumption of material and substantial changes, the district court shall consider the recalculated percentage of combined income attributable to Petitioner independent of other considerations. If continued enforcement of the 2010 decree would result in inequity between the parties, the 2010 decree must be modified.

ATTORNEY FEES

{59} This Court reviews awards of attorney fees for abuse of discretion. *Bustos v. Bustos*, 2000-NMCA-040, ¶ 24, 128 N.M. 842, 999 P.2d 1074. Rule 1-127 NMRA governs the award of attorney fees in domestic relations cases and requires consideration of the "disparity of the parties' resources, prior settlement offers, the total amount of fees and costs expended by each party, and the success on the merits." *Weddington v. Weddington*, 2004-NMCA-034, ¶ 27, 135 N.M. 198, 86 P.3d 623. No single factor is dispositive. *See id.* ¶ 28 (holding that "disparity is only one factor to be considered and disparity cannot support reversal where the other factors weigh in favor of the award of attorney fees").

{60} The district court concluded that Respondent was the prevailing party on the merits and awarded attorney fees consistent with that conclusion in the amount of $15,000. The district court additionally concluded that several of the issues raised in Petitioner's motion to modify lacked merit and awarded Respondent $750 in attorney fees for the cost of defending. The district court's finding that Respondent prevailed on the merits, when viewed in conjunction with record evidence of settlement offers made by Respondent, could support an award of attorney fees. However, our reversal on the merits undermines the primary rationale underlying the district court's conclusion. The district court concluded that Respondent was the prevailing party because "[Petitioner] did not get an increase in child support."

[4]The actual three-year average of $1,464,139 is reduced by $120,000 to account for spousal support paid by Respondent. It is not increased in consideration of the district court's deduction of taxes paid on W-2 earnings as discussed above.

Table 2

Part 1 Basic Support	**Mother**	**Father**	**Combined**
1. Gross Monthly Income	$9,090	$112,110	$121,101
2. Percentage of Combined Income	8%	92%	
3. Number of Children			2
4. Basic Support from Table (static)			$10,707
5. Shared Custody Basic Obligation			$16,060
6. Each Parent's Share	$1,284	$14,775	
7. Number of 24 Hour Periods with Each Parent	201	164	365
8. Percentage with Each Parent	55%	45%	100%
9. Amount Retained	$706	$6,648	
10. Each Parent's Obligation	$578	$8,127	
11. Amount Transferred		$7,549	
Part 2 Additional Monthly Payments			
12. Children's Health and Dental		$300	
13. Work-Related Child Care (NA)			
14. Additional Expenses (Tuition)		$2,500	
Petitioner's Contribution (8%)	$224		
Respondent's Actual (Transferred) Obligation		$7,325	

This issue is open on remand. *See Rabie v. Ogaki*, 1993-NMCA-096, ¶ 18, 116 N.M. 143, 860 P.2d 785 (holding that "ordinarily the district court should reconsider an award of attorney's fees and expenses when the judgment is reversed and the matter remanded to that court"). Therefore, we reverse the district court's award of attorney fees in the amounts of $15,000 and $750. The district court may reconsider the appropriateness of awards of attorney fees to both parties, including appellate attorney fees, on remand.

{61} The same analysis does not apply to the district court's February 2, 2015 award of attorney fees arising from Respondent's post-judgment enforcement actions. On September 30, 2014, the district court entered its judgment. Respondent thereafter began efforts to enforce the awards of attorney fees in his favor. Rule 1-069(A) provides that, "[u]pon request of the judgment creditor or a successor in interest, the clerk shall issue a subpoena directing any person with knowledge that will aid in enforcement of or execution on the judgment, including the judgment debtor, to appear before the district court to respond to questions concerning that knowledge." Respondent filed notice to depose Petitioner in accordance with Rule 1-069 on November 4, 2014. Petitioner did not appear for this scheduled deposition and filed various motions seeking protection from deposition and other enforcement efforts. Respondent filed responses to the motions as well as a motion to compel Petitioner's deposition. He also appeared in court to litigate these motions. Following a hearing on the merits, the district court denied Petitioner's motions and awarded Respondent attorney fees in the amount of $1,500.

{62} Petitioner argues on appeal that the district court was divested of authority to increase its award of attorney fees because the matter was pending on appeal. Petitioner's argument presents a question of subject matter jurisdiction, which we review de novo. *Weddington*, 2004-NMCA-034, ¶ 13. Petitioner does not argue that this award constituted an abuse of discretion by the district court. *See State v. Garnenez*, 2015-NMCA-022, ¶ 15, 344 P.3d 1054 ("We will not address arguments on appeal that were not raised in the brief in chief and have not been properly developed for review.").

{63} Generally speaking, the filing of notice of appeal by either party "divests the district court of jurisdiction and transfers jurisdiction to the appellate court." *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 9, 139 N.M. 625, 136 P.3d 1035. This rule is not absolute. *Id.* The district court retains jurisdiction "to carry out or enforce the judgment." *Id.* (internal quotation marks and citation omitted). Rule 1-069 is solely related to enforcement of a judgment and is collateral to the matters on appeal. *See State ex rel. Howell v. Montoya*, 1965-NMSC-005, ¶ 11, 74 N.M. 743, 398 P.2d 263 (interpreting Rule 69 of the Federal Rules of Civil Procedure and holding that "a new or independent action is not contemplated, but . . . the supplementary proceedings authorized by [Rule 69] is only a continuation of the original case for the purpose of discovery in aid of the *enforcement of the judgment*" (emphasis added)); *see also Kelly Inn No. 102 v. Kapnison*, 1992-NMSC-005, ¶ 39, 113 N.M. 231, 824 P.2d 1033 ("[I]n collateral matters not involved in the appeal, . . . the trial court retains jurisdiction.").

{64} Because the district court had subject matter jurisdiction over the parties under Rule 1-069, we affirm the February 2, 2015 attorney fee award of $1,500 to Respondent.

CONCLUSION

{65} For the foregoing reasons, we reverse and remand to the district court. On remand, the district court must use a figure for gross income consistent with the evidence offered at trial, and the court must then enter each parties' gross income into the child support guidelines to determine whether there has been a deviation of more than twenty percent. If not, the court still has to apply the factors in *Spingola* to determine whether there has been a material and substantial change justifying modification. If there is a deviation of more than twenty percent, the presumption does apply, and the court should first consider whether the non-movant has rebutted that presumption. Even if the presumption is rebutted, the district court must independently consider whether the recalculated percentage of combined income attributed to each party is inequitable such that modification is required. The district court must enter findings and conclusions that transparently supply the court's underlying basis for its determination whether to grant or deny the motion to modify, so that the parties are clear as to the manner in which the court evaluated the motion to modify.

{66} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
STEPHEN G. FRENCH, Judge

Classified

Positions

Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Ninth District Attorney's Office, Attention: Steve North, 417 Gidding St. Suite 200, Clovis, New Mexico 88101.

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The Fifth Judicial District Attorney's office has an immediate position open to a new or experienced attorney. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney to a Senior Trial Attorney ($41,685.00 to $72,575.00). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs , NM 88240-8335 or e-mail to DLuce@da.state.nm.us.

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Attorney-Advanced Position

The New Mexico Department of Health's Office of General Counsel seeks applicants for an Attorney-Advanced position, which requires at least a Juris Doctorate degree from and accredited school of law and five years of experience in the practice of law. This position will represent the Department in administrative and district court hearings, mediations, and arbitrations and will provide legal opinions and recommendations to Department personnel based on legal research and analysis. The attorney will advise about, draft, and edit agency policies, rules, and regulations; review state contracts; and participate in the New Mexico legislative session. This position works independently as the lead or assistant counsel for Department-run health facilities and/or divisions and spanning numerous areas of state and federal law. The New Mexico Department of Health is the largest State agency in New Mexico and, in addition to providing traditional public health services and programs such as epidemiology and public health offices, it operates seven 24-hour health facilities, the medical cannabis program, the developmental disabilities supports program, and the licensing division for health facilities. The Department also licenses certain health care professionals. The Department's Office of General Counsel is based in Santa Fe, New Mexico and includes a small team of attorneys and support staff, along with the Office of the Chief Privacy Officer/Chief Records Custodian. This position is a Pay Band 80. For more information about this position, contact the Office Administrator, Ann Pacheco at 505-827-2988. Applications must be submitted via the State Personnel Office's website: https://www.governmentjobs.com/careers/newmexico. The State of New Mexico hires without regard to race, color, religion, national origin, sex, sexual orientation, gender identity or expression, age, disability or any other characteristic protected by federal, state or local law. Reasonable accommodations provided to known disabilities of individuals in compliance with the Americans with Disabilities Act . For accommodation information, please contact Andrea Rivera-Smith, Career Services Division Director @ 505-695-5606.

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Blackburn Law Offices, an established Albuquerque criminal defense and racetrack/casino litigation law firm, is seeking a full time attorney to assist in all areas of our practice. Candidates should have strong writing and analytical skills. Please submit a letter of interest and resume to Denise@BBlackburnLaw.com or Blackburn Law Offices, 1011 Lomas NW, Albuquerque, NM 87102.

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The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Clayton Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

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We are seeking a strong litigation secretary to join our Albuquerque office. Eligible candidates will have the following qualifications: Both State, Federal & Appellate court experience, including knowledge of CM/ECF e-filing procedures; Litigation experience; Heavy law and motion practice, with knowledge of trial preparation helpful; Proficiency in Microsoft Word, Excel and Outlook; Skills will include being organized, reliable, good attention to detail, and ability to work under short deadlines; Initiative and willingness to be a team player are important assets for this extremely busy and high profile desk. Salary commensurate with experience. Please send cover letter, resume and desired salary to NMHiring@aol.com.

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