BAR BULLETIN

Official Publication of the State Bar of New Mexico

April 6, 2016 • Volume 55, No. 14

Verdes 9 by Jonathan Morse

www.jmorseart.com

Inside This Issue

CLE *at* Sea 2016

Western Caribbean • Nov. 27–Dec. 4, 2016

Join State Bar President Brent Moore for this incredible trip and enter the holiday season CLE stress free. One year's worth of CLE credits will be provided.

Seven Night Roundtrip from Fort Lauderdale

Ports of call on the Royal Caribbean Allure of the Seas:
Cozumel, Mexico • Falmouth, Jamaica • Labadee, Haiti

Prices per person based on double occupancy (including port expenses)

$679 Interior
$901 Obstructed ocean view
$939 Superior ocean view, deck 10 or 11 with balcony
$949 Superior ocean view, deck 12 or 14 with balcony

Plus taxes and fees

Contact Terri Nelson with Vacations To Go by April 29 to guarantee a room.
Flight reservations may be made on your own or through Terri.
1-800-998-6925, ext. 8704 • tnelson@vacationstogo.com

CLE course information is forthcoming.
Teach a one to two hour class and get free CLE registration ($325).
Send proposals to Christine Morganti, cmorganti@nmbar.org.

State Bar of New Mexico
Center for Legal Education

For more information go to www.nmbar.org, for Members, CLE at Sea

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

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

Cover Artist: Jonathan Morse's M.F.A. from the Visual Studies Workshop was in photography with a specialization in experimental printmaking. He creates unique images from the ground up using Photoshop as a constructive and iterative tool through a confluence of visual sources and personal influences. A past recipient of the Massachusetts Arts and Humanities Foundation Photography Fellowship, his work is in numerous public collections and is currently shown in New Mexico at Hulse/Warman Gallery in Taos. Preferring to make a picture rather than take a picture, digital imaging for this artist is just another pencil, taking its rightful place in the continuum of human mark-making. Ann Landi, former arts writer for ARTnews and the *Wall Street Journal*, has written a recent preview of Morse's work in the Under the Radar column for her arts site (www.vasari21.com). For more of his work, visit www.jmorseart.com.

Notices

Court News

Second Judicial District Court

Reassignment of Cases

Gov. Susana Martinez appointed David Williams to fill the vacancy of Division IX at the Second Judicial District Court. Effective Feb. 29, Judge Williams will be assigned criminal court cases previously assigned to Judge Judith Nakamura's special calendar. Individual notices of reassignment will be sent for active pending cases. Inactive cases will be reassigned to Judge Williams by March 11. Check Odyssey to determine if an inactive case has been reassigned to Judge Williams. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from April 13 to excuse Judge David Williams.

Fifth Judicial District Court

Announcement of Vacancy

A vacancy will exist in the Fifth Judicial District Court, Chaves County, as of April 2 due to the retirement of Hon. Steven L. Bell on April 1. This will be for the Division X bench assignment. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Alfred Mathewson, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications can be found at http://lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., April 19. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Commission will meet at 9 a.m. on April 28 at the Chaves County Courthouse, 400 N. Virginia, Roswell, to evaluate the applicants. The Commission meeting is open to the public and members of the public who have comments about any of the candidates will have an opportunity to be heard.

Ninth Judicial District Court

Notice of Exhibit Destruction

The Ninth Judicial District Court, Roosevelt 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 criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for the years 1993–2012 may be retrieved through April 30; and 3) All cassette tapes in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for years prior to 2007 have been exposed to hazardous toxins and extreme heat in the Roosevelt County Courthouse and are ruined and cannot be played, due to the exposures. These cassette tapes have either been destroyed for environmental health reasons or will be destroyed by April 30. For more information or to claim exhibits, contact the Court at 575-359-6920.

Professionalism Tip

With respect to opposing parties and their counsel:
I will cooperate with opposing counsel's requests for scheduling changes.

State Bar News

Attorney Support Groups

- April 11, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- April 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
- May 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)

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

Board of Bar Commissioners

Appointments

The BBC will make the following appointments. Members who want to serve should send a letter of interest and brief résumé to executive director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or e-mail to jconte@nmbar.org.

ABA House of Delegates

The BBC will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2018 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. The deadline is April 15.

Civil Legal Services Commission

The BBC will make one appointment to the Civil Legal Services Commission for a three-year term. The deadline is April 15.

Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review and act upon complaints against State judges, including supporting documentation on each case as well as other issues that may surface. Experience with receiving, viewing and preparing for meetings and trials with substantial quantities of electronic documents is necessary. The commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment to serve on this board is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this board. The deadline is April 15.

Committee on Women and the Legal Profession

Golf Swing Clinic

The Committee on Women and the Legal Profession invites women to a Golf Swing Clinic on from 10 a.m.–noon, Saturday, April 23, at Sandia Resort & Casino. The instruction will be followed by lunch. The price is $65 per person which includes instruction, rental clubs (if needed) and lunch. Registration is not limited to attorneys. All lady golfers of all skill levels are welcome. Register online at https://www.cgmarketingsystems.com/onlineshop/index.asp?id=9495&courseid=1083. For more information, contact Jocelyn Castillo at jcastillosd@yahoo.com or 505-844-7346.

Entrepreneurs in Community Lawyering

Now Acepting Applications

The New Mexico State Bar Foundation announces its new legal incubator

initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys to start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation is now accepting applications from qualified practitioners. To view the program description, www.nmbar.org/ECL. For more information, contact Director of Legal Services Stormy Ralstin at 505-797-6053.

Paralegal Division

Law Day CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Law Day CLE program (3.0 G) from 9 a.m. to 12:15 p.m., April 30, at the State Bar Center. Topics include working with medicare, presented by Daniel Ulibarri, current issues in immigration presented by Christina Rosado; and recent changes to the federal rules of Civil Procedure. Remote connections for audio or video will not be available. Registration is $35 for Division members, $50 for non-member paralegals and $55 for attorneys. Send checks for registration (no credit cards or cash) to Paralegal Division, PO Box 92860, Albuquerque, NM 87199-2860. Include printed name, State Bar member number and phone number in order to receive CLE credit. Pre-registrations must be received by April 22. Registrations will be accepted at 8:30 a.m. the day of the program, but availability of materials will be limited. For more information, contact Carolyn Winton, 505-888-4357 or visit www.nmbar.org/About us/Divisions/Paralegal Division/CLE Programs.

Young Lawyers Division

ABA YLD District 23 Representative Vacancy

The ABA District Representative position for New Mexico and Arizona (District 23) will be vacant following the 2016 ABA Annual Meeting. The State Bar YLD Board of Directors will appoint a New Mexico young lawyer to fill this position. YLD seeks a motivated person who can represent the interest of New Mexico and Arizona with the ABA YLD. The position requires attending the ABA Annual and Midyear meetings as well as the ABA YLD Spring and Fall Meetings in order to serve on the ABA YLD Council. This position is also a voting member of the State Bar YLD Board of Directors.

To be eligible, applicants must be a member of the State Bar YLD (36 years of age or younger or in practice five years or less), be a member of the ABA and have attended an ABA meeting in the past year. If appointed, this last requirement may be satisfied by attending the ABA YLD Spring Conference in St. Louis on May 5. Interested applicants should send a one to two page letter of interest to YLD Chair Spencer Edelman (spencer.edelman@modrall.com) by April 15. The appointment will be made by April 22. For more information contact Edelman or YLD Chair-elect Tomas Garcia.

Volunteers Needed for Veterans Legal Clinic on April 12

The Young Lawyers Division and the New Mexico Veterans Affairs Health Care System are holding clinics for the Veterans Civil Justice Legal Initiative from 9 a.m.–noon, the second Tuesday of each month at the New Mexico Veterans Memorial, 1100 Louisiana Blvd. SE, Albuquerque. Breakfast and orientation for volunteers begin at 8:30 a.m. No special training or certification is required. Volunteers can give advice and counsel in their preferred practice area(s). The next clinic is Tuesday, April 12. Those who are interested in volunteering or have questions should contact Keith Mier at kcm@sutinfirm.com or 505-883-3395.

Volunteers Needed for Wills for Heroes Event in Santa Fe

YLD is seeking volunteer attorneys for its Wills for Heroes event at 9 a.m. to noon, on Saturday, April 23, at the Santa Fe County Station 60-Rancho Viejo, 37 Rancho Viejo Boulevard, Santa Fe. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders Volunteers need no prior experience with wills. Contact Jordan Kessler at jlkessler@hollandhart.com.

UNM

Law Library

Hours Through May 14

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	Noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Mexican American Law Student Association

21st Annual Fighting for Justice Banquet

The Mexican American Law Student Association invites members of the legal community to the 21st Annual Fighting for Justice Banquet at 6 p.m., April 16, at Hotel Albuquerque in Old Town. Tickets and sponsorship packages can be bought at http://malsaorg.wix.com/ffj2016 or by contacting MALSA President Jazmine Ruiz at ruizja@law.unm.edu. MALSA will award Hon. Justice Cruz Reynoso of the California Supreme Court (ret.) with the 2016 Fighting for Justice Award for his remarkable work in civil rights. Justice Reynoso will be introduced by his former colleague, emeritus professor and former dean of the UNM School of Law Leo Romero.

Other Bars

Albuquerque Lawyers Club

April Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, April 6, at Seasons

Rotisserie & Grill. Jean Bernstein, CEO of Flying Star Cafes and Satellite Coffee, will be presenting. The luncheon is free for members and for $30 non-members. For more information, email ydennig@Sandia.gov.

American Bar Association

Women Rainmakers Event: Using Persuasion to Win

Women of the New Mexico legal community are invited to attend the upcoming ABA Women Rainmakers Spring 2016 Workshop "Don't Be Afraid to Persuade: Using Persuasion to Win" from 3:30–5:30 p.m., April 7, at the Albuquerque Country Club. The workshop is hosted by Roybal-Mack Law, PC, and the Law Offices of Erika E. Anderson, LLC. During the workshop, attendees will explore the art of persuasion in depth, using sound principles and group exercises to help them gain the confidence you need to succeed at appropriately influencing others. Women attorneys at all levels of experience can benefit from learning how to successfully use persuasion in their interactions with clients, colleagues and others. The workshop is free but space is limited and registration is required: http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=239632793.

First Judicial District Bar Association

April Luncheon and Ethics CLE

Join the First Judicial District Bar Association for a buffet luncheon and one hour ethics CLE from noon to 1:30 p.m., April 18, at the Hilton HOtel in Santa Fe. William Slease, chief disciplinary counsel for the New Mexico Supreme Court Disciplinary Board will discuss the most common complaints received by the Board and the types of complaints that result in discipline. Discussion will include discerning what behavior crosses the Rules of Professional Conduct lines and what to do when faced with it. Attendance is $15 and includes a buffet lunch. R.S.V.P. by April 14 to Erin McSherry, erin.mcsherry@state.nm.us.

New Mexico Criminal Defense Lawyers Association

Civil Rights Solitary Confinement CLE Program

By popular demand, the New Mexico Criminal Defense Lawyers Association is hosting a special civil rights CLE (5.2 G, 1.0 EP) on solitary confinement on April 8 in Albuquerque for criminal defense and civil rights plaintiffs' attorneys. Learn how to protect the constitutional rights of clients subjected to solitary confinement while in pre-trial custody, or in post-conviction detention. Taught by some of the state's top practitioners, this CLE also provides a road map of the civil rights litigation process in the context of solitary confinement, including hurdles which face a civil rights attorney. Visit www.nmcdla.org to register.

New Mexico Trial Lawyers Foundation

Tort Law CLE

The New Mexico Trial Lawyers Foundation presents the "35th Annual Update on New Mexico Tort Law" (5.2 G, 1.0 EP) on April 22 in Albuquerque. Visit www.nmtla.org or call 505-243-6003 to register.

Other News

Christian Legal Aid

Training Seminar

New Mexico Christian Legal Aid invites new members to attend a volunteer refresher seminar from noon to 5 p.m., April 29th, at the State Bar Center. Join them for free lunch, free CLE credits and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800, or email christianlegalaid@hotmail.com.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

A Momentous Occasion

The State Bar celebrated its 130th birthday on Feb. 26. To recognize the achievements of members, certificates of recognition were presented to the 13 members celebrating 50 years of practice in the legal profession and 153 attorneys who have been practicing for 25 years. Master of Ceremonies and President J. Brent Moore gave some history of the State Bar and the celebration. Organized by 19 members on Jan. 19, 1886, Moore noted that the State Bar is actually older than the State of New Mexico and the University of New Mexico which were founded in 1912 and 1889 respectively.

Justice Edward L. Chávez presented certificates to the five 50 year honorees who were able to attend. Calling it "a momentous occasion," the Justice expressed his sincere appreciation for the opportunity to present the awards. While outlining the many accomplishments of the 50 year honorees, Justice Chávez joked that the ceremony would last many hours if he were to read them all.

State Bar President J. Brent Moore presented certificates to the 22 attorneys who have completed 25 years of practice. Afterwards, honorees and their guests were invited to celebrate and mingle at a festive reception.

For a full list of 25 and 50 year honorees and to view more photos and a video of the ceremony, visit www.nmbar.org > for Members > Birthday Celebration.

Above: State Bar President J. Brent Moore welcomes attendees and 50 year honorees Lester C. Cannain, Peter B. Soenfeld, Turner W. Branch, Samuel Thomas Overstreet and Mark K. Adams.

Left: Justice Edward L. Chávez addresses the audience.

Law Day Call-in Program

NEEDED: **Volunteer attorneys who can answer questions about many areas of law including:**

- Family law
- Landlord/tenant disputes
- Consumer law
- Personal injury
- Collections
- General practice

During the Young Lawyers Division Law Day Call-in Program

Saturday, April 30 • 9 a.m. to noon

(volunteers should arrive at 8 a.m. for breakfast and orientation)

Alamogordo, Albuquerque, Farmington, Las Cruces and Roswell

Volunteer attorneys will provide very brief legal advice to callers from around the state in the practice area of their choice. Attorneys who speak Spanish are always needed.

Earn pro bono hours!

For more information or to volunteer, contact the following YLD board member in your area:

Alamogordo: Erin M. Akins, atkinser@gmail.com
Albuquerque: Sonia Russo, soniarusso09@gmail.com
Farmington: Evan R. Cochnar, ecochnar@da.state.nm.us
Las Cruces: Robert Lara, robunm@gmail.com
Roswell: Anna C. Rains, acr@sbcw.com

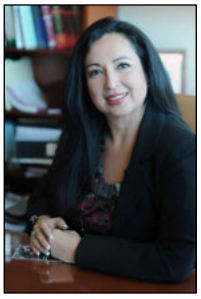
STATE BAR of NEW MEXICO
YOUNG LAWYERS DIVISION


Denise M. Chanez

Denise M. Chanez has been honored by *Albuquerque Business First* as one of New Mexico's 2016 Women of Influence. Chanez is a director in the Albuquerque office of the Rodey Law Firm. Her practice focuses on health law and medical malpractice. Chanez is a Fellow of the American Bar Foundation. Women of Influence includes some of the most powerful and innovative women in New Mexico who are experts in the art of transforming challenges into opportunities.


Bobbie Collins

Bobbie Collins has joined Lewis Roca Rothgerber Christie LLP as an associate in the firm's litigation practice group, focusing on complex civil litigation, real estate and taxation law. Collins represents national, regional and local business entities in a variety of commercial disputes, including director/officer liability, shareholder derivative actions, business management agreements, defamation, strict product liability, construction claims and patent and trademark infringement. She also provides general advice and litigation representation of individuals, business entities and tax exempt organizations in local, state and federal taxation matters. Collins attended the University of Colorado (bachelor's degree, political science) and the University of Denver Sturm College of Law (J.D., expected LL.M. in Taxation in December).


Michelle Hernandez

Michelle Hernandez has been elected as vice chair and member of the 2016 executive committee of the Albuquerque Hispano Chamber of Commerce Board of Directors. Hernandez is a shareholder at Modrall Sperling with experience in all aspects of civil litigation and is recognized as a Board Certified Health Law Specialist by the New Mexico Board of Legal Specialization. She received her undergraduate degree from the University of New Mexico and her law degree from the University of California at Los Angeles. Prior to joining Modrall Sperling, Hernandez served as a judicial law clerk to Hon. Joseph F. Baca of the New Mexico Supreme Court.


Brig. Gen. Fermin A. Rubio

Fermin A. Rubio, a member of the New Mexico Air National Guard, was promoted to the rank of Brigadier General on Jan. 22. Brig. Gen. Rubio has also been appointed as assistant adjutant general for air and head of the New Mexico Air National Guard. He is a U.S. Navy veteran, and served on active duty with the U.S. Navy from 1990–1994. He was affiliated with the U.S. Naval Reserve and then transferred to the U.S. Air Force Reserve in 1997. Brig. Gen. Rubio is a 1986 graduate of the UNM School of Law.


Louren G. Oliveros

Louren G. Oliveros was approved for the rank of an associate member of the American Board of Trial Advocates in January. This accomplishment honors her high level of ethical and legal excellence and her extensive jury trial experience in both civil and criminal trials over the course of her 15 year legal career. Oliveros has also been recently honored to graduate from the Gerry Spence Trial Lawyers College, Class of 2015, where she joins an elite group of trial lawyers nationally that fight for their clients at trial. Oliveros is currently working with her firm Gorence & Oliveros, PC, in New Mexico and Oregon and is serving as trial counsel with firms as requested in both states.

On March 19, **New Mexico Lawyers for the Arts** held a pro bono clinic for creatives, hosted by WESST in Albuquerque. NMLA's clinic served over 20 creative businesses and individuals. New Mexico Lawyers for the Arts would like to express gratitude and appreciation for the the attorneys and partner organizations who volunteered their time, expertise and resources during the clinic: **WESST**, **State Bar Young Lawyers Division**, **Jose J. Garcia**, **Shavon Ayala**, **Mathew Bradburn**, **Kate Fitz-Gibbon**, **Talia Kosh**, **Seth Grant** and **Sam Walker**.

Rodey, Dickason, Sloan, Akin & Robb, PA
Benchmark Litigation: Top New Mexico Litigation Firm
Benchmark Litigation: Leading Litigation Attorneys
Cristina Adams, Jeff Croasdell, Jocelyn Drennan, Nelson Franse, Scott Gordon, Bruce Hall, Jeff Lowry, Ed Ricco, Andy Schultz and **Tom Stahl**

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@nmbar.org.

Legal Education

April

7 **Treatment of Trusts in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2015 Land Use Law in New Mexico**
5.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **More Reasons to be Skeptical of Expert Witnesses Part VI (2015)**
5.0 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Federal Practice Tips and Advice from U.S. Magistrate Judges (2015)**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Invasion of the Drones: IP – Privacy, Policies, Profits (2015 Annual Meeting)**
1.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Civil Rights: Solitary Confinement**
5.2 G, 1.0 EP
Live Program, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

12 **Overview of the Recent Changes to Bail Bonding Law and Regulation**
1.0 G
Live Program
H. Vearlye Payne Inns of Court
505-321-1461

14 **Governance for Nonprofits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Update on New Mexico Rules of Evidence**
2.0 G
Live Program
New Mexico Legal Aid
505-768-6112

15 **Guardianship in New Mexico: The Kinship Guardianship Act**
5.5 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

14 **Evolution of Family Adoption and Estate Planning Law Impacting Same Sex Relationships**
1.0 G
Live Program
Davis Miles McGuire Gardner
www.davismiles.com

18 **Disciplinary Process Civility and Professionalism**
1.0 EP
Live Program
First Judicial District Court
505-946-2802

20 **Midyear Meeting**
6.0 G
Live Program
American Judges Association
www.americanjudgesassociation.net

22 **Ethics for Estate Planners**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **35th Annual Update on New Mexico Tort Law**
5.2 G, 1.0 EP
Live Program, Albuquerque
New Mexico Trial Lawyers Foundation
www.nmtla.org

26 **Spring AODA Conference**
11.2 G, 4.0 EP
Live Program
Administrative Office of the District Attorneys
www.nmdas.com

26 **Employees, Secrets and Competition: Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Landlord Tenant Law Lease Agreements Defaults and Collections**
5.6 G, 1.0 EP
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

28 **Annual Advanced Estate Planning Strategies**
11.2 G
Live Program
Texas State Bar
www.texasbarcle.com

29 **2016 Legislative Preview**
2.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 **Criminal Procedure Update (2015)**
1.2 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

30 **Law Day CLE**
3.0 G
Live Program
State Bar of New Mexico
Paralegal Division
505-888-4357

May

4 **Ethics and Drafting Effective Conflict of Interest Waivers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Annual Estate Planning Update**
6.0 G, 1.0 EP
Live Program
Wilcox Law Firm
www.wilcoxlawnm.com

5 **Public Records and Open Meetings**
5.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Foundation for Open Government
www.nmfog.org

6 **Best and Worst Practices Including Ethical Dilemmas in Mediation**
3.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

6 **Nonprofit Financing**
1.0 G
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

10 **Arbitration an Overview of Current Issues**
1.0 G
Live Program
H. Vearle Payne Inns of Court
505-321-1461

11 **Adding a New Member to an LLC**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Spring Elder Law Institute**
6.2 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

17 **Workout of Defaulted Real Estate Project**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Trusts 101**
5.0 G, 1.0 EP
Live Program
NBI Inc.
www.nbi-sems.com

19 **2016 Retaliation Claims in Employment Law Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **The New Lawyer – Rethinking Legal Services in the 21st Century (2015)**
4.5 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing – From Fiction to Fact: Morning Session (2015)**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Social Media and the Countdown to Your Ethical Demise (2016)**
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics (2016 Edition)**
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics and Virtual Law Practices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

6 **2016 Estate Planning Update**
1.0 G
Teleseminar
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7 **Conflicts of Interests (Ethicspalooza Redux—Winter 2015 Edition)**
1.0 EP
Live Replay
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7 **Beyond Sticks and Stones (2015 Annual Meeting)**
1.5 EP
Live Replay
Center for Legal Education of NMSBF
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16 **Negotiating and Drafting Issues with Small Commercial Leases**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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17 **Legal Ethics in Contract Drafting**
1.0 EP
Teleseminar
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Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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Effective March 25, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,827	Serna v. Webster	COA 34,535/34,755	03/24/16
No. 35,824	Earthworks Oil and Gas v. N.M. Oil & Gas Association	COA 33,451	03/24/16
No. 35,823	State v. Garcia	COA 32,860	03/24/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,820	Martinez v. Overton	COA 34,740	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,818	State v. Martinez	COA 35,038	03/22/16
No. 35,817	State v. Nathaniel L.	COA 34,864	03/22/16
No. 35,816	State v. McNew	COA 34,937	03/18/16
No. 35,815	State v. Sanchez	COA 34,170	03/18/16
No. 35,813	State v. Salima J.	COA 34,904	03/17/16
No. 35,812	State v. Tenorio	COA 34,994	03/17/16
No. 35,814	Campos v. Garcia	12-501	03/16/16
No. 35,811	State v. Barreras	COA 33,653	03/16/16
No. 35,810	State v. Barela	COA 34,716	03/16/16
No. 35,809	State v. Taylor E.	COA 34,802	03/16/16
No. 35,805	Trujillo v. Los Alamos Labs	COA 34,185	03/16/16
No. 35,804	Jackson v. Wetzel	12-501	03/14/16
No. 35,803	Dunn v. Hatch	12-501	03/14/16
No. 35,802	Santillanes v. Smith	12-501	03/14/16
No. 35,795	Jaramillo v. N.M. Dept. of Corrections	COA 34,528	03/09/16
No. 35,794	State v. Brown	COA 34,905	03/09/16
No. 35,793	State v. Cardenas	COA 33,564	03/09/16
No. 35,792	State v. Garcia-Ortega	COA 33,320	03/08/16
No. 35,789	State v. Cly	COA 35,016	03/03/16
No. 34,559	State v. Thompson	COA 34,559	03/03/16
No. 35,786	State v. Pacheco	COA 33,810	03/02/16
No. 35,785	State v. Aragon	COA 34,817	03/02/16
No. 35,784	State v. Diaz	COA 35,079	03/02/16
No. 35,783	State v. Jason R.	COA 34,562	02/29/16
No. 35,781	State v. Bersame	COA 34,686	02/29/16
No. 35,777	N.M. State Engineer v. Santa Fe Water Resource	COA 33,704	02/25/16
No. 35,771	State v. Garcia	COA 33,425	02/24/16
No. 35,758	State v. Abeyta	COA 33,461	02/15/16
No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
No. 35,747	Sicre v. Perez	12-501	02/04/16
No. 35,739	State v. Angulo	COA 34,714	02/04/16
No. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,730	State v. Humphrey	COA 34,601	01/29/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13

No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16
No. 35,751	State v. Begay	COA 33,588	03/25/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,613	Ramirez v. State	COA 31,820	12/17/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	State v. Cordova	COA 32,820	03/28/16
No. 35,286	Flores v. Herrera	COA 32,693/33,413	03/30/16
No. 35,395	State v. Bailey	COA 32,521	03/30/16
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/30/16
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	04/13/16
No. 34,929	Freeman v. Love	COA 32,542	04/13/16
No. 34,830	State v. Le Mier	COA 33,493	04/25/16
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	04/27/16
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	04/27/16
No. 35,297	Montano v. Frezza	COA 32,403	08/15/16
No. 35,214	Montano v. Frezza	COA 32,403	08/15/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,782	Washington v. Board of Regents	COA 35,205	03/23/16
No. 35,779	State v. Harvey	COA 33,724	03/23/16
No. 35,776	State v. Mendez	COA 34,856	03/23/16
No. 35,775	Northern N.M. Federation v. Northern N.M. College	COA 33,982	03/23/16
No. 35,772	Castillo v. Arrieta	COA 34,108	03/23/16
No. 35,713	Hernandez v. CYFD	COA 33,549	03/23/16

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective March 25, 2016

Published Opinions

No. 33859	1st Jud Dist Santa Fe CV-10-2022, B SHERRILL v FARMERS INSURANCE (affirm in part, reverse in part and remand)	3/22/2016
No. 33787	1st Jud Dist Santa Fe CV-11-1534, S FOY v NM INVESTMENT COUNCIL (affirm)	3/24/2016
No. 34042	1st Jud Dist Santa Fe CV-11-1534, S FOY v NM INVESTMENT COUNCIL (affirm)	3/24/2016
No. 34077	1st Jud Dist Santa Fe CV-11-1534, S FOY v NM INVESTMENT COUNCIL (affirm)	3/24/2016

Unublished Opinions

No. 35105	1st Jud Dist Santa Fe CV-11-468, J BACA v L PETERSON (affirm)	3/22/2016
No. 35273	2nd Jud Dist Bernalillo CR-13-4644, STATE v C BUCK (dismiss)	3/22/2016
No. 33876	13th Jud Dist Sandoval CV-07-1364, G COOPER v R VIRDEN (affirm)	3/23/2016
No. 34207	2nd Jud Dist Bernalillo LR-13-43, STATE v J CRUTCHER (affirm)	3/23/2016
No. 34707	2nd Jud Dist Bernalillo LR-14-48, STATE v G ETHERLY (affirm)	3/23/2016
No. 34881	AD AD AD-00000, PROTEST OF SANTA FE TOW (affirm)	3/23/2016
No. 34871	2nd Jud Dist Bernalillo CV-12-5958, S PEPLINSKI v TANOAN COMMUNITY (affirm)	3/23/2016
No. 34977	2nd Jud Dist Bernalillo LR-15-4, STATE v S ZAMORA (affirm)	3/23/2016
No. 34793	2nd Jud Dist Bernalillo CR-14-2359, STATE v N FREEDMAN (affirm)	3/23/2016
No. 34132	9th Jud Dist Curry CR-11-383, STATE v S JAMES (affirm)	3/24/2016
No. 34414	3rd Jud Dist Dona Ana CR-10-378, STATE v M HOFFMAN (dismiss)	3/24/2016
No. 35137	5th Jud Dist Lea CR-11-271, CR-10-213, CR-11-324, STATE v J WILSON (dismiss)	3/24/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated March 18, 2016

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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 April 6, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the special summary of proposed rule amendments published in the March 9 issue of the Bar Bulletin. *The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 6, 2016.*

Recently Approved Rule Changes Since Release of 2015 NMRA:

Rules of Criminal Procedure for the Magistrate Courts

Rule 6-506	Time of commencement of trial	05/24/16

Rules of Criminal Procedure for the Metropolitan Courts

Rule 7-506	Time of commencement of trial	05/24/16

Rules of Procedure for the Municipal Courts

Rule 8-506	Time of commencement of trial	05/24/16

Second Judicial District Court Local Rules

LR2-400	Case management pilot program for criminal cases.	02/02/16

For 2015 year-end rule amendments that became effective December 31, 2015, and that will appear in the 2016 NMRA, please see the November 4, 2015, issue of the Bar Bulletin or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRules.aspx.

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.

From the New Mexico Supreme Court

In the Supreme Court of the State of New Mexico

March 25, 2016
No. 16-8300-002

In the Matter of the Amendment of Rule 6-506 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rule 7-506 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, and Rule 8-506 NMRA of the Rules of Procedure for the Municipal Courts

ORDER

WHEREAS, this matter came on for consideration by the Court to amend Rule 6-506 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rule 7-506 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, and Rule 8-506 NMRA of the Rules of Procedure for the Municipal Courts, and the Court being sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 6-506, 7-506, and 8-506 NMRA are APPROVED;

IT IS FURTHER ORDERED that the amendments to Rules 6-506, 7-506, and 8-506 NMRA shall be effective for all cases filed on or after May 24, 2016; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the Bar Bulletin and New Mexico Rules Annotated.

IT IS SO ORDERED.

WITNESS, Honorable Barbara J. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 25th day of March, 2016.

_____

Joey D. Moya,
Chief Clerk of the
Supreme Court of the State of New Mexico

6506. Time of commencement of trial.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. A defendant in custody shall be arraigned on the complaint or citation as soon as practical, but in any event no later than four (4) days after the date of arrest.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eightytwo (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the magistrate court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the magistrate court;

(4) in the event of a remand from an appeal or request for extraordinary relief, the date the mandate or order is filed in the magistrate court disposing of the appeal or request for extraordinary relief;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the magistrate court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding [~~thirty (30)~~] sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(3) upon stipulation of the parties and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to ninety (90) days;

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period[~~, provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days~~] and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice; or

(6) if defense counsel fails to appear for trial within a reasonable time, for a period not to exceed one hundred eightytwo (182) days, provided that the aggregate of all extensions granted under this subparagraph may not exceed one hundred eightytwo (182) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial under Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension

of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

[As amended, effective August 1, 1999; effective August 1, 2004; as amended by Supreme Court Order No. 078300025, effective November 1, 2007; by Supreme Court Order No. 088300054, effective January 15, 2009; as amended by Supreme Court Order No. 138300019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions [~~which~~] that are unusual or extraordinary, such as[~~:~~] death or illness of the judge, prosecutor, or [~~a~~] defense attorney immediately preceding the commencement of the trial; [~~and~~] or other circumstances [~~which~~] that ordinary experience or prudence would not foresee, anticipate, or provide for. The court may grant an extension for exceptional circumstances only if the court finds that the extension will not unfairly prejudice the defendant. The defendant may move the court to dismiss the case based on a particularized showing that the extension or impending extension would subject the defendant to oppressive pretrial incarceration, anxiety and concern, or the possibility that the defense will be impaired.

Constitutional right to speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico. See *State v. Urban*, 2004NMSC007, 135 N.M. 279, 87 P.3d 1061, for the factors to be considered.

Duty of prosecutor. — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule. It is the obligation of both parties to make a good faith effort to complete their separate discovery and to advise the court of noncompliance with Rule 6504 NMRA.

Computation of time. — Time periods are computed under Rule 6104 NMRA.

Paragraph A. — Paragraph A of this rule requires arraignment within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. For defendants in custody, arraignment is required within four (4) days after the date of arrest. The court anticipates that arraignment for those in custody will take place sooner than four days, but the rule allows four days for those courts in rural counties or for other extraordinary circumstances. A failure to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay.

Paragraph B. — A violation of Paragraph B of this rule can result in a dismissal with prejudice [~~of criminal proceedings. See~~] under Paragraph E of this rule. *See also State v. Lopez*, ¶ 3, 1976NMSC012, 89 N.M. 82, 547 P.2d 565[~~ (1976)~~]. However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *See State v. Vigil*, 1973NMCA089, ¶ 28, 85 N.M. 328, 512 P.2d 88[~~ (Ct. App. 1973)~~]. [~~Where~~] If the state in good faith files a nolle prosequi under Paragraphs C and D of Rule 6506A NMRA and later files the same charge, the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 6506 NMRA, unless, under Paragraph D of Rule 6506A NMRA, the court finds the refiled complaint should not be treated as a continuation of the same case. [~~*See also* commentary to Rule 6506A NMRA; *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972); *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).~~]

[As amended by Supreme Court Order No. 138300019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

7506. Time of commencement of trial.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. A defendant in custody shall be arraigned on the complaint or citation as soon as practical, but in any event no later than two (2) calendar days after the date of arrest.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eightytwo (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order is filed in the metropolitan court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the metropolitan court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the metropolitan court disposing of the appeal;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been referred to a preprosecution or court diversion program, the date a notice is filed in the metropolitan court that the defendant has been deemed not eligible for, is terminated from, or is otherwise removed from the preprosecution or court diversion program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding [~~thirty (30)~~] sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(3) upon stipulation of the parties and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a

period up to sixty (60) days; or

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period[~~, provided that the aggregate of all extensions granted under this subparagraph may not exceed thirty (30) days~~] and a finding, either on the record or in writing, that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial granted under Subparagraph (C)(5) [~~of Paragraph C~~] of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

[As amended, effective August 1, 1999; August 1, 2004; as amended by Supreme Court Orders No. 088300051 and No. 088300053, effective January 15, 2009; as amended by Supreme Court Order No. 138300019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions [~~which~~] that are unusual or extraordinary, such as[:] death or illness of the judge, prosecutor, or [~~a~~] defense attorney immediately preceding the commencement of the trial; [~~and~~] or other circumstances [~~which~~] that ordinary experience or prudence would not foresee, anticipate, or provide for. The court may grant an extension for exceptional circumstances only if the court finds that the extension will not unfairly prejudice the defendant. The defendant may move the court to dismiss the case based on a particularized showing that the extension or impending extension would subject the defendant to oppressive pretrial incarceration, anxiety and concern, or the possibility that the defense will be impaired.

Speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico.

Duty of prosecutor. — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

[Amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

8506. Time of commencement of trial.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. A defendant in custody shall be arraigned on the complaint or citation as soon as practical, but in any event no later than four (4) days after the date of arrest.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eightytwo (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the municipal court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the municipal court;

(4) in the event of a remand from an appeal or request for extraordinary relief, the date the mandate or order is filed in the municipal court disposing of the appeal or request for extraordinary relief;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the municipal court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding [~~thirty (30)~~] sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days; or

(3) upon stipulation of the parties and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to ninety (90) days;

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the [~~state~~] prosecution or the court that prevented the case from being heard within the time period[~~, provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days~~] and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice; or

(6) if defense counsel fails to appear for trial within a reasonable time, for a period not to exceed one hundred eightytwo (182) days, provided that the aggregate of all extensions granted under this subparagraph may not exceed one hundred eightytwo (182) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial [~~pursuant to~~] under Paragraph

C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-tordered extensions, the case shall be dismissed with prejudice.

[As amended, effective August 1, 1999; August 1, 2004; as amended by Supreme Court Order 07830026, effective November 1, 2007; by Supreme Court Order No. 088300057, effective January 15, 2009; as amended by Supreme Court Order No. 138300019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions [~~which~~] that are unusual or extraordinary, such as[:] death or illness of the judge, prosecutor, or [~~a~~] defense attorney immediately preceding the commencement of the trial; [~~and~~] or other circumstances [~~which~~] that ordinary experience or prudence would not foresee, anticipate, or provide for. The court may grant an extension for exceptional circumstances only if the court finds that the extension will not unfairly prejudice the defendant. The defendant may move the court to dismiss the case based on a particularized showing that the extension or impending extension would subject the defendant to oppressive pretrial incarceration, anxiety and concern, or the possibility that the defense will be impaired.

Constitutional right to speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico. See *State v. Urban*, 2004NMSC007, 135 N.M. 279, 87 P.3d 1061 for the factors to be considered.

Duty of prosecutor. — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

Computation of time. — Time periods are computed under Rule 8104 NMRA.

Paragraph A. — Paragraph A of this rule requires arraignment within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. For defendants in custody, arraignment is required within four (4) days after the date of arrest. The court anticipates that arraignment for those in custody will take place sooner than four days, but the rule allows four days for those courts in rural counties or for other extraordinary circumstances. A failure to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay.

Paragraph B. — A violation of Paragraph B of this rule can result in a dismissal with prejudice [~~of criminal proceedings. See~~] under Paragraph E of this rule. *See also State v. Lopez*, ¶ 3, 1976NMSC012, 89 N.M. 82, 547 P.2d 565[~~ (1976)~~]. However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *See State v. Vigil*, 1973NMCA089, ¶ 28, 85 N.M. 328, 512 P.2d 88[~~ (Ct. App. 1973)~~]. [~~Where~~] If the state in good faith files a nolle prosequi under Paragraphs C and D of Rule [~~6506A~~] 8-506A NMRA and later files the same charge, the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 8506 NMRA, unless, under Paragraph D of Rule 8506A NMRA, the court finds the refiled complaint should not be treated as a continuation of the same case. [~~See also commentary to Rule 8506A NMRA, State ex rel. Delgado v. Stanley, 83 N.M. 626, 495 P.2d 1073 (1972); State v. Lucero, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).~~]

[As amended by Supreme Court Order No. 088300057, effective January 15, 2009; as amended by Supreme Court Order No. 138300019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016.]

Certiorari Denied, October 13, 2015, No. 35,504

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-001

No. 34,097 (filed August 4, 2015)

WILD HORSE OBSERVERS ASSOCIATION, INC.,
Plaintiff-Appellant,
v.
NEW MEXICO LIVESTOCK BOARD,
Defendant-Appellee,
and
SUSAN BLUMENTHAL, ASH COLLINS, SUSAN COLLINS, JON COUCH, PETER HURLEY, JUDITH HURLEY, ZANE DOHNER, CAROLYN E. KENNEDY, LYNN MONTGOMERY, JOE NEAS, MIKE NEAS, and PAMELA NEAS,
Defendants by Intervention-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VALERIE A. HULING, District Judge

STEVEN K. SANDERS
STEVEN K. SANDERS
& ASSOCIATES, LLC
Albuquerque, New Mexico
for Appellant

ANDREA BUZZARD
KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES, LLC
Cheyenne, Wyoming
for Appellee

DAVID G. REYNOLDS
Corrales, New Mexico
for Intervenors

Opinion

Jonathan B. Sutin, Judge

{1} Plaintiff Wild Horse Observers Association, Inc. (the Association) appeals the district court's dismissal for failure to state a claim under Rule 1-012(B)(6) NMRA. The Association claims that Defendant New Mexico Livestock Board (the Board) has unlawfully treated a group of undomesticated, unowned, free-roaming horses near Placitas, New Mexico (the Placitas horses) as "livestock" and "estray" rather than as "wild horses" under the Livestock Code, NMSA 1978, §§ 77-2-1 to -18-6 (1967, as amended through 2015). The Board and various residents and homeowners in Placitas (Intervenors) maintain that the horses are estray livestock and argue that the Association's appeal is both moot and barred by collateral estoppel.

{2} Primarily at issue is whether the Association pleaded facts that, when accepted as true, sufficiently demonstrated that the Placitas horses are legally "wild horses" rather than "livestock" and "estray." We conclude that "livestock" does not include undomesticated, unowned animals, including undomesticated and unowned horses; therefore, undomesticated, unowned horses may not be "estray." We also conclude that Section 77-18-5(B) requires the Board to DNA test and relocate wild horses. We hold that the Association pleaded sufficient facts in its complaint to withstand a motion to dismiss under Rule 1-012(B)(6).

BACKGROUND

{3} In February 2014, the Association filed a complaint for declaratory and injunctive relief, claiming that the Board had unlawfully treated the Placitas horses as if they were estray livestock rather than wild horses. The Association claimed that only livestock may be estray, and since the Placitas horses are not livestock, they cannot be estray. The Association sought an order declaring the Placitas horses wild as opposed to estray; declaring that the Board failed to comply with Section 77-18-5(B) because the Board did not DNA test and relocate the wild horses; declaring that the Board acted ultra vires by capturing wild horses on public land and subsequently selling the wild horses; enjoining the Board from disallowing the Association from managing the Placitas horse population with equine birth control; and awarding the Association equitable costs and relief.

{4} The following averments appear in the Association's complaint. The Placitas horses are a group of ownerless, unbranded horses that have lived and roamed on public land near Placitas, New Mexico, since at least 1965. The Placitas horses do not now have nor have ever had owners, and no private landowner, rancher, horse rescue, or Indian tribe currently claims the horses. The Board has no record of ownership for the Placitas horses. At the time of the Association's initial complaint, approximately forty Placitas horses still roamed the Placitas area.

{5} The Association further averred that the Board impounded and auctioned at least twenty-five of the Placitas horses. The Association averred that the Board took the auctioned Placitas horses directly from public land before auctioning them. According to the complaint, no owner claimed the horses during the auction process and no owners have claimed the Placitas horses since they were sold.

{6} The Board responded to the Association's complaint by filing a motion to dismiss for failure to state a claim under Rule 1-012(B)(6). The Board argued that "livestock" as defined in the Livestock Code includes horses, and therefore the Placitas horses were livestock. The Board further argued that because "estray" means "livestock found running at large . . . whose owner is unknown," as defined in Section 77-2-1.1(N), and because the Placitas horses' owners are unknown, the Placitas horses are plainly both livestock and estray—not wild as the Association contended. The Board also argued that carving out wild horses, including the Placitas horses, as an exception to the definition of "livestock" would create an absurd exception to the Livestock Code, as wild horses would be exempt from all laws pertaining to livestock, including transportation, inspection, and cruelty statutes. As a second ground to dismiss for failure to state a claim, the Board argued that Section 77-18-5(B) does not require the Board itself to test and relocate horses, so no claim may be stated against it under

that statute. Finally, the Board argued that the Association's claims were barred by collateral estoppel and that the Association lacked standing to maintain the action.

{7} The district court granted the Board's motion to dismiss on the ground that the Association failed to state a claim upon which relief could be granted and did not reach the collateral estoppel and standing issues. Specifically, the district court held that the Association's "claims fail to demonstrate that the [Placitas] horses . . . are not estray livestock[.]" The district court reasoned that "horses" are included within the definition of "livestock," and therefore the Placitas horses were livestock. The district court additionally reasoned that "the definition of estray does not require an affirmative determination of ownership or lack of ownership but rather broadly encompasses 'livestock . . . whose owner is unknown.' " As such, the district court determined that the Association's complaint failed to plead facts establishing that the Placitas horses were not legally livestock or estray and that the Board had acted unlawfully.

{8} On appeal, the Association argues that the Placitas horses are not "livestock" as defined in Section 77-2-1.1(A) because they have never been raised or used on a farm or ranch and that only livestock may be "estray" as defined in Section 77-2-1.1(N). The Board counters that the Placitas horses are livestock whose owners are unknown; therefore, the horses are plainly estray. The Board and Intervenors also argue that the district court's order should be affirmed under the "right for any reason" doctrine because the Association's claim and appeal are moot and barred by collateral estoppel. Additionally, the Board and Intervenors claim that Section 77-18-5(B) does not require the Board to test or relocate any wild horses.

{9} We hold that "livestock," as defined in the Livestock Code, does not include animals that are not domesticated and that the Board is required to test and relocate wild horses under Section 77-18-5. We do not reach the merits of the arguments that the appeal is moot or barred by collateral estoppel. We reverse the district court's dismissal of the Association's complaint and remand for further proceedings.

DISCUSSION

Standard of Review

{10} We review de novo the district court's dismissal for failure to state a claim under Rule 1-012(B)(6). *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71. In doing so, "we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* Dismissal under Rule1-012(B)(6) is appropriate only if the plaintiff is unable to recover under any theory of the facts alleged in the complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51. In this case, the district court determined that the Association did not plead sufficient facts to show the Placitas horses were "wild horses" as defined in the Livestock Code.

{11} In resolving the issues before us, we must not only examine the complaint, we must also interpret provisions of the Livestock Code. We undertake statutory interpretation de novo. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860. We are "to determine and give effect to the Legislature's intent. In discerning the Legislature's intent, . . . [the appellate courts] look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (internal quotation marks and citations omitted). In construing a statute, we give effect to a statute's unambiguous meaning, but we will not interpret a statute literally when doing so would lead to an absurd or unreasonable result. *State v. Wyrostek*, 1988-NMCA-107, ¶ 8, 108 N.M. 140, 767 P.2d 379. "Where possible, each and every part of [a] statute must be given some effect in an effort to reconcile it in meaning with every other part." *Postal Fin. Co. v. Sisneros*, 1973-NMSC-029, ¶ 8, 84 N.M. 724, 507 P.2d 785.

Wild, Undomesticated Horses Are Not Estray Because They Are Not Livestock

{12} Under the Livestock Code, "estray" means in pertinent part "*livestock* found running at large upon public or private lands, either fenced or unfenced, whose owner is unknown[.]" Section 77-2-1.1(N) (emphasis added). "Livestock" means "all domestic or domesticated animals that are used or raised on a farm or ranch . . . and includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rheas, camelids[,] and farmed cervidae upon any land in New Mexico." Section 77-2-1.1(A). A "wild horse" is "an unclaimed horse on public land that is not an estray." Section 77-18-5(A)(4).

{13} The Association contends that the Placitas horses are not livestock because the Placitas horses have never been domesticated or used or raised on a farm or ranch. According to the Association, the language "domestic or domesticated" and "used or raised on a farm or ranch" is a definitional requirement. Thus, a horse must be domesticated and used or raised on a farm or ranch to be considered livestock, and the language "livestock . . . includes horses . . . upon any land in New Mexico" does not change the definitional requirement. Section 77-2-1.1(A). The Board and Intervenors, on the other hand, contend that the plain and unambiguous definition of "livestock" means and includes all horses everywhere in New Mexico. The Board and Intervenors further argue that carving wild horses out of the definition of "livestock" would be illogical, impractical, and unfeasible to implement because wild horses would be exempt from cruelty, sale, and transportation provisions of the Livestock Code.

{14} We agree with the Association and conclude that "livestock" does not include undomesticated animals. We also agree that enumerated examples of "domestic or domesticated animals that are used or raised on a farm or ranch" in Section 77-2-1.1(A) do not mean all such animals in New Mexico are livestock and potentially estray. For example, sheep, bison, poultry, and farmed cervidae (e.g., deer and elk), like horses, are all included in the definition of "livestock." *See id.* However, a substantial amount of bighorn sheep, bison, turkey, deer, and elk are wild animals commonly found in New Mexico. The Board is required to search for the owner of estray livestock, publish notice of the impoundment of estray livestock, and eventually sell estray livestock for the benefit of the legal owner. *See* §§ 77-13-1 to -10. Surely, the Legislature did not intend to require that the Board search for the owner of wild animals, including sheep, bison, turkey, deer, elk, and other wild animals that are not domesticated, impound them, proceed to publish notification of the impoundment, and then proceed to sell them.

{15} Further, wild sheep, bison, turkey, deer, and elk are all considered game animals elsewhere in our statutes. *See* NMSA 1978, § 17-2-3 (1967, amended 2015) (defining "game mammals" to include American bison "except where raised in captivity for domestic or commercial meat production[,]" bighorn sheep "except for the domestic species of sheep[,]"

deer and elk, and "game birds" to include turkeys "except for the domestic strains of turkeys"). Interpreting these definitions together, it would be absurd to consider all sheep, bison, turkey, deer, and elk anywhere in New Mexico to be livestock, but that some are allowed to be hunted and killed, with the appropriate license, rather than impounded and auctioned. Rather, in order to give effect to both statutes and avoid an unreasonable result, we interpret the definition of "livestock" to include only domestic or domesticated animals, while "game animal" includes only wild animals. Thus, we reject the argument that all horses anywhere in New Mexico are livestock because horses are included within the definition of livestock.

{16} Other case law dealing with whether an animal is wild or domesticated is instructive. In *State v. Parson*, this Court considered whether a criminal defendant could be charged under two laws covering roughly the same conduct. 2005-NMCA-083, 137 N.M. 773, 115 P.3d 236. In *Parson*, the defendant was convicted for transporting elk heads under animal cruelty laws, but the defendant argued that he should have been convicted under more specific game and fish laws providing for illegal possession of game animal parts. *Id.* ¶ 1. Relying in part on the general/specific rule of statutory interpretation, we held that game and fish laws covered wild, undomesticated, free-roaming elk, while the general animal cruelty statute pertained to domesticated elk. *Id.* ¶ 22. We treated the question whether the elk was domesticated or wild as a factual issue and reversed the defendant's conviction under general animal cruelty laws. *Id.* ¶ 24. The Association's argument is similar here: the Placitas horses are wild, undomesticated, unowned, and free-roaming and are therefore not subject to livestock and estray provisions, but rather the more specific statute pertaining to wild horses. Our interpretation of the Livestock Code and its definition of "livestock" accords with *Parson* in that we interpret the livestock and estray provisions to pertain only to domesticated horses rather than wild, free-roaming horses.

{17} The Board and Intervenors contend that considering wild horses as outside the definition of "livestock" is an absurd interpretation that would create dangerous loopholes in the law. These supposed loopholes, however, do not survive close examination. First, the Board and Intervenors argue that wild horses would be exempt from transportation laws pertaining to livestock, specifically laws requiring permits to transport livestock. However, the statutes governing horse transportation refer specifically to "any horses" and "each horse" rather than "livestock," so it appears that wild horses would be subject to those provisions although they are not livestock. *See* §§ 77-9-41 to -42 (providing for the unlawful transport of "any horses" and requiring an owner's transportation permit "for each horse"). Second, the Board and Intervenors argue that wild horses will be exempt from cruelty statutes that refer specifically to "livestock." *See* § 77-18-2. Although wild horses may not be protected by cruelty to livestock statutes, they would be covered by general animal cruelty statutes if they are in captivity. *See State v. Cleve*, 1999-NMSC-017, ¶ 12, 127 N.M. 240, 980 P.2d 23 (interpreting NMSA 1978, Section 30-18-1 (1999, amended 2007) to apply to domesticated animals and wild animals in captivity). Further, the protections available in the general animal cruelty statute, NMSA 1978, § 30-18-1.1 (1999), are identical to the ones in the more specific cruelty to livestock statute, § 77-18-2, therefore, there would be no gap in the protection of wild horses in captivity and domesticated horses in captivity.[1] Thus, interpreting wild horses as distinct from livestock does not create as dangerous a loophole as the Board and Intervenors suggest. To the extent that wild horses not in captivity appear to be unprotected by animal cruelty statutes, perhaps our Legislature has a void to fill.

{18} The Board also asserts that it would be "novel, unworkable[,] and foreign to the [Livestock] Code" to require a livestock inspector to make a determination about whether a horse is domesticated or wild. We disagree. Wild horses are referred to in two statutes in the Livestock Code. Section 77-18-5 pertains to testing and relocating wild horses captured on public land, and Section 77-2-30 pertains to horse rescue and retirement facilities. *See* § 77-2-30(A) (providing for horse rescue or retirement facilities, including preserves and reserves, that care for "captured wild horses that cannot be returned to their range"). Section 77-2-30 does not define "wild horses," but the New Mexico Administrative Code does, in 21.30.5.7(F) NMAC (07/15/2005, as amended through 07/15/2014), governing horse rescue facilities. Given that 21.30.5.7(F) NMAC, defining a "wild horse" as a feral horse that "exist[s] in an untamed state having returned to a wild state from domestication[,]" is among the governing regulations issued by the Board itself in July 2005, and given the language within the Livestock Code that a "feral hog" is a pig that "exists in an untamed state from domestication[,]" § 77-18-6(D), it does not appear to be novel or foreign to the Livestock Code or the Board to require an inspector to make such a determination with regard to a horse.

Section 77-18-5(B) Creates Duties for the Board

{19} The Board and Intervenors cursorily argue that even if the Placitas horses are wild the Association still failed to state a claim against the Board since Section 77-18-5(B) does not explicitly name the Board as responsible to test and relocate wild horses. Thus, according to the Board and Intervenors, no claim may be asserted against the Board under Section 77-18-5(B).

{20} Section 77-18-5(B) states that a wild horse captured on public land "shall have its conformation, history[,] and [DNA] tested[.]" If a horse tests positive as a Spanish colonial, the horse "shall be relocated to a state or private wild horse preserve[,]" and if the horse is not a Spanish colonial, the horse "shall be returned to the public land, relocated to a public or private wild horse preserve[,] or put up for adoption by the agency on whose land the wild horse was captured." *Id.*

{21} The existence of a legal duty is a question of law. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917. Our charge in construing a statute is to give effect to legislative intent. *See id.* "If the Legislature is silent on an issue, we look at the overall structure and function of the statute, as well as the public policy embodied in the statute." *Id.* In interpreting any omission in a statute, we are required to "look at the objectives the [L]egislature sought to accomplish and thereby interpret the statute to achieve [those] purposes." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 34, 120

[1]Wild animals not in captivity are not protected by animal cruelty statutes. *Cleve*, 1999-NMSC-017, ¶ 15 (concluding that "the Legislature intended the phrase 'any animal' [throughout Section 30] to include domesticated animals and wild animals in captivity and did not intend to include other wild animals").

N.M. 579, 904 P.2d 28 (internal quotation marks and citation omitted).

{22} We conclude that the Legislature intended to require the Board to test and relocate horses captured on public land as provided under Section 77-18-5(B). The Legislature provided that the Livestock Code "shall be liberally construed to carry out its purposes[.]" Section 77-2-1. The Board was created in order to achieve those purposes, which include goals associated with the "administration of the laws relating to the livestock industry of New Mexico[.]" *Id.*; *see* § 77-2-2 (creating the Board). Section 77-18-5(B) is located within the Livestock Code; therefore, it is counterintuitive to argue that a statute within the Livestock Code was not actually meant to affect the powers and responsibilities of the Board, which is tasked with administering the Livestock Code.

{23} Further, sections within the Livestock Code that do not confer a duty on the Board do so explicitly. Section 77-18-1 provides that the sale, purchase, trade, and possession of certain animals are to be regulated by the Department of Health. As the Board points out, other duties and rights in Section 77-18-5 are explicitly given to parties other than the Board. *See* § 77-18-5(B) (providing that a horse may be put up for adoption "by the agency on whose land the wild horse was captured"); § 77-18-5(C) (providing that the Mammal Division of the Museum of Southwestern Biology at the University of New Mexico may capture, relocate, and, if required, euthanize wild horses). These provisions indicate that if the Legislature meant to task someone other than the Board with testing and relocating wild horses, the Legislature would have done so explicitly.

{24} Given the placement of Section 77-18-5 within the Livestock Code and explicit language that creates a right or duty for parties that are not the Board, we conclude that it was the Legislature's intent to require the Board to test and relocate wild horses captured on public land as provided in Section 77-18-5(B).

{25} The Board and Intervenors essentially ask this Court to render Section 77-18-5(B) inert. The Board and Intervenors argue that it is not the Board's responsibility to test and relocate wild horses because the Board is not explicitly tasked with testing and relocating wild horses. No other agency is explicitly tasked with testing and relocating wild horses. *See, e.g.*, § 77-18-1; § 77-18-5(C). If we were to agree with the Board and Intervenors on this argument, the practical effect would be that no one would be required to test or relocate wild horses captured on public land, which is in direct contrast to Section 77-18-5(B). The logical extension of this argument once again leads to an unreasonable result that we cannot accept. In order to give effect to each part of the statute and implement the legislative intent, we conclude that the Board is required to test and relocate horses captured on public land as required by Section 77-18-5(B).

The Association Pleaded Facts Sufficient to State a Claim

{26} Having determined that "livestock" does not include horses that are not domesticated and that Section 77-18-5(B) creates duties for the Board, we turn to the Association's initial complaint. We hold that the Association pleaded facts sufficient to state a claim.

{27} First, the Association's complaint is replete with references to the Placitas horses as wild rather than domestic. Although "wild horses" has a technical definition under the Livestock Code, *see* § 77-18-5(A)(4), we interpret the Association's claims to be that the horses are factually not domesticated, just as the *Parson* case involved whether elk were wild or domesticated as a matter of fact. The Association also repeatedly averred that the Placitas horses are not owned now nor have they been owned in their lives. The Association also averred that the Placitas horses are unbranded, unclaimed, and free-roaming. The Association further asserted that the Board has captured and auctioned at least twenty-five Placitas horses and that the auctioned horses were "taken directly from public land[,]" presumably the Placitas Open Space. Finally, the Association averred that the captured Placitas horses have not been tested to confirm whether they are Spanish colonial horses, as Section 77-18-5(B) requires. These facts, taken as true, adequately state a contention that the Placitas horses fit the criteria of "wild horses" under Section 77-18-5(A)(4), (B), rather than "estray" under Section 77-2-1.1(N), and that the Board unlawfully failed to test and relocate the wild horses it captured. Thus, the Association sufficiently stated a claim against the Board.

Right for Any Reason

{28} Intervenors nonetheless urge this Court to affirm the dismissal below under the right-for-any-reason doctrine. Intervenors make the argument under this theory that the Association's appeal is moot. For the following reasons, we decline to affirm based on this argument.

{29} An appellate court may affirm a district court if it was right for any reason and affirming on new grounds would not be unfair to the appellant. *Bd. of Cnty. Comm'rs v. Chavez*, 2008-NMCA-028, ¶ 12, 143 N.M. 543, 178 P.3d 828. An appellee is not required to preserve arguments to affirm so long as those arguments are not fact-based "such that it would be unfair to the appellant to entertain those arguments." *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 17, 137 N.M. 57, 107 P.3d 11. Further, an appellate court may affirm the district court on different grounds than those relied on by the district court only if those grounds do not require looking "beyond the factual allegations that were raised and considered below." *State v. Wasson*, 1998-NMCA-087, ¶ 16, 125 N.M. 656, 964 P.2d 820.

{30} The basis for Intervenors' mootness argument is found in factual allegations that were not considered below; therefore, it would be unfair to affirm on those grounds, and we decline to do so. Intervenors assert that the Placitas Open Space has been completely rid of horses and completely fenced off since two weeks before the Association filed its claim. As such, Intervenors contend, any controversy that existed over the Board's treatment of horses in the Placitas Open Space is now resolved because there are no horses currently there and no horses are likely to return. In support of these assertions, Intervenors cite a number of affidavits filed in the district court. However, nothing in the record indicates the district court actually considered these affidavits in dismissing the Association's claims. The district court's amended opinion and order does not refer to the affidavits or to any mootness argument. Because these factual allegations were not both raised and considered below, affirming on these grounds would be unfair to the Association, and we will not affirm under the right-for-any-reason doctrine on these grounds.

Collateral Estoppel

{31} The Board and Intervenors argue that the Association's claims and appeal are barred by collateral estoppel based on earlier, federal court litigation regarding the Placitas horses. The Association replies that it would be unfair to affirm on this ground because it was not adequately considered below. In *Silva v. State*, our Supreme Court held that "defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously liti-

gated and lost regardless of whether [the] defendant was privy to the prior suit[.]" 1987-NMSC-107, ¶ 11, 106 N.M. 472, 745 P.2d 380. However, the "[a]pplicability of collateral estoppel requires factual findings that (1) the party against whom collateral estoppel is asserted must have been a party in . . . the original action; and (2) the two cases must have concerned the same ultimate issue or fact, which was (a) actually litigated, and (b) necessarily determined in the first suit." *Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 44, 288 P.3d 888 (omission in original) (internal quotation marks and citation omitted). Further, collateral estoppel "should be applied only where the trial [court] determines that its application would not be fundamentally unfair." *Reeves v. Wimberly*, 1988-NMCA-038, ¶ 14, 107 N.M. 231, 755 P.2d 75; *see Padilla v. Intel Corp.*, 1998-NMCA-125, ¶ 10, 125 N.M. 698, 964 P.2d 862; *Callison v. Naylor*, 1989-NMCA-055, ¶ 7, 108 N.M. 674, 777 P.2d 913.

{32} The district court did not reach the issue of collateral estoppel in its opinion and order, and as such did not make necessary factual findings regarding the applicability of collateral estoppel. *See Silva*, 1987-NMSC-107, ¶ 13 ("In deciding whether to apply the doctrine of collateral estoppel, the threshold issues of fact are for the [district] court to resolve."). Absent any factual findings related to collateral estoppel below, deciding this appeal based on collateral estoppel now would be unfair to the Association. Accordingly, we decline to affirm under the right-for-any-reason doctrine.

CONCLUSION

{33} We reverse the district court's opinion and order dismissing the Association's claim and remand for further proceedings.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-002

No. 33,506 (filed August 31, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JACOB MENDOZA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
DONNA J. MOWRER, District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} A jury found Defendant guilty of one count of child solicitation by electronic device contrary to NMSA 1978, Section 30-37-3.2 (A), (B)(1) (2007). As grounds for reversal, Defendant argues that he was entrapped, that the State destroyed evidence thereby depriving him of due process, and that he was deprived of his constitutional right to a speedy trial. We hold that Defendant's arguments do not demonstrate any ground for reversal, and we affirm.

BACKGROUND

{2} In *State v. Schaublin*, 2015-NMCA-024, ¶ 3, 344 P.3d 1074, *cert. denied*, 2015-NMCERT-002, 346 P.3d 370, we discussed an advertisement placed in the Craiglist website by Agent Phil Caroland of the Curry County Sheriff's office. This case involves the same Craigslist ad as discussed in *Schaublin*, by Agent Caroland posing as "Myrna Gonzales," a fifteen-year-old girl. *Id.* After engaging in a sexually explicit e-mail discussion with Myrna, Defendant arranged to meet her in person. When Defendant appeared for the meeting, he was arrested. He was later charged with one count of child solicitation. Additional facts are provided as necessary in our discussion.

{3} Prior to trial, Defendant sought dismissal of the child solicitation charge on the ground that he was subjectively and objectively entrapped as a matter of law. Defendant also sought dismissal on the ground that the State had destroyed evidence and on the ground that he was deprived of his right to a speedy trial. On appeal, Defendant seeks reversal of his conviction on the three grounds argued in the district court as bases for dismissal.

{4} We hold that Defendant was not entrapped as a matter of law under either a subjective or objective analysis. We also hold that Defendant's destruction of evidence and speedy trial arguments do not demonstrate grounds for reversal. We affirm.

DISCUSSION

{5} "New Mexico recognizes two major approaches to the defense of entrapment, the subjective approach and the objective approach." *Id.* ¶ 10. Subjective entrapment, which focuses on the defendant's predisposition, is normally resolved by a fact-finder and is only rarely resolved as a matter of law by the court. *Id.* ¶¶ 11-12.

{6} Objective entrapment, which "focuses upon the inducements used by the police[,]" is broken into two subsets, factual and normative. *Id.* ¶ 13 (internal quotation marks and citation omitted). A defendant seeking to establish objective entrapment under a factual approach would attempt to prove to a fact-finder that "as a matter of fact . . . police conduct created a substantial risk that a hypothetical ordinary person not predisposed to commit a particular crime would have been caused to commit that crime." *Id.* (omission in original) (alterations, internal quotation marks, and citation omitted). A defendant seeking to establish objective entrapment under a normative approach, that is as a matter of law, would seek a ruling by the district court that "as a matter of law and policy [the] police conduct exceeded the standards of proper investigation." *Id.* ¶ 14 (alterations, internal quotation marks, and citation omitted).

{7} In the present case, the district court concluded that Defendant was not subjectively or objectively entrapped as a matter of law, but the court allowed the jury to resolve the issue whether Defendant was subjectively or objectively entrapped, as a matter of fact. The jury rejected Defendant's entrapment defenses when it found him guilty of child solicitation. On appeal, Defendant seeks reversal of his conviction on the grounds that he was subjectively and objectively entrapped as a matter of law. Because Defendant challenges the court's rejection of his entrapment defense, as a matter of law, our review is de novo. *State v. Vallejos*, 1996-NMCA-086, ¶ 28, 122 N.M. 318, 924 P.2d 727, *rev'd in part on other grounds*, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957. Defendant does not challenge the jury's conclusion that he was not objectively entrapped as a matter of fact.

Defendant's Subjective Entrapment Argument

{8} "Subjective entrapment occurs when the criminal design originates with the police, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to generate a prosecution." *Schaublin*, 2015-NMCA-024, ¶ 11 (alteration, internal quotation marks, and citation omitted). It is permissible for police to set a trap for the unwary criminal by means of a ruse. *Id.* ¶ 19. The line between the permissible use of a ruse and impermissible entrapment is drawn at the point where the police "persuade[] an otherwise law abiding citizen to engage in criminal activity through repeated and consistent appeals[.]" *Id.* "[E]ntrapment as a matter of law exists only when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act." *United States v. Dozal-Bencomo*, 952 F.2d 1246, 1249-50 (10th Cir. 1991) (internal quotation marks and citation omitted); *see id.* at 1249 (stating that a court "may find entrapment as a matter of law if the evidence satisfying the essential elements of entrapment is uncontradicted" (internal quotation marks and citation omitted)). Subjective entrapment

is rarely held to exist as a matter of law. *Schaublin*, 2015-NMCA-024, ¶ 12.

{9} To support his contention that he was subjectively entrapped as a matter of law, Defendant argues that (1) Myrna's ad was posted in a section of Craigslist that required each user to be at least eighteen years old, and therefore, it was reasonable for him to assume that any posting in that section was done by an adult; (2) he was misled by photographs of a twenty-six-year-old woman purporting to be Myrna; and (3) Myrna "pushed to set up a meeting with [him] after engaging him in [a] sexual discussion." Defendant claims that he lacked the predisposition to commit child solicitation and that, but for the foregoing circumstances by which Defendant argues the police entrapped him, he would not have engaged in such "conversations[.]"

{10} Defendant's argument in this regard resembles the argument made by the defendant in *Schaublin*. In *Schaublin*, the defendant argued that, because Myrna's ad was in the adults-only section of Craigslist, the officer used an age-regressed photograph of an adult woman to accompany the "Myrna" persona, and Myrna "inserted sexuality into their communications[,]" he was subjectively entrapped as a matter of law. *Id.* ¶¶ 6, 9, 12, 18-20. We held that because Myrna "informed [the d]efendant immediately, in her response to [his] initial response to her ad, that she was fifteen years old[,]" and because the record reflected that the defendant, not Myrna, first broached the topic of sexuality, "the jury could reasonably have concluded that [the d]efendant engaged with Myrna willingly and without having been persuaded to do so[.]" *Id.* ¶¶ 20-21.

{11} Defendant attempts to distinguish this case from *Schaublin* on the ground that the "Myrna" photos in *Schaublin* were age-regressed and that the photos in the present case depicted a twenty-six-year-old woman whose photo had not been subject to age-regression. This distinction is contradicted by the record in the present case in which Agent Caroland testified that the Myrna photographs that had been sent to Defendant had been subjected to an age-regression process by the National Center for Missing and Exploited Children and were intended to represent a pre-teen or young teenage girl. Furthermore, even were we to assume that the Myrna photographs in the present case were not age-regressed, such a fact would not "conclusively and unmistakably" demonstrate that Defendant was not predisposed to commit child solicitation such that Defendant was entitled to a ruling that, as a matter of law, he was subjectively entrapped. *See Dozal-Bencomo*, 952 F.2d 1249-50 ("[E]ntrapment as a matter of law exists only when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act." (internal quotation marks and citation omitted)). Here, as in *Schaublin*, in Myrna's first reply to Defendant's first e-mail to her, Myrna stated that she was "15 and going to be in 10th grade." Therefore, even if we were to agree with Defendant that the Myrna photographs had not been age-regressed, at best this would have created a circumstance in which there existed evidence supporting Defendant's argument that he believed that Myrna was an adult and evidence supporting the State's position that Defendant believed that Myrna was a fifteen-year-old child. Under these circumstances, the district court properly determined that the issue of subjective entrapment should be resolved by the jury as a matter of fact. *See Dozal-Bencomo*, 952 F.2d at 1249 (recognizing that subjective entrapment may only be found as a matter of law where the relevant facts are uncontradicted).

{12} Further, although Defendant argues that Myrna "pushed" to meet him after engaging in a "sexual discussion" with him, the record reflects that Defendant initiated the sexual discussion by asking Myrna, "R u still a virgin?" and that he initiated the plan to meet by asking Myrna whether she could "get away" and by stating "I wanna see how well u can please me. I just need to find us a place[.]" The record is devoid of any evidence that Agent Caroland used repeated and consistent appeals to persuade Defendant to communicate with or meet Myrna. *See Schaublin*, 2015-NMCA-024, ¶¶ 16, 19 (stating the standard used to determine whether a defendant was subjectively entrapped includes "repeated and consistent appeals" to "persuade[] an otherwise law abiding citizen to engage in criminal activity"). In sum, under the circumstances of this case, the district court did not err in denying Defendant's motion to dismiss on the ground that he was subjectively entrapped as a matter of law. *See Dozal-Bencomo*, 952 F.2d at 1249-50 (recognizing that entrapment as a matter of law may be found where it is unmistakable "that an otherwise innocent person was induced to commit the act" (internal quotation marks and citation omitted)).

Defendant's Objective Entrapment Argument

{13} The district court determined that the police conduct was not unconscionable, and Defendant's motion to dismiss on the ground that he was objectively entrapped as a matter of law was denied. Defendant challenges the district court's denial of his motion to dismiss, reiterating that he was objectively entrapped as a matter of law.

{14} Objective entrapment may be held to exist as a matter of law when the district court determines that "as a matter of law [the] police conduct exceeded the standards of proper investigation[.]" *Vallejos*, 1997-NMSC-040, ¶ 11. This is distinct from the issue of objective entrapment as a matter of fact in which a jury considers whether, as a factual matter, the "police conduct created a substantial risk that an ordinary person not predisposed to commit a particular crime would have been caused to commit that crime[.]" *Id.* In his argument, Defendant conflates these distinct forms of objective entrapment and argues that he was objectively entrapped as a matter of law because the Myrna ad "created a substantial risk [that] an ordinary person would be lured into committing" child solicitation. Since Defendant expressly limits his argument on appeal to the issue of objective entrapment as a matter of law and he does not challenge the jury's verdict, we do not consider whether the jury properly concluded that, as a matter of fact, the police did not create a substantial risk that an ordinary person would be lured into committing child solicitation.

{15} Instead, we limit our discussion of objective entrapment to Defendant's argument, that is, whether the police were guided by an "illegitimate purpose" and that they acted unconscionably when they placed the ad in an adults-only section of Craigslist, used photographs of a twenty-six-year-old woman to depict "Myrna," and engaged Defendant in two days of conversation "attempting to bait him into a sexual discussion[.]" Before fully discussing Defendant's argument, however, we observe that, although Defendant characterizes the photographs as depicting "a [twenty-six] year old," the evidence presented at the hearing on the motion to dismiss on entrapment grounds was that the photographs were of a twenty-three-year-old deputy and that the photographs had been age-regressed to portray a pre-teen or young teenage girl. Therefore, we do not accept Defendant's characterization that the photographs portrayed a twenty-six-year-old woman.

{16} The issue whether the law enforcement practice of posting an ad in an adults-only section of a website and using an age-

regressed photo of an adult to accompany the false persona of a fifteen-year-old child, who purportedly placed the ad, constitutes objective entrapment as a matter of law is one of first impression in New Mexico. In *Vallejos*, our Supreme Court cautioned the judiciary not to "micro-manage police investigative procedures" and stated that a determination of objective entrapment should be "reserved for only the most egregious circumstances[.]" *Id.* ¶¶ 21-22 (internal quotation marks and citation omitted). Additionally, the Supreme Court noted that objective entrapment is not indicated simply because the police participate "in a crime [that] they are investigating" or use "deception to gain the confidence of suspects[.]" *Id.* ¶ 22.

{17} To illustrate the distinction between a permissible "degree of deception" and impermissible "unconscionable methods" of crime detection, the *Vallejos* Court provided several examples to serve "as indicia of unconscionability." *Id.* ¶ 18. Among the examples of unconscionable police methods are giving a defendant free illicit drugs until he is addicted and then playing on his addiction to persuade him to purchase illicit drugs; overcoming a defendant's demonstrated hesitancy by persistent solicitation; threatening or using violence; appealing to sympathy or friendship; offering "inordinate gain or . . . excessive profit"; "excessive involvement by the police in creating the crime"; manufacturing "a crime from whole cloth"; and acting with the "illegitimate purpose" of "ensnar[ing] a defendant solely for the purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large." *Id.* ¶¶ 18-19 (internal quotation marks and citations omitted). The court then applied the foregoing standards to determine that the police methods used in *Vallejos*, specifically, law enforcement's use of illegal drugs to set up drug transactions and their use of assumed identities as drug dealers to capture potential drug buyers did not constitute objective entrapment as a matter of law because none of the indicia of unconscionability were present. *Id.* ¶¶ 3-4, 39-41.

{18} In the present case, the record is void of any evidence that Agent Caroland persuaded Defendant to engage in child solicitation by any of the indicia of unconscionability discussed in *Vallejos*. Although Defendant argues that Agent Caroland attempted "to bait him into a sexual discussion" with Myrna, as noted earlier, the subject of sex was introduced into his and Myrna's conversation by Defendant. Further, the record is void of any indication that the agent used persistent solicitation to overcome any hesitancy expressed by Defendant to engage in a sexual relationship with Myrna, attempted to appeal to Defendant's sense of sympathy or friendship, or offered Defendant any form of profit or gain.

{19} Nor, under the circumstances of this case, was the act of placing an ad in the adults-only section of Craigslist an unconscionable police practice. Although the ad itself did not indicate Myrna's age, Agent Caroland represented Myrna to be a fifteen-year-old child in his first reply to Defendant's response to the ad. Thus, despite the placement of the ad in the adults-only section of Craigslist, Defendant was made aware at the outset that the ad had not been placed by an adult. Additionally, in terms of the conscionability of police practices, we see little distinction between Agent Caroland perpetuating the ruse that he was a fifteen-year-old girl who was breaking the rules of Craigslist by posting an ad in an adult-restricted section and the law enforcement practice of posing undercover as a drug dealer. *See id.* ¶ 40 (holding that in terms of the objective entrapment analysis it was not unconscionable for the police to maintain assumed identities as drug dealers). In each instance, law enforcement is playing a role and engaging in a ruse intended to root out criminals. Likewise, just as the *Vallejos* Court approved the use of actual illicit drugs in the drug sale by undercover agents posing as drug dealers, we approve the use in the present case of age-regressed photographs to accompany the Myrna persona. *See id.* To hold that it was impermissible for Agent Caroland to use the age-regressed photographs that were essentially a "prop" that permitted him to believably maintain the Myrna persona would amount to micro-management of police investigative procedures that is not within the purview of this Court. *See id.* ¶ 21 ("The evaluation of police conduct in the normative inquiry [of objective entrapment] . . . should not be used as a guise to . . . micro-manage police investigative procedures.").

{20} On a final note in regard to Defendant's objective entrapment argument, we observe that Section 30-37-3.2(D) expressly provides that "[in] a prosecution for child solicitation . . . it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age." Thus, in drafting Section 30-37-3.2(D) the Legislature appears to have contemplated that the police would use methods such as Agent Caroland's "Myrna" Craigslist ad to enforce the prohibition against child solicitation. The obvious legislative intent behind Section 30-37-3.2 further supports our conclusion that the activity here did not exceed the standards of proper investigation and was not unconscionable under *Vallejos*. *See* 1997-NMSC-040, ¶ 21 (stating that the appellate court should not interfere with the policy and enforcement decisions of the legislative and executive branches of government). In sum, Defendant's argument that he was objectively entrapped as a matter of law does not demonstrate grounds for reversal.

Defendant's Constitutional Arguments

{21} Defendant raises two constitutional arguments. First, Defendant argues that he was deprived of his due process right to a fair trial by virtue of the State having "failed to preserve" or having "destroyed" the electronic versions of the e-mail correspondence between him and "Myrna." Secondly, Defendant argues that his right to a speedy trial was violated. We review these constitutional issues de novo; however, we defer to the district court's underlying factual findings. *State v. Samora*, 2013-NMSC-038, ¶ 6, 307 P.3d 328 ("We review constitutional claims de novo."); *State v. Montoya*, 2011-NMCA-074, ¶ 9, 150 N.M. 415, 259 P.3d 820 (recognizing that, in a de novo review of a constitutional issue, the appellate court defers to the district court's factual findings).

Defendant's Due Process Argument

{22} The district court found that Agent Caroland used a Yahoo e-mail account to communicate as "Myrna" with Defendant. Pursuant to the terms of use of the Yahoo e-mail account, the e-mails between Myrna and Defendant were automatically deleted after a period of inactivity. However, all of the e-mails between Myrna and Defendant had been printed, and the printed versions were disclosed to Defendant prior to trial.

{23} Without attacking the foregoing findings and without citing facts in the record, Defendant argues that Agent Caroland printed only a selection of Myrna's e-mail conversation with Defendant and discarded the rest without permitting Defendant to review it. Building on the premise that only some of the correspondence was preserved, Defendant argues that an analysis of the effect of the "destroyed" e-mails pursuant to the three-part test outlined in *State v. Chouinard* leads to a conclusion that his due process rights were violated by the alleged destruction of the e-mails. 1981-NMSC-096, ¶¶ 12, 16, 96 N.M. 658, 634 P.2d 680 (recognizing that due process requires that the prosecution

make available to the defense evidentiary material in its possession and stating that "New Mexico has adopted a three-part test to determine whether deprivation of evidence is reversible error"). We disagree.

{24} Under the three-part test outlined in *Chouinard* the deprivation of evidence constitutes reversible error where: (1) "[t]he [prosecution] either breached some duty or intentionally deprived the defendant of evidence[,]" (2) the evidence of which the defendant was deprived was material, and (3) the defendant was prejudiced by the deprivation of evidence. *Id.* ¶ 16 (internal quotation marks and citation omitted). Applying the *Chouinard* factors, the district court found and Defendant does not refute that, as to the first factor, the State did not intentionally delete the electronic version of the correspondence between Myrna and Defendant. Further, although Defendant argues on appeal that "[l]aw enforcement has a duty to preserve . . . evidence[,]" he does not argue or provide authority for the proposition that, under the circumstances of this case, the State breached its duty of preserving evidence. Here, the district court determined in an unattacked and, therefore, conclusive finding that "printed versions [of the e-mails] do exist[.]" *See* Rule 12-213(A)(4) NMRA (stating that the appellant's argument "shall set forth a specific attack on any finding, or such finding shall be deemed conclusive"). With no argument or authority to support a contrary proposition, we conclude that notwithstanding the inadvertent loss of the electronic versions of the e-mails, the State satisfied its duty of preserving the evidence by printing the e-mails. *Cf. Chouinard*, 1981-NMSC-096, ¶¶ 14, 21 (concluding that destroyed evidence did not warrant reversal where the prosecutor followed a system of preservation procedures that were reasonably assured to preserve evidence and recognizing that, in general, sanctions are not warranted where the loss of evidence is inadvertent).

{25} As to the second and third *Chouinard* factors, the district court found that because printed versions were available, the electronic versions of the e-mails between Myrna and Defendant were not material, and their destruction was not prejudicial to the defense. Defendant's arguments to the contrary rest upon the unsupported assumption that the printed e-mails did not depict the full extent of the communications between him and Myrna; the arguments are not persuasive. In sum, Defendant has failed to demonstrate a due process violation or reversible error as a consequence of the electronic version of the e-mail correspondence between him and Myrna having been deleted.

Defendant's Speedy Trial Argument

{26} Speedy trial issues are evaluated by the balancing test discussed in *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387, pursuant to which we consider: "(1) the length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant." (Internal quotation marks and citation omitted.) "[G]enerally a defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect." *Montoya*, 2011-NMCA-074, ¶ 11 (internal quotation marks and citation omitted). "If a defendant does not demonstrate prejudice, he . . . may still show violation of the speedy trial right" if the other three *Garza* factors weigh in his favor *and* he has not acquiesced in the delay. *Id.* In the present case, Defendant acquiesced in the delay and failed to demonstrate prejudice of the kind against which the speedy trial right is intended to protect; accordingly, without considering the remaining *Garza* factors, we conclude that Defendant has failed to demonstrate a violation of his right to a speedy trial.

{27} Approximately twenty-two months passed from the time that Defendant was charged with child solicitation to the time that he was convicted. Because the district court determined and Defendant does not dispute that this was a complex case, with an according presumptive-prejudice threshold of eighteen months within which trial should commence, there was an approximate four-month delay beyond that threshold. *See Garza*, 2009-NMSC-038, ¶ 48 (stating that, in a complex case, the presumptive-prejudice threshold is eighteen months). Although Defendant asserts that he "was not responsible for any delay[,]" the record reflects that he acquiesced in or caused a significant portion of the delay. A jury trial originally scheduled to commence on March 7, 2012, was continued pursuant to a stipulated motion for a continuance; a jury trial set for February 28, 2013, was continued pursuant to Defendant's motion for a continuance; a jury trial set for April 8, 2013, was continued pursuant to a stipulated order for continuance; and a jury trial set for July 23, 2013, was also continued pursuant to a stipulated motion for a continuance. Defendant, having acquiesced in approximately sixteen of the almost twenty-two months of delay, may not now benefit from that delay by seeking dismissal on speedy trial grounds. *State v. McCroskey*, 1968-NMCA-074, ¶ 17, 79 N.M. 502, 445 P.2d 105 (stating that a defendant "cannot be heard to complain [of a deprivation of his right to a speedy trial] if he consented to or acquiesced in the delay").

{28} The right to a speedy trial is intended to guard against three forms of prejudice: oppressive pretrial incarceration, undue anxiety and concern of the accused, and impairment to the defense. *Garza*, 2009-NMSC-038, ¶ 35. In seeking to establish a speedy trial violation, it is incumbent upon the defendant to demonstrate and to provide evidence of a causal link between the delay and any alleged prejudice as a result of the delay. *State v. Spearman*, 2012-NMSC-023, ¶ 39, 283 P.3d 272.

{29} Defendant argues one source of prejudice, that is, the "disappearance" of the e-mails between Myrna and Defendant from Agent Caroland's e-mail account, which Defendant asserts occurred sometime between April 16, 2012, and July 9, 2013, a period during which Defendant acquiesced. Defendant equates the disappearance of the e-mails to the death, disappearance, or memory loss of a witness, which, as stated in *Garza*, is the "most serious" type of prejudice. 2009-NMSC-038, ¶ 36 (internal quotation marks and citation omitted). Defendant's comparison of the electronic copies of the e-mails to the absolute loss of witness testimony as a result of a witness's death, disappearance, or memory loss is unavailing.

{30} As discussed earlier, the district court concluded that the e-mails between Myrna and Defendant were printed and provided to Defendant before trial, and Defendant does not attack that finding. Defendant does not argue, nor could he reasonably do so under these circumstances, that his defense was impaired by the loss of the electronic version of his communications with Myrna. He has, therefore, failed to show the type of prejudice that the speedy trial right was intended to prevent.

{31} In sum, because Defendant acquiesced in the delay in bringing this case to trial and he has failed to demonstrate prejudice, his speedy trial argument provides no basis for reversal.

CONCLUSION

{32} We affirm.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
LINDA M. VANZI, Judge

From the New Mexico Court of Appeals

Opinion Number:2016-NMCA-003

No. 33,473 (filed September 2, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JUAN CARLOS ACOSTA,
Defendant-Appellee.

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

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Opinion

Timothy L. Garcia, Judge

{1} The State appeals the district court's order granting Defendant's motion for a new trial. This case presents the following issues: (1) the State's ability to appeal the grant of a new trial based upon an evidentiary ruling, (2) the district court's jurisdiction to grant a motion for a new trial on grounds that were raised sua sponte more than ten days after the verdict, and (3) whether the grant of a new trial was an abuse of discretion under the circumstances of this case. We affirm.

BACKGROUND

{2} Defendant was indicted by a grand jury on June 2, 2011, for trafficking a controlled substance (cocaine) by possession with intent to distribute, child abuse, conspiracy to commit trafficking a controlled substance by possession with intent to distribute, and possession of drug paraphernalia. The indictment stated that the crimes occurred on or about October 19, 2010, the date that the search warrant was executed. As part of the State's investigation, three uncharged controlled buys were executed by officers, with the assistance of a confidential informant (CI), in the weeks prior to the execution of the search warrant.

{3} On August 19, 2013, the day before trial commenced, Defendant filed a motion in limine to exclude "[a]ny information provided by the [CI] to the police officers regarding . . . Defendant" on the grounds that it would be "inadmissible hearsay." A hearing was held on the same day, during which defense counsel argued that if the officers testified at trial that a CI told them that Defendant was selling drugs, and the CI was not going to testify at trial, that testimony would present confrontation clause and hearsay problems. Defense counsel noted that he was not concerned with the officers "mentioning that based on their investigation they decided to get a search warrant[.]" The State argued that "the officer has a right to testify that [he] gave a [CI] money,[the CI] met with . . . Defendant[,] [m]oney that was provided to the [CI] was gone, and there were drugs in [the CI's] possession, which he observed [as having occurred] hand-to-hand." The district court replied that if the officers personally observed the hand-to-hand exchange during the controlled buys, they could testify as to those observations; however, because the CI was unavailable, the officers could not testify as to what the CI told them. Ultimately, the district court agreed to reserve ruling on the matter.

{4} During the same motion hearing, defense counsel moved to exclude as inadmissible character evidence "any testimony from any detective that [he or she] had previous knowledge of my client[, such as] saying we knew [Defendant], we knew him well and he was up to no good[.]" *See* Rule 11-404(A) NMRA (providing that evidence of a person's character or character trait is inadmissible to prove conformity therewith on a particular occasion). In response, the prosecutor indicated that "[he did not] anticipate the officers testifying to anything outside of this current investigation[,]" specifically stating that the officers would not testify about Defendant's 1997 arrest for trafficking. The morning of trial, the State again asked the district court whether the officers could testify as to their observations of the CI, and the district court agreed.

{5} Jury trial began on August 20, 2013. The State argued in its opening statement that Sergeant Carpenter of the Albuquerque Police Department would testify that with the assistance of a CI, he observed Defendant take part in three controlled buys. The State explained that after the three controlled buys, a search warrant was obtained for an apartment thought to be Defendant's residence. Sergeant Carpenter subsequently testified about the controlled buys and the events that transpired the day that the search warrant was executed, and the defense did not object to the testimony about the controlled buys. The theory of the defense was that Defendant was not a resident of the apartment, that he happened to be in the area "by chance," and that there was no evidence against him at all.

{6} The jury found Defendant guilty of trafficking a controlled substance by possession with intent to distribute, conspiracy to commit trafficking a controlled substance by possession with intent to distribute, abuse of a child, and possession of drug paraphernalia. Defendant filed a timely motion for a new trial, *see* Rule 5-614(C) NMRA (providing that a motion for a new trial based upon any grounds other than newly discovered evidence must be made within ten days of the verdict or within the grant of a motion for extension of time by the court within that ten-day period), citing inconsistent witness testimony and improper prosecutorial comment during closing argument.

{7} At the motion hearing, the district court granted Defendant's motion for a new trial, but it did so on new grounds that the court raised sua sponte. First, the indictment stated that the charges stemmed from the execution of a search warrant on October 19, 2010, but the State introduced evidence of previous controlled buys involving Defendant that were conducted in the weeks prior. Second, the defense did not have reasonable notice of the State's

intent to introduce this prior bad acts evidence, as required by Rule 11-404(B). Third, this failure to give notice prejudiced Defendant because it was the only evidence tying Defendant to the apartment, to the co-defendant, and to the drugs found on the co-defendant. The instant appeal ensued, with the State challenging the district court's grant of a new trial.

DISCUSSION

A. The State's Ability to Appeal the Order Granting a New Trial

{8} Because it implicates our authority to hear this appeal, we turn first to Defendant's contention that the State may not appeal the district court's order granting a new trial. In support of his contention, Defendant relies upon *State v. Griffin*, 1994-NMSC-061, ¶ 11, 117 N.M. 745, 877 P.2d 551, for the proposition that the grant of a new trial is appealable by the State only when the district court's ruling is based on a determination of prejudicial legal error. Defendant asserts that the district court's grant of a new trial was premised on the fact-based admission of evidence under Rule 11-404(B)(2), and because an evidentiary ruling is discretionary, the ruling does not present a legal question. We disagree.

{9} In *State v. Chavez*, our Supreme Court explained that Article VI, Section 2 of the New Mexico Constitution permits the State to appeal an order granting a new trial because the State has a "strong interest in enforcing a lawful jury verdict." 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232. This holding was later limited by *Griffin*, which provided that in a criminal case, the State may only appeal "an order in which it is claimed the grant of a new trial was based on an erroneous conclusion that prejudicial legal error occurred during the trial or that newly-discovered evidence warrants a new trial." 1994-NMSC-061, ¶ 11.

{10} At the hearing on Defendant's motion for a new trial, the district court noted that even though the indictment charged only conduct that was discovered during the execution of the search warrant, the State introduced evidence at trial of prior uncharged controlled buys involving Defendant that were made in the weeks leading up to the execution of the search warrant. Because uncharged misconduct falls within the ambit of Rule 11-404(B), which requires reasonable notice prior to introduction at trial, the district court found that the State did not provide reasonable notice to Defendant of its intent to use these prior controlled buys. *See* Rule 11-404(B)(2)(a), (b) (providing that, in a criminal case, evidence of other crimes may be admissible for certain purposes, but the prosecution must give reasonable notice of the general nature of any such evidence before trial, or during trial if the district court excuses the lack of pretrial notice for good cause). The district court further suggested that in any second trial, the State could either amend the indictment to include the prior controlled buys, or file a notice of intent to use Rule 11-404(B) evidence.

{11} Importantly, the district court's ruling was not that the evidence of uncharged controlled buys would or would not have been admissible under Rule 11-404(B). If the prosecution had provided reasonable notice, and if the defense had then objected to the evidence, the district court would have been presented with an opportunity to rule on the admissibility of this evidence. Instead, the district court concluded that under the facts of this case, because the prior controlled buys were uncharged misconduct, the prosecution failed to reasonably notify the defense of its intent to introduce such evidence, which was contrary to Rule 11-404(B) and prejudicial to the defense. Because the district court's ruling hinged upon the interpretation and application of the notice requirement of Rule 11-404(B)(2) to the facts of this case, we hold that the district court's grant of a new trial was based on the conclusion that prejudicial legal error occurred, which the State was permitted to immediately appeal. *See Griffin*, 1994-NMSC-061, ¶ 14 (holding, in a case where the only basis for the grant of a new trial was newly-discovered evidence, that such an order was appealable "because it presents a question of law easily reviewed by an appellate court and not a question of fact as to the correctness of a discretionary ruling"); *see also* Fed. R. Evid. 404 advisory committee's note (1991 amendments) ("Because the notice requirement serves as condition precedent to admissibility of [Rule 11-404(B)] evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.").

B. The District Court's Jurisdiction to Grant a New Trial

{12} We turn next to the State's contention that the district court lacked jurisdiction to grant Defendant's motion for a new trial on other grounds that were raised sua sponte by the court more than ten days after the entry of the jury's verdict. The State argues that the district court effectively raised and granted a new trial on its own motion outside of the ten-day window set forth in Rule 5-614(C). The State also argues that the district court needed to have enlarged the time for the filing of a motion for new trial within the ten-day window before it could consider other additional grounds to grant a new trial. We disagree.

{13} On appeal, we address whether the district court had jurisdiction to grant a motion for a new trial de novo. *State v. Moreland*, 2007-NMCA-047, ¶ 9, 141 N.M. 549, 157 P.3d 728, *aff'd on other grounds*, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363. It is undisputed that Defendant invoked the district court's jurisdiction by timely filing a motion for a new trial. *See State v. Lucero*, 2001-NMSC-024, ¶ 9, 130 N.M. 676, 30 P.3d 365 (holding that the ten-day filing requirement in Rule 5-614(C) is jurisdictional). The district court then exercised its independent discretion when ruling upon Defendant's timely-filed motion. The fact that the district court based its ruling on different grounds does not alter the jurisdictional analysis. Insofar as the State argues that the district court is prohibited from relying on different grounds from those raised by the moving party when it does go beyond ten days of the entry of the verdict, the State points us to no authority in support of this contention, and we are unaware of any. *See generally In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). To the extent that the State invites us to adopt such a position, we believe it would be contrary to the wording and intent of Rule 5-614, and therefore decline. *Cf. Moreland*, 2007-NMCA-047, ¶ 22, ("Rule 5-614(A) could also be construed as reserving to the district court a 'reservoir of equitable power' to assure that justice is done, and order a new trial sua sponte beyond the thirty days specified in Rule 5-614(C)." (citation omitted)). Accordingly, we conclude that the district court had jurisdiction to grant Defendant's motion for a new trial and proceed to address the merits of the district court's ruling.

C. The District Court's Discretion to Grant a New Trial

{14} The State raises two general arguments challenging the district court's grant of a new trial: (1) the district court erred by finding that the State failed to provide notice of its intent to use the prior controlled

buys as evidence of prior bad acts and surprised Defendant as a result; and (2) the evidence of the prior controlled buys was admissible under Rule 11-404(B) because defense counsel's opening statement placed Defendant's intent, knowledge, and possession of the drugs inside of the apartment at issue. In response, Defendant argues that the State did not specifically designate its intent to introduce the controlled buys as prior bad acts evidence with a permitted purpose, as required by Rule 11-404(B)(2). Apart from lack of proper notice, Defendant further argues that the evidence of controlled buys nonetheless was not admissible Rule 11-404(B) evidence because it had no purpose other than to prove a prior propensity to act in a particular manner. For the reasons discussed below, we affirm the district court's finding that the State failed to provide adequate notice of its intent to use the evidence of prior controlled buys under Rule 11-404(B) and conclude that there was no abuse of discretion when the district court determined that this error was sufficiently prejudicial to warrant a new trial.

{15} On appeal, we review the district court's grant of a new trial for "clear and unmistakable abuse of discretion." *Griffin*, 1994-NMSC-061, ¶ 9. We apply a two-prong test to determine whether the district court abused its discretion. *Id.* First, we determine whether the grant of the new trial was premised upon legal error, and second, we evaluate "whether the error is substantial enough to warrant the exercise of the [district] court's discretion." *Id.* (internal quotation marks and citation omitted). No abuse of discretion occurs when there are reasons to both support and detract from the district court's ruling. *Moreland*, 2008-NMSC-031, ¶ 9. "Because the trial judge has observed the demeanor of the witnesses and has heard all the evidence, the function of passing on motions for new trial belongs naturally and peculiarly to the trial court." *Id.* (alteration, internal quotation marks, and citation omitted).

1. Legal error

{16} We turn first to the question of whether the district court correctly determined the prosecution failed to provide adequate notice of its intent to offer Rule 11-404(B) evidence. In granting a new trial, the district court orally concluded that Defendant was surprised by the erroneous admission of the prior controlled buys. The State disputes this, arguing that because the defense moved to exclude the statements of the CI on hearsay and confrontation grounds in a pretrial motion, this indicated that the defense had sufficient actual notice of the State's intent to introduce evidence of the controlled buys. The State further argues that during the hearing on Defendant's motion, the prosecutor's statement that the detective should be allowed to testify about his observations as to the controlled buys sufficiently alerted the defense to the issue.

{17} Inherent in the district court's finding that the defense was surprised by this evidence was a determination that any actual notice stemming from the discussion about defense counsel's motion in limine to exclude statements of the CI on other grounds was insufficient under Rule 11-404(B)(2) to put the defense on notice of the nature of the prior bad acts evidence to be presented at trial. Rule 11-404(B) states:

> (1) *Prohibited [U]ses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) *Permitted [U]ses; [N]otice in a [C]riminal [C]ase*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case, the prosecution must
>
> > (a) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial, and
> >
> > (b) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

{18} Our case law states that it is incumbent upon the party seeking to offer Rule 11-404(B) evidence "to identify the consequential fact to which the proffered evidence of other acts is directed." *State v. Lucero*, 1992-NMCA-107, ¶ 10, 114 N.M. 489, 840 P.2d 1255. "The proponent of the evidence must demonstrate its relevancy to the consequential facts, and the material issue, such as intent, must in fact be in dispute." *State v. Elinski*, 1997-NMCA-117, ¶ 13, 124 N.M. 261, 948 P.2d 1209, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

{19} We disagree with the State's suggestion that the general discussion that occurred in the course of the proceeding on Defendant's hearsay objection, along with materials provided in discovery, should be regarded as sufficient to provide reasonable notice of the general nature of the evidence the State intended to present. In doing so, we acknowledge that Rule 11-404(B)(2), while requiring a prosecutor to provide reasonable notice of prior bad acts, does not provide specific guidance on exactly how this notice is to be accomplished. As such, the plain language of the rule accommodates a certain amount of flexibility. Nevertheless, at a minimum, the State must give direct notice that it specifically intends to introduce prior bad acts evidence under Rule 11-404(B)(2) pursuant to an articulated permissible use. *See* 3 Clifford S. Fishman, *Jones on Evidence* § 17:24, at 368 (7th ed. 1998) ("Notice should be sufficiently detailed to permit defendant to bring a motion in limine. Disclosing the information in discovery rather than in response to the specific rule . . . 'misses the point' of the rule, which is to inform the defendant of crimes the [s]tate intends to introduce and to allow the defendant time to respond by motion in limine or otherwise." (footnotes omitted) (quoting *State v. Houle*, 642 A.2d 1178, 1181 (Vt. 1994)). Here, although it may have become reasonably apparent that the State intended to introduce evidence of the prior controlled buys, the State neither specifically invoked Rule 11-404(B) nor made any attempt to identify the consequential fact or facts to which the prior bad acts evidence in question might properly have been directed. *See State v. Serna*, 2013-NMSC-033, ¶ 19, 305 P.3d 936 (holding that the State's failure to inform the court of the relevance of prior convictions beyond merely reciting the exceptions enumerated in Rule 11-404(B) resulted in the erroneous admission of prior crimes evidence); *State v. Gallegos*, 2007-NMSC-007, ¶ 25, 141 N.M. 185, 152 P.3d 828 (stating that a party seeking to introduce Rule 11-404(B) evidence must both "identify and articulate the consequential fact to which the evidence is directed" and "cogently inform the court—whether the trial court or a court on appeal—the rationale for admitting the evidence to prove something other than propensity").

{20} We note that, had the indictment encompassed Defendant's conduct during the controlled buys, evidence concerning the controlled buys would not have been subject to Rule 11-404(B)(2)'s notice re-

quirement because such conduct would not have been an "other act" under the rule. The fact that the conduct charged in the indictment did not include Defendant's conduct during the controlled buys may have been an oversight on the part of the State, the implications of which were not specifically addressed by the defense, the State, or the district court until the district court discovered the oversight. However, once the district court discovered the oversight, realized that admission of the controlled buys evidence was governed by the limitations of Rule 11-404(B), and concluded that the State did not provide the required Rule 11-404(B)(2) notice, the district court acted well within its discretion to address whether to order a new trial. *See* 3 Fishman, *supra*, § 17:24, at 367-68 ("The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness." (footnote omitted) (internal quotation marks and citation omitted)); *see also Griffin*, 1994-NMSC-061, ¶ 9 (requiring "clear and unmistakable abuse of discretion" to reverse a district court's order for a new trial).

{21} Courts have long recognized the dangers of unfair surprise associated with prior bad acts evidence. *See State v. Martinez*, 2008-NMSC-060, ¶ 23, 145 N.M. 220, 195 P.3d 1232. Requiring prosecutors to provide advance notice of their intent to present such evidence at trial serves significant purposes. *See* 3 Fishman, *supra*, § 17.19 at 360 ("Such notice permits the defendant to move to challenge such admissibility prior to trial, avoids the risk that the jury will be exposed to prejudicial material before the court can exclude it, and enables the court to conduct a hearing, require briefs, etc., without disrupting the trial itself. A pretrial ruling on admissibility also permits the parties to plan their strategy accordingly[.]"). Enabling defense counsel to anticipate the presentation of Rule 11-404(B) evidence facilitates intelligent objection and argument, provides greater opportunity for thoughtful rulings that address all legitimate considerations and concerns, and tailors the evidence presented to the specific circumstances. As a result, the State's failure to give Defendant articulated notice that it intended to use the prior controlled buys for some purpose allowed under Rule 11-404(B)(2) resulted in legal error that the district court was entitled to address.

2. Prejudice

{22} We turn next to the question of prejudice and address whether the prosecution's failure to notify the defense of its intent to introduce evidence of the prior controlled buys was prejudicial and, if so, whether the prejudice was substantial enough to warrant an exercise of the district court's discretion. *See Griffin*, 1994-NMSC-061, ¶ 9 (stating that the second prong of the two-prong test to determine whether the district court's grant of a new trial was an abuse of discretion involves "a determination of whether the error is substantial enough to warrant the exercise of the [district] court's discretion" (internal quotation marks and citation omitted)). "[A] much stronger showing is required to overturn an order granting the new trial than denying a new trial." *Id.* ¶ 12 (internal quotation marks and citation omitted). "A review of the action of the trial court in the exercise of its discretion does not depend upon whether the appellate court would have reached the same conclusion." *State v. Gonzales*, 1986-NMCA-050, ¶ 14, 105 N.M. 238, 731 P.2d 381, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008. We conclude that under the circumstances presented in this case, the district court's grant of a new trial was not an abuse of discretion.

{23} The district court determined that evidence of the prior controlled buys was sufficiently prejudicial to warrant an exercise of its discretion to grant a new trial because, as undisputed by the State, the prior uncharged controlled buys were: (1) the only evidence linking Defendant to the apartment; (2) the only evidence linking Defendant to the co-defendant; and (3) the only evidence linking Defendant to the drugs found inside the apartment during the execution of the search warrant. The district court, having heard all pretrial motions and the trial in its entirety, was in the best position to evaluate the prejudicial effect of this important evidence on the trial as a whole, and our review of the record comports with the district court's assessment of the importance of this evidence. *See Moreland*, 2008-NMSC-031, ¶ 9 (providing that where evidence in the record both supports and destracts from the district court's grant of new trial, there is no abuse of discretion).

{24} Finally, the State argues that a new trial was unwarranted because the prior controlled buys were admissible Rule 11-404(B) evidence to prove Defendant's intent to distribute and conspire to traffic cocaine, as well as to show Defendant's knowledge, access, and control over the drugs that were kept inside the apartment. In response, Defendant argues that the evidence of prior controlled buys was unnecessary, overly prejudicial, and only offered for the improper purpose of proving a prior propensity to act in a particular manner.

{25} At this juncture, however, we decline to resolve the question of whether evidence of the prior controlled buys could have been admissible evidence under Rule 11-404(B)(2) to show intent, knowledge, access, and control over the drugs at issue. Because the district court did not rule upon the admissibility of this evidence based upon a lack of reasonable notice and no prior opportunity to assess its admissibility for another purpose under Rule 11-404(B)(2), that issue remains unresolved and this Court would be premature in addressing such an evidentiary issue before the district court has made an informed ruling. It is the district court's responsibility to address the generally prejudicial nature of evidence of prior drug transactions, *see State v. Wrighter*, 1996-NMCA-077, ¶ 11, 122 N.M. 200, 922 P.2d 582 (holding that, in a case involving a defendant charged with selling crack cocaine to a CI, evidence of prior buys between that defendant and the same CI were not admissible to show context, and, even assuming the evidence was admissible, it was more unfairly prejudicial than probative and should have been excluded), and it is important that such evidence be determined to have "real probative value, and not just possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan." *Serna*, 2013-NMSC-033, ¶ 17 (internal quotation marks and citation omitted) (quoting *State v. Mason*, 1968-NMCA-072, ¶ 23, 79 N.M. 663, 448 P.2d 175). We conclude that the district court did not abuse its discretion in determining that the prosecution's failure to give notice of its intent to offer evidence of Defendant's prior bad acts under Rule 11-404(B) was sufficiently prejudicial to warrant a new trial.

CONCLUSION

{26} For the foregoing reasons, we affirm the district court's grant of a new trial.

{27} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
J. MILES HANISEE, Judge

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Honorable Cynthia A. Fry

9:45 am **Litigation Purgatory: Pending on Appeal**
Lee Hunt, Esq.

10:30 am **Break**

10:45 am **That was Then, This is Now: Discovery in the Technology Age**
Kathy Love, Esq.
William Carpenter, Esq.

11:45 am **Lunch (on your own)**

1:00 pm **Insurance Update**
Maureen A. Sanders, Esq.

2:00 pm **Workers' Compensation Update**
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Veronica Dorato, Esq.

2:45 pm **Break**

3:00 pm **...And the Kitchen Sink: Other Recent Decisions of Interest**
Maureen A. Sanders, Esq.

4:00 pm ***Duty and Conflict: Ethical Consideration for the PR and Counsel in Multi-Party Cases***
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