REFERENCE GUIDE ON MEDIA ISSUES

COMPILED BY THE BENCH BAR MEDIA COMMITTEE

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Preface

Judges, lawyers and members of the news media at times find themselves in situations where the interests of free press, fair trial, litigants, witnesses and others are in conflict. These issues frequently arise during the course of a proceeding, with little advance warning.

The Bench Bar Media Committee, as a result of dialogue involving judges, lawyers and journalists, has prepared this quick reference guide on media issues that commonly arise in State District Courts and the Bernalillo County Metropolitan Court. The guide includes some key statutes, Supreme Court Rules, case summaries and citations dealing with these issues. Local rules also should be consulted.

The Bench Bar Media Committee consists of judges, lawyers and journalists. It has been active for a number of years and has provided a useful forum for discussion of issues of mutual concern. The committee also has undertaken various tasks at the request of the New Mexico Supreme Court.

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New Mexico courts, both administratively and in decisions, have noted the importance of access to court proceedings by the news media, which act as a surrogate for the public. The work of the press in reporting on the legal system plays an important role in maintaining public confidence in the administration of justice. In recognition of this principle, the New Mexico Supreme Court and the U.S. Supreme Court have established rigorous tests that must be met before news media access to court proceedings is restricted.

New Mexico courts have recognized the right of the news media to challenge orders that may restrict their ability to report on an event. In *State ex rel. New Mexico Press Ass'n v. Kaufman,* 98 N.M. 261, 648 P.2d 300 (1982), the issue presented was the validity of restrictions on coverage of a criminal trial. In that case, the Supreme Court did not need to decide whether standing was possible in the absence of invasion of a legally protected interest, because the media had such an interest -- the First Amendment right of the public (and hence the media) to attend criminal trials. *See Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). Our Supreme Court observed in *Kaufman* that "cases from many jurisdictions make it clear that the news media has standing to question the validity of an order impairing its ability to report the news, even though it is not a party to the litigation below." 98 N.M. at 264, 648 P.2d at 303; *see Davis v. East Baton Rouge Parish Sch. Bd.,* 78 F.3d 920, 926 (5th Cir. 1996).

The most recent New Mexico case addressing this issue is *Does I through III v. Roman Catholic Church of the Archdiocese,* 1996-NMCA-95, 122 N.M. 307, 924 P.2d 273. In that case, the New Mexico Court of Appeals held that media organizations had standing to challenge a protective order limiting the dissemination of discovery in certain priest abuse cases. In that case, the court articulated the following:

> The role of the news media is fundamental to the proper functioning of American society. The media serve as a non-governmental surrogate for the people in pursuing the public interest in information. This role is important in determining whether standing is appropriate.

Id. at ¶ 36, 122 N.M. at 315, 924 P.2d at 281.

Generally, the media have a well-established right to intervene in cases to maintain their right to cover court proceedings.

II. Access to Court Proceedings

By statute, most court proceedings in New Mexico are open to the public. NMSA 1978, § 34-1-1 states that "[e]xcept as provided in the Children's Code and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum."

In addition, to this statutory right, the public and the press have a constitutional right to attend trials. In addition to trials, this constitutional right is presumed in pretrial proceedings that have historically or traditionally been open. Examples include pretrial detention, bail, plea and sentencing hearings.

A. Criminal Trials

The right of the public and the press to attend a criminal trial is guaranteed by both the common law and the First Amendment to the U.S. Constitution. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). That case stemmed from a state court ruling in a Virginia murder trial. In March 1976, John Stevenson was indicted for murder. He was tried and convicted of second-degree murder, but his conviction was reversed. A second trial ended in a mistrial when a juror asked to be excused in the midst of the hearing. A third trial also resulted in a mistrial because a prospective juror told other prospective jurors about Stevenson's earlier conviction on the same charges. This exchange was not revealed until after the trial had started. As proceedings were about to begin for the fourth time in late 1978, the defense asked that the trial be closed. The prosecution did not object and the court closed the trial over the objections of Richmond newspapers.

Chief Justice Burger wrote the court's opinion, noting that "through its evolution the trial has been open to all who cared to observe." A presumption of open hearings is the very nature of a criminal trial under our system of justice, the Chief Justice added. Although there is no specific provision in the Bill of Rights to support the open trial, the expressly guaranteed freedoms in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." Burger wrote, "In guaranteeing freedoms such as those of speech and press the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." The First Amendment, the Chief Justice noted, prohibits the government from summarily closing courtroom doors, which had been open to the public at the time that amendment was adopted.

B. Civil Trials

In 1984, the U.S. Court of Appeals for the 3rd Circuit ruled that civil proceedings are also presumptively open to the public and the press. In *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3rd Cir. 1984), a lawsuit involving a corporate proxy fight, the court noted that a "survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right of access of criminal trials." The right is not absolute, the court said, but absent a clear showing that closing the trial serves an important governmental interest and that closing the trial is the only way to serve this interest, the civil proceeding should be open. Numerous other federal and state courts have followed the rulings in *Richmond Newspapers* and *Publicker.*

C. Other Pretrial Hearings - *Press-Enterprise* Test

Issues frequently arise concerning closure of pretrial hearings. The United States Supreme Court ruled in *Press-Enterprise v. Riverside Superior Court,* 478 U.S. 1 (1986), that pretrial hearings are presumptively open to the public. It recognized the press has a qualified privilege to attend such proceedings and that under certain circumstances a pretrial hearing could be closed if certain findings were established. However, a mere risk of prejudice does not automatically deny public access to hearings. *Press-Enterprise* established a key test to assess whether a pretrial hearing can be closed.

Prior to issuing an order closing a pretrial hearing, a trial judge must apply the *Press-Enterprise* test to evaluate the situation. Again, under the *Kaufman* case, the media must be provided notice of any attempt to limit their right to attend a hearing. First, the court must determine whether the kind of hearing involved is presumptively open or closed. The answer to this question will determine which party or parties will carry the burden of proof in this dispute. The judge makes the initial decision by determining:

1. Whether this kind of hearing (or document, if access to a court record is involved) has traditionally and historically been open to the press and public, or;

2. Whether public and press access to this hearing will play a positive role in the functioning of the judicial process.

Then it is up to the persons seeking to close the hearing, the defendant or the state, to convince the court that there is a good reason to close it. In doing this, the advocates of closure would:

1. Advance an overriding interest that is likely to be harmed if the proceeding remains open or the court permits access to the court document.

Examples of such interests include the right to a fair trial for the defendant, or protection of a witness's privacy. If established, then the advocate of closure must:

2. Prove to the court that if the hearing or document is open to the press and public, that there is a *substantial probability* that this interest will be harmed, that the jury will prejudiced or the privacy of the witness will be invaded, for example.

If the advocate of closure proves that there is a substantial probability that such harm may occur, then the judge must:

3. Consider whether there are reasonable alternatives to closure that might solve the problem. The court must consider if voir dire or a change of venue would reduce the probability of prejudice. Closure of the hearing or the sealing of the document should be a last option, not a first option, considered by the court.

If there are no alternatives, then it is the responsibility of the judge to:

4. Narrowly tailor the closure so there is an absolute minimum of interference with the rights of the press and public to attend the hearing or see the document. A pretrial hearing on evidence might include many issues beyond the single issue that could harm the defendant. The court must close only that portion of the hearing dealing with the single issue. Or, the court must exclude the press and public from only that portion of a witness's testimony that might cause embarrassment or humiliation, not the entire testimony.

Finally, the trial judge must:

5. Make evidentiary findings to support this decision, and prepare a thorough factual record relating to the closure order, a record that can be evaluated by an appellate court. This final element is important. Appellate courts want to be certain that the trial judge thoughtfully and carefully considered options other than closure as a solution to the problem.

Because of the importance the courts have placed on open proceedings, the *Press-Enterprise* test provides a difficult challenge for anyone advocating closure of a presumptively open judicial proceeding. In addition to hearings, the test applies to documents. *U.S. v. McVeigh*, 119 F.3d 806 (10th Cir. 1997).

III. Access to Court Documents

Court records are subject to public access unless sealed by order of a court or are otherwise protected from disclosure. In 2010, the New Mexico Supreme Court enacted rules confirming this presumption of public access to court records and setting forth procedures that the courts are required to follow before any court records may be sealed. Those rules may be found as follows:

Rule 1-079 NMRA (district courts - civil)

Rule 2-112 NMRA (magistrate courts - civil)

Rule 3-112 NMRA (metropolitan courts - civil)

Rule 5-123 NMRA (district courts – criminal)

Rule 6-114 NMRA (magistrate courts – criminal)

Rule 7-113 NMRA (metropolitan courts – criminal)

Rule 8-112 NMRA (municipal courts)

Rule 10-166 NMRA (children's courts)

Rule 12-314 NMRA (appellate courts)

These rules (which are the same in each court) set forth guidelines for sealing of records. First, the rules provide a list of certain court records that are confidential and shall be automatically sealed without motion or order of the court (such as proceedings commenced under the Uniform Parentage Act). *See, e.g.,* Rule 1-079(C). No other court records may be sealed except by court order. *See, e.g.,* Rule 1-079(E). Any party or member of the public may file a motion for an order sealing the court record, and any party or member of the public may file a response to the motion. *Id.* The rules provide a procedure in which a court record that is

the subject of a motion may be lodged with the court pending ruling on the motion. *See, e.g.*, Rule 1-079(F).

Once a motion is filed, a court must follow the following procedures before sealing records:

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;
(b) the overriding interest supports sealing the court record;
(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;
(d) the proposed sealing is narrowly tailored; and
(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

See, e.g., Rule 1-079(G). The rules also contain guidelines for motions to unseal records, as well as authority for the court to hold in contempt or otherwise sanction any person or entity who knowingly discloses any material obtained from a court record or lodged pursuant to the rules. *See, e.g.*, Rule 1-079(I) and (J).[1]

Two New Mexico cases which pre-date the enactment of the rules discussed above address the issue of disclosure of certain information produced or obtained through the discovery process.

In *Kraehling v. Executive Life Insurance Company*, 1998-NMCA-071, 125 N.M. 228, 959 P.2d 562, the New Mexico Life Insurance Guaranty Association (the Association) appealed a trial court order imposing confidentiality requirements upon evidence obtained by the Association through compelled discovery from the Honeywell Pension and Retirement Committee (Honeywell). The issue on appeal was whether the trial court erred in denying the Association's motion to lift an order of confidentiality that prohibited the Association from sharing certain discovery material with litigants in other jurisdictions engaged in similar litigation. The New Mexico Court of Appeals held the trial court's entry of the blanket order of confidentiality was improvidently granted. *See also Does I through III v. Archdiocese*, 122 N.M. 307, ¶ 13 (basis for entry of protective order is grounded upon "'good cause shown'") (quoting Rule l-026(C) NMRA); Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. at 492 (1991) ("Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic[.]"); Thomas M. Flaming, Annotation, Propriety and Extent of State Court Protective Order Restricting Party's Right to

[1] Some district courts have local rules regarding sealing of court files (for example, LR1-208 in the First Judicial District and LR2-111 in the Second Judicial District). Those rules generally predate the enactment of the sealing rules by the Supreme Court in 2010, and to the extent that the local rules conflict with the 2010 rules, the local rules may not be valid.

Disclose Discovered Information to Others Engaged in Similar Litigation, 83 A.L.R. 4th 987, 991 (1991) (blanket orders of confidentiality generally found to be improper and overbroad).

A. Good Cause Requirement

The *Kraehling* case held that, consistent with the New Mexico Rules of Civil Procedure, an order prohibiting the disclosure of information obtained during discovery proceedings must be supported by a finding of good cause. *See* Rule l-026(C); *see also Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786 (3d Cir. 1994) ("Good cause is established [by] showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." (quoting *Publicker Indus., Inc.,* 733 F.2d at 1071)). The burden of proving an assertion of privilege rests upon the party asserting such claim. *McFadden v. Norton* Co., 118 F.R.D. 625, 627 (D. Neb. 1988).

In determining whether a party has made a showing of good cause for the issuance of a protective order, courts have generally applied a balancing process. *See Pansy*, 23 F.3d at 787 (citing Arthur R. Miller, *supra,* at 492 (court should balance the party's need for information against the injury that might result if uncontrolled disclosure is compelled)). Absent compelling circumstances, a party should not be barred from disclosing evidence which was actually utilized by the trial court in reaching its decision. *See State ex rel. Bingaman v. Brennan,* 98 N.M. 109, 111, 645 P.2d 982, 984 (1982) (recognizing presumption in favor of public inspection and copying of matters received into evidence at public session of trial); *see also* NMSA 1978, § 34-1-1, (except as otherwise provided by law, court sessions shall be public). To do otherwise would undermine the openness of court proceedings, the public right of inspection, and is contrary to the provisions of Rule 1-026(C). *See Does I through III v. Archdiocese,* 122 N.M. 307, ¶ 14.

B. Sealed Settlements

While private party settlements are normally reached outside of a pleading, it should be noted that settlements that include a government entity are subject to disclosure under the New Mexico Inspection of Public Records Act ("IPRA"). *Bd. of Comm'rs of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36. Settlements involving payment of public funds typically have been subject to disclosure under IPRA, any agreement to seal notwithstanding.

The Court of Appeals held that, pursuant to IPRA, the public's interest in accessing a settlement documents outweighs any argument offered to protect public funds. "When a member of the public has been wronged by some action or inaction of a government agent, the government's proper goal coincides with that of the injured citizen in uncovering and correcting the wrong[,]" not the narrower interest in prevailing in a lawsuit. *State ex rel. Children, Youth & Families Dep't. v. George F.*, 1998-NMCA-119, 125 N.M. 597, 964 P.2d 158. Accordingly, we hold that the public interest in protecting public funds under the facts of this case does not outweigh the right to inspect public records." *Bd. of Comm'rs of Dona Ana County* at ¶ 28.

Settlement documents that are held by the state Risk Management Division do not have to be disclosed until six months after the settlement of the claim. NMSA 1978, § 15-7-9.

IV. Cameras and Recording Devices in the Courtroom

The media is authorized, by New Mexico Supreme Court rule and case law, to broadcast, televise, photograph and record court proceedings in the Supreme Court, Court of Appeals, district and metropolitan Courts of the State of New Mexico. Under the New Mexico Supreme Court's Rule 23-107 NMRA, cameras and recording devices are allowed in the courtroom as long as they comply with the guidelines set forth in the Rule. In addition, the media coverage must not "detract from the dignity of the court proceedings or otherwise interfere with the achievement of a fair and impartial hearing." The Rule grants these privileges only to "persons or organizations that are part of the news media." Rule 23-107(E). Pursuant to Rule 23-107(A)(4), a court can exclude television and photograph coverage only if it determines, after a hearing at which media representatives have a right to be heard, that "coverage may have a deleterious effect on the paramount right of the defendant to a fair trial."

The Rule also grants judges the discretion to limit or deny coverage for good cause. Media coverage is subject to a judge's authority to ensure decorum and the fair administration of justice. The judge has the discretion to exclude coverage of certain witnesses, such as victims of sex crimes, police informants and juveniles. In addition, the rule dictates that neither members of the jury nor the jury selection process may be photographed. Broadcasting, photographing or recording of conferences between members of the court, court and counsel, co-counsel or counsel and clients is also not permitted. *See* Rule 23-107(A). The Rule also sets forth guidelines for equipment and personnel present in the courtroom. *See* Rule 23-107(E)

The seminal case in New Mexico regarding media coverage of court proceedings, *State ex rel. New Mexico Press Association v. Kaufman*, 98 N.M. 261, 648 P.2d 300 (1982), sets forth

the specific requirements a judge must follow before limiting press coverage in a public courtroom. The Supreme Court in *Kaufman* court stated that:

> Before placing restrictions on the media, some minimum form of notice should be given to the media and a hearing held. Anyone present should be given an opportunity to object. These proceedings should take place in advance of the date set for trial, if possible, to avoid delays and postponements....
>
> The court should weigh the competing interests of the defendant and the public and determine if the limitation sought would be effective in protecting the interests threatened and if it would be the least restrictive means available. The court is charged with the duty of considering all reasonable alternatives to limiting media coverage. Its consideration of these issues should be articulated in oral or written findings and conclusions in the record, but formal findings, conclusions are not necessary. The order must be no broader in application or duration than necessary to serve its purpose.

Id. at 265, 304.

In addressing the issue of television cameras in the courtroom, the New Mexico Supreme Court ruled that a showing of prejudice is required for a court to determine that cameras should not be allowed in the courtroom. *State v. Hovey*, 106 N.M. 300, 303, 742 P.2d 512, 515 (1987). In *Hovey*, the defendant, on trial for murdering his parents, claimed cameras in the courtroom made him nervous while he testified, therefore damaging his credibility. *Id*. The court held that the effect of cameras on a defendant, such as causing nervousness, should be considered in determining whether cameras should be allowed. *Id*. However, in overruling the defendant's challenge, the court found that the defendant failed to present any evidence supporting his claim that cameras would prejudice his testimony. *Id.*

V. Gag Orders

Restrictive orders aimed at trial participants or the press to control pretrial publicity have been the subject of considerable litigation. These judicial orders are commonly known as "gag orders," and are presumptively unconstitutional.

A. Gag Orders Aimed at Trial Participants

The most important case addressing gag orders aimed at trial participants in New Mexico is *Twohig v. Blackmer*, 1996-NMSC-23, 121 N.M. 746, 918 P.2d 332. In *Twohig*, the New Mexico Supreme Court granted an attorney's petition for a writ of superintending control and vacated a trial court's gag order. The case assesses various cases where gag orders have been upheld and struck down. It notably recognized that a "prior restraint requires special judicial attention" because of a "heavy presumption against its constitutional validity." *Twohig* at 756, citing *State ex rel. New Mexico Press Association v. Kaufman*, 98 N.M. 261, 264, 648 P.2d 300, 303 (1982).

In analyzing the need for gag orders, the Court stated that there are five considerations the trial court must specifically address prior to the issuance of a gag order: what may not be said, when it may not be said, where it may not be said, who may not say it, and whether alternatives less restrictive of free speech than an outright ban would suffice to alleviate any prejudice caused by further speech. *Twohig* at 751.

In *Twohig*, the Court struck down the gag order on the basis that there were no specific findings, nor any analysis, to support the court's conclusion that a gag order was necessary. The lack of any analysis for less restrictive alternatives was also noted. *Id.* at 754.

B. Gag Orders Aimed at the Press

There are no New Mexico cases addressing gag orders aimed at the press. However, the seminal United States Supreme Court case addressing orders aimed at the press and limiting coverage is *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). In that case, Chief Justice Warren Burger outlined a three-part test to be used to evaluate whether a gag order aimed at the press would pass First Amendment scrutiny. The Court held that any such order could only be justified if:

1. Intense and pervasive publicity concerning the case is certain.
2. No other alternative measure might mitigate the effects of the pretrial publicity.
3. The restrictive order will in fact effectively prevent prejudicial material from reaching potential jurors.

Within three years, the United States Supreme Court reinforced its decision with successive decisions in *Landmark Communications v. Virginia,* 435 U.S. 829 (1978) and *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979). In the twenty-five years following *Nebraska Press Association,* the number of restrictive orders aimed at the news media has dwindled.

C. Ethical Considerations for Attorneys

Attorneys are subject to Rule 16-306(A) NMRA regarding trial publicity. The principal importance of this Rule of Professional Conduct is that a lawyer cannot make extrajudicial statements in *"criminal proceedings that may be tried to a jury"* when the lawyer knows, or reasonably should know that the statement is either false or "creates a clear and present danger of prejudicing the proceeding." *Id.* The second part of the Rule extends an obligation on the lawyer to make "reasonable efforts" to ensure compliance with this rule by associated attorneys, employees, law enforcement personnel, and investigative agencies. *Id.* This Rule is designed to address and regulate out of court publicity in favor of adjudicative proceedings on the merits. In

striking the balance between the public's right to be informed and the accused's right to a fair trial, matters that impact public safety and security are of particular importance. Special rules and protocols may govern juvenile, domestic relations and mental disability proceedings. Out of court statements and pretrial publicity are generally not forbidden in civil litigation. Discussion on these issues is available in the *ABA Standard Relating to Fair Trial and Free Press*, as amended 1978.

VI. Journalist Subpoenas

Journalists who are subpoenaed in criminal and civil proceedings have a qualified right of protection from testifying based on two legal principles. First, New Mexico Rule of Evidence 11-514 offers news media a confidential source or information privilege, commonly known as a "shield law." Second, a significant number of federal and state courts have recognized a reporter's privilege for journalists which provides for a qualified privilege protecting them from testifying about confidential and nonconfidential information. The basis for shield laws and the reporter's privilege is the recognition that the free flow of information to the public can be threatened without some kind of protection for journalists.

A. New Mexico Shield Law

With respect to Rule 11-514, the general rule of the privilege is:

> A person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose:
>
> (1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities; and
>
> (2) any confidential information obtained in the course of pursuing professional activities.

Applicability of this rule for a radio station requires it to keep recordings or a certified written transcript of the recordings for 180 days. Likewise, a television station is required to keep either the recordings or a written transcript for one year in order for the privilege to apply.

Rule 11-514 states the following exception in which the party seeking the evidence must show by a preponderance of the evidence:

> (1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;

(2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;

(3) the confidential information or source is crucial to the case of the party seeking disclosure; and

(4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

The Rule sets out a specific procedure that must be followed if a privilege is asserted and a court is asked to determine whether the exception applies.

B. Reporter's Privilege

Although there are no published cases, New Mexico state trial courts have recognized a qualified reporter's privilege that has established tests that should be met before journalists can be compelled to testify on criminal and civil matters.[2]

Generally speaking, courts that consider a reporter's privilege will ask three questions when deciding whether to force a reporter to testify. The questions are similar to the exceptions stated in the New Mexico Shield Law:

1. Has the person seeking the information from the reporter shown that this information is highly relevant to the case?
2. Does this information go to the heart of the issue before the court? That is, is it critical to the case?
3. Can the person who wants the information show the court that there is no other source for this information?

[2] Recent federal decisions have significantly curtailed a reporter's *federal* privilege in federal criminal cases.

VII. Juvenile Matters

Each judicial district has a separate children's court division or at least one judge designated to sit in juvenile matters. Children's court judges hear delinquency proceedings, child abuse and neglect proceedings and adoptions. *See* NMSA 1978, §§ 32-A-1 to 32-A-21.

A. Delinquency Proceedings

Delinquency hearings are open to the public, except where the judge, based on exceptional circumstances, finds it appropriate to conduct a closed hearing. The media may attend a closed hearing provided that they agree not to reveal information regarding the "exceptional circumstance" that resulted in the need for a closed hearing. The media shall also be subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act. Persons who are granted admission to a closed hearing and intentionally divulge information are guilty of a petty misdemeanor. *See* NMSA 1978, § 32-2-16(B).

B. Child Abuse and Neglect Proceedings

Abuse and neglect hearings are closed to the general public. Only the parties, their counsel, witnesses and other persons approved by the court may be present at a closed hearing. Accredited members of the news media may be admitted to such closed hearings on the condition that they refrain from divulging any information that would identify the child or family involved in the proceeding. They are subject to enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Children's Code. The New Mexico Supreme Court ruled in 2001 that the media did not have an unqualified right of access to child abuse and neglect proceedings, especially when extensive pre-hearing media coverage made it impossible for reporters to cover the proceeding without

divulging the identity of the parties involved. *Albuquerque Journal v. Jewell*, 2001-NMSC-005, 130 N.M. 64, 17 P.3d 437. This ruling reflects a long-standing tendency of both judges and legislators to protect the identities of juveniles who find themselves in the judicial system either as victims or defendants. Persons or parties who are admitted to a closed hearing and who intentionally divulge information in violation of this section are guilty of a petty misdemeanor. *See Abuse and Neglect Act,* NMSA 1978, § 32A-4-23.

C. Adoption Proceedings

All hearings in adoption proceedings are confidential and are held in closed court without admittance of any person other than parties to the case and their counsel. NMSA 1978, § 32A-5-8.

D. Access to Juvenile Records

Records of juvenile delinquent offenders may be sealed pursuant to a motion filed with the court or on the court's own motion if a judge finds that:

> (1) two years have elapsed since the final release of the person from legal custody and supervision; or two years have elapsed since the entry of any other judgment not involving legal custody or supervision; and
>
> (2) the person has not, within the two years immediately prior to the filing of the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent by a court and no proceeding is pending seeking such a conviction or finding.

See NMSA 1978, § 32A-2-26(A). If two years have elapsed since a person was released from legal custody and supervision and the department has not received any new allegations of delinquency regarding the person, that person's file and records shall be automatically sealed. NMSA 1978, § 32A-2-26(H).

E. Confidentiality

All social records, including diagnostic evaluation, psychiatric reports, medical reports, social studies reports, pre-parole reports and supervision histories obtained by the juvenile probation office, parole officers and parole board or in possession of the department are privileged and are generally not available to the public. However, members of the public may inspect the above-mentioned records by order of the court and if the person has a legitimate interest in the case or the work of the court. Persons who intentionally and unlawfully release any information or records closed to the public are guilty of a petty misdemeanor. NMSA 1978, § 32A-2-32.

VIII. Domestic Relations Matters

Each judicial district has a separate family court division or at least one judge designated to preside over domestic relations matters, which include divorce, separation, allocation of property and debt, spousal support, paternity, child custody, child support, and domestic violence matters, which include requests for orders of protection. The Domestic Relations Court is a civil court, and consequently, the same legal principles set forth in Sections II and III govern public access to trials, pretrial proceedings and court documents.

A. Access to Proceedings

Domestic relations proceedings are a type of civil proceeding that has historically been open to the press and general public. *See* 24 Am. Jur. 2d Divorce and Separations § 313 (1998) ("Public access to courtroom proceedings is strongly favored, even in matrimonial cases .... Parties seeking a dissolution of their marriage are not entitled to a private court proceeding."). Public access plays a significant role in the functioning of the court in domestic relations proceedings by "enhancing the quality and safeguarding the integrity of the fact finding process ... [and] fostering an appearance of fairness, thereby heightening public respect for" domestic relations proceedings. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

There is a statute applicable to pretrial proceedings in paternity cases. The Uniform Parentage Act provides for an informal settlement conference that is not recorded unless requested by a party or ordered by the court. NMSA 1978, § 40-11-10. Section 40-11-10 specifically provides that "the public shall be barred from the proceeding." This section is designed to encourage candor and settlement in a private setting. If the parties are not willing to accept the court's recommendations, the informal hearing is terminated and the matter set for trial. NMSA 1978, § 40-11-11.

B. Access to Records

The New Mexico Court of Appeals specifically addressed the public's right of access to records in domestic relations cases in *Thomas* v. *Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7. The Court of Appeals interpreted Local Rule 2-111 of the Second Judicial District Court. This rule allowed the trial court to seal records in extraordinary cases upon a show of good cause. In *Thomas,* a husband moved to seal the record because his wife had repeatedly and continually made "outrageous, unsubstantiated allegations against [Husband] which would be libelous and slanderous if stated in any other forum but pleadings." He did not offer any more detail, and no hearing was held on this motion. The Court of Appeals held that the trial court erred in granting Husband's motion to seal upon the showing made. In doing so, the Court applied the "rule of reason" analysis, balancing the right of access to public records against public policy considerations favoring confidentiality. The Court noted the burden is on the party who wishes to seal the record, and found that the husband failed to carry the burden.

IX. Probate

The New Mexico Uniform Probate Code (NMSA 1978 § 45-1-1 *et seq*.) provides for closure of courtrooms in limited circumstances. For example § 45-5-303(K) states that in cases in which the Court is asked to appoint a guardian for an incapacitated person, the issue of whether a guardian shall be appointed shall be determined at a closed hearing unless the alleged incapacitated person requests otherwise. Similarly, under § 45-5-407(O), where the Court is asked to appoint a conservator for a minor, the issue of whether a conservator shall be appointed shall be determined at a closed hearing unless the person to be protected requests otherwise.

X. Appendix

BOARD OF COMMISSIONERS OF DONA ANA COUNTY, Petitioner-Appellant, vs. LAS CRUCES SUN-NEWS, Respondent-Appellee.

Docket No. 22,644

COURT OF APPEALS OF NEW MEXICO

134 N.M. 283*; *2003 NMCA 102*; *76 P.3d 36*; *2003 N.M. App. LEXIS 57*; *32 Media L. Rep. 1440

June 11, 2003, Filed

SUBSEQUENT HISTORY: CERTIORARI NOT APPLIED FOR. Released for Publication August 21, 2003. As Corrected September 23, 2003.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY. Robert E. Robles, District Judge.

DISPOSITION: Affirmed.

COUNSEL: Lisa L. Warren, County Attorney, Karen E. Wootton, Senior Assistant County Attorney, Las Cruces, NM, for Appellant.

Martin R. Esquivel, Dines, Gross & Esquivel, P.C., Albuquerque, NM, for Appellee.

JUDGES: MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: JAMES J. WECHSLER, Chief Judge, IRA ROBINSON, Judge.

OPINION BY: MICHAEL D. BUSTAMANTE

OPINION

[*286] [***39] BUSTAMANTE, Judge.

[**1] The Board of Commissioners of Dona Ana County (the County) refused to promptly disclose certain public records requested by the Las Cruces Sun-News (the Newspaper) pursuant to the Inspection of Public Records Act, *NMSA 1978, §§ 14-2-1 to -12* (1999, prior to 2001 amendment) (IPRA). The district court ruled in favor of the Newspaper and ordered the County to pay attorney fees pursuant to Section 14-2-12(D). Three issues are presented: (1) whether it was error to deny the County's motion for protective order, (2) whether the public interests in protecting related criminal and civil proceedings from prejudice outweigh the public interest in the immediate release of information regarding their status, and (3) whether an award of attorney fees was proper under the circumstances. We affirm.

BACKGROUND

[**2] In September 1999 the Newspaper made a written request under IPRA for a copy of a settlement agreement between the County and former Dona Ana County Detention Center inmate Claudia Moreno, including its terms and amounts, as well as any documents reflecting the attorney fees incurred [***40] [*287] by the County during the course of negotiations. Moreno's civil claims were based on allegations of criminal sexual acts by two former county detention officers. In a

second letter, the Newspaper expanded its request to include "any and all documents related to settlements the County of Dona Ana has reached on behalf of the Dona Ana County Detention Center."

[**3] In a letter response to these requests, the County acknowledged it was undoubtedly required to release the documents, but claimed a temporary exemption from disclosure under the Risk Management Division (RMD) confidentiality provision, *NMSA 1978, § 15-7-9(A)(2)* (1981), an exception incorporated through a provision in IPRA exempting confidential documents "as otherwise provided by law." *Section 14-2-1(A)(8)*. The County also cited the countervailing public interests exception recognized in *State ex rel. Newsome v. Alarid, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977)*, claiming the public interest in protecting public funds by providing a zealous defense, and the public interest in having proceedings free from undue prejudice, tipped the balance in favor of non-disclosure until all related litigation was resolved.

[**4] At the time the Petition was filed, there were three civil lawsuits pending by former inmates of the Dona Ana County Detention Center who alleged they had been sexually assaulted by county detention officers while they were incarcerated at the facility. Two additional civil claims had settled, and there were criminal charges pending against six detention officers based on these same allegations. Perhaps anticipating additional requests would be forthcoming because of similar tort claims notices and correspondence threatening litigation it received, the County filed a Petition for Declaratory Decree that "the counterveiling [sic] public policy exception to [IPRA justified] a delay" in disclosing the settlement records to Newspaper, "until all related civil claims and criminal proceedings [were] resolved." The Newspaper counterclaimed that the denial of its request constituted a violation of IPRA and asked the district court to order the County to disclose the records and award it attorney fees.

[**5] Several months after filing the Petition, the County filed a motion for protective order, followed by a motion for summary judgment. Both motions were denied and the district court issued a "final order" holding that the denial of the County's motion for summary judgment was dispositive of the Newspaper's counterclaim for violation of IPRA and awarded the Newspaper attorney fees in the amount of $ 3353. We remanded the case to district court so it could clarify the final order. The district court entered an Amended Final Order on February 4, 2093, ordering the County to produce the Moreno settlement agreement and any other settlement documents, in related cases, which the Newspaper might request.

I. MOTION FOR PROTECTIVE ORDER

[**6] The County sought a protective order to seal the district court record of the summary judgment proceedings and to maintain the information disclosed during the hearing confidential. The County pursued this avenue in lieu of the in camera review contemplated by *Newsome. 90 N.M. at 796, 798, 568 P.2d at 1242, 1244*. The motion asked that the summary judgment hearing also be closed to the public. We assume the reason for this tack was to allow the parties to argue, and the district court to consider, all of the relevant facts at the summary judgment hearing without making that information public at the hearing.

[**7] Rule 1-026(C) NMRA 2003 "permits the district court 'for good cause shown' to issue a protective order 'which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.'" *John Does I*

Through III v. Roman Catholic Church of the Archdiocese, Inc., 1996 NMCA 94, P13, 122 N.M. 307, 924 P.2d 273. The movant bears the burden to show that "disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." *Krahling v. Executive Life Ins. Co., 1998 NMCA 71, P15, 125 N.M. 228, 959 P.2d 562* (internal quotation marks and citations omitted). In short, good [***41] cause [*288] "must be based on a factual determination of potential harm, not on conclusory statements." *Id. P10*. In determining whether good cause has been shown, courts balance "the party's need for information against the injury that might result if uncontrolled disclosure is compelled." *Id. P15*.

[**8] The district court is given broad discretion in determining whether good cause has been shown and reversal is permitted only for an abuse of discretion. *John Does I Through III, 1996 NMCA 94, P13*. "An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances of the case." *Bustos v. Bustos, 2000 NMCA 40, P24, 128 N.M. 842, 999 P.2d 1074*.

[**9] The County argues that the district court needed to consider the nature of the requested information in order to decide whether it could appropriately decide if it could delay disclosure without sanctions. The County provided information as to the number of civil litigants, the alleged perpetrators, the dates, conduct, and nature and extent of injuries alleged, and whether the civil claims had been resolved. The County declined to disclose the details of the then completed settlements to the district court, unless the court first issued a protective order.

[**10] As an initial matter, we note there is no order denying the motion for protective order in the record and transcripts of the hearing on the motion were not submitted for our review. We assume, therefore, the district court considered all of the facts provided to it in the County's motions. *Reeves v. Wimberly, 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct. App. 1988)* ("Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the trial court's decision, and the appellate court will indulge in reasonable presumptions in support of the [ruling]."). As for the settlement agreements, the County cannot now protest that the district court did not consider the material when it refused to provide this same material absent a protective order rather than submit it for in camera review as required by Newsome.

[**11] The Supreme Court has set forth specific procedures to be followed when an exception to IPRA is invoked. *Newsome, 90 N.M. at 797-98, 568 P.2d at 1243-44*. Each inquiry starts with the presumption that public policy favors the right of inspection. *Id. at 796, 568 P.2d at 1242*. To overcome this presumption, a public entity seeking to withhold public records bears the burden of proving why their disclosure would be prejudicial to the public interest. *Id. at 796, 798, 568 P.2d at 1242, 1244*. In assessing the competing public interests, Newsome directs courts to apply the "rule of reason" to each case "to determine whether the explanation of the custodian is reasonable and to weigh the benefits to be derived from non-disclosure against the harm which may result if the records are not made available." *Id. at 797-98, 568 P.2d at 1243-44*. To do so, the trial judge must review the materials--preferably in camera--to make an informed decision as to whether the justification for non-disclosure is reasonable. *Id. at 796, 568 P.2d at 1242*. Once the district court has conducted its review, the records are placed under seal of the court and held by the clerk of the court until further order of the district court or appellate court. Id. As always, it is the appellant's task to designate the sealed records for review by this Court. *See Williams v. Bd.*

of County Comm'rs, 1998 NMCA 90, P10, 125 N.M. 445, 963 P.2d 522 (appellant has responsibility to provide adequate record for appellate court's review).

[**12] The County sought to circumvent this procedure by filing a motion for protective order, asserting to the district court that it could only consider the settlement records if the motion for protective order was granted. The basis for this deviation from established procedure apparently was that the County was only seeking to delay disclosure--albeit indefinitely--rather than permanently deny access to the records. We are at a loss as to why the County would not submit the records to the district court for confidential review. To balance the interests involved, in camera review is most efficient, [***42] [*289] if not imperative. "'In no other way can such questions be determined.'" *Newsome, 90 N.M. at 796, 568 P.2d at 1242* (quoting *Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893, 896-97 (Ariz. 1952)*). The County's decision to bypass established procedure effectively obstructed full review by the district court and this Court. See *Newsome, 90 N.M. at 798, 568 P.2d at 1244*.

[**13] We hold that the district court did not abuse its discretion in denying the County's motion for protective order. The proper procedure was for the County to submit the settlement documents for an in camera review in order for the district court to rule on the motion for summary judgment.

[**14] Having affirmed the district court's denial of the motion for protective order under Rule 1-026, we do not reach the *First Amendment* issues argued by the parties regarding prior restraint of the media and public from the court proceedings. The motion was denied and an open hearing was held. *See Srader v. Verant, 1998 NMSC 25, P40, 125 N.M. 521, 964 P.2d 82* (reviewing court will not determine academic or moot questions).

II. MOTION FOR SUMMARY JUDGMENT

[**15] The district court denied the County's motion for summary judgment, finding that "any countervailing public interest in the delay of the release of information about a settlement . . . [did] not outweigh the public interest in prompt disclosure." The district court ordered the County to release the requested settlement agreement and any related documents, and to comply with future requests from the Newspaper in related cases. Where there are no material facts in dispute on an appeal from a motion for summary judgment, this Court reviews the district court's legal determination de novo. *Gordon v. Sandoval County Assessor, 2001 NMCA 44, P12, 130 N.M. 573, 28 P.3d 1114*.

[**16] We begin our analysis by emphasizing that every "citizen has a fundamental right to have access to public records." *Newsome, 90 N.M. at 797, 568 P.2d at 1243*. IPRA allows only a few exceptions:

> A. Every person has a right to inspect any public records of this state except:
>
> (1) records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;
>
> (2) letters of reference concerning employment, licensing or permits;
>
> (3) letters or memorandums which are matters of opinion in personnel files or students' cumulative files;
>
> (4) law enforcement records that reveal confidential sources methods, information or individuals accused but not charged with a crime. Law

> enforcement records include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed above;
>
> (5) as provided by the Confidential Materials Act [*14-3A-1, 14-3A-2 NMSA 1978*];
>
> (6) trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
>
> (7) public records containing the identity of or identifying information relating to an applicant or nominee for the position or president of a public institution of higher education; and
>
> (8) as otherwise provided by law.

Section 14-2-1(A). According to our Supreme Court the right to freely inspect public records is limited only by "contrary statute or countervailing public policy." *Newsome, 90 N.M. at 797, 568 P.2d at 1243.*

[**17] The County argues for three exceptions under subsection (A)(8) "as otherwise provided by law," citing (1) *Section 15-7-9(A)(2),* the Risk Management Division confidentiality provision; (2) *NMSA 1978, § 10-15-1(H)(7)* (1999) providing exceptions to the *Open Meetings Act; and* (3) countervailing public interests as recognized under *Newsome, 90 N.M. at 797-98, 568 P.2d at 1243*- [***43]*44*. [*290] We discuss each argument separately. For the sake of clarity, we note that the countervailing public policy, or "rule of reason" as it is often referred to, is a non-statutory confidentiality exception. *Spadaro v. Univ. of N.M. Bd. of Regents, 107 N.M. 402, 404, 759 P.2d 189, 191 (1988).*

A. *Section 15-7-9(A)(2)*

[**18] *Section 15-7-9(A)(2)* makes confidential, on threat of criminal conviction, certain records held by RMD. The confidentiality provision reads:

> A. The following *records created or maintained by the risk management division* are confidential and shall not be subject to any right of inspection by any person not a state officer, member of the legislature or state employee within the scope of his official duties:
>
> . . . .
>
> (2) records pertaining to claims for damages or other relief against any governmental entity or public officer or employee; provided such records shall be subject to public inspection by New Mexico citizens one hundred eighty days after the latest of the following dates:
>
> (a) the date all statutes of limitation applicable to the claim have run;
>
> (b) the date all litigation involving the claim and the occurrence giving rise thereto has been brought to final judgment and all appeals and rights to appeal have been exhausted;
>
> (c) the date the claim is fully and finally settled; or

(d) the date the claim has been placed on closed status.

(Emphasis added). Although RMD has not insured the County for the past eleven years, the County urges us to construe *Section 15-7-9(A)(2)* to encompass all public bodies, not just those insured by RMD, despite the clear, unambiguous language limiting confidentiality to "records created or maintained by the risk management division." We decline to do so.

[**19] This Court reviews questions of statutory interpretation de novo. Gordon, 2001-NMCA-044, P12. Our primary goal in interpreting statutes is to ascertain legislative intent. *Regents of the Univ. of N.M. v. N.M. Fed'n of Teachers, 1998 NMSC 20, P28, 125 N.M. 401, 962 P.2d 1236.* The primary indicator of legislative intent is the statute's plain language. *Gen. Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).* Where the statute's language is clear and unambiguous, we give the statute its plain and ordinary meaning and refrain from further interpretation. *Id.; Key v. Chrysler Motors Corp., 1996 NMSC 38, 121 N.M. 764, 769, 918 P.2d 350, 355*.

[**20] Prior to 1989, insurance coverage through RMD was mandatory for public entities under the Torts Claim Act (TCA), *NMSA 1978, §§ 41-4-1 to - 29* (1976, as amended through 2001). *See* 1977 N.M. Laws, ch. 386, § 19; 1978 N.M. Laws, ch. 166, § 5; 1979 N.M. Laws, ch. 10, § 1; 1983 N.M. Laws, ch. 301, § 76; 1986 N.M. Laws, ch. 27, § 1 and ch. 102, § 9; 1988 N.M. Laws, ch. 57, § 1. The TCA was amended in 1989, eight years after the confidentiality provision of *Section 15-7-9* was enacted, to allow public entities to obtain coverage from sources other than RMD. *Section 41-4-25(C). Section 15-7-9*, however, has not been amended to extend confidentiality to records held by public bodies that choose coverage from sources other than RMD. The County argues it would be unreasonable not to extend *Section 15-7-9(A)(2)* to counties who chose to obtain coverage from other sources, merely because the Legislature "forgot" to amend the statute after it amended the TCA.

[**21] We cannot disregard the plain language of *Section 15-7-9* which makes confidential only those "records created or maintained by the risk management division." There is nothing in the statute to suggest the confidentiality provision of *Section 15-7-9* relates to records held by any other insurer. Moreover, it becomes apparent, when one reads the statute as a whole, that the sole purpose of *Section 15-7-9* was to establish the risk management division. Everything in the statute is tailored to this purpose: Article 7 is entitled "Risk Management Division," and the sections contained therein describe the establishment of the division and [***44] [*291] an advisory board, as well as their duties, powers, and management of public liability funds. In the context of this particular statute then, public entities are merely "clients" of RMD. While public bodies insured by RMD indirectly benefit from the confidentiality provision, the language of the statute and context of the provision indicate the benefit is conferred primarily to RMD, as the insurer, and only incidentally to its insureds.

[**22] Nothing in the TCA changes the analysis. Under the TCA, it is "the duty of governmental entities to cover every risk for which immunity has been waived under the [Act]." *Section 41-4-20(A)*. Counties which are insured by RMD contribute money to the public liability fund, which RMD is then authorized to expend to respond to tort liability claims. *Section 41-4-23(A), (B); Section 41-4-25(A).* When a public entity chooses commercial insurance coverage, it does not contribute to the public fund.

Nothing in the TCA suggests the Legislature intended to extend the protection of *Section 15-7-9* to funds held by private insurers. See § *41-4-25(C)*.

[**23] Finally, we cannot say the Legislature "forgot" to reassess *Section 15-7-9* after amending the TCA to give public entities a choice between insurers. "The Legislature is presumed to know existing statutory law and to take that law into consideration when enacting new law." *Gutierrez v. West Las Vegas Sch. Dist., 2002 NMCA 68, P15, 132 N.M. 372, 48 P.3d 761*. "The decision to extend the scope of an existing statute . . . is a matter for the Legislature, and absent an amendment to *[Section 15-7-9*], we presume that the Legislature continues to intend that the statute apply according to its original meaning." *State v. Cleve, 1999 NMSC 17, P15, 127 N.M. 240, 980 P.2d 23*. Accordingly, we hold *Section 15-7-9* does not prevent disclosure of the requested settlement documents under *Section 14-2-1(A)(8)*, "as otherwise provided by law."

B. *Section 10-15-1(H)*

[**24] In New Mexico, the Open Meetings Act protects attorney-client confidentiality by authorizing "closed session" meetings "pertaining to threatened or pending litigation in which the public body is or may become a participant." *Section 10-15-1(H)(7)*; see *Bd. of County Comm'rs v. Ogden, 117 N.M. 181, 184, 870 P.2d 143, 146 (Ct. App. 1994)*.

[**25] The attorney-client privilege applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Rule 11-503(B) NMRA 2003. *Section 10-15-1(H)* incorporates the privilege by protecting confidential communications between attorneys and their public agency clients. See *Ogden, 117 N.M. at 184, 870 P.2d at 146*. However, settlement agreements entered into between parties are outside the privilege. As such, even the County admits the settlement agreements are public record.

[**26] Although the Newspaper's general request for "any and all documents related to settlement agreements the County of Dona Ana has reached on behalf of the Dona Ana County Detention Center" might reach privileged material, the County has not made that argument and has not identified any materials that might be privileged. The County's *Section 10-15-1(H)* argument is utterly without merit.

C. Countervailing Public Policies

[**27] The County raises two countervailing public policies: (1) the public interest in protecting public funds, and (2) the public interest in obtaining a fair trial. According to the County, disclosure of settlement records would diminish its ability to protect public funds by (1) creating an external incentive for others to assert claims and allege it had actual notice of such claims, (2) interfering with its ability to negotiate fair and reasonable settlements by causing claimants to look beyond the facts of underlying claims to other settlement awards, and (3) impeding the County's right to a fair trial because of pretrial publicity. The County also maintains that pretrial publicity of the information contained in the settlement documents would prejudice the criminal defendants' right to a fair trial.

[**28] [***45] [*292] The trial court ruled countervailing interests did not outweigh public access, and we agree.

Public Interest in Protecting Public Funds

[**29] The interest in protecting public funds does not outweigh the public interest in accessing public records under the circumstances of this case. In essence, the County seeks to keep information from the public on the fear that the information could

be used against it to engender phantom claims or to interfere in possible settlements. Nothing in the record indicates these fears are anything more than rank speculation. Even if they were grounded in some fact, however, the County's position overlooks the core purposes of IPRA to provide access to public information and thereby encourage accountability in public officials and employees. "Public business is the public's business." *Newsome, 90 N.M. at 795, 568 P.2d at 1241* (internal quotation marks and citation omitted). People have a right to know that the people they entrust "with the affairs of government are honestly, faithfully and competently performing their function as public servants." *Id.* (internal quotations and citation omitted). Further, IPRA does not limit how the information might be used.

[**30] The County's concerns are misplaced. "When a member of the public has been wronged by some action or inaction of a government agent, the government's proper goal coincides with that of the injured citizen in uncovering and correcting the wrong[,]" not the narrower interest in prevailing in a lawsuit. *State ex rel. Children, Youth & Families Dep't v. George F., 1998 NMCA 119, P17 n.1, 125 N.M. 597, 964 P.2d 158* (internal quotation marks and citation omitted). Accordingly, we hold that the public interest in protecting public funds under the facts of this case does not outweigh the right to inspect public records.

Public Interest in Obtaining a Fair Trial

[**31] There are three layers to the County's assertion that the right to a fair trial outweighs the right to access public records, they are: (1) the County will be prejudiced in the remaining civil cases, (2) the public has an interest in criminal trials free from undue prejudice, and (3) defendant's right to a fair trial.

[**32] Pretrial publicity does not automatically deprive a party of a fair trial; it does not establish actual prejudice or create a presumption of prejudice. *State v. Lasner, 2000 NMSC 38, P26, 129 N.M. 806, 14 P.3d 1282*; *State v. Hernandez, 115 N.M. 6, 21, 846 P.2d 312, 327 (1993)*; *see State v. House, 1999 NMSC 14, P51, 127 N.M. 151, 978 P.2d 967*. Like any other party, the County as a party must show by clear and convincing evidence that there is a reasonable probability a fair and impartial trial cannot be had if the information is disclosed. See *id. PP 41-44*. The County failed to meet this burden in the civil cases. The record is devoid of any information regarding the nature, extent or timing of existing publicity, the nature of the community, or any other information that would assist in assessing the County's general claim of prejudice. The naked assertion that the fair trial rights of the County in related civil proceedings will be prejudiced is insufficient as a matter of law to establish prejudice to the public interest sufficient to delay disclosure. *Newsome, 90 N.M. at 796, 798, 568 P.2d at 1242, 1244.*

[**33] The right to a fair trial in criminal proceedings is a right that is conferred upon defendants under the Sixth and *Fourteenth Amendments of the Federal Constitution* and *N.M. Const. art. II, § 7*. Generally, this right is created for the benefit of, and is personal to, the defendant. In this case, it is the County, not defendants in the related criminal proceedings, which is asserting the right. To establish standing to assert an interest of a third-party,

> the *litigant* must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's

ability to protect his or her own interests.

[***46] [*293] *New Mexico Right to Choose/NARAL v. Johnson, 1999 NMSC 5, P13, 126 N.M. 788, 975 P.2d 841* (emphasis added) (citation omitted). An injury in fact is "an invasion of a *legally protected interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *John Does I Through III, 1996 NMCA 94, P17* (internal quotations and citation omitted). The County presented no evidence that the harm to it or the individual defendants in the criminal proceedings is anything more than speculation. Absent a factual basis for the alleged injury, the asserted interests in a fair criminal trial are nothing more than "generalized statements . . . [that] are neither substantial nor persuasive." See *State ex rel. N.M. Press Assn v. Kaufman, 98 N.M. 261, 267, 648 P.2d 300, 306 (1982)* (good cause not established by generalized statement that publishing picture of defendant in court would prejudice his right to a fair trial).

[**34] Moreover, the County has not shown why the individual defendants could not protect their own interests, or even if they were ever made aware of the Petition filed by the County. Defendants could have asserted their right under Rule 1-024(A)(2) NMRA 2003, as well as through traditional safeguards that protect these interests, such as voir dire, motion for change of venue, or jury sequestration. There is no explanation provided why these alternatives were unavailable to defendants or otherwise inadequate. Accordingly, we find that the County lacked standing to assert a public interest in defendant's right to a fair trial.

III. ATTORNEY FEES

[**35] The district court awarded the Newspaper attorney fees pursuant to *Section 14-2-12(D)* which provides: "the court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the *Inspection of Public Records Act*." The district court found the filing of the Petition for Declaratory Judgment was unreasonable and therefore constituted an unlawful denial under IPRA, and the Newspaper prevailed on its counterclaim. The County argues the Newspaper is not entitled to attorney fees because (1) it brought its action under the Declaratory Judgment Act, *NMSA 1978, §§ 44-6-1 to - 15 (1975)*, which does not provide for attorney fees; (2) denial of fees is consistent with *Section 14-2-9(B)(4)* which prohibits the custodian of records from charging a fee for determining whether the material is subject to disclosure; (3) the request was equivalent to a finding that it was "excessively burdensome" given the lack of legal precedent, *Section 14-2-10*; and (4) the filing of the Petition was not a "denial" but merely a "delay" until all claims were resolved.

[**36] The IPRA is the controlling statute in this case, not the Declaratory Judgment Act. Although the County brought an action for declaratory judgment, the Newspaper filed a counterclaim under IPRA. The court found that the Newspaper prevailed under IPRA which provides for attorney fees. See *Section 14-2-12(D)*.

[**37] Under IPRA's "enforcement" provision, an award of attorney fees is mandatory when (1) the request has been denied, and (2) the requester is successful in a court action to enforce the Act. The County seeks to avoid the mandatory language by arguing the Petition was not a "denial" but merely a reasonable "delay" under the circumstances. We disagree. Under the plain

language of the "enforcement" provision there is no such distinction. It is clear the Legislature intended to enforce disclosure by imposing a cost--including attorney fees--for nondisclosure within the time frames set by IPRA.

[**38] Reading other provisions of IPRA, we find that "delay" is addressed only in *Section 14-2-11(A)*, which provides that:

> A. Unless a written request has been determined to be excessively burdensome or broad a written request for inspection of public records that has not been permitted within fifteen days of receipt by the office of the custodian may be deemed denied. The person requesting the public records may pursue the remedies provided in the [Act].

[***47] [*294] And *Section 14-2-10* which describes the procedure for excessively burdensome requests:

> If a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. The custodian shall provide written notification to the requester within fifteen days of receipt of the request that additional time will be needed to respond to the written request. The requester may deem the request denied and may pursue the remedies available pursuant to the [Act] if the custodian does not permit the records to be inspected in a reasonable period of time."

In other words, a "delay" is not deemed a denial if the materials are produced within fifteen days or "within a reasonable time" if the request is an excessive burden on the agency and notice to this effect is given the requester.

[**39] The record does not contain any indication that the County provided written notification to the Newspaper requesting additional time because the request was unreasonably burdensome or broad. And the County does not assert to us that it provided written notification requesting additional time.

[**40] The County does seem to argue, for the first time on appeal, that the filing of the Petition was akin to an excessive burden request, in light of the countervailing public interests and absence of any legal authority on the matter. The County did not make this argument to the district court, and we decline to address the issue in this posture. *Woolwine v. Furr's, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)* (holding appellate court will not consider argument not presented to court below unless it is jurisdictional).

IV. CONCLUSION

[**41] We affirm the district court's decision that the County's denial of the requested materials was unreasonable and a violation of IPRA. We, thus, also affirm the award of attorney fees.

[**42] IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

IRA ROBINSON, Judge

JOHN DOES I through III, JAMES DOE, on behalf of JOHN DOE II, and JANE DOE, on behalf of JOHN DOE II, Plaintiffs, v. ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF SANTA FE, INC., a New Mexico corporation, Defendant-Appellant and JASON E. SIGLER a/k/a JAY B. SIGLER, BISHOP ARTHUR TAFOYA and CLARENCE GALLI, Defendants, and THE ALBUQUERQUE JOURNAL, INC., THE NEW MEXICO TRIBUNE COMPANY, and KOB-TV, INC., Intervenors-Appellees, and ROBERT F. SANCHEZ, Real Party in Interest-Appellant.

Docket No. 16,296

COURT OF APPEALS OF NEW MEXICO

122 N.M. 307*; *1996 NMCA 94*; *924 P.2d 273*; *1996 N.M. App. LEXIS 75

August 1, 1996, Filed

SUBSEQUENT HISTORY: Certiorari Denied September 17, 1996. Released for Publication September 24, 1996.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY. Susan M. Conway, District Judge.

DISPOSITION: Affirmed

COUNSEL: Robert H. Clark, Arthur O. Beach, Sean Olivas, Keleher & McLeod, P.A., Albuquerque, NM, Karen C. Kennedy, Karen Kennedy & Associates, Albuquerque, NM, for Appellant Roman Catholic Church of the, Archdiocese of Santa Fe, Inc.

William S. Dixon, Charles K. Purcell, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, NM, for Appellee The Albuquerque Journal, Inc.

R.E. Thompson, Charles A. Armgardt, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuqurque, NM, for Appellee The New Mexico Tribune Company.

Geoffrey D. Rieder, Silva, Rieder & Maestas, P.C., Albuquerque, NM, for Appellee KOB-TV, Inc.

Richard A. Winterbottom, Stout & Winterbottom, Albuquerque, NM, for Appellant Robert F. Sanchez.

JUDGES: HARRIS L HARTZ, Judge. WE CONCUR: RUDY S. APODACA, Chief Judge, RICHARD C. BOSSON, Judge (Specially concurring).

OPINION BY: HARRIS L. HARTZ

OPINION

[*308] [***274] OPINION

HARTZ, Judge.

[**1] This appeal arises out of litigation against the Roman Catholic Church of the Archdiocese of Santa Fe, Inc. (the Archdiocese) brought by several persons who alleged that they had been sexually abused by members of the Roman Catholic clergy. Former Archbishop Robert F. Sanchez (the

Archbishop), who was not accused of such abuse, was deposed during the litigation. Two newspapers and a television station (the Appellees) seek disclosure of portions of the deposition. Before the deposition the Bernalillo County District Court entered a protective order (the Protective Order) forbidding release of the videotape or transcript of the deposition without prior court approval. After the case was settled, the district court modified the Protective Order at the request of the Appellees. The modified order (the Disclosure Order) directed the court reporter for the deposition to release extensive portions of the transcript and videotape of the deposition (the Disclosed Testimony) to any members of the media who made satisfactory payment arrangements with the reporter. The Archdiocese and the Archbishop (the Appellants) appeal from the Disclosure Order.

[**2] Because one of the plaintiffs' attorneys has expressed the intention to release publicly the Disclosed Testimony if not prohibited from doing so by a court order, we need not decide whether the district court could order the court reporter to release the Disclosed Testimony to the media. Indeed, as explained below, essentially the only issue we need resolve is whether the district court could grant the Appellees standing to challenge the Protective Order. We hold that the district court had that authority. We affirm the Disclosure Order to the extent that it sets aside the Protective Order's prohibition on release of the Disclosed Testimony.

I. BACKGROUND

[**3] Allegations of sexual abuse by priests have received a great deal of attention in both the media and courtrooms of New Mexico. According to counsel for the Archdiocese at oral argument, approximately 150 sexual-abuse lawsuits have been filed against the Archdiocese, of which 50 or so are still pending. Judicial restrictions on publicity regarding the litigation were first imposed on March 26, 1993. On that date District Judge Susan Conway entered orders in several lawsuits, including the one before us on appeal, which severely limited disclosure of materials obtained pursuant to discovery unless such disclosure was authorized by a later court order. The order recited several reasons for [*309] [***275] the limitations, including the defendants' interest in a fair trial, the need to conduct settlement negotiations free of the coercion that could arise from threats to disclose information, and the privacy interests of litigants and third parties.

[**4] After he was noticed for a videotaped deposition to be conducted on January 12, 1994, the Archbishop moved for further protection. His motion requested that the deposition be taken at a confidential location within a half-day's airplane travel from Albuquerque, that inquiry be prohibited with respect to certain subject matter, and that the court forbid disclosure of the contents or substance of his testimony and of the time and place of the deposition. District Judge Philip Ashby heard the motion on January 5, 1994. He then prepared an order, and on January 12 he conducted a hearing to consider objections to the proposed order.

[**5] At the hearing William Dixon, the attorney for The Albuquerque Journal, one of the Appellees, argued that there were insufficient grounds for a protective order limiting disclosure of the Archbishop's deposition. Judge Ashby responded:

> I can understand your concerns. I'm going to enter the order as proposed. There are matters which may or may not come up in this deposition, which I feel might very seriously affect a fair trial. I'm not primarily concerned with the privacy of Archbishop Sanchez, because he is a public figure, but I do feel strongly that the fair trial

> rights of all the parties may be affected in this case. I really think your motion is premature. If after the deposition is taken and the Court is then -- can be made aware of what was in the deposition, if you or any other counsel on behalf of any media wants to move at that time to open the deposition, I will hear the arguments at that time, Mr. Dixon, but at this time I'm denying your motion which I consider to be a motion filed formally on behalf of the Albuquerque Journal.

[**6] The order imposed some restrictions on the scope of the deposition, prohibited disclosure of the location of the deposition, and stated:

> The transcript of the deposition will be sealed, and the original of the videotapes will be maintained privately by counsel for the party taking the deposition, and will not be released to any other third person or organization without prior order of the Court. All provisions of the previous order regarding dissemination of information obtained in discovery will remain in effect and pertain to this deposition.

[**7] On April 4, 1994, after completion of the deposition, The New Mexico Tribune Company, another of the Appellees, moved to vacate or modify the protective orders of March 26, 1993 and January 12, 1994. It requested alternatively (1) permitting the litigants or their counsel to disseminate immediately the transcript and videotape of the Archbishop's deposition, (2) permitting such dissemination immediately upon the use of any part of the deposition in court, or (3) permitting such dissemination as soon as the case was resolved at trial or by settlement. The motion recited that counsel for the defendants did not consent to the motion and that counsel for the plaintiffs neither consented to nor opposed the motion.

[**8] Three days later The Albuquerque Journal moved to intervene and moved for an order (1) vacating the prior protective orders, (2) requiring that the transcript of the Archbishop's deposition be filed with the court clerk and be available to the public, and (3) permitting release of the deposition by the parties. As with the Tribune's motion, the motion recited that counsel for the defendants did not consent to the motion and that counsel for the plaintiffs neither consented to nor opposed the motion.

[**9] District Judge Conway conducted a hearing on the motion on May 10, 1994. After reviewing the depositions she issued a letter opinion on October 5, 1994. The opinion listed extensive portions of the deposition that should be disclosed. It also requested additional information, apparently to determine whether further disclosures would violate privacy interests of litigants and third parties. KOB-TV, Inc., the third Appellee, then moved to intervene, seeking the same access to the deposition testimony as the other movants. The district court issued an [*310] [***276] additional letter opinion on January 17, 1995 and an addendum to that letter on the following day. The district court proceedings concluded with a presentment hearing on March 8 and entry of an order on March 14, 1995. As previously stated, the order directed the official court reporter to provide the Disclosed Testimony to the movants. Other members of the media could make arrangements with the court reporter to obtain the same materials. The court stayed its order until March 28, 1995 to permit the Archdiocese and the Archbishop to appeal.

[**10] The Archdiocese and Archbishop filed their notice of appeal from the Disclosure Order on March 23, 1995. They simultaneously filed a motion to stay the Disclosure Order until determination of the merits of their appeal. This Court denied the motion for such a stay but extended the stay until April 19 to permit the Appellants to seek review by the Supreme Court. The Supreme Court extended the stay, and on July 12, 1995 it ordered that the Disclosure Order be stayed pending completion of the appeal. While the matter was pending before it, the Supreme Court directed the parties to file briefs on several issues, including whether the Appellees had standing to challenge the Protective Order when none of the parties had objected to the order. In support of their brief addressing the standing issue, the Appellees submitted an affidavit of Merit Bennett, who had represented several of the plaintiffs in the suits against the Archdiocese. The affidavit stated that were it not for the Protective Order, he would provide the Archbishop's deposition to anyone who asked for it.

II. DISCUSSION

A. Issues Not Decided

[**11] The Appellants contend that (1) the district court had no authority to issue the Disclosure Order and (2) the Appellees had no standing to challenge the Protective Order. We begin our discussion by explaining why we need address only the second contention.

[**12] There are two potential questions concerning the authority of the district court to issue the Disclosure Order: whether the court could *permit* disclosure of the Disclosed Testimony and whether the court could *order* its disclosure. The question that is the focus of the briefs on appeal is whether the district court had authority to order the court reporter to disclose to the Appellees various portions of the Archbishop's deposition. It is one thing for a court to say that a party or attorney is not forbidden from disclosing discovery material. It is quite another for a court to order a party, attorney, or third person to disclose the material to any particular non-party. In the present case, however, the difference is only theoretical. Merit Bennett's affidavit makes clear that it is not necessary for the district court to order anyone to disclose portions of the Archbishop's deposition to the Appellees. If the Protective Order is lifted with respect to portions of the deposition, Mr. Bennett will release those portions to whoever requests them. Although the Appellants suggest that only the client, not the attorney, can decide to release the Disclosed Testimony, we note that ordinarily the attorney has such authority, *see* Charles W. Wolfram, *Modern Legal Ethics* § 12.3.2, at 640 (1986), and, in any event, we presume that Mr. Bennett is acting consistently with instructions from his clients. *Cf. Sun Country Sav. Bank v. McDowell, 108 N.M. 528, 532, 775 P.2d 730, 734 (1989)* (absent evidence to contrary, court presumes that attorney has authority of client to act at hearings). Of course, we cannot be absolutely certain that Mr. Bennett will disclose the material if the Protective Order is lifted. Even assuming, as we must and do, that the affidavit was executed in good faith, various contingencies could arise. Nevertheless, courts traditionally do not reach out to decide issues unnecessarily. *See generally* 5 C.J.S. *Appeal and Error* § 705 (1993). Because the Appellees will obtain the same relief whether (1) the Disclosure Order is enforced in full or (2) it is enforced only to the extent that it lifts the Protective Order with respect to the Disclosed Testimony, we need not resolve whether the district court has power to order disclosure. We decide, for the reasons discussed hereafter, only that the Disclosure Order should be affirmed to the extent that it [*311] [***277] lifts the Protective Order with respect to the Disclosed Testimony. If, for some reason, lifting the Protective Order does not provide the Appellees as much relief as would be provided by the Disclosure Order in its entirety, the

matter can be brought to the attention of this Court for further consideration.

[**13] As for the authority of the district court to *permit* disclosure of the Disclosed Testimony, the question is simply whether relaxing the Protective Order was substantively correct. That is, assuming that the Appellees had standing to challenge the Protective Order, or that one of the plaintiffs had challenged it, was there any legal error in the district court's removing the restrictions of the Protective Order with respect to the Disclosed Testimony? We need not answer that question because it has not been properly raised by the Appellants on this appeal. NMRA 1996, 1-026(C) (Rule 26(C)) permits the district court "for good cause shown" to issue a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." The Appellants acknowledge, as they must, that the district court has broad discretion in determining whether good cause exists, and that we will reverse a protective order or a modification of a protective order only for abuse of that discretion. *See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984)*; *Ex parte General Motors Acceptance Corp., 631 So. 2d 990, 991 (Ala. 1994)*; *Loveall v. American Honda Motor Co., 694 S.W.2d 937, 939 (Tenn. 1985)*; *Earl v. Gulf & W. Mfg. Co., 123 Wis. 2d 200, 366 N.W.2d 160, 164* (Wis. Ct. App.), *review denied, 371 N.W.2d 376 (Wis. 1985)*; *cf. State ex rel. California v. Ramirez, 99 N.M. 92, 94, 654 P.2d 545, 547 (1982)* (discretion to enter protective order requiring party to pay cost of opposing counsel's travel to deposition). Yet, the Appellants have not established an abuse of that discretion. They have not pointed to any particular portion of the Disclosed Testimony and argued that the district court was required to find good cause to continue the Protective Order prohibiting disclosure of that specific testimony.

[**14] To the extent that the Appellants may be contending that pretrial discovery is inherently private and that the district court should never permit anyone (not even an opposing party) to release any part of it, we can dispose of that contention in short order. We are aware of no authority for the proposition. On the contrary, the very language of Rule 26(C) implies that those who obtain information through discovery should not be restrained from disclosing that information absent a showing of good cause why disclosure of particular information would be inappropriate. As previously stated, the Appellants have not attempted such a showing on appeal.

[**15] Thus, there remains only one issue that must be decided to resolve this appeal: Did the Appellees have standing to challenge the Protective Order? We now turn to a discussion of that issue.

B. Standing

[**16] At first blush it may appear that the New Mexico Supreme Court has provided an easy answer to the standing issue. In *De Vargas Savings & Loan Association v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975)*, the Court wrote: "We hold that to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is *injured in fact* or is imminently threatened with injury, economically or otherwise." *Id. at 473, 535 P.2d at 1324* (emphasis added). One could conclude that because the Appellees have suffered an actual injury--the inability to acquire information that Mr. Bennett is willing to disclose to them--the Appellees would have standing.

[**17]

Such a conclusion would be premature. Our Supreme Court in *De Vargas* relied heavily on federal law. The phrase "injury in fact" appears

in *Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)*, a decision discussed at length in *De Vargas*. In federal law, "injury in fact" is a term of art. *See* 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3531.4, at 419 (1984). As explained in a leading treatise: "It is not enough to establish [*312] [***278] standing that an identifiable interest has been injured. The injured interest must be one that the courts will recognize for standing purposes . . . . Thus the test of injury in fact leaves it necessary to identify what interests deserve protection against injury." *Id. at 420*. Recently the United States Supreme Court has defined "injury in fact" as "an invasion of a *legally protected interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* (internal quotations and citations deleted) (emphasis added). This language suggests that the injury necessary to confer standing must be injury to an interest that is entitled to some legal protection, even though the ultimate ruling on the merits may be inimical to that interest. For example, the United States Constitution may protect the interest of the press in attending court proceedings; but in a particular case, compelling reasons may justify closing the proceeding to the press. The press would have standing to contest closure of the proceeding because closure would invade a legally protected interest of the press; but the press would not necessarily prevail on the merits.

[**18] Of course, the phrase "injury in fact" may mean different things to the New Mexico Supreme Court and the United States Supreme Court. We should be cautious about adopting the United States Supreme Court's current gloss on the term, particularly when the gloss may constitute a departure from what was commonly understood when our Supreme Court followed United States Supreme Court precedent in *De Vargas*. Nevertheless, it appears that the New Mexico Supreme Court's understanding of "injury in fact" is quite similar to that of the United States Supreme Court. In *De Vargas* itself the Court wrote:

> In this case, appellants clearly have standing to seek review of the supervisor's order as associations "aggrieved and directly affected" by the order. Appellants assert they will suffer from undue competitive injury if another branch is permitted in Santa Fe because there is not sufficient business and demand to assure and maintain the solvency of existing associations. They also assert another branch will not be to the advantage of the community. These claims are sufficient. In fact, the protection of these interests is explicitly recognized in [the governing statute].

87 N.M. at 473, 535 P.2d at 1324. Thus, the Court found that the injury forming the predicate for standing was an injury to a "legally protected interest."

[**19] Other recent New Mexico Supreme Court decisions are consistent with this approach. In *State v. Reynolds, 119 N.M. 383, 384 n.1, 890 P.2d 1315, 1316 n.1 (1995)*, the Supreme Court noted that a criminal defendant, even though convicted on the basis of certain evidence admitted at trial (undoubtedly a severe injury), may not have standing to challenge admission of the evidence if the alleged unlawful police conduct did not infringe upon the defendant's constitutional rights.

[**20]

Likewise, in *Key v. Chrysler Motors Corp., 121 N.M. 764, 918 P.2d 350 (1996),* the Court denied standing to a motor vehicle dealer who sued Chrysler Motors for allegedly acting unreasonably in withholding consent to transfer a dealership franchise to the dealer. The Supreme Court ruled that the dealer had no standing despite financial injury because the statute upon which the dealer relied for relief was not intended to protect the interests of prospective franchisees. *Id.* PP 10-35. Clearly, injury alone, even a grave one, does not suffice to confer standing.

[**21] We also note that New Mexico Supreme Court decisions involving the news media do not undercut this precedent. In *State ex rel. Bingaman v. Brennan, 98 N.M. 109, 645 P.2d 982 (1982),* the Supreme Court denied a television station access to wiretap recordings not introduced into evidence or used in open court. Standing was not discussed in the opinion. Although the fact that the station was a party in the proceeding may represent an implicit determination that it had standing, we should not rely on a decision as authority with regard to matters not addressed in the opinion. *See Sangre de Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 347-48, 503 P.2d 323, 327-28* [*313] [***279] *(1972), cert. denied, 411 U.S. 938, 36 L. Ed. 2d 400, 93 S. Ct. 1900 (1973).*

[**22]

In *State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982),* the issue was the validity of restrictions on coverage of a criminal trial. The Supreme Court did not need to decide whether standing was possible in the absence of invasion of a legally protected interest, because the media had such an interest--the First Amendment right of the public (and hence the media) to attend criminal trials, *see Richmond Newspapers v. Virginia, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980).* (Actually, it was two media associations, not any newspaper or broadcaster, who were granted standing in *Kaufman*. But no issue was raised regarding the right of the associations to pursue the interests of their members.)

[**23] In light of this precedent, we are reluctant to hold that the Appellees can suffer an "injury in fact" without suffering injury to a legally protected interest. In any event, we need not resolve that matter on this appeal. Nor need we address the Appellees' contention that the Protective Order infringed their rights under the First Amendment, the common law, and the New Mexico Inspection of Public Records Act, *NMSA 1978, §§ 14-2-1 to -12* (Repl. Pamp. 1995).

[**24] We avoid these issues by holding that the Appellees have standing under a different theory. We hold that the district court properly granted standing to the Appellees to challenge the Protective Order insofar as it impinged upon the legally protected interests of third persons, particularly Mr. Bennett. To reach this conclusion, we need to examine the foundations of the law of standing.

[**25] The requirements for standing derive from constitutional provisions, enacted statutes and rules, and prudential considerations. *See generally United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996).* In federal court the constitutional requirements are rooted in Article III of the United States Constitution, which limits the federal judicial power to "Cases" or "Controversies." *Id. at 1533.* The United States Supreme Court has held that to satisfy constitutional requirements there must be "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.*

[**26] The New Mexico Constitution does not speak of Cases or Controversies. Article VI, Section 1 simply states: :

> The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts; probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.

Article VI, Section 13 adds that "the district court shall have original jurisdiction in all matters and causes not excepted in this constitution[.]" Thus, any constitutional restrictions on standing in New Mexico district courts must derive from the meaning of "judicial power" in Article VI, Section 1 or the meaning of "matters and causes" in Article VI, Section 13.

[**27] Unfortunately, we have found no clear statement in New Mexico case law regarding any constitutional limitations on standing. A suggestion of such a restriction appears in *Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926)*, which held that a citizen-taxpayer had no standing to seek an injunction against the governor and other state officers to prevent the alleged misuse of state trust funds. The Court wrote:

> In our scheme of government, the function of the courts is to declare and apply the law in the decision of justiciable controversies. We are not placed over the other departments of government, generally, to review or interfere with their acts, as the special guardian of the Constitution. Ours is the judicial power.

Id. at 647, 249 P. at 1076. Yet, in *State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965)*, the Supreme Court relied on *Asplund* to deny standing to citizen-taxpayers [*314] [***280] but then proceeded to decide the issue because of "our duty to the public." *Id. at 92, 400 P.2d at 960*. One can conclude that the absence of standing did not deprive the court of jurisdiction to decide the matter, which would certainly have been the case if denial of standing had been based on constitutional limitations on the court's power.

[**28] Although the case law does not provide guidance regarding requirements for standing imposed by the New Mexico Constitution, we are aware of no basis for concluding that those requirements are stricter than those imposed by the federal Constitution. The concept of "judicial power" in Article VI, Section 1, certainly encompasses those types of power exercised by the federal courts. As for the language "all matters and causes" in *Article VI, Section 13 of the New Mexico Constitution*, the brief-in-chief of the Archdiocese appears to assume that the New Mexico constitutional provisions have the same effect as the "case or controversy" language in the United States Constitution. Consequently, we do not investigate whether for some reason the New Mexico Constitution imposes stricter requirements. We conclude that there is no constitutional prohibition against the Appellees' standing to challenge the Protective Order if there are present "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food, 116 S. Ct. at 1533*.

[**29]

These three requirements are met in this case. [1] First, there is "an injury in fact." The "injury in fact" need not be an injury to the party bringing the action. In *United Food* the United States Supreme Court held that a union may sue to recover backpay for members who did not receive statutorily required notice of a plant closing. The Court wrote: "The general prohibition on a litigant's raising another person's legal rights is a judicially self-imposed limit on the exercise of federal jurisdiction, not a constitutional mandate." *116 S. Ct. at 1536* (quotation marks and brackets omitted). Here, even if there was no injury to a legally protected interest of the Appellees, there is certainly such an injury to the litigants and their counsel (in particular, Merit Bennett). Their interest in being permitted to disseminate information they possess is protected by both Rule 26(C) and the [*315] [***281] First Amendment. *See Seattle Times, 467 U.S. at 32-34*.

1 Because the three requirements are met, we need not decide whether all are required by the New Mexico Constitution.

[**30] As for the remaining two constitutional requirements, the challenged conduct--the issuance of the Protective Order--is the cause of those injuries, and a "favorable decision"--that is, modification of the Protective Order--would redress the injury. *Cf. Oklahoma Hosp. Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424-25 (10th Cir. 1984)*(second two requirements not met because newspaper made no showing that lifting of protective order would result in disclosure to newspaper), *cert. denied, 473 U.S. 905, 87 L. Ed. 2d 652, 105 S. Ct. 3528 (1985).*

[**31]

Next, we address whether any statute or promulgated rule raises an impediment to the Appellees' standing. On occasion New Mexico courts have considered statutory requirements regarding standing. *See, e.g. Key*; *De Vargas Sav. & Loan*. In this case, however, there is no governing statute. Nor does any court rule address the matter. Rule 26(C) states that courts may enter protective orders "upon motion by a party or by the person from whom discovery is sought"; but no mention is made of who may oppose such a motion, and our rules of civil procedure contain nothing about motions to set aside or modify protective orders.

[**32] Thus, whether to afford standing to the Appellees in this case turns on prudential considerations. Those considerations favor standing.

[**33] Rule 26(C) permits protective orders only "for good cause shown." This standard reflects the view that ordinarily no restraint should be placed upon a person's right to disclose discovery information however he or she pleases. Indeed, we have already noted that this right finds some protection in the First Amendment. *See Seattle Times, 467 U.S. at 32-34*. The obvious candidate to seek vindication of this right by challenging a protective order is the person who possesses discovery information and wishes to disclose it. Yet the realities of litigation are such that the person possessing the information, even though willing to disclose it, may have no incentive to litigate the matter. Litigation is expensive. The chief concern of the party and the attorney representing the party is success in the lawsuit. If the protective order does not handicap pursuit of that objective, challenging the protective order becomes a low priority, particularly if there is concern that such a challenge could jeopardize the ultimate objective by creating ill will from the opposing party or even the court. Thus, it must be recognized that as a practical matter the right to disseminate may receive protection only if a third party is permitted to litigate on behalf of the person possessing the right.

[**34] Of course, the fact that a person does not choose to litigate a personal right does not mean that any officious third party should be granted standing to litigate that right. But granting standing to members of the news media such as the Appellees is appropriate for four reasons.

[**35] First, one of the more compelling prudential reasons to limit standing does not apply here. Commentators have recognized that standing requirements serve the purpose of preventing the courts from intruding too much into the work of the other branches of government. *See* William A. Fletcher, *The Structure of Standing*, *98 Yale L.J. 221, 222 (1988)*. It may also serve to prevent undue judicial interference in private arrangements. *See Key*. In the present case, however, the matter to be decided is whether the judiciary has conducted its own "internal" work appropriately: Has the court complied with its own rules in issuing a protective order? Thus, we can tolerate, even welcome, participation by third parties without worrying about meddling in the affairs of the other branches of government or private ordering.

[**36] Second, we should presume that the willingness of recognized news media to challenge the protective order indicates a public interest in the material covered by the protective order. Of course, we are not blind to the financial motives that can influence the media, nor are we unfamiliar with the tragic consequences that can flow from irresponsible behavior by the media. But the role of the news media is fundamental to the proper functioning of American society. The media serve as a non-governmental surrogate for the people in pursuing the public interest in information. This role is important in determining whether standing is appropriate. Although a private interest in information withheld pursuant to a protective order may not justify third-party standing, a legitimate public interest in the materials constitutes a policy reason for granting such standing. We note that our Supreme Court has only very recently reaffirmed that the right to bring a cause of action may depend on whether the cause of action vindicates the public interest or merely a private interest. *Garrity v. Overland Sheepskin Co., 121 N.M. 710, 917 P.2d 1382 (1996),* held that the existence of a cause of action for retaliatory discharge when an employee is fired for making disclosures depends upon whether the disclosures were to advance the employee's private interest or a public purpose. *Id.* at , 917 P.2d at 1387. More directly in point, *State ex rel. Clark v. Johnson, 120 N.M. 562, 568-69, 904 P.2d 11, 17-18 (1995),* conferred standing to those petitioning for mandamus simply "on the basis of the importance of the public issues involved." *Id. at 569, 904 P.2d at 18* (quoting *State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974)).* Similarly, when considering the suitability of standing by a third party to challenge a protective order, an important factor is whether the third party seeks to vindicate a personal interest or the public welfare.

[**37] Third, we have little doubt that news media such as the Appellees in this case will pursue their challenges to protective orders with the "adversarial vigor," *United Food, 116 S. Ct. at 1536*, necessary to sharpen the presentation of issues. *See Baker v. Carr, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)*. Fourth, experience indicates that media challenges to [*316] [***282] protective orders will not burden the courts with frivolous litigation.

[**38]

Thus, we hold that the district court did not err in granting the Appellees standing to challenge the Protective Order in this case. As previously noted, in reaching this result we need not decide whether the news media have a First Amendment interest, or any other legally protected interest, in discovery materials that

are not offered in court proceedings. Also, we need not decide whether or when other third parties should be granted standing to challenge a protective order. We decide only the narrow, although important, issue raised by this appeal--the propriety of granting standing to the Appellees to challenge the Protective Order.

[**39] In arriving at this result, we are supported by the weight of authority. *Kaufman* granted standing to the New Mexico Press Association and the New Mexico Broadcasters Association to challenge court-ordered restrictions on coverage of a criminal trial. Although the holding in that case could rest on narrower grounds, our Supreme Court observed that "cases from many jurisdictions make it clear that the news media has [sic] standing to question the validity of an order impairing its ability to report the news, even though it [sic] is not a party to the litigation below," *98 N.M. at 264, 648 P.2d at 303*; *see Davis v. East Baton Rouge Parish Sch. Bd., 78 F.3d 920, 926 (5th Cir. 1996)* (collecting cases). In particular, other courts have granted news media standing to challenge protective orders governing discovery. *See Grove Fresh Distribs. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994)*; *In re Alexander Grant & Co. Litig., 820 F.2d 352, 354 (11th Cir. 1987)* (per curiam); *In re Consumers Power Co. Sec. Litig., 109 F.R.D. 45 (E.D. Mich. 1985)*; *cf. Oklahoma Hosp. Ass'n* (denying standing when no indication that parties would disclose records if protective order were lifted); *Booth Newspapers v. Midland Circuit Judge, 145 Mich. App. 396, 377 N.W.2d 868, 870 (Mich. Ct. App. 1985)* (same), *appeal denied* (Apr. 28, 1986) *and cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 831, 107 S. Ct. 877 (1987). But see West Va. v. Moore, 902 F. Supp. 715, 718 (S.D.W. Va. 1995)* (press has no standing because it suffered no injury in fact); *Mokhiber v. Davis, 537 A.2d 1100, 1102 (D.C. 1988)* (per curiam).

[**40]

We affirm the order of the district court insofar as it sets aside the Protective Order with respect to the Disclosed Testimony.

[**41] IT IS SO ORDERED.

HARRIS L HARTZ, Judge

WE CONCUR:

RUDY S. APODACA, Chief Judge

CONCUR BY: RICHARD C. BOSSON

CONCUR

BOSSON, Judge. (Specially concurring)

[42] I agree that an injury in fact must be an injury to an interest that is arguably entitled to some legal protection. I interpret *DeVargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975)* to mean no less, and I believe that *De Vargas*, taken in context, offers ample support for affirmance in this case. Our Supreme Court's recent opinion in *Key v. Chrysler Motors Corp., 121 N.M. 764, 918 P.2d 350 (1996)* is fully consistent with this conclusion. There, the Court narrowly interpreted a state statute (as opposed to the First Amendment) to confer standing upon only a certain class of litigants. We do not have that situation here. I am persuaded that *Key* intended no deviation from the broad standing principles articulated in *De Vargas* and I do not understand the majority opinion to imply anything to the contrary.

[43] Although I would agree with the analysis of the majority opinion conferring standing upon the media to assert the rights of third persons in this case, I see no need to reach that issue. I would recognize media standing to claim a First Amendment interest in the subject matter of this litigation on its own behalf and on behalf of the public. I would stop there, seeing no need to proceed further. The standing of the New Mexico media to raise First Amendment issues based on access to court-sponsored information could not, in my mind,

be clearer and has been blessed more than once by our Supreme Court. *See, e.g., State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 264-65, 648 P.2d 300, 303-04 (1982)*; *State ex rel. Bingaman v. Brennan, 98 N.M. 109, 111, 645 P.2d 982, 984 (1982)*. This is not to say the media will always win--only [*317] [***283] that they have the right to come into court and make their case, much as they did here. This is also not to say that persons other than the media may or may not demonstrate that they fall within that class of litigants who are properly entitled to seek judicial protection for an alleged breach of First Amendment rights.

[44] Given the historical breadth of the First Amendment, we need not reach so far to resolve the present dispute. I do not believe this case compels us to introduce the notion of "prudential considerations" into New Mexico jurisprudence. These are federally inspired concepts, interpreting "case or controversy" within Article III of the United States Constitution and creating judge-made law for the "prudential" management of the federal courts. Why do we need them to resolve this dispute? These latest federal pronouncements--which themselves are subject to change from forces outside our courts--bring with them a considerable body of criticism from the intellectual community; moreover, they arguably may not even be relevant to the limited issue before us of standing to claim injury under the First Amendment, as opposed to the more complex issue of standing under federal statutes. *See generally* William A. Fletcher, *The Structure of Standing, 98 Yale L.J. 221 (1988)*.

[45] New Mexico is a government of reserved, plenary powers as opposed to the limited, enumerated powers of the federal government. Unlike federal courts, our judiciary is one of general jurisdiction. Problems unique to the federal structure ought not be imported into our judge-made law, unless there is a proven need. Seeing none, I would affirm without the analysis of "prudential considerations" and based primarily on De Vargas

RICHARD C. BOSSON, Judge.

CHRIS KRAHLING, Superintendent of Insurance, State of New Mexico, Plaintiff, vs. EXECUTIVE LIFE INSURANCE COMPANY, A California corporation, and DOES 1 THROUGH 1,000, Defendants, and THE NEW MEXICO LIFE INSURANCE GUARANTY ASSOCIATION, Defendant/Third Party Plaintiff-Appellant, vs. FIRST TRUST NATIONAL ASSOCIATION, HONEYWELL, INC., and HONEYWELL PENSION AND RETIREMENT COMMITTEE, Third Party Defendants-Appellees.

Docket No. 17,916

COURT OF APPEALS OF NEW MEXICO

125 N.M. 228; 1998 NMCA 71; 959 P.2d 562; 1998 N.M. App. LEXIS 45; 37 N.M. St. B. Bull. 23

April 21, 1998, Filed

SUBSEQUENT HISTORY: Certiorari Not Applied For. Released for Publication May 19, 1998.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. STEVE HERRERA, District Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Victor R. Marshall, Cindi L. Pearlman, Victor R. Marshall & Associates, P.C., Albuquerque, NM, for Appellants.

David L. Hashmall, Felhaber, Larson, Fenlon & Vogt, Minneapolis, MN, Paul Bardacke, John Baugh, Eaves, Bardacke & Baugh, P.A., Albuquerque, NM, for Appellees.

JUDGES: THOMAS A. DONNELLY, Judge, WE CONCUR: RICHARD C. BOSSON, Judge, MICHAEL D. BUSTAMANTE, Judge.

OPINION BY: THOMAS A. DONNELLY

OPINION

[*230] [***564] *OPINION*

DONNELLY, Judge.

[**1] The New Mexico Life Insurance Guaranty Association (the Association) appeals from an order of the trial court imposing confidentiality requirements upon evidence obtained by the Association through compelled discovery from Honeywell Pension and Retirement Committee (Honeywell). The central issue presented on appeal is whether the trial court erred in denying the Association's motion to lift an order of confidentiality which prohibited the Association from sharing certain discovery material with litigants in other jurisdictions engaged in similar litigation. For the reasons discussed herein, we reverse.

FACTS

[**2] Executive Life Insurance Company (ELIC), a California corporation authorized to do business in New Mexico, became insolvent in 1991. The Superintendent of Insurance filed ancillary receivership proceedings in this state and joined the Association as a party. The Association is comprised of insurers authorized to transact insurance business in this state and

provides statutory protection to New Mexico policyholders pursuant to the requirements of the New Mexico Life and Health Insurance Guaranty Law (the Act). *See NMSA 1978, §§ 59A-42-1 to -16* (1984, as amended in 1993).

[**3] The Association filed a third-party complaint against Honeywell and First Trust National Association (First Trust) for a declaratory judgment as to whether guaranteed investment contracts (GICs) issued by ELIC were covered by the provisions of the Act. The trial court ruled that the GICs were not annuity contracts within the contemplation of this state's statutory definitions of annuities. First Trust and Honeywell appealed the decision to this Court and, on July 7, 1997, this Court affirmed the trial court's ruling in *Krahling v. First Trust National Ass'n, 1997 NMCA 082, P4, 123 N.M. 685, 944 P.2d 914*.

[**4] During the course of this litigation, the Association sought production of evidence from Honeywell through discovery. The Association did not obtain all of the discovery sought and filed a motion to compel production. The trial court ordered production, but granted Honeywell's request that the discovery be kept confidential. The trial court directed that the matters produced be sealed and that the Association be enjoined from sharing the discovery information with guaranty associations engaged in litigation in other states. After the trial court granted summary judgment in favor of the Association, relying in part on documents which had been ordered to be sealed, the Association moved to lift the order of confidentiality. Following a hearing on October 7, 1996, the court denied the motion.

ANALYSIS

[**5] The Association argues that the trial court erred in denying its request to lift the [***565] [*231] confidentiality order. Specifically, the Association asserts that the trial court erred in allowing Honeywell to designate all of the documents produced by it during discovery as "confidential," without any showing of a legally cognizable or sufficient cause for the order. Responding to this argument, Honeywell raises several defenses, including its contention that the appeal herein was untimely. We turn first to an examination of this issue.

Timeliness of Appeal

[**6] The order of confidentiality was entered January 18, 1996. [1] Honeywell argues that, at the hearing on the Association's motion for summary judgment on April 1, 1996, the trial court considered an oral request of the Association to lift the protective order, and the motion was orally denied. An order granting the Association's motion for summary judgment was entered on July 19, 1996; however, the order made no reference to the trial court's denial of the motion to lift the order of confidentiality. Although Honeywell appealed the order granting summary judgment on July 19, 1996, the ruling denying the Association's oral motion to lift the order of confidentiality was never reduced to writing. See *Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 178, 870 P.2d 138, 140 (Ct. App. 1994)* ("Oral rulings are not final and therefore [are] not a proper basis for an appeal.").

1 The order provided, in part, that if any party deems it necessary "for the purpose of this action, it needs to disclose . . . information contained in or derived from any confidential matter" pursuant to the trial court's discovery order, and the parties cannot agree on the release of such information, "application to the court for a ruling on such request may be made."

[**7] On August 15, 1996, the Association filed a written motion to lift the order of confidentiality. This motion was pending and unresolved by the trial court when Honeywell filed its appeal from the order

granting summary judgment. On October 7, 1996, the trial court denied the Association's timely motion to lift the order of confidentiality and the Association filed its amended notice of appeal on November 4, 1996.

[**8] The appeal herein was filed within thirty days of the entry of the order which is the subject of this appeal; hence, we deem it timely. To the extent Honeywell is arguing that the trial court was deprived of jurisdiction to rule on the motion to lift the order of confidentiality after the filing of the notice of appeal from the order granting summary judgment, the court retained jurisdiction to consider the motion because it dealt with a collateral issue which was not disposed of by the appeal. *See Gonzales v. Surgidev Corp., 120 N.M. 151, 157, 899 P.2d 594, 600 (1995)* (trial court retains jurisdiction pending appeal to address discovery matters extrinsic and collateral to principal issues raised by the parties).

The Confidentiality Order

[**9] Honeywell asserts a multifaceted defense in support of the trial court's order of confidentiality. It argues that the Association lacks standing to raise this issue; that the Association has waived such claim; that it would be unfair to lift the order of confidentiality because it relied on the trial court's ruling in complying with discovery; that the Association has failed to show a compelling need to lift the order of confidentiality; and that discovery sharing by the Association with other litigants in other jurisdictions is an impermissible use of discovery. We address each of these arguments in turn.

[**10] In *Does v. Roman Catholic Church, 1996 NMCA 094, P13, 122 N.M. 307, 924 P.2d 273*, this Court considered the standard of review and standing of a party to vacate a discovery order noting that a reviewing court will reverse a protective order only for abuse of discretion, and that "[Rule] 1-026(C) [NMRA 1998] permits the district court 'for good cause shown' to issue a protective order 'which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.'" *See also Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986)* (finding of "good cause" must be based on a factual determination of potential harm, not on conclusory statements); 8 Charles A. Wright, et al., *Federal Practice and Procedure* § 2035 (2d ed. 1994). [2]

2 Honeywell does not argue that the discovery materials which are covered by the confidentiality order contain trade secrets, attorney work product, or sensitive proprietary information. During oral argument, counsel argued that Honeywell's burden of demonstrating cause was satisfied solely because of the existence of collateral litigation in Minnesota where a court order staying discovery had been entered until several issues could be resolved on appeal.

[***566] [**11] [*232] Honeywell argues that the Association lacks standing to challenge the confidentiality order in this case because the Association has access to the documents within the scope of the order and therefore cannot show any actual or threatened injury flowing from the order. *See De Vargas Sav. & Loan Ass'n v. Campbell, 87 N.M. 469, 473, 535 P.2d 1320, 1324 (1975)*. We find this argument unpersuasive. As this Court observed in *Does*, 1996-NMCA-094, P 33, "Ordinarily no restraint should be placed upon a person's right to disclose discovery information however he or she pleases." The nature and purpose of the confidentiality order in this case is to restrain the general right of disclosure; hence, we find that the Association is a proper party to challenge the order. *See id.* ("The obvious candidate to seek vindication of this right [of disclosure] by challenging a protective order is

the person who possesses discovery information and wishes to disclose it.").

[**12] Honeywell alternatively asserts that the Association waived its right to challenge the confidentiality order because it did not object to the order when it was entered and because the Association stipulated to the form of the order. We disagree. The Association was not required to preserve by objection what the confidentiality order expressly authorized. The order specifically stated that "any party may at any time apply to this Court for modifications of or an exception to this Protective Order." The order further granted leave to both parties to apply to the trial court for a "determination that the materials are not subject to the restrictions contained in this Order." Having sought such a determination through its motion to lift the confidentiality order, the Association properly raises this issue on appeal from the trial court's denial of that motion. *See* Rule 12-216 NMRA 1998; *cf. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 141-42, 646 P.2d 565, 568-69 (1982)* (issue preserved where both parties filed their briefs and argued the issue before the district court). Honeywell advances no authority for the proposition that a stipulation to the *form* of an order amounts to waiver of any rights by the stipulating party; therefore, we do not address this issue. *See* Rule 12-213(A)(3) NMRA 1998; *see also In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984)* (where arguments in briefs are unsupported by cited authority, counsel is assumed to have been unable to find supporting authority). Moreover, as observed in *Courtney v. Nathanson, 112 N.M. 524, 526, 817 P.2d 258, 260 (Ct. App. 1991)*, "The three words ['as to form'] mean that the attorney agrees that the order or judgment accurately reflects the judge's decision, but the attorney does not agree with that decision."

[**13] Additionally, Honeywell argues that it provided virtually unlimited discovery to the Association in reliance on the confidentiality order and that its asserted reliance militates strongly in favor of upholding the order. Most of the cases cited by Honeywell in support of its argument, however, involve situations in which the parties themselves requested and agreed to an order of confidentiality, whereas here, Honeywell secured confidentiality through imposition of a court order rather than by negotiated agreement. In *Tavoulareas v. Washington Post Co., 111 F.R.D. 653, 662-63 (D.D.C. 1986)*, also cited by Honeywell, the court refused to remove a blanket protective order following the completion of trial in part because the plaintiff had provided "massive" discovery of commercially sensitive, proprietary information in reliance on the terms of the protective order in that case. We find *Tavoulareas* inapposite to the factual situation here. In the instant case, unlike in *Tavoulareas*, the confidentiality order specifically stated that "the fact that a document or information has been designated as 'confidential' shall not create a presumption that it is protected by a cognizable claim of confidentiality." Under these circumstances, we do not think that Honeywell was entitled to rely on the permanence of the [***567] [*233] confidentiality order. *See Beals v. General Motors Corp., Civ. A., 1989 U.S. Dist. LEXIS 18336*, No. 85-825- WF, 1989 WL 384829, at *6 n.1 (D. Mass. Dec. 4, 1989) (distinguishing *Tavoulareas* because defendant knew that plaintiff reserved right to seek modification of the confidentiality stipulation). Also, as previously noted, *Honeywell* does not maintain on appeal that the discovery in question contains proprietary information. Finally, we note that even in *Tavoulareas* the court did lift the confidentiality order with respect to that discovery which was actually "used at trial or formed the basis for substantive pretrial motions." *Tavoulareas, 111 F.R.D. at 662*. The core of what the Association seeks to disseminate in this case apparently formed the basis for its motion for summary judgment and

was expressly relied upon by the trial court in granting the motion.

[**14] Honeywell also contends that at this point in the proceedings the Association bears the burden of showing a compelling need for the confidentiality order to be modified or lifted. The Association, on the other hand, argues that because Honeywell failed to make a prima facie showing of good cause in support of the confidentiality order, the burden of proof still rests upon Honeywell to support the continuation of the order. We agree with the latter contention. Even after a confidentiality order has been entered, the burden remains on the party supporting the order to demonstrate the existence of good cause. *Tavoulareas, 111 F.R.D. at 658*; *see also* Jacqueline S. Guenego, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score, 60 Fordham L. Rev. 541, 569 (1991)* ("Most courts conclude that to sustain the status quo, the opposing party must demonstrate that 'good cause' for the protective order exists."); cf. LR1-208(B) NMRA 1998 ("No court file, except those matters required by law to remain confidential, shall be ordered sealed from public inspection, except in extraordinary cases to be determined by the court[.]").

[**15] An order prohibiting the disclosure of information obtained during discovery proceedings must be supported by a finding of good cause. *See* Rule 1-026(C); *see also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994)* ("'Good cause is established [by] showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.'" (quoting *Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984))*. The burden of proving an assertion of privilege rests upon the party asserting such claim. *McFadden v. Norton Co., 118 F.R.D. 625, 627 (D. Neb. 1988)*. In determining whether a party has made a showing of good cause for the issuance of a protective order, courts have generally applied a balancing process. *See Pansy, 23 F.3d at 787* (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 432-33 (1991)* (court should balance the party's need for information against the injury that might result if uncontrolled disclosure is compelled)).

[**16] Some of the documents or evidence which were subject to the trial court's order of confidentiality were relied upon by the trial court in its decision to grant the Association's motion for summary judgment. Absent compelling circumstances, a party should not be barred from disclosing evidence which was actually utilized by the trial court in reaching its decision. *See State ex rel. Bingaman v. Brennan, 98 N.M. 109, 111, 645 P.2d 982, 984 (1982)* (recognizing presumption in favor of public inspection and copying of matters received into evidence at public session of trial); *see also NMSA 1978, § 34-1-1* (1972) (except as otherwise provided by law, court sessions shall be public). To do otherwise would undermine the openness of court proceedings, the public right of inspection, and is contrary to the provisions of Rule 1-026(C). *See Does*, 1996-NMCA-094, P 14.

[**17] The record discloses that each of approximately 66,000 pages of documents was uniformly designated as confidential; that Honeywell has not asserted that these documents are protected by specific privilege, including attorney-client privilege or trade secrets; and that Honeywell has [***568] [*234] failed to point out with particularity the basis for according confidentiality of any individual document covered by the trial court's order. Nor has Honeywell shown that it will be harmed from such disclosure. In contrast, the Association asserts that certain materials included in the order are, in fact, public documents and that others have no apparent basis for remaining confidential. Based on the

record before us, we conclude that the trial court's entry of the blanket order of confidentiality was improvidently granted. *See Does*, 1996-NMCA-094, P 13 (basis for entry of protective order is grounded upon "'good cause shown'") (quoting Rule 1-026(C)); *see also* Arthur R. Miller, *supra, 105 Harv. L. Rev. at 492* ("Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic[.]"); Thomas M. Flaming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation, 83 A.L.R.4th 987, 991 (1991)* (blanket orders of confidentiality generally found to be improper and overbroad).

[**18] Lastly, Honeywell asserts that discovery sharing by the Association with other guaranty associations that are in litigation with Honeywell around the country would be a misuse of discovery for an "illicit" purpose. The majority of courts that have considered assertions of this nature authorize the practice of discovery sharing among litigants. Guenego, *supra* at 546-48 and 570-71; *see also* Fleming, *supra*, 83 A.L.R.4th at 991 ("Characterizing as useful and proper the sharing of discovered material with similarly situated litigants in other cases, the state courts have generally disapproved of protective orders categorically forbidding the disclosure to outside parties of information produced in discovery[.]"). *See generally* Edward F. Sherman and Stephen O. Kinnard, *Federal Court Discovery in the 80's--Making the Rules Work, 95 F.R.D. 245, 287* (1982). Moreover, Rule 1-001 NMRA 1998 indicates that the interests served by the New Mexico Rules of Civil Procedure are "to secure the just, speedy and inexpensive determination of every action." This language is identical to *Rule 1 of the Federal Rules of Civil Procedure*, and, as noted by the author in *60 Fordham Law Review, at 548*, "barring a bad faith purpose for the litigation on the part of the discovering party, most courts agree that discovery sharing serves Rule 1 interests and does not constitute good cause for entry of a protective order." (Footnote omitted.)

[**19] The fact that courts in other jurisdictions may have restricted discovery in cases pending before them is generally insufficient to provide a basis for restricting access to discovery in New Mexico. We find instructive the reasoning of the court in *Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980)* (as amended Jan. 9, 1981), recognizing the presumption that pretrial discovery should take place in public and that such presumption

> should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.

[**20] Other than its bare contention that discovery sharing is "illicit," Honeywell has not alleged any bad faith purpose on the part of the Association in seeking to share the fruits of discovery in this action with other guaranty associations. Honeywell does not deny that it can seek protective measures in the collateral litigation in Minnesota where discovery is presently stayed. Therefore, we conclude that the trial court's order prohibiting discovery sharing was in error, and Honeywell failed to make a sufficient showing of good cause for issuance or continuation of a blanket order of confidentiality. Moreover, we do not foresee this placing an undue burden upon the trial court because Honeywell has not asserted any particularized privilege with respect to any of

the approximately 66,000 pages of the documents involved herein.

CONCLUSION

[**21] The order denying the motion to lift the order of confidentiality is reversed and the cause is remanded for further proceedings [***569] [*235] consistent herewith. The Association is awarded its costs on appeal.

[**22] IT IS SO ORDERED.

THOMAS A. DONNELLY, Judge

WE CONCUR:

RICHARD C. BOSSON, Judge

MICHAEL D. BUSTAMANTE, Judge

STATE, ex rel. NEW MEXICO PRESS ASSOCIATION and New Mexico Broadcasters Association, Petitioners, v. Hon. Bruce E. KAUFMAN, District Judge, Respondent

No. 14088

SUPREME COURT OF NEW MEXICO

98 N.M. 261; 648 P.2d 300; 1982 N.M. LEXIS 2864; 36 A.L.R.4th 1115; 8 Media L. Rep. 1713

June 2, 1982

SUBSEQUENT HISTORY: [***1] Rehearing Denied July 8, 1982.

PRIOR HISTORY: ORIGINAL PROHIBITION PROCEEDING

DISPOSITION: Reversed.

COUNSEL: Hal Simmons, Albuquerque, for petitioners.

Jeff Bingaman, Atty. Gen., Ralph Muxlow, Asst. Atty. Gen., Charles Baldonado, Chief Sp. Prosecutor, Santa Fe, for respondent.

Martha A. Daly, Santa Fe, for amicus curiae New Mexico Criminal Defense Lawyers Assn.

Johnson & Lanphere, Michael A. Gross, Albuquerque, for amicus curiae Journal Pub. Co.

JUDGES: Easley, Chief Justice. Sosa, Senior Justice, and Payne and Federici, JJ., concur. Riordan, J., not participating.

OPINION BY: EASLEY

OPINION

[*263] [**302] OPINION

Prior to trial in this penitentiary riot-related murder case, Chapman moved to limit media coverage. The State made no objection. Without notice to the media and without their participation in the hearing on the motion, Judge Kaufman ordered limitations on press coverage.

The New Mexico Press Association and the New Mexico Broadcasters Association (Media) intervened by petitioning this Court to prohibit the restraint. We issued a temporary writ as to part of the complaints, ordered briefs and set a hearing date. Prior to the hearing, Chapman was convicted and sentenced.

We address [***2] these questions:

1. Whether the Media has standing to intervene, and if so, whether its filing first in this Court is proper.

2. Whether the issues are moot.

3. Whether the trial court could mandate that the names of jurors not be published.

4. Whether the trial court could order that Chapman not be photographed in the "judicial complex".

5. Whether the Media could be required to preserve all news articles, tapes and transcripts for ten days after the verdict was rendered.

Chapman moved to restrict media coverage to insure him a fair trial. He claimed, *inter alia*, that publishing the jurors' names would subject them to intimidation and harrassment, publication of his photographs would influence testimony of witnesses in this trial and another later trial, and the physical evidence of the stories published or aired by the Media should be preserved for ten days so that he might have access to this evidence, if needed. The trial court held a hearing at which the Media was not represented, since no notice was given to them. Without objection by the prosecution, the court issued its order limiting media coverage as indicated. The Media filed first in this Court to prohibit [***3] the actions of the trial judge.

This conflict exemplifies the classic collision between two important constitutional rights. This clash between well-guarded legal principles leaves the Court with the duty to perform a delicate balancing act. Freedom of the press, so sacred to the media, must be weighed against the defendant's right to a fair trial.

"'[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.'" *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566-67, 100 S.Ct. 2814, 2822-23, 65 L.Ed.2d 973 (1980)* (quoting F. Pollock, The Expansion of the Common Law 31-32 (1904)). This concept came across the Atlantic and became a part of colonial jurisprudence. Our First Continental Congress vouchsafed the right to trial by jury and openness of the proceedings.

> "[O]ne great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably [***4] be supposed to be acquainted with his character, and the characters of [*264] [**303] the witnesses, upon a fair trial, and full enquiry, face to face *in open Court, before as many of the people as chuse to attend*, shall pass their sentence upon oath against him . . . ."

Id. at 568-69, 100 S.Ct. at 2823-24 (quoting 1 Journals of the Continental Congress, 1774-1789, at 107 (1904)).

It is no coincidence that the *First Amendment to the Constitution of the United States* contains the provision that "Congress shall make no law . . . abridging the freedom . . . of the press." This amendment is made applicable to the states through the Fourteenth Amendment. *Near v. Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 627, 75 L.Ed. 1357 (1931). Article II, section 17, of the New Mexico Constitution* contains the same mandate against interference with freedom of the press.

The *Sixth Amendment to the United States Constitution*, however, secures rights equally fundamental to our jurisprudence: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed [***5] . . ." The Sixth Amendment is made applicable to the states by the Fourteenth Amendment. *Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).* "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights" and the interplay of these sacred Amendments are as old as the Republic itself. *Nebraska Press Assn. v. Stuart,*

427 U.S. 539, 561, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976).

We fully agree with Mr. Justice Black's observation that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California, 314 U.S. 252, 260, 62 S.Ct. 190, 192, 86 L.Ed. 192 (1941).* In analyzing the interplay of the First and Sixth Amendments, we note that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971)* (citations omitted).

In *Nebraska Press Assn., supra, 427 U.S. at 587, 96 S.Ct. at 2816* (Brennan, J., concurring), Justice Brennan [***6] stated:

> Commentary and reporting on the criminal justice system is at the core of First Amendment values . . . . Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . by subjecting it to the clensing effects of exposure and public accountability. [Citations omitted.]

The issues in our case must be matched with this impressive authority.

1. *Standing.*

The Media did not plead or appear in the trial court, but filed a petition for a writ in this Court. Thus, issues arise as to whether the Media has standing to intervene in this criminal case, particularly at the appellate level.

Cases from many jurisdictions make it clear that the news media has standing to question the validity of an order impairing its ability to report the news, even though it is not a party to the litigation below. *See, e.g., State ex rel. Miami Herald Pub. v. McIntosh, 340 So.2d 904 (Fla.1977).* However, the news [***7] media has no right to intervene as a party in a criminal case. *State v. Bianchi, 92 Wash.2d 91, 593 P.2d 1330 (1979).* The proper approach lies in a separate action for declaratory judgment, mandamus or prohibition. *Bianchi, supra.* Therefore, we find that the Media has standing.

In Canon 3(A)(7), Code of Judicial Conduct, 20 N.M.St.B.Bull. 1249-51 (1981), we provided that an appellate court shall not exercise its appellate or supervisory jurisdiction to review an order banning media coverage. The State argues that we should [*265] [**304] deny this petition based on that section. The Court finds that we are compelled by our *New Mexico Constitution, Article VI, section 3,* to hear cases involving writs of prohibition, and that these issues are of such great importance, the guidelines are now so indefinite and the potential for further disputes so great that we address these questions.

Furthermore, when an order banning coverage constitutes a prior restraint, it attenuates the basic constitutional rights of the media to publish. If no effective review is provided, constitutional error may be uncorrected. *See United States v. Dickinson, 465 F.2d 496 (5th Cir.* [***8] *1972).*

We hold that the Media has a right to appear and contest this decision.

It is imminently necessary that the trial courts, the attorneys and the litigants be given more definite guidelines for reconciling these competing positions. In satisfying these guidelines, we draw liberally on *Seattle Times*

v. Ishikawa, 97 Wash.2d 30, 640 P.2d 716 (1982).

We hold as follows:

The media right to publish is not absolute. *See Richmond Newspapers, Inc., supra.* It may be limited to protect other interests.

When restrictions are sought in a criminal case, the trial court should require certain steps. The proponent of the ban must specify the reasons for and show cause for a limitation. If it is sought for the purpose of protecting a defendant's right to a fair trial, the evidence must demonstrate that there is a substantial likelihood that the presence of cameras will deny defendant a fair trial. However, if a limitation is sought to protect other interests, which involve important constitutional rights, a higher test should be required. The proponent of a ban should in that case prove that a "serious and imminent threat to some other important interest" exists.

Before placing [***9] restrictions on the media, some minimum form of notice should be given to the media and a hearing held. Anyone present should be given an opportunity to object. These proceedings should take place in advance of the date set for trial, if possible, to avoid delays and postponements. Short notice, proof by affidavits, abbreviated hearings are not precluded.

The court should weigh the competing interests of the defendant and the public and determine if the limitation sought would be effective in protecting the interests threatened and if it would be the least restrictive means available. The court is charged with the duty of considering all reasonable alternatives to limiting media coverage. *Sacramento Bee v. United States Dist. Court, 656 F.2d 477 (9th Cir. 1981).* Its consideration of these issues should be articulated in oral or written findings and conclusions in the record, but formal findings and conclusions are not necessary. The order must be no broader in application or duration than necessary to serve its purpose.

In deciding whether to exclude media coverage of a particular participant, the trial judge should require evidence sufficient to support a finding that [***10] such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media. This test is derived from *Petition of Post-Newsweek Stations, Florida, 370 So.2d 764 (Fla.1979),* and *State v. Palm Beach Newspapers, Inc., 395 So.2d 544 (Fla.1981).* In *Palm Beach Newspapers, 395 So.2d at 549,* the Florida Supreme Court stated:

> We also reiterate, however, that it remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable, but it is not indispensable.

2. *Mootness*.

Chapman argues that his trial is over and the issues raised here are now [*266] [**305] moot. It is not a function of this Court to give opinions on merely abstract or theoretical matters, but to settle actual controversies affecting the rights of the parties. A well-defined exception to the mootness rule is present here. Where the issues involved are of substantial public interest and are capable [***11] of repetition yet evading appellate review, this Court will decide the questions. *See Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).* The same important questions of media access will surely be raised again without there being an opportunity for a decision on appeal.

The issues, although moot in this case, will be addressed on their merits.

3. *Restraint on Publication of Jurors' Names*.

Judge Kaufman's order prohibited the release or publication of the names of prospective or selected jurors. However, the names of the jurors were read in open court and a jury list was filed in the district court clerk's office.

Chapman claims the restriction against publication of the jurors' names has only a minimal impact on First Amendment rights and is necessary to insure him a fair trial as guaranteed under the *Sixth Amendment to the United States Constitution*. The State made no objection to Judge Kaufman's order, and the State also expressed concern that there might be efforts to tamper with the jury, as had happened previously in another similar case. The judge considered and ruled out sequestration of the jury. Prior to their selection, the trial court advised the jurors that [***12] their names would not be published. Some jurors indicated apprehension about their names being known, and all jurors expressed their approval of preventing the media from publishing their names.

This is one of the many criminal trials arising out of the February 1980 prison riot at the state penitentiary at Santa Fe. Publicity has been high, not only locally but also nationally. The trial court sought to prevent jury tampering and allay any fears the jurors might have of reprisals by issuing a gag order on the Media. His rejections of the motion to sequester the jury was an implicit finding that the gag order was the best method to protect the jury and fulfill the defendant's right to a fair trial. In effect, the trial court partially closed the trial from the Media.

In *Richmond Newspapers, Inc., supra*, the United States Supreme Court ruled that sequestration of the jury during the trial should have been considered as an alternative to guard against the jurors' being subjected to any improper information. The Court held that "there exists in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness." *Id. 448 U.S. at* [***13] *581, 100 S.Ct. at 2830* (citations omitted). The Court said:

> Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.

Id. (footnote omitted). This case is somewhat different from ours, in that Judge Kaufman considered sequestration but ruled it out. *See In re United States ex rel. Pulitzer Pub. Co., 635 F.2d 676 (8th Cir. 1980).*

In *Nebraska Press Assn., supra*, the Court announced a three prong test to judge restraints on the media. For the purposes of applying that test to the facts of this case, we restate the three prongs as follows: (1) What is the nature and extent of the evil of publication? (2) Are there any alternatives to imposing a gag order? and (3) Were the means selected adequately tailored to accomplish the ends sought?

This test was applied in a case very similar to the one before us. [***14] In *Des Moines Register & Tribune v. Osmundson, 248 N.W.2d 493 (Iowa 1976)*, the Iowa Supreme Court considered whether a trial court could prevent

the media from publishing the [*267] [**306] names, addresses and telephone numbers of jurors when that information was public. The court first determined that there was no evidence in the record to support the view that the jurors feared reprisals during or after trial. Secondly, even if the jurors were afraid, the trial court failed to consider adequately other alternatives which would insulate the jurors from improper influence rather than imposing a gag order. And finally, the court found that the gag order was not adequately tailored to alleviate the jurors' fear of reprisals against them and their families by defendant or defendant's friends. The names, addresses, telephone numbers and physical identity of the jurors were a matter of public record. Consequently, the court held that the prior restraint on the media did not satisfy the *Nebraska Press Assn.* test. *See also* 2 A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 8-3.6(d)(ii) (2d ed. 1980).

Mere speculation that publishing the names of jurors might expose them [***15] to intimidation during the trial is not sufficient reason to justify a prior restraint on the Media. Thus, the first prong of the test in *Nebraska Press Assn., supra,* has not been met. Furthermore, since the names of the jurors were announced in open court and filed as a public record, the procedures failed the third prong of the test. Every citizen has a right to inspect public records, with certain well-defined exceptions. *§ 14-2-1, N.M.S.A.1978* (Cum.Supp.1981). There is no question that the jury list is a public record and that the Media was entitled to inspect and publish it. *See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).*

Thus, one of the problems with the gag order in this case is that the means selected by the trial judge to prevent intimidation were not carefully tailored to accomplish the ends sought. We hold that a prior restraint on publication of jurors' names must be based upon imperative circumstances supported by a record that clearly demonstrates that a defendant's right to a fair trial will be jeopardized and that there are no other reasonable alternatives to protect that right. *See State ex rel. Beacon Journal* [***16] *Pub. Co. v. Kainrad, 46 Ohio St.2d 349, 348 N.E.2d 695 (1976).* This record is deficient in that regard, and the trial judge was in error to exclude publication of the jurors' names.

4. *Photograph of Defendant*.

The trial court's order restricted the media from photographing Chapman in the "judicial complex". Chapman argues that the penitentiary riot and the trials arising out of it have received an enormous amount of publicity and that further public display of his picture would taint the public perception of him and prevent the empanelling of an impartial jury in this case as well as another case set for later trial. He also claimed that publication of his picture would taint any identification testimony.

The Media has always had the right in New Mexico to take photographs of defendants so long as they were not taken in the courtroom. Thus, the order extending the ban to other places in the judicial complex would be a retreat from our prior law. Our new Canon 3(A)(7) extends the rights of the media to take photographs even in the courtroom, unless the court finds good cause to prohibit them.

We said only recently in *Hubbard Broadcasting v. Allen,* No. 14,197 (N.M.S.Ct. [***17] March 17, 1982) that the good cause found by the judge must be supported in the record by such evidence as would lead the court to believe that the presence of cameras in the courtroom would result in an unfair trial for the defendant.

The generalized statements of Chapman in this case, that publishing his picture would taint the public's perception of him and prevent his having an impartial jury or would have some

indefinite effect on his identification, are neither substantial nor persuasive that he would not receive a fair trial. The trial court was in error in this regard and is reversed.

5. *Order to Preserve Tapes and Articles*.

The court ordered that all media representatives covering the trial "preserve articles, tapes or transcripts . . . until ten [*268] [**307] days after the verdict is rendered." Chapman advanced the novel notion that he has a right under the fair trial provision of the Sixth Amendment to have these articles preserved by the Media. He cites no authority that supports the theory, and we found none.

The United States Supreme Court has not considered the specific issue but has ruled in two cases that interference in or regulation of the manner [***18] in which a publisher conducts his business is not permissible. *Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974)*, dealt with a state statute requiring a newspaper to print a political candidate's reply to press criticism. *Columbia Broadcasting v. Democratic Comm., 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973)*, involved a requirement that a television station air paid political advertisements. The Court refused to allow the imposition of such requirements in both cases.

There was not sufficient evidence to establish that Judge Kaufman's order restraining the Media of its freedom to handle its records was a valid exercise of judicial power under any legal theory. We reverse the trial court on this issue.

IT IS SO ORDERED.

RAY TWOHIG, Attorney for Gordon House, GORDON HOUSE, and CAROLYN HOUSE, Petitioners, vs. THE HON. JAMES F. BLACKMER, Judge, Division II, District Court of the Second Judicial District, Bernalillo County, State of New Mexico, Respondent, and STATE OF NEW MEXICO, Real Party in Interest.

No. 22,704

SUPREME COURT OF NEW MEXICO

121 N.M. 746*; *1996 NMSC 23*; *918 P.2d 332*; *1996 N.M. LEXIS 174*; *35 N.M. St. B. Bull. 23

May 20, 1996, FILED

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COUNSEL: Adam G. Kurtz, Albuquerque, NM, Ray Twohig, P.C., Ray Twohig, Albuquerque, NM, for Petitioners.

Hon. Tom Udall, Attorney General, Donna L. Dagnall, Assistant Attorney General, Santa Fe, NM, for Respondent.

Hon. Robert M. Schwartz, District Attorney, Steven S. Suttle, Assistant Chief Deputy District Attorney, Albuquerque, NM, for Real Party in Interest.

JUDGES: RICHARD E. RANSOM, Justice. STANLEY F. FROST, Chief Justice, JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PAMELA B. MINZNER, Justice, concur.

OPINION BY: RICHARD E. RANSOM

OPINION

[*747] [***333] ORIGINAL SUPERINTENDING CONTROL PROCEEDING

OPINION

RANSOM, Justice.

[**1] Attorney Ray Twohig petitioned this Court for a writ of superintending control vacating a trial court order prohibiting all trial participants from communicating with the media about the third trial of Twohig's client, Gordon House. As grounds for his petition, Twohig claimed that this "gag order" impermissibly restricted his rights of free speech in violation of *Article II, Section 17 of the New Mexico Constitution* and our recently amended rule governing trial publicity, SCRA 1986, 16-306 (Repl. Pamp. 1995). We assumed jurisdiction over Twohig's petition under the *New Mexico Constitution, Article VI, Section 3* (providing that Supreme Court shall have power of superintending control over all inferior courts). *See* SCRA 1986, 12-504 (Cum. Supp. 1995) (establishing procedure for issuance of extraordinary writs). At a hearing held before us on March 22, 1995, we issued our writ vacating the order in question. In this opinion we explain the reasons for our earlier ruling and hold, in the absence of certain requisite findings of fact supporting a conclusion that a universal restriction of speech was necessary to meet a clear and present danger of infringing House's and the State's

right to a fair trial, the gag order issued here violated Article II, Section 17 and Rule 16-306.

[**2] *Facts and Proceedings.* The amount of publicity surrounding a fatal 1992 Christmas Eve accident and the three trials of House on vehicular-homicide charges well may be unprecedented in New Mexico. From the beginning it was made generally known that House had been involved in a wreck that claimed the lives of Melanie Cravens and her three daughters. It was also made known that when the accident occurred, House was driving at nighttime at a high rate of speed in the wrong direction on Interstate 40. *See* Steve Shoup, *Police Suspect Alcohol in Christmas Eve Wreck,* Albuquerque J., Dec. 26, 1992, at A1, A8. It was speculated that House had been drinking, *see id.*, and test results made public by the Albuquerque Police Department (APD) soon after the accident indicated that five hours after the fatal crash House had a blood alcohol level of 0.1 percent, *see* Robert Rodriguez, *Test Says House Legally Drunk,* Albuquerque J., Dec. 30, 1992, at A1.

[**3] Long before the first trial, prosecution and defense attorneys commented extensively in the media about the case and the issues presented by it. The strategies and opinions of the lawyers received early press coverage. An article appearing in the Albuquerque Journal quoted Twohig as saying "'experts will be used' to determine whether the signs on the Volcan offramp were confusing or insufficient." Patricia Gabbett Snow, *Officer: Pickup Sped Wrong Way 10 Miles,* Albuquerque J., Jan. 9, 1993, at A1, A3. In this same article, Chief Deputy District Attorney Alan Rackstraw was quoted to the effect that, although he would not release results of a blood sample taken from House by University Hospital staff members on the evening of the crash, "I don't deny that they are consistent with the tests from APD." *Id.*

[**4] Twohig attacked the blood-test results almost immediately. In an article appearing in the Navajo Times--a paper published in Window Rock, Arizona--Twohig hinted that "some important facts" in House's case had not been made public. Valerie Taliman, *Family Seeks Fair Justice,* Navajo Times, Jan. 14, 1993, at 1. He also stated that the blood-alcohol test taken by APD may not have been accurate because testing equipment at the APD lab was broken within a two-day period prior to testing and there was no proof that the instruments had been fixed. *Id.* at 3.

[*748] [**5] [***334] Another theme that surfaced early on was Twohig's contention that charges against his client were racially motivated. Prior to House's first trial, Twohig said, "I can tell you this, if Gordon House was not Native American and if the victims were not Anglos, despite tragedy, [this case] would not have received any where near the kind of media attention it has generated." *Id.* at 1. Further, commenting on the fact that a police report still had not been filed nearly three weeks after the accident, Twohig said, "It appears to me that the only reason the police department has not filed a report is that they are attempting to leak information selectively to press people in order to get their story before the public as effectively as possible." *Id.* at 3. He concluded that "the public and press have already convicted Gordon House and they've got the noose ready for him." *Id.*

[**6] Allegations of racial bias reached their zenith when District Attorney Robert Schwartz announced his intention to pursue first-degree depraved-mind murder charges against House. *See* Leslie Linthicum, *House May Face Murder Charges,* The Sunday J., Mar. 21, 1993, at A1. Explaining why the State had decided to pursue these charges, Schwartz stated that "the case [had] turned up 'information that takes us way beyond vehicular homicide.'" *Id.* He elaborated further, stating, "The big difference is we now have a report with all kinds of information we didn't have then. . . . It's not simply the raw fact of being in

the wrong lane of the freeway and going the wrong way. There's more." *Id.* at A5. Twohig disagreed, accusing the District Attorney of "prosecutorial overreaching." *Id.* at A1. In a separate article reporting the District Attorney's decision to add first-degree murder charges to charges of vehicular homicide and driving while intoxicated, Schwartz stated that "there is evidence that House had the opportunity to avoid the accident." Laura Bendix, *DWI Defense Denounces Murder Charges,* Albuquerque Trib., Mar. 22, 1993, at A1.

[**7] Following the jury's verdict in House's first trial--guilty of driving while intoxicated, hung jury on charges of reckless driving, vehicular homicide, and causing great bodily harm--there was extensive comment by the attorneys in the case and by relatives of the victims and of the defendant. Bob Milford, Melanie Cravens' father, said: "The system is flawed. A child could have figured it out. If they believed he was drunk and he was on the wrong side of the road, why doesn't the rest fall into place?" Leslie Linthicum, *DWI Only Guilty Count,* Albuquerque J., June 19, 1994, at A1, A14.

[**8] On November 23, 1994, after a second trial on charges of vehicular homicide had resulted in a hung jury, District Attorney Robert Schwartz announced his intention to try House for a third time. Ed Asher, *House Trial Ends in Hung Jury,* Albuquerque Trib., Nov. 23, 1994, at A1. When he made this announcement, Schwartz, echoing sentiments he had expressed following the first trial, stated that those members of the House jury who had voted to acquit could have done so only out of sympathy for House. Schwartz also stated that House should take responsibility for his actions.

[**9] In response to Schwartz's comments, Twohig wrote an article that was published in the Albuquerque Journal. Ray Twohig, *Justice Would Not Be Served by Third Trial for Gordon House,* Albuquerque J., Dec. 2, 1994, at A15. In that article Twohig wrote: "by trying to force the case to go to trial a third time, the district attorney continues to ignore his responsibility to seek justice in this case. Instead, he has adopted the lust for vengeance of some who speak for the Cravens, Woodard, and Milford families." Twohig also appeared as a guest on several radio talk shows. During these talk shows he responded to questions about issues of evidence and law presented at the first two trials and also responded to questions from citizen callers.

[**10] Soon after Twohig's newspaper article and radio talk-show appearances, the State filed a motion for an injunction prohibiting all attorneys, parties, and related persons "from making any comment in the media . . . regarding any substantive issue dealing with [the House] case." The ostensible purpose of this motion was to preserve the parties' right to a fair trial. Twohig filed a response in which he argued:

> [*749] [***335] The statements of the District Attorney have created a strong sentiment against the Defendant in the public arena.
>
> . . . .
>
> The attorney for the Defendant has a First Amendment right to speak about this case, which is unquestionably a matter of great public interest in New Mexico. Counsel for Defendant insists upon his right to speak in response to the misleading and inaccurate statements of the District Attorney and his assistants concerning this case.
>
> . . . .
>
> The Code of Professional Responsibility only restricts comment which is false or creates

> a clear and present danger of prejudicing the proceeding. SCRA 1986, 16-306 (Cum. Supp. 1994).

On December 16, 1994, the Honorable James F. Blackmer conducted a hearing on the State's motion. At this hearing Twohig introduced several newspaper articles and videotaped news broadcasts. Relying upon its inherent authority and citing the strictures in Rule 16-306 of the Rules of Professional Conduct, the court granted the State's motion. The resulting gag order prohibited counsel for both parties "from making any extrajudicial oral or written statement, comment, opinion, press release, letter or other communication to or through any media or public fora, . . . on any substantive matters or substantive issues of this case." The order also directed counsel to refrain from releasing motions and pleadings to the press without the court's prior approval.

[**11] *Rule 16-306 requires facts demonstrating a clear and present danger to the judicial process.* SCRA 1986, 16-306 (Repl. Pamp. 1995) provides that "[a] lawyer shall not make any extrajudicial . . . statement in a criminal proceeding that may be tried to a jury that the lawyer knows or reasonably should know . . . creates a clear and present danger of prejudicing the proceeding." The clear and present danger standard adopted in this rule is based upon the premise that "the well-being of the judicial, administrative and legislative systems, and of the larger society of which they are parts, requires a public informed of matters arising in law practice and of matters pertaining to proceedings of public interest." SCRA 16-306 cmt. As observed by the U.S. Supreme Court, "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell, 384 U.S. 333, 349, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966)* (quoting *In re Oliver, 333 U.S. 257, 268, 92 L. Ed. 682, 68 S. Ct. 499 (1948))*. As we explain below, to ensure that an appropriate balance is struck between rights of free speech and the interest in fair and impartial adjudication, any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements would pose a clear and present danger to the administration of justice.

[**12] *Constitutional underpinnings of Rule 16-306. Article II, Section 17 of the New Mexico Constitution* provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

By its terms, Article II, Section 17 protects the right of each person to disseminate his or her ideas on any number of subjects and prohibits legislation that restricts the right of free speech. Although Article II, Section 17 expressly prohibits only the legislature from abridging freedom of speech, "there is no reason why the courts [should] be given greater power" in this regard. *Blount v. T.D. Publishing Corp., 77 N.M. 384, 388, 423 P.2d 421, 424 (1966).* Therefore, the gag order issued by the trial court is subject to constitutional scrutiny.

[**13] An order such as the one issued here, which prohibits trial participants from speaking with anyone about the case, is a prior restraint. *See, e.g., Breiner v. Takao, 73 Haw. 499, 835 P.2d 637, 640-41 (Haw. 1992)* (analyzing as a prior restraint order which prohibited parties from talking with media about pending murder trial); *Kemner v. Monsanto Co., 112 Ill. 2d 223,* [*750] [***336] *492 N.E.2d 1327, 1336, 97 Ill. Dec. 454 (Ill. 1986)* (analyzing as a prior restraint order that prohibited all

communication between a party and the media about civil trial involving claims against chemical manufacturer); *Davenport v. Garcia, 834 S.W.2d 4, 9-11 (Tex. 1992)* (analyzing as a prior restraint order that prohibited trial participants from discussing pending civil suit outside of courtroom). A prior restraint requires special judicial attention. Thus we have observed that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *State ex rel. New Mexico Press Ass'n v. Kaufman, 98 N.M. 261, 264, 648 P.2d 300, 303 (1982)* (alteration in original) (quoting *Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971))*.

[**14] Nevertheless, a prior restraint is not unconstitutional per se. *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)*. Courts agree that, "in order to achieve the delicate balance between the desirability of free discussion and the necessity for fair adjudication, . . . a trial court can restrain parties and their attorneys from making extrajudicial comments." *Kemner*, 492 N.E.2d at 133-37. New Mexico's Rule 16-306 and similar provisions in effect in other states--" substantial likelihood" or "serious and imminent threat" of prejudicing a fair and impartial trial--are an articulation of the abstract considerations that go into striking this delicate balance. Various precedents of the United States Supreme Court and of the courts of other states have outlined the constitutional limitations on a court's power to impose speech restrictions on attorneys and other trial participants under particular factual circumstances. The thrust of prior-restraint cases in general, and of cases involving limitations on the speech of trial participants in particular, is that post-speech remedies are favored over prior restraints. *See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976)* (distinguishing criminal punishments for speech from prior restraints in case involving restrictive order entered against press); *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-15, 75 L. Ed. 1357, 51 S. Ct. 625 (1931)* (noting that punishment for libel or slander is permissible and preferable to system of prior restraint).

[**15] The U.S. Supreme Court decision in *Gentile v. State Bar of Nevada, 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991)*, underlies the analysis in most attorney political speech cases decided in recent years. Writing for the Court, Chief Justice Rehnquist noted that "membership in the bar is a privilege burdened with conditions." *Id. at 1066* (quoting *In re Rouss, 221 N.Y. 81, 116 N.E. 782, 783 (N.Y. 1917), cert. denied, 246 U.S. 661, 62 L. Ed. 927, 38 S. Ct. 332 (1918))*. Reasoning that "the outcome of a criminal trial is to be decided by impartial jurors . . . based on material admitted into evidence before them in a court proceeding," *id. at 1070*, and that, "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice," *id. at 1074* (alteration in original) (quoting *Nebraska Press Ass'n, 427 U.S. at 601 n.27* (Brennan, J., specially concurring)), the Court held that the "substantial likelihood" standard adopted by Nevada was sufficient to safeguard constitutionally protected speech, *id. at 1075*. The Court nevertheless held that the Nevada disciplinary rule was void for vagueness because under Section 177(3) of the Nevada disciplinary rule an attorney could "state without elaboration . . . the general nature of the . . . defense" notwithstanding express prohibitions contained in subsections (1) and (2) of Section 177. *Id. at 1048*. Thus, because Section 177(3) failed to provide adequate guidance as to what statements were permissible and what statements were not,

sanctions were improper against an attorney who had asserted that the state had sought indictment of an innocent man and had not "been honest enough to indict the people who did it; the police department, crooked cops." *Id. at 1034*.

[*751] [**16] [***337] After *Gentile* was decided, this Court amended the New Mexico disciplinary rule governing pretrial publicity. Our rule adopted the "clear and present danger" standard, which differs semantically from the "substantial likelihood of material prejudice" standard that the U.S. Supreme Court found constitutionally adequate as a general formulation of the test for permissible restrictions on attorney speech. *Gentile* and the precedents upon which it relies make clear, however, that whatever particular articulation of the test is adopted, the essential inquiry remains unchanged: "a court [must] make its own inquiry into the imminence and magnitude of the danger said to flow from [a] particular utterance and then . . . balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Gentile, 501 U.S. at 1036* (plurality opinion) (quoting *Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978))*. Further, the inquiry is the same regardless of whether a court is analyzing the constitutionality of a gag order, *see Nebraska Press Ass'n, 427 U.S. at 562-69* (striking down order prohibiting press from publishing confessions and admissions of defendant as well as other facts "strongly implicative" of defendant), considering the propriety of disciplinary action, *see Gentile, 501 U.S. at 1048-51* (proposed sanctions), or determining whether pretrial publicity was so pervasive as to deprive a criminal defendant of a fair trial, *see Sheppard, 384 U.S. at 363* (remanding for new trial). Thus when analyzing whether the gag order issued here was appropriate, we legitimately may resort to each of these three types of cases.

[**17] *Cases considering gag orders.* Our research has uncovered about an equal number of cases upholding and striking down gag orders. A close examination of the factual circumstances underlying the courts' conclusions in these cases should aid members of the bar in determining the type of statements that will support a gag order and those that will not. From these cases emerge five considerations that the trial court specifically must address prior to the issuance of any gag order: what may not be said, when it may not be said, where it may not be said, who may not say it, and whether alternatives less restrictive of free speech than an outright ban would suffice to alleviate any prejudice caused by further speech.

[**18] *Cases upholding gag orders.* In *Levine v. United States District Court, 764 F.2d 590, 600-01 (9th Cir. 1985), cert. denied, 476 U.S. 1158, 90 L. Ed. 2d 719, 106 S. Ct. 2276 (1986),* the Ninth Circuit concluded that there were sufficient facts to justify entry of a gag order to safeguard the defendant's right to a fair trial, although it struck down as overbroad the particular gag order in that case. *Levine* involved a highly publicized espionage trial in which the defendant, a former special agent with the Federal Bureau of Investigation, was charged with passing classified documents to two Russian emigres. *Id. at 591*. While the trial of the Russians was proceeding and before trial of the FBI agent had begun, an attorney for the former, commenting on the government's decision to drop four counts of aiding and abetting espionage, stated: "The dismissal of these charges means the government has now conceded that no documents were ever passed. It's also a concession that there's been no damage to national security." *Id. at 592* (quoting William Overend, *Lawyers Contend FBI Exaggerated Evidence in Spy Case,* L.A. Times, Mar. 3, 1985, pt. 1., at 3). Attorneys for the FBI agent were characterized as agreeing with this assessment, stating, "To a large

extent, the FBI misled the U.S. attorney's office about the strength of the case until it was too late." *Id.* The attorneys also added comments of their own.

> The only reason [our client] is still charged with passing documents is that he admitted it alter five days of questioning, and he'd already told them he'd say anything just to end the questioning.
>
> If he had admitted passing pumpkin papers from the Alger Hiss case, I think he'd be charged with it.

Id. Following publication of this article and upon the government's motion, the district court issued a restraining order prohibiting the attorneys from talking to the media about "any aspect of [the] case that bears [*752] [***338] upon the merits to be resolved by the jury." *Id. at 593*.

[**19] After concluding that the trial court's order was properly characterized as a prior restraint, *id. at 595*, the Ninth Circuit went on to analyze whether there were sufficient facts to justify the trial court's conclusion that further extrajudicial statements would pose "a serious and imminent threat to the administration of justice," *id. at 597*. In its recitation of the facts, the Ninth Circuit noted that lawyers for the defendant had indicated to the court that they might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom." *Id. at 592*. Of particular importance to the Ninth Circuit was the fact that the defense attorneys had chosen to directly attack the prosecution's case in the media "*during, or immediately before, trial.*" *Id. at 598* (emphasis added). Quoting from the trial court's findings, the Ninth Circuit agreed that "neither the press nor the public has the right to hear counsel argue their case prior to this court and the impanelled jury hearing the evidence." *Id. at 597*. Finally, the court stated that "while we have focused on the article in the *Los Angeles Times*, it is apparent that this case has received widespread publicity. The district court found that the level of publicity would increase as the trial approached. We conclude that the district court's findings in this regard were appropriate." *Id. at 598*.

[**20] Similarly, in *United States v. Tijerina, 412 F.2d 661, 666* (10th Cir.), *cert. denied, 396 U.S. 990, 24 L. Ed. 2d 452, 90 S. Ct. 478 (1969)*, the Tenth Circuit upheld a gag order because of the "'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." In that case the defendants had made public statements to large groups. Among these statements was a boast that one of the defendants had "told the witnesses what to say and what to do." *Id. at 665*. This defendant had also charged that the judge in his case was "using the law to take vengeance and drink blood and humiliate our race." *Id.* A codefendant had said that "the United States has declared that he and his co-defendants 'are criminals and that it was going to try [them] and put [them] to death.'" *Id. at 665-66*. Finally, the first defendant had "urged a 'march around the court house'," while his codefendant suggested "a scorched earth policy." *Id. at 666*. The Tenth Circuit concluded that such statements made "*while [the] criminal trial was pending* [were] not compatible with the concept of a fair trial." *Id.* (emphasis added); *see also In re Russell, 726 F.2d 1007, 1010* (4th Cir.) (upholding trial court order prohibiting potential witnesses in a criminal case from discussing their proposed testimony with members of the media because of "tremendous publicity[,] the potentially inflammatory and highly prejudicial statements . . ., and the relative ineffectiveness of the *considered* alternatives" (emphasis added)), *cert. denied,*

469 U.S. 837, 83 L. Ed. 2d 74, 105 S. Ct. 134 (1984); *In re San Juan Star Co. (Soto v. Barcelo), 662 F.2d 108, 116-17 (1st Cir. 1981)* (upholding district court order insofar as it prohibited disclosure of deposition contents to press in a pending civil rights action arising out of the shooting of two alleged terrorists because "the *community had been fully saturated'* by . . . reports of the proceedings" and because "Puerto Rico is singularly *unsuited to a change of venue*" (emphasis added)).

[**21] *Cases striking down gag orders. Breiner v. Takao, 73 Haw. 499, 835 P.2d 637, 639 (Haw. 1992),* involved the fourth retrial of a defendant charged with murdering his infant son. In that case, upon a prosecution motion made after advisory counsel for defendant had been seen talking to a reporter, the trial court had issued an order prohibiting the attorneys and the defendant "from making any extrajudicial statement to any member of the media relating to the trial, parties, or issues in the trial." *Id. at 640*. After noting that "extrajudicial statements of attorneys may be subject to prior restraint by a trial court upon a demonstration that the activity restrained poses a serious and imminent threat to a defendant's right to a fair trial," *id. at 641*, the Hawaii Supreme Court concluded that the trial court's order was "constitutionally impermissible," *id. at 642*. The court based its conclusion upon the fact that "the record is devoid of any evidence showing that [advisory counsel for the defendant] [*753] [***339] made any statements to the media regarding the trial." *Id.* (emphasis added). Further, the court noted that the *trial court had made no findings* indicating that a gag order was the least restrictive alternative. *Id.*

[**22] In *Kemner, 492 N.E.2d at 1328*, the Illinois Supreme Court considered the propriety of a gag order issued in twenty-two consolidated cases involving claims for injuries and property damage resulting from exposure to dioxin following a train derailment. About a month after the trial had started, the National Institute of Occupational Safety and Health (NIOSH) held a press conference in St. Louis, Missouri, at which officials announced that a former truck driver had developed a rare form of cancer possibly linked to dioxin exposure at three separate St. Louis trucking terminals. *Id. at 1331*. In response to this news conference, and while the case against it was proceeding in St. Clair County, Illinois, Monsanto (the defendant corporation) issued a press release in which it stated:

> We have no involvement in the truck terminal issue per se. But we are currently a defendant in a lawsuit in St. Clair County, Illinois, in which several residents of Surgeon, Mo., claim they are suffering or will in the future suffer health problems from alleged exposure to dioxin stemming from a 1979 train derailment and chemical spill.
>
> The jury, which is presently hearing this case, is *not* sequestered, i.e., they are free to view and listen to local news reports. Obviously we're concerned that the jurors may have heard or read some of the exaggerated NIOSH pronouncements stemming from the March 1 news conference . . . . We . . . hope that by calling your attention to the basic facts that relate specifically to the March 1 NIOSH

> announcement, we can sensitize you to the need to be careful, responsible and accurate in the way dioxin subjects are reported in the future. *Id.* Soon after this press release, an article appeared in the *Belleville News Democrat* entitled "Monsanto Takes Aim at Government Report." *Id.* This article discussed the NIOSH news conference, the information contained in Monsanto's press release, and the St. Clair County litigation. *Id.*

[**23] The Illinois Supreme Court stated that, to withstand constitutional scrutiny, the gag order would have to "fit within one of the narrowly defined exceptions to the prohibition against prior restraints," such that disclosure of further information about the pending litigation would substantially affect the parties' right to a fair trial. *Id. at 1336.* An Illinois appellate court had upheld the gag order, relying on the fact that Monsanto had in its press release specifically referred to the St. Clair County litigation as its rationale for providing information to the press and had noted its vested interest in ensuring that jurors in that litigation were not given a biased view of the effects of dioxin. *Id. at 1337.* On this basis the appellate court concluded that Monsanto had distributed the press release with the intent to influence jurors. *Id.* The Illinois Supreme Court disagreed with the lower court and held that there were insufficient facts to sustain the gag order. *Id.* The court specifically noted that the *plaintiffs had not demonstrated that any juror had even read* the *Belleville News Democrat* story, concluding that mere "possibilities" were insufficient to justify a prior restraint.

[**24] Finally, in *Chase v. Robson, 435 F.2d 1059, 1061-62 (7th Cir. 1970)* (per curiam), the Seventh Circuit Court of Appeals issued a writ of mandamus striking down a pretrial order that prohibited attorneys and defendants in a pending criminal trial from making any public statements regarding the case. The court held that "whether approached on its individual bases or construed as a whole, [the order] is devoid of sufficient findings to satisfy either the 'clear and present danger' or 'reasonable likelihood' tests of a 'serious and imminent threat to the administration of justice.'" *Id. at 1061*. The facts in *Chase* were set out by the district court in *United States v. Chase, 309 F. Supp. 430 (N.D. Ill. 1970), mandamus granted and appeal dismissed sub nom. Chase v. Robson, 435 F.2d 1059. Chase* involved the indictment of several defendants for allegedly destroying government records and hindering the administration [*754] [***340] of the Military Selective Service Act. *Id. at 432*. The trial court had based its restrictive order on the observation that the defendants had sought publicity by contacting the press and issuing press releases. The court relied upon accounts in articles the defendants had appended to a motion for a continuance. Even though the majority of the articles reviewed by the court appeared in newspapers published outside the Northern District of Illinois, and although the last article involving the defendants was published almost one year before the projected beginning of the trial, the trial court concluded that an order prohibiting communication with the media by trial participants was necessary. *Id. at 437*. In justifying its order, the court also noted the association of one defense counsel

with an attorney not involved in the case but whom the trial judge considered to have "repeatedly and brazenly transgressed the local rules" regarding extrajudicial statements. *Id. at 436*.

[**25] The Seventh Circuit concluded that newspaper articles that had been *published outside the jurisdiction* more than *seven months before the gag order was issued* and association by one of defendant's counsel with another attorney not involved in the pending criminal matter were irrelevant. *Chase, 435 F.2d at 1061* & n.1. While the Seventh Circuit agreed that cases should be tried in the courts rather than in the media, it did not agree that the trial court had found specific facts sufficient to justify a complete ban on all further speech. *Id. See also Davenport v. Garcia, 834 S.W.2d 4, 10, 11 (Tex. 1992)* (holding that there must be "specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm," and striking down gag order because it *failed to identify* any miscommunication, did not indicate any specific harm to the judicial process, and did not indicate why any harm caused by further statements could not be remedied by less drastic measures).

[**26] *The findings in this case did not warrant imposition of a gag order.* The gag order issued in this case contains no specific findings to support the generalized conclusion that "extrajudicial statements . . . must be restricted by this Court to protect the RIGHT of BOTH the Defendant AND the citizenry of New Mexico to fair and impartial JURY trial(s)." The court nowhere laid out the factual foundation for finding a substantial likelihood of prejudice or clear and present danger to a fair and impartial trial. The order merely draws the conclusion that "Counsel for both sides have made numerous extrajudicial statements to the media and in public fora which they knew--or reasonably should [have known--will have a SUBSTANTIAL LIKELIHOOD of MATERIALLY PREJUDICING . . . JURY trial(s) in this case." The order does not contain any analysis of the facts supporting the court's conclusion that a gag order was necessary. Nor does the order indicate that the court considered alternatives less restrictive of free speech rights than an outright ban on all communication with the media--what may not be said, when it may not be said, where it may not be said, who may not say it, and why less restrictive alternatives would not suffice.

[**27] Unlike the defendant in *Sheppard,* House was not to be tried where a majority of the publicity was generated. News stories published at the time of jury selection in House's first trial suggest that despite the tremendous amount of publicity the case had received in Albuquerque, residents of Taos, where House's first and second trials were held, knew almost nothing about the case. *See* Ed Asher, *Gordon House? Who's That? Taos Asks,* Albuquerque Trib., June 7, 1994, at A1. Further, the court, attorneys for the State, and attorneys for House had used another tool to combat potential prejudice caused by pretrial publicity--extensive voir dire--which also was available for use in the third trial. Jurors in House's first trial were selected from a venire of ninety persons. These ninety persons were questioned at length about their opinions on drinking and driving, migraine headaches, possible prejudices against Native Americans, and what they knew and thought about Gordon House. Leslie Linthicum, *Potential House Jurors Questioned,* Albuquerque J., June 7, 1994, at C3.

[*755] [**28] [***341] *Conclusion.* We conclude that to have allowed the gag order to stand in the face of a complete lack of factual findings to support the conclusion that such an order was necessary to preserve the parties'

right to a fair trial would have done serious injustice to the principle that post-speech remedies are favored over prior restraints. For the foregoing reasons we issued our writ of superintending control vacating the gag order entered by the trial court.

[**29] IT IS SO ORDERED.

RICHARD E. RANSOM, Justice

WE CONCUR:

STANLEY F. FROST, Chief Justice

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PAMELA B. MINZNER, Justice

SUPREME COURT GENERAL RULES

N.M. S. Ct. R. 23-107 (2013)

23-107 Broadcasting, televising, photographing and recording of court proceedings; guide lines

The broadcasting, televising, photographing and recording of court proceedings in the Supreme Court, Court of Appeals, district and metropolitan courts of the State of New Mexico are hereby authorized in accordance with the guidelines promulgated herewith which contain safeguards to ensure that this type of media coverage shall not detract from the dignity of the court proceedings or otherwise interfere with the achievement of a fair and impartial hearing.

GUIDELINES:

A. Discretion of judges. Live coverage of proceedings shall not be limited by the objection of counsel or parties, except that the court reserves to the individual courts the right to limit or deny coverage for good cause.

(1) Media coverage in the courts is subject at all times to the authority of the judge or judges to:

(a) control the conduct of the proceedings before the court;

(b) ensure decorum and prevent distractions; and

(c) ensure fair administration of justice in the pending cause.

(2) The presiding district judge has sole and plenary discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses and juveniles.

(3) Neither the jury nor any member of the jury may be filmed in or near the courtroom, nor shall the jury selection process be filmed.

(4) The judge has discretionary power to forbid coverage whenever the judge is satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial.

(5) Audio pickup, broadcast or recording of a tender of evidence offered by a party for the purpose of determining admissibility made before the judge out of the hearing of the jury is not permitted.

(6) Audio pickup, broadcast, photography, televising or recording of a conference in the courtroom between members of the court, court and counsel, co-counsel or counsel and client is not permitted.

B. Notice. The broadcasters, photographers and recorders shall notify the clerk of the particular court at least twenty-four (24) hours in advance of coverage of their desire to cover the trial. Each trial judge may, in the judge's discretion, lengthen or shorten the time for advance notice for coverage of a particular trial.

C. Decorum. The decorum and dignity of the court, the courtroom and the proceedings must be maintained at all times. Court customs must be followed, including appropriate attire. Movement in the courtroom shall be limited, except during breaks or recess. The changing of tapes, film magazines, film and similar actions during the proceedings shall be avoided.

D. Standards. The media shall maintain high journalistic standards regarding the fairness, objectivity and quality of the coverage allowed under these guidelines.

E. Equipment and personnel. Unless otherwise agreed upon by the court, equipment and personnel within the courtroom or hearing room shall be limited as follows:

(1) All equipment shall be operated behind the rail.

(2) Not more than one portable television camera operated by not more than one camera person shall be permitted. Only natural lighting shall be used. Cameras shall be quiet and shall be placed and operated as unobtrusively as possible within the courtroom at a location approved by the court. The cameras shall be in place at least fifteen (15) minutes before the proceedings begin.

(3) Not more than two audio systems shall be permitted. All running wires shall be securely taped to the floor. Multiple radio feeds shall be provided by a junction box.

(4) Not more than two still photographers, utilizing not more than one still camera each, shall be permitted. The cameras must not produce any distracting sounds. Only natural lighting shall be used. Still photographers shall remain in one place during the proceedings, but they may shift positions during breaks or recess.

(5) Tape recorders may be used by members of the media, so long as they do not constitute a distraction during the proceedings.

(6) Any pooling arrangements necessary shall be the sole responsibility of the media and must be concluded prior to coverage without calling upon the court to mediate any dispute regarding appropriate media and personnel.

F. Inapplicability to individuals. The privileges granted by these rules may be exercised only by persons or organizations that are part of the news media.

G. Objections limited.

(1) An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any news media persons or organization seeking to exercise a privilege conferred upon them by these rules, any order or ruling of any judge under these rules.

(2) Any party may request, or object to, cameras in the courtroom by written motion, which may be supported by affidavits, which motion shall be filed not later than fifteen (15) days prior to trial. No other evidence shall be presented.

The trial court shall consider the motion and grant or deny the same. The trial judge shall state the judge's reasons for the judge's ruling on the record.

H. Impermissible use of media material. None of the film, videotape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceeding.

I. Other courts. The broadcasting, televising, photographing and recording of court proceedings in courts other than the appellate, district and metropolitan courts of New Mexico is prohibited.

[As amended, effective September 1, 1989; August 17, 1999.]

RULES OF EVIDENCE

Rule 11-514 NMRA

11-514. News media-confidential source or information privilege.

A. **Definitions.** Unless a different meaning clearly appears from the context of this rule, as used in this rule:

(1) a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional news media services or those reasonably necessary for the transmission of the communication;

(2) "in the course of pursuing professional activities" does not include any situation in which a news media person participates in any act involving physical violence, property damage or criminal conduct;

(3) "news" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged or employed by a news media and so procured or obtained while such required relationship is in effect;

(4) "newspaper" means a news service that is printed or distributed electronically and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest;

(5) "news agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters;

(6) "news media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public;

(7) "magazine" means a publication containing news which is published and distributed periodically;

(8) "press association" means an association of newspapers or magazines formed to gather and distribute news to its members;

(9) "wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

B. **General rule of privilege.** A person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose:

(1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities; and

(2) any confidential information obtained in the course of pursuing professional activities.

The provisions of this rule insofar as it relates to radio stations shall not apply unless the radio station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one hundred eighty (180) days from the date of an actual broadcast, an exact recording, transcription, or certified written transcript of the actual broadcast.

The provisions of this rule insofar as it relates to television stations shall not apply unless the television station maintains and keeps open for inspection by a person affected by the broadcast, for

a period of at least one year from the date of an actual telecast, an exact recording, transcription, kinescope film or certified written transcript of the actual telecast.

C. **Exception.** There is no privilege under this rule in any action in which the party seeking the evidence shows by a preponderance of evidence, including all reasonable inferences, that:

(1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;

(2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;

(3) the confidential information or source is crucial to the case of the party seeking disclosure; and

(4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

D. **Procedure.** If a person defined in Paragraph B claims the privilege granted, and the court is asked to determine whether the exception applies, a hearing shall be held in open court, to consider all information, evidence or argument deemed relevant by the court. If possible, the determination of whether the exception applies, shall be made, without requiring disclosure of the confidential source or information sought to be protected by the privilege.

If it is not possible for the court to make a determination of whether the exception applies, without the court knowing the confidential source or information sought to be protected, the court may issue an order requiring disclosure to the court alone, in camera.

Following the in camera hearing the court shall enter written findings of fact and conclusions of law, without disclosing any of the matters for which the privilege is asserted, and a written order directing that disclosure either shall or shall not be made to the party seeking disclosure.

Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court, in the event of an appeal, and the contents shall not otherwise be revealed without the consent of the person asserting the privilege.

All counsel and parties shall be permitted to be present at every stage of the proceedings under this rule, except at the in camera hearing, at which no counsel or party, except the person asserting the privilege, and counsel for that person, shall be permitted to be present.

Any order requiring an in camera disclosure or ordering or denying disclosure may be appealed by any party or by the person asserting the privilege, if not a party, in the procedural manner provided by the Rules of Appellate Procedure.

[Adopted, effective November 1, 1982; as amended, effective December 1, 1993.]

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS
ARTICLE 9. DISTRICT COURTS

N.M. Dist. Ct. R.C.P. 1-079 (2013)

1-079 Public inspection and sealing of court records

A. **Presumption of public access; scope of rule**. Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions**. For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) "lodged" means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) "public access" means the inspection and copying of court records by the public; and

(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access**. In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of *Section 32A-5-8 NMSA* 1978;

(2) proceedings to detain a person commenced under *Section 24-1-15 NMSA* 1978;

(3) proceedings for testing commenced under *Section 24-2B-5.1 NMSA* 1978;

(4) proceedings commenced under the Adult Protective Services Act, *Sections 27-7-14 to 27-7-31 NMSA* 1978;

(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in *Section 43-1-19 NMSA* 1978;

(6) wills deposited with the court pursuant to *Section 45-2-515 NMSA* 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in *Section 45-2-515 NMSA* 1978;

(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person subject to the disclosure requirements of Subsection I of *Section 45-5-303 NMSA* 1978; and

(8) proceedings commenced for the appointment of a conservator subject to the disclosure requirements of Subsection M of *Section 45-5-407 NMSA* 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order

D. ***Protection of personal identifier information.***

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. **Motion to seal court records required**. Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member

of the public may file a motion for an order sealing the court record. Any party or member of the public may file a response to the motion to seal. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records**. A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 1-008.1 and 1-010 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal.**

(1) Court records sealed in the magistrate, metropolitan, or municipal court that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the

particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. Failure to comply with sealing order. Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order 10-8300-023, temporarily suspending Paragraph D for 90 days effective August 11, 2010; as amended by Supreme Court Order 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; as amended by Supreme Court Order 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.]

COMMITTEE COMMENTARY. --This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g., NMSA 1978, § 7-1-4.2(H)* (providing for confidentiality of taxpayer information); *NMSA 1978, § 14-6-1(A)* (providing for confidentiality of patient health information); *NMSA 1978, § 24-1-9.5* (limiting disclosure of test results for sexually transmitted diseases); *NMSA 1978, § 29-10-4* (providing for confidentiality of certain arrest record information); *NMSA 1978, § 29-12A-4* (limiting disclosure of local crime stoppers program information); *NMSA 1978, § 29-16-8* (providing for confidentiality of DNA information); *NMSA 1978, § 31-25-3* (providing for confidentiality of certain communications between victim and victim counselor); *NMSA 1978, § 40-8-2* (providing for sealing of certain name change records); *NMSA 1978, § 40-6A-312* (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); *NMSA 1978, § 40-10A-209* (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); *NMSA 1978, § 40-13-7.1* (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); *NMSA 1978, § 40-13-12* (providing for limits on internet disclosure of certain information in domestic violence cases); *NMSA 1978, § 44-7A-18* (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the

court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal". If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as *Sealed Pleading* or *In the Matter of a Sealed Case,* and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the

court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

THE 2011 AMENDMENT, effective February 7, 2011, in C, deleted C(1) which formerly read: "proceedings commenced under the Uniform Parentage Act, *Sections 40-11-1 to 40-11-23 NMSA* 1978" and redesignated the remaining paragraphs accordingly; and rewrote D.

EDITOR'S NOTES. --Pursuant to court order 10-8300-004 dated February 24, 2010, this rule is effective for all court records filed on or after July 1, 2010. Pursuant to Supreme Court Order 10-8300-023, effective August 11, 2010, Paragraph D of Rule 1-079 NMRA, relating to protection of personal identifier information, was suspended for ninety days, beginning August 11, 2010 until

November 9, 2010. Pursuant to Supreme Court Order 10-8300-037, the temporary suspension of Paragraph D was extended an additional ninety days until February 7, 2011. Pursuant to Supreme Court Order 11-8300-006, effective February 7, 2011, this rule is effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.

CHAPTER 15. ADMINISTRATION OF GOVERNMENT
ARTICLE 7. RISK MANAGEMENT DIVISION

N.M. Stat. Ann. § 15-7-9 (2012)

§ 15-7-9. Confidentiality of records; penalty

A. The following records created or maintained by the risk management division are confidential and shall not be subject to any right of inspection by any person not a state officer, member of the legislature or state employee within the scope of his official duties:

(1) records pertaining to insurance coverage; provided any record of a particular coverage shall be available to any public officer, public employee or governmental entity insured under such coverage; and

(2) records pertaining to claims for damages or other relief against any governmental entity or public officer or employee; provided such records shall be subject to public inspection by New Mexico citizens one hundred eighty days after the latest of the following dates:

(a) the date all statutes of limitation applicable to the claim have run;

(b) the date all litigation involving the claim and the occurrence giving rise thereto has been brought to final judgment and all appeals and rights to appeal have been exhausted;

(c) the date the claim is fully and finally settled; or

(d) the date the claim has been placed on closed status.

B. Records protected pursuant to Subsection A of this section shall be made available as necessary for purposes of audit or defense. Any person performing such audit or providing such defense shall keep such records confidential, except as required otherwise by law.

C. Any person who reveals records protected pursuant to Subsection A of this section to another person in violation of this section is guilty of a misdemeanor and shall, upon conviction, be fined not more than one thousand dollars ($ 1,000). The state shall not employ any person so convicted for a period of five years after the date of conviction.

HISTORY: 1978 Comp., § 15-7-9, enacted by Laws 1981, ch. 280, § 1.

CHAPTER 34. COURT STRUCTURE AND ADMINISTRATION
ARTICLE 1. GENERAL PROVISIONS

N.M. Stat. Ann. § 34-1-1 (2012)

§ 34-1-1. Court sessions to be public

Except as provided in the Children's Code [*32A-1-1 NMSA* 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.

HISTORY: Laws 1851, p. 142; C.L. 1865, ch. 27, § 1; C.L. 1884, § 663; C.L. 1897, § 1037; Code 1915, § 1356; C.S. 1929, § 34-103; 1941 Comp., § 16-101; 1953 Comp., § 16-1-1; Laws 1972, ch. 97, § 46.