

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

March 16, 2016 • Volume 55, No. 11



Day Work by Joan McMahon

Lea County Museum Art Gallery

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—SPECIAL INSERT—
CLE Planner



The **New Mexico State Bar Foundation** would like to welcome our new Development Director **Stephanie Wagner**. Stephanie comes to us with a background in marketing and sales. Stephanie will be responsible for building and executing the State Bar Foundation's development plan and directing all fundraising and friend-raising activities. She will be overseeing the implementation and execution of all Foundation events. Stephanie has a fresh, new and positive approach to our fundraising. We are confident that Stephanie's new ideas will help revitalize the State Bar Foundation.

The **State Bar Foundation** is the charitable arm of the State Bar of New Mexico representing the legal community's commitment to serving the people of New Mexico and the profession. The goals of the Foundation are to:

- *Enhance* access to legal services for underserved populations
- *Promote* innovation in the delivery of legal services
- *Provide* legal education to members and the public



Did you know that in the last five years the State Bar Foundation provided the following services to our community and members?

For Our Community

- Provided direct legal assistance to approximately **22,500** seniors statewide.
- Sponsored **250** workshops statewide on as debt relief/bankruptcy, divorce, wills, probate, long term care Medicaid and veteran's issues.
- Helped more than **10,000** New Mexicans statewide find an attorney.
- Distributed **\$1.716 million** for civil legal service programs throughout New Mexico.
- Introduced more than **800** high school students to the law through the Student Essay Contest.
- Provided more than **25,000** pocket Constitutions and instruction by volunteer attorneys to New Mexico students statewide.

For Our Members

- Lawyer referral programs helped members meet new clients and accumulate pro bono hours with more than **10,000** referrals to the private bar, **1,600** prescreened by staff attorneys.
- Provided more than **100,000** credit hours of affordable continuing legal education.
- In 2016, the Foundation will launch **Entrepreneurs in Community Lawyering**, a solo and small firm legal incubator.

The State Bar Foundation Relies on the *Passion* of Lawyers!



For more information, contact Stephanie at
505-797-6007 • swagner@nmbar.org



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Meetings

March

- 16**
Family Law Section BOD,
 9 a.m., teleconference
- 18**
Indian Law Section BOD,
 9:30 a.m., State Bar Center
- 18**
Trial Practice Section BOD,
 Noon, State Bar Center
- 22**
Senior Lawyers Division BOD,
 4 p.m., State Bar Center
- 24**
Natural Resources, Energy and Environmental Law Section BOD,
 Noon, teleconference
- 25**
Immigration Law Section BOD,
 Noon, State Bar Center
- 26**
Young Lawyers Division BOD,
 10 a.m., State Bar Center

State Bar Workshops

March

- 16**
Family Law Clinic:
 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 23**
Consumer Debt/Bankruptcy Workshop:
 6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

April

- 1**
Civil Legal Clinic:
 10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861
- 1**
Civil Legal Clinic:
 10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861
- 6**
Divorce Options Workshop:
 6–8 p.m., State Bar Center, Albuquerque, 505-797-6003
- 6**
Civil Legal Clinic:
 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

Cover Artist: Joan McMahon seeks to capture the joy she experiences in sharing her life with an extended family of animal members. Her watercolors radiate the inner light of her subject animals. Joan decided that her artwork should "pay it forward" for the animals that inspire it. With the sales of her art Joan donates to animal rescue and welfare organizations. More of her work can be viewed at www.joansart.com.

Notices

COURT NEWS

New Mexico Supreme Court Proposed Amendments to Rules of Practice and Procedure

Several Supreme Court Committees are considering whether to recommend for the Supreme Court's consideration proposed amendments to the rules of practice and procedure summarized in the March 16 issue of the *Bar Bulletin* (Vol. 55, No. 10). To view and comment on the proposed amendments summarized below before they are submitted to the Court for final consideration, submit comments electronically through the Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505-827-4837, or by mail to Joey D. Moya, Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848.

Comments must be received by the Clerk on or before April 6 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court's website for public viewing.

New Mexico Board of Bar Examiners Services for Attorneys

The New Mexico Board of Bar Examiners provides the following services to New Mexico attorneys: duplicate licenses; certification of bar application and examination dates, bar passage, MPRE scores, and admission dates; copies of bar applications; and reinstatement applications. Attorneys must request their own file documents and certifications; these items are not available to the general public. For information and fees, visit <http://nmexam.org/attorney-services/>.

New Mexico Commission on Access to Justice March Meeting

The next meeting of the New Mexico Supreme Court Commission on Access to Justice is noon–4 p.m., March 18, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.nmbar.org > for Public > Access to Justice.

New Mexico Court of Appeals 50th Anniversary Celebration

Join the New Mexico Court of Appeals in celebrating its 50th Anniversary at an

Professionalism Tip

With respect to opposing parties and their counsel:
I will not make improper statements of fact or of law.

open house reception from 4–6 p.m., April 1, at the Pamela B. Minzner Law Center. R.S.V.P. to the COA Clerks' Office at 505-841-4618 or by email to Aletheia.Allen@coaava.nmcourts.gov by March 25. Parking is available in the L lot only.

Fifth Judicial District Court Retirement Celebration for Judge Steven L. Bell

The judges and employees of the Fifth Judicial District Court invite members of the legal community to attend a retirement ceremony for the Hon. Steven L. Bell. The celebration will be at 3 p.m., March 25, at the Chaves County Courthouse, Historic Courtroom 1. A reception will follow on the first floor of the courthouse in the historic rotunda.

Ninth Judicial District Court Notice of Exhibit Destruction

The Ninth Judicial District Court, Roosevelt County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) All unmarked exhibits, oversized poster boards/maps and diagrams; 2) Exhibits filed with the court, in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for the years 1993–2012 may be retrieved through April 30; and 3) All cassette tapes in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for years prior to 2007 have been exposed to hazardous toxins and extreme heat in the Roosevelt County Courthouse and are ruined and cannot be played, due to the exposures. These cassette tapes have either been destroyed for environmental health reasons or will be destroyed by April 30. For more information or to claim exhibits, contact the Court at 575-359-6920.

STATE BAR NEWS

Attorney Support Groups

- March 21, 7:30 a.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
- April 4, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)

- April 11, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

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

Board of Bar Commissioners Appointments Appointment to ABA House of Delegates

The BBC will make one appointment to the American Bar Association House of Delegates for a two-year term, which will expire at the conclusion of the 2018 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members who want to serve should send a letter of interest and brief résumé by April 15 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or e-mail to jconte@nmbar.org.

Appointment to Civil Legal Services Commission

The BBC will make one appointment to the Civil Legal Services Commission for a three-year term. Members who want to serve should send a letter of interest and brief résumé by April 15 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or e-mail to jconte@nmbar.org.

Appointment to Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term. The responsibilities of the Judicial Standards Commission are to receive, review and act upon complaints against State judges, including supporting documentation on each case as well as other

issues that may surface. Experience with receiving, viewing and preparing for meetings and trials with substantial quantities of electronic documents is necessary. The commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment to serve on this board is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this board. Members who want to serve should send a letter of interest and brief résumé by April 15 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 505-828-3765; or e-mail to jconte@nmbar.org.

Appointment to Risk Management Advisory Board

A vacancy exists on the Risk Management Advisory Board and a replacement needs to be appointed for the remainder of the term expiring June 30, 2018. The appointee is requested to attend the Risk Management Advisory Board meetings. A summary of the duties of the advisory board, pursuant to §15-7-5 NMSA 1978, are to review: specifications for all insurance policies to be purchased by the risk management division; professional service and consulting contracts or agreements to be entered into by the division; insurance companies and agents to submit proposals when insurance is to be purchased by negotiation; rules and regulations to be promulgated by the division; certificates of coverage to be issued by the division; and investments made by the division. Members who want to serve on the board should send a letter of interest and brief résumé by March 31 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, e-mail to jconte@nmbar.org, or fax to 505-828-3765.

Meeting Summary

The Board of Bar Commissioners met on Feb. 26. Action taken at the meeting was as follows:

- Supreme Court Justice Edward L. Chavez conducted the swearing-in for the new commissioners: Joshua A. Allison, Kevin L. Fitzwater, Clara Moran, and Benjamin I. Sherman in the First Bar Commissioner District; Joseph F. Sawyer in the Second Bar Commissioner District; Spencer L. Edelman, Young Lawyers Division Chair; and Yolanda R. Ortega, Paralegal Division Liaison;
- Approved the Dec. 9, 2015 meeting minutes as submitted;
- Accepted the December year-end 2015 and January 2016 financials, cash flow statements and executive summaries;
- Received an update on dues payments and reported that there are over 600 active and inactive attorneys outstanding and that reminder notices will be sent out in an effort to try to reduce that number;
- Approved a proposal from Starline Printing for the *2016-2017 Bench & Bar Directory*;
- Approved requests from the Appellate Practice Section and Taxation Section to carry over excess funds to 2016; approved the Criminal Law Section's request to carry over funds provided they spend the excess this year or the funds will not roll over to 2017;
- Decided to hold a Board retreat May 6-7 at the State Bar, rather than at a hotel, and to not hire a facilitator which will save money;
- Approved a sponsorship request in the amount of \$500 for the UNM Mock Trial Club;
- Approved a sponsorship request in the amount of \$500 for the New Mexico Center on Law and Poverty's 20th Anniversary Celebration;
- Referred the development of a policy for funding requests to the Bylaws and Policies Committee;
- Received an update on IOLTA;
- Received an update on the logistics of the State Bar's purchase of the Bar Foundation's ownership in the State Bar Center;
- Received a presentation by Greer Stafford Architects on the feasibility study for potential expansion of the Bar Center;
- Reported that the State Bar credit cards are earning a lot of points and staff will research how they can be used;
- Received a report on the Executive Committee meetings at which the agreement with CLA and the meeting agendas were discussed;
- Held an executive session to discuss the agreement with CLA and the State Bar; following the executive session, reported that the Board decided to terminate the agreement with CLA;
- The Bylaws and Policies Committee met to discuss the Executive Director Compensation and Evaluations Policies for clarification on the timing of the contract renewal and bonus and to

—Featured— Member Resource

ETHICS ASSISTANCE

Contact the ethics helpline at 800-326-8155 for immediate assistance or for a written response to an ethics inquiry regarding one's own conduct. Send original questions to the Ethics Advisory Committee in care of rspinello@nmbar.org.



New Mexico Lawyers and Judges Assistance Program

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www.nmbar.org > for Members >
Lawyers/Judges Assistance

specify when those would occur; the Board went into executive session and made additional amendments to the proposed Compensation Policy;

- Approved the Animal Law Section bylaw amendment to increase the size of its board from eight to nine members;
- Approved the Natural Resources, Energy and Environmental Law Section's bylaw amendments clarifying faculty and student UNM Law School representatives;
- Appointed Carla C. Martinez to fill the vacancy in the Third Bar Commissioner District through the end of this year until the next regular election of commissioners;
- Provided the 2016 Board meeting schedule as follows: May 6, Aug. 18, Sept. 30 and Dec. 14;
- Provided the 2016 rosters for the Supreme Court Boards and Committees for 2016 and the Board's internal committees;
- Received an update on the Bar Foundation and introduced the new development

- director and presented the mission statement and fundraising efforts; and
- Received an update on the ECL (Entrepreneurs in Community Lawyering) Project and reported that a director has been hired who will start in August. The application process for lawyer participants has started.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the May 6th meeting.

Entrepreneurs in Community Lawyering

Announcement of New Program

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

Public Law Section

Happy Hour Event in Santa Fe

The Public Law Section and the Young Lawyers Division invite members to a happy hour event from 5:30-7:30 p.m., March 17, at the offices of Montgomery & Andrews, PA, 325 Paseo de Peralta, Santa Fe. Beer, wine and appetizers will be provided. For more information, contact Sean Cunniff, chair, Public Law Section at scunniff@nmag.gov or 827-6469.

Solo and Small Firm Section

Legislative Update with Sen. Mike Sanchez

As part of the Solo and Small Firm Section's luncheon and presentation series, State Sen. Mike Sanchez will present a legislative update. Sen. Sanchez will discuss what was accomplished in the

Roundhouse this session and what may be coming in the future. The presentation will be noon, March 15, at the State Bar Center in Albuquerque. The presentation is open to all members of the State Bar who R.S.V.P. to Evann.Kleinschmidt@nmbar.org. Pizza and cookies will be provided.

Young Lawyers Division

Roswell Happy Hour

Join the Young Lawyers Division for a happy hour event from 5:30-7 p.m., March 23, at The Liberty. R.S.V.P.s are not necessary. Co-sponsors include the UNM School of Law, the New Mexico Hispanic Bar Association and the New Mexico Women's Bar Association. Hennighausen & Olsen will sponsor a limited hosted bar. For more information, contact Anna C. Rains, acraains@sbw-law.com.

UNM

Law Library

Abbreviated Hours Through March 20 (Spring Break)

Building & Circulation

Monday-Thursday	8 a.m.-8 p.m.
Friday	8 a.m.-6 p.m.

Reference

Monday-Friday	9 a.m.-6 p.m.
Saturday-Sunday	Closed

OTHER BARS

American Bar Association

Women Rainmakers Event: Using Persuasion to Win

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

First Judicial District Bar Association

March Buffet Luncheon and CLE

Join the First Judicial District Bar Association for a buffet luncheon and CLE at noon, March 21, at the Hilton Hotel, 100 Sandoval Street, Santa Fe. The course will be a one-hour, town hall style presentation by Senator Peter Wirth and Representative Brian Egolf. The discussion topics will include the legislation proposed in the 2016 session, actions taken by the House and Senate and the new laws passed. There will also be a question and answer session to address issues raised by the audience. Attendance is \$15 and includes a buffet lunch. For more information or to R.S.V.P., contact Erin McSherry at erin.mcsherry@state.nm.us or 827-6390.

New Mexico Criminal Defense Lawyers Association

Civil Rights Solitary Confinement CLE Program

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

Trial Skills College

Need to brush up on trial tactics? In the New Mexico Criminal Defense Lawyers Association's "Trial Skills College" (15.5 G) on March 17-19 in Albuquerque, students will hear lectures and practice with each other in small focus groups on every aspect of a trial, from voir dire to closing statements. New and seasoned practitioners alike will benefit from this course. Only 30 seats are available. Register at www.nmcdla.org.

New Mexico Defense Lawyers Association

Announces New Board Members

The New Mexico Defense Lawyers Association has selected five civil defense lawyers

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Arturo Jaramillo Clerkship Program

The State Bar of New Mexico Committee on Diversity in the Legal Profession wishes to thank the law firms participating in the 2016 Arturo Jaramillo Clerkship Program. **Thanks to these law firms, 12 first year law students from the University of New Mexico School of Law will have the opportunity to gain valuable clerkship experience this summer.**

Butt Thornton & Baehr PC
Comeau Maldegen Templeman & Indall LLP
Freedman Boyd Hollander Goldberg Urias & Ward PA
Kennedy Kennedy & Ives LLC
Martinez Hart Thompson & Sanchez PC
Montgomery & Andrews PA

O'Brien & Padilla PC
Peifer Hanson & Mullins PA
Rodey Dickason Sloan Akin & Robb PA
Rothstein Donatelli Hughes Dahlstrom Schoenburg & Bienvenu
Saucedo Law Firm
Sutin Thayer & Browne APC

Congratulations to the students selected to participate in the 2016 program!

Elizabeth Perkins
Lauren Kedge
Carlos Padilla
Bayard Roberts
Andre Archuleta
Timothy Piatt

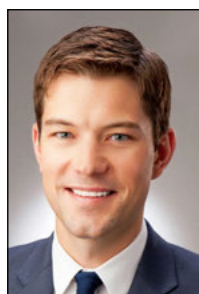
Rachel Kelchner
Peter Kelton
Diana Torres Valerde
Austin Megli
Nicholas Nunez
Liliana Benitez De Luna

Also, the Committee would like to extend a special thank you to Mo Chavez, chair of the Clerkship Program Selection Committee; Heather Harrigan, assistant dean for Career Services at the UNM School of Law; and the sponsors of the Clerkship Program reception, the New Mexico Hispanic Bar Association and the New Mexico Black Lawyers Association.



New Mexico
Black Lawyers Association





Matthew M. Beck

Matthew M. Beck has been appointed to the City of Albuquerque Indicators Progress Commission. Beck is an associate with the Rodey Law Firm where he practices in the litigation department, primarily with the complex and commercial litigation practice group. The IPC's job is to measure how well Albuquerque is progressing toward its goals, by designing and reporting on indicators that inform the community how close they are to achieving each desired community condition.



Daniel Brannen Jr.

Daniel Brannen Jr. has started a private law practice in Eldorado in Santa Fe. A graduate of Pennsylvania State University (B.A., Accounting, 1990) and George Washington University (J.D., 1993), Brannen has more than 22 years of legal experience in corporate, private and non-profit settings. He will offer services for small businesses, wills and estates, real estate and land use, civil litigation, family law and non-profit law.



David P. Buchholtz

David P. Buchholtz, formerly of counsel with the Rodey Law Firm, was elected to the Board of Directors of the Rodey Law Firm on Jan. 27. Buchholtz began his legal career in 1976 and joined the Rodey Firm in 2014. He focuses on government finance law, economic development and state tax incentive law, financial institutions law, government relations, securities law and corporate matters. Additionally, he represents issuers and underwriters in connection with the issuance of government securities.

James P. Lyle, of the Law Offices of James P. Lyle, PC, has achieved recertification as a civil trial advocate by the National Board of Trial Advocacy. Lyle has been a NBTA member in good standing for 15 years. He is a native New Mexican, earned his undergraduate degree in electrical engineering (with distinction) from the University of New Mexico and is a graduate of the UNM School of Law. Lyle is licensed to practice in all New Mexico state and federal courts and has been admitted to practice in federal courts in Texas, Louisiana, Minnesota and West Virginia.



Kelly Stout Sanchez

Kelly Stout Sanchez has become a shareholder of the firm Martinez, Hart, Thompson & Sanchez, PC, whose name recently changed. Sanchez' practice will continue to concentrate on personal injury litigation with a special emphasis of representation of children and victims of crime. She earned her bachelor's degree in history and political science from the University of Minnesota and her law degree from UNM School of Law in 2009.



Maria Montoya Chavez

Maria Montoya Chavez recently was elected to the board of directors of Sutin, Thayer & Browne. Her duties as a board member will include participation in matters of policy, objectives, compensation, finance, leadership and firm performance. Montoya Chavez has practiced with the Firm since 2000 and was elected a shareholder in 2008. She is a family law specialist certified by the New Mexico Board of Legal Specialization. Montoya Chavez earned her law degree at St. Mary's University in San Antonio and her undergraduate degree from the University of New Mexico.

In Memoriam

Michael "Mike" Calligan died on Dec. 29, 2015, after a short unforeseen illness. Calligan was a retired Orange County Sheriff Deputy and attended law school at the University of California, Los Angeles, where he graduated with honors. Calligan moved to New Mexico in 1991 and worked as an attorney in the community until his death. He was a loving husband, father, grandfather, friend and colleague. He is survived by his wife of 50 years, Linda of Grants; daughter, Wendy and her husband Daniel Baca of Grants; and son Sean Calligan of California; grandchildren McKylie and Delaney Calligan of Texas, Jared and Caroline Bachman of Grants; and step-grandchildren Kyler, Kyla and Kylissa Baca of Grants. Calligan was preceded in death by his parents Edward and Opal Calligan.

Carla Anne Carter died at home on Feb. 3. She was born April 20, 1960, in Lexington Park, Md. Carter joined the U.S. Navy in 1979 and served for 17 years. She was stationed in Italy, Puerto Rico and Japan, but her favorite assignment was the five years she spent as an arms control inspector/interpreter under the U.S./Soviet nuclear weapons treaties. She was the first U.S. Navy enlisted woman to serve on an arms control inspection team. In that role, she traveled to Russia, Belarus, Kazakhstan and Ukraine. She also served on a humanitarian mission to the Republic of Georgia. She later attended the University of San Francisco School of Law and worked as a federal government attorney until retiring in 2011. Carter would like to be remembered as wicked smart, killer funny and kind to animals. She loved cats, especially Kashmir, the three-time World Series Champion San Francisco Giants, liberal politics, art and other beautiful things. She will be missed by many in California, New Mexico, Pennsylvania and Maryland.

Jeff Helak, 52, formerly of Albuquerque, died on Dec. 13, 2015, at his home in Elk Grove, Calif. A graduate of St. Pius X High School, New Mexico State University and Oklahoma City University Law School, Helak was a software engineer in Davis, Calif. A loving husband, father, brother, friend and colleague, he will be sorely missed. Helak was predeceased by his parents, Joseph and Barbara Helak and brother John. Survivors include his loving wife, Martha; daughter, Gracie Helak; sons, Nicholas Helak, Daniel Dobleman, and James Dobleman; siblings Laura Warden, Joseph Helak, Linda Schenkel, Lisa Drapeau, Lois Brakenhoff, Leigh Schierloh, Lynn Jeffries and James Helak.

Nancy Ann Richards, 68, a prominent Las Vegas attorney, died at Christus St. Vincent Hospital in Santa Fe on Feb. 23. She was born in Dearborn, Mich., and was a beloved mother, friend and attorney. She was preceded in death by her war veteran father, Charles Miglin and his wife Anna Grace Miglin. She is survived by her two sons, James Nathan Miglin and Jonathan Charles Miglin of Los Lunas; and two grandchildren, Judy and Tyson Parkinson of Tucson, Ariz. She received her law degree at the University of Montana School of Law and a Bachelor of Science (*magna cum laude*) from Bradley University. Richards attained a degree in journalism and many years ago also wrote for the Las Vegas Daily Optic. She has practiced law in the State of New Mexico since the 1980's. She was a kind-hearted, generous, caring individual and one would be far pressed to find a rival to her good spirited nature and benevolence. She always had an optimistic approach to life and would go the extra mile to lend a helping hand. Her heart was gigantic and her work ethic was unmatched. She was one of a kind person and she will be truly missed.

Roger "Ernie" Yarbrow, beloved husband, dad, grandpa, wild man on the slopes, connoisseur of fine wine and music, number one Yankees fan and keeper of the home fires, died on Jan. 17. He leaves behind Shawna, his loving wife and confidant of 23 years; brother, Charles Eugene "Chuck" Yarbrow; sister, Kaydene Yarbrow Stanley, along with their extended families; daughters, Megan Yarbrow Armijo and Kristin Yarbrow Tofani with her life partner, Keith Newberry, Brianna Jonnes with her husband, Ryan. Yarbrow is also survived by his grandchildren Zachary Armijo, Ariana Armijo, Aidan Armijo, Bryce Newberry, Tiffany Franzoy-Tofani, Sadie Tofani, and Karsyn Jonnes; former spouse, Susan M. Bennett; and very close family friend, Erich Wuerschling. He was preceded in death by his son, Byron Caleb Ligon; parents, Dora Lou Lackey Yarbrow, Arvil Ray Yarbrow, and Chester Eugene Riggs; and many other family and friends. Yarbrow was born on June 21, 1945, in Carlsbad. He grew up in Loving on the family farm and graduated from Carlsbad Senior High School in 1963, where he played high school basketball. He earned his B.B.A. in Finance and Economics from Texas Tech University in 1969, followed by his Juris Doctorate from South Texas College of Law in Houston in 1975. That same year, Yarbrow and family moved back to Carlsbad, where he worked for the law firm McCormick and Forbes before branching out with his own law firm, Marek & Yarbrow. He expanded that firm upon moving to Las Cruces in 1989, where it became Marek, Yarbrow & Carter. In 1991, Yarbrow established his own law firm, Yarbrow & Associates and ultimately moved to Cloudcroft in 1993. Home is where the heart is, and the mountains of Cloudcroft suited Ernie, Shawna and family perfectly. Yarbrow loved the outdoors and could be found working in his yard, hiking with his four-legged friends, stacking wood for the winter or, his favorite pastime, flying down the mountain on his skis. When he couldn't be outside, he busied himself with his work, the stock market or his favorite music just as loud as it would go. There was never an opponent Yarbrow hesitated to take on, including cancer. Though he ultimately lost that battle, his family and friends are proud of his noble fight.

continued from page 6

to join its board of directors with terms ranging from three to five years. The new board members are Christina L. G. Brennan, Matthew T. Byers, Tyler M. Cuff, Juan M. Marquez Jr. and Tiffany Roach Martin. Re-elected to board are William R. Anderson, Bryan C. Garcia and S. Carolyn Ramos.

New Mexico Women's Bar Association Meet and Greet Event

The New Mexico Women's Bar Association, a voluntary state-wide bar association open to all New Mexico attorneys regardless of sex or gender, is hosting a meet and greet event from 5:30–7 p.m., March 18, at the Albuquerque Country Club, 601 Laguna Blvd. SW, Albuquerque. NMWBA will be providing light hors d'oeuvres and an exciting door prize with a cash bar. Members who bring a guest are eligible to attend a NMWBA sponsored CLE for free. R.S.V.P. suggested but not required to barbara@frjlaw.com.

OTHER NEWS Dine' Hoghaan Bii Development Inc. Veterans Mini Stand Down

Dine' Hoghaan Bii Development Inc. calls for attorney volunteers for its first annual Veterans Mini Stand Down from 8:30 a.m.– 3:30 p.m. on March 25 at the Fire Rock Casino in Church Rock (just east of Gallup). There will be two-hour shifts with two attorneys for each shift. To schedule a shift or for more information, contact bernadinem25@gmail.com.

New Mexico Lawyers for the Arts Volunteers Needed for Pro Bono Legal Clinic

New Mexico Lawyers for the Arts and WESST/Albuquerque seek attorneys to volunteer for the New Mexico Lawyers for the Arts Pro Bono Legal Clinic from 10 a.m. to 1 p.m., March 19, at the WESST Enterprise Center, 609 Broadway Blvd. NE, Albuquerque. Continental breakfast will be provided. Clients will be creative professionals, artists or creative businesses. Attorneys are needed to assist in many areas including contracts, business law, employment matters, tax law, estate planning and intellectual property law. For more

information and to participate, contact Talia Kosh at tk@thebennettlawgroup.com.

New Mexico Workers' Compensation Administration Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the adoption of new WCA Rules at 1:30 p.m., April 8, at the WCA, 2410 Centre Avenue SE, Albuquerque. Copies of the proposed rule amendments will be available

on March 21 at <http://www.workerscomp.state.nm.us/> or by calling 505-841-6083. Written comments on the rule changes will be accepted until the close of business on April 20. Comments made in writing and at the public hearing will be taken into consideration. The WCA is proposing new rules regarding tests, testing and cutoff levels for intoxication or influence as well as other miscellaneous revisions to Part 3. Individuals with disabilities who want to participate in the hearing should contact the general counsel office at 505-841-6083.

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STATE BAR
of NEW MEXICO

2016–2017 Bench & Bar Directory

Update Your Contact Information by March 25

To verify your current information: www.nmbar.org/FindAnAttorney

To submit changes (must be made in writing):

Online: Visit www.nmbar.org > for Members > Change of Address

Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860

Fax: 505-828-3765

Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 25.



STATE BAR
of NEW MEXICO

2016 | Annual Meeting— Bench & Bar Conference

Call for Nominations



State Bar of New Mexico 2016 Annual Awards

Nominations are being accepted for the 2016 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2015 or 2016. The awards will be presented August 19 during the 2016 Annual Meeting—Bench and Bar Conference at the Buffalo Thunder Resort in Santa Fe. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below.*

— Distinguished Bar Service Award-Lawyer —

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr., Mary T. Torres

— Distinguished Bar Service Award-Nonlawyer —

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman, David Smoak

— Justice Pamela B. Minzner* Professionalism Award —

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly, Hon. Angela J. Jewell

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

— Outstanding Legal Organization or Program Award —

Recognizes sections, committees, local and voluntary bars and outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center, N.M. Hispanic Bar Association

— Outstanding Young Lawyer of the Year Award —

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Jucero Jr., Keya Koul

— Robert H. LaFollette* Pro Bono Award —

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney.

Previous recipients: Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright, Ronald E. Holmes

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

— Seth D. Montgomery* Distinguished Judicial Service Award —

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.), Hon. Jerald A. Valentine

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmba.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 20

Legal Education

March

- | | | |
|---|--|---|
| <p>17 Second Annual State Bar Symposium on Diversity and Inclusion
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Civility and Professionalism (Ethicspalooza Redux – Winter 2015)
1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>17–19 Trial Skills College
15.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org</p> | <p>18 Ethics and Keeping Your Paralegal and Yourself Out of Trouble
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>18 2015 Tax Symposium (2015)
7.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>21 Honorary Trusts: Trusts for Pets
1.5 G
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 Drafting Demand Letters
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>18 The Trial Variety: Juries, Experts and Litigation (2015)
6.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>23 Avoiding Family Feuds in Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>31 Fair or Foul: Lawyers' Duties of Fairness and Honesty to Clients, Parties, Courts, Counsel and Others
2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>18 Ethically Managing Your Practice (Ethicspalooza Redux – Winter 2015)
1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Full Implementation Navigating the ACA Minefield
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com</p> | <p>31 Working With Expert Witnesses
3.0 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
505-797-6020
www.nmbar.org</p> |
| | <p>25 Legal Technology Academy for New Mexico Lawyers
4.0 G, 2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

April

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| <p>5 Planning Due Diligence in Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 2015 Land Use Law in New Mexico
5.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Federal Practice Tips and Advice from U.S. Magistrate Judges
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>7 Treatment of Trusts in Divorce
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 More Reasons to be Skeptical of Expert Witnesses Part VI (2015)
5.0 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Invasion of the Drones: IP – Privacy, Policies, Profits (2015 Annual Meeting)
1.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> |

April

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|---|---|---|
| <p>8 Civil Rights: Solitary Confinement
5.2 G, 1.0 EP
Live Program, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org</p> | <p>18 Disciplinary Process Civility and Professionalism
1.0 EP
Live Program
First Judicial District Court
505-946-2802</p> | <p>27 Landlord Tenant Law Lease Agreements Defaults and Collections
5.6 G, 1.0 EP
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com</p> |
| <p>14 Governance for Nonprofits
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Ethics for Estate Planners
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Annual Advanced Estate Planning Strategies
11.2 G
Live Program
Texas State Bar
www.texasbarcle.com</p> |
| <p>15 Guardianship in New Mexico: The Kinship Guardianship Act
5.5 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Employees, Secrets and Competition: Non-Competes and More
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | |

May

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| <p>4 Ethics and Drafting Effective Conflict of Interest Waivers
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>13 Spring Elder Law Institute
6.2 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Legal Writing – From Fiction to Fact: Morning Session (2015)
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Public Records and Open Meetings
5.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Foundation for Open Government
www.nmfog.org</p> | <p>17 Workout of Defaulted Real Estate Project
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Social Media and the Countdown to Your Ethical Demise (2016)
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 Best and Worst Practices Including Ethical Dilemmas in Mediation
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 2016 Retaliation Claims in Employment Law Update
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics (2016 Edition)
3.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>11 Adding a New Member to an LLC
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 The New Lawyer – Rethinking Legal Services in the 21st Century
4.5 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Ethics and Virtual Law Practices
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective February 26, 2016

Petitions for Writ of Certiorari Filed and Pending:				No. 35,671	Riley v. Wrigley	12-501	12/21/15
		Date Petition Filed		No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,779	State v. Harvey	COA 33,724	02/26/16	No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,777	N.M. State Engineer v. Santa Fe Water Resource	COA 33,704	02/25/16	No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,776	State v. Mendez	COA 34,856	02/25/16	No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,775	Northern N.M. Federation v. Northern N.M. College	COA 33,982	02/25/16	No. 35,635	Robles v. State	12-501	12/10/15
No. 35,774	State v. Damon C.	COA 33,962	02/24/16	No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,773	State v. Simpson	COA 33,723	02/24/16	No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,772	Castillo v. Arrieta	COA 34,108	02/24/16	No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,771	State v. Garcia	COA 33,425	02/24/16	No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,768	State v. Begay	COA 34,409	02/22/16	No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,767	State v. Gallegos	COA 34,698	02/22/16	No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,765	State v. Perez	COA 31,678	02/19/16	No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,764	State v. Kingston	COA 32,962	02/19/16	No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,758	State v. Abeyta	COA 33,461	02/15/16	No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,759	State v. Pedroza	COA 33,867	02/15/16	No. 35,586	Saldana v. Mercantel	12-501	10/30/15
No. 35,760	State v. Gabaldon	COA 34,770	02/12/16	No. 35,576	Oakleaf v. Frawner	12-501	10/23/15
No. 35,763	State v. Marcelina R. Valenzuela v. A.S. Horner Inc.	COA 34,683	02/12/16	No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,754				No. 35,555	Flores-Soto v. Wrigley	12-501	10/09/15
No. 35,753	State v. Erwin	COA 33,521	02/12/16	No. 35,554	Rivers v. Heredia	12-501	10/09/15
No. 35,751	State v. Begay	COA 33,561	02/12/16	No. 35,523	McCoy v. Horton	12-501	09/23/15
No. 35,750	State v. Norma M.	COA 33,588	02/12/16	No. 35,522	Denham v. State	12-501	09/21/15
No. 35,749	State v. Vargas	COA 34,768	02/11/16	No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,748	State v. Vargas	COA 33,247	02/11/16	No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,742	State v. Jackson	COA 33,247	02/11/16	No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,747	Sicre v. Perez	COA 34,852	02/05/16	No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,743	Conger v. Jacobson	12-501	02/04/16	No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,741	State v. Coleman	COA 34,848	02/04/16	No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,740	State v. Wisner	COA 34,603	02/04/16	No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,739	State v. Angulo	COA 34,974	02/04/16	No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,746	Bradford v. Hatch	COA 34,714	02/04/16	No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,371	Citimortgage v. Tweed	COA 34,714	02/04/16	No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,730	State v. Humphrey	12-501	02/01/16	No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,722	James v. Smith	COA 34,870	01/29/16	No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,711	Foster v. Lea County	COA 34,601	01/29/16	No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,713	Hernandez v. CYFD	12-501	01/25/16	No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,718	Garcia v. Franwer	12-501	01/25/16	No. 35,159	Jacobs v. Nance	12-501	03/12/15
No. 35,717	Castillo v. Franco	COA 33,549	01/22/16	No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,707	Marchand v. Marchand	12-501	01/19/16	No. 35,099	Keller v. Horton	12-501	12/11/14
No. 35,702	Steiner v. State	12-501	01/19/16	No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 35,682	Peterson v. LeMaster	COA 33,255	01/12/16	No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 35,677	Sanchez v. Mares	12-501	01/05/16	No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 35,669	Martin v. State	12-501	01/05/16	No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 35,665	Kading v. Lopez	12-501	12/30/15	No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 35,664	Martinez v. Franco	12-501	12/29/15	No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 35,657	Ira Janecka	12-501	12/28/15	No. 34,706	Camacho v. Sanchez	12-501	05/13/14

Writs of Certiorari

<http://nmsupremecourt.nmcourts.gov>

No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utlely v. State	12-501	06/07/12

No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)	Date Writ Issued
No. 33,725 State v. Pasillas	COA 31,513 09/14/12
No. 33,877 State v. Alvarez	COA 31,987 12/06/12
No. 33,930 State v. Rodriguez	COA 30,938 01/18/13
No. 34,363 Pielhau v. State Farm	COA 31,899 11/15/13
No. 34,274 State v. Nolen	12-501 11/20/13
No. 34,443 Aragon v. State	12-501 02/14/14
No. 34,522 Hobson v. Hatch	12-501 03/28/14
No. 34,582 State v. Sanchez	COA 32,862 04/11/14
No. 34,694 State v. Salazar	COA 33,232 06/06/14
No. 34,669 Hart v. Otero County Prison	12-501 06/06/14
No. 34,650 Scott v. Morales	COA 32,475 06/06/14
No. 34,784 Silva v. Lovelace Health Systems, Inc.	COA 31,723 08/01/14
No. 34,812 Ruiz v. Stewart	12-501 10/10/14
No. 34,830 State v. Le Mier	COA 33,493 10/24/14
No. 34,929 Freeman v. Love	COA 32,542 12/19/14
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No. 35,121 State v. Chakerian	COA 32,872 05/11/15
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No. 35,213 Hilgendorf v. Chen	COA 33,056 06/19/15
No. 35,279 Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245 07/13/15
No. 35,289 NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245 07/13/15
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No. 35,318 State v. Dunn	COA 34,273 08/07/15
No. 35,278 Smith v. Frawner	12-501 08/26/15
No. 35,427 State v. Mercer-Smith	COA 31,941/28,294 08/26/15
No. 35,446 State Engineer v. Diamond K Bar Ranch	COA 34,103 08/26/15
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No. 35,438 Rodriguez v. Brand West Dairy	COA 33,104/33,675 08/31/15
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No. 35,499 Romero v. Ladlow Transit Services	COA 33,032 09/25/15
No. 35,456 Haynes v. Presbyterian Healthcare Services	COA 34,489 09/25/15

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)	Submission Date
No. 33,884 Acosta v. Shell Western Exploration and Production, Inc.	COA 29,502 10/28/13
No. 34,093 Cordova v. Cline	COA 30,546 01/15/14
No. 34,287 Hamaatsa v. Pueblo of San Felipe	COA 31,297 03/26/14
No. 34,613 Ramirez v. State	COA 31,820 12/17/14
No. 34,798 State v. Maestas	COA 31,666 03/25/15
No. 34,630 State v. Ochoa	COA 31,243 04/13/15
No. 34,789 Tran v. Bennett	COA 32,677 04/13/15
No. 34,997 T.H. McElvain Oil & Gas v. Benson	COA 32,666 08/24/15
No. 34,993 T.H. McElvain Oil & Gas v. Benson	COA 32,666 08/24/15
No. 34,726 Deutsche Bank v. Johnston	COA 31,503 08/24/15
No. 34,826 State v. Trammel	COA 31,097 08/26/15
No. 34,866 State v. Yazzie	COA 32,476 08/26/15
No. 35,035 State v. Stephenson	COA 31,273 10/15/15
No. 35,478 Morris v. Brandenburg	COA 33,630 10/26/15
No. 35,248 AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706 01/11/16
No. 35,255 State v. Tufts	COA 33,419 01/13/16
No. 35,183 State v. Tapia	COA 32,934 01/25/16
No. 35,101 Dalton v. Santander	COA 33,136 02/17/16
No. 35,198 Noice v. BNSF	COA 31,935 02/17/16
No. 35,249 Kipnis v. Jusbasche	COA 33,821 02/29/16
No. 35,302 Cahn v. Berryman	COA 33,087 02/29/16
No. 35,349 Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586 03/14/16
No. 35,148 El Castillo Retirement Residences v. Martinez	COA 31,701 03/16/16
No. 35,297 Montano v. Frezza	COA 32,403 03/28/16
No. 35,214 Montano v. Frezza	COA 32,403 03/28/16
No. 35,386 State v. Cordova	COA 32,820 03/28/16
No. 35,286 Flores v. Herrera	COA 32,693/33,413 03/30/16
No. 35,395 State v. Bailey	COA 32,521 03/30/16
No. 35,130 Progressive Ins. v. Vigil	COA 32,171 03/30/16

Opinion on Writ of Certiorari:

		Date Opinion Filed
No. 35,298	State v. Holt	COA 33,090 02/25/16
No. 35,145	State v. Benally	COA 31,972 02/25/16

Petition for Writ of Certiorari Denied:

		Date Order Filed
No. 35,733	State v. Meyers	COA 34,690 02/26/16
No. 35,732	State v. Castillo	COA 34,641 02/26/16
No. 35,705	State v. Farley	COA 34,010 02/24/16
No. 35,551	Ortiz v. Wrigley	12-501 02/24/16
No. 35,540	Fausnaught v. State	12-501 02/24/16



The graphic features a central circular design with four overlapping circles. The top circle shows a smiling woman and is labeled 'confidence'. The bottom circle shows two men in business attire and is labeled 'integrity'. The left circle shows hands shaking and is labeled 'professionalism'. The right circle is empty. In the center of these four circles is a red circle with the text 'Mentoring Has Its Rewards'. The entire graphic is set against a light green background with a yellow border.

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Effective March 4, 2016

Published Opinions

No. 33282	11th Jud Dist McKinley CR-12-218, STATE v J RADOSEVICH (affirm in part, reverse in part and remand)	3/01/2016
No. 33934	2nd Jud Dist Bernalillo CR-11-4202, STATE v C BAXENDALE (reverse and remand)	3/02/2016

Unpublished Opinions

No. 34208	2nd Jud Dist Bernalillo CV-13-2487, K HOOKER v E MILLER (affirm)	2/29/2016
No. 34535	2nd Jud Dist Bernalillo CV-07-9594, CV-07-6641, M WEBSTER v E SERNA (affirm)	2/29/2016
No. 34755	2nd Jud Dist Bernalillo CV-07-6641, CV-07-9594, E SERNA v D WEBSTER (affirm)	2/29/2016
No. 35151	2nd Jud Dist Bernalillo CV-08-5751, S SHERMAN v ANASAZI MEDIC (affirm) 3/01/2016	
No. 34751	13th Jud Dist Valencia CV-13-01303, R BANILLA v CENTEX (affirm)	3/01/2016
No. 34819	1st Jud Dist Santa Fe CV-14-2146, C DAIGLE v ELDORADO COMM (affirm)	3/01/2016
No. 33181	13th Jud Dist Cibola CR-13-71, STATE v D MARTINEZ (reverse and remand)	3/02/2016
No. 33690	2nd Jud Dist Bernalillo LR-11-72, STATE v M PAGE (affirm)	3/02/2016
No. 34170	2nd Jud Dist Bernalillo LR-12-94, STATE v M SANCHEZ (affirm)	3/02/2016
No. 34887	2nd Jud Dist Bernalillo DM-10-2600, S LOPEZ v A LOPEZ (affirm)	3/02/2016
No. 35038	2nd Jud Dist Bernalillo CR-15-568, STATE v V MARTINEZ (affirm)	3/02/2016

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

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From the Clerk of the New Mexico Supreme Court

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The clerk's certificate of address and/or telephone changes dated February 12, 2016, reported an incorrect address for **Darryl Millet**. His correct address of record, telephone number, and e-mail address are as follows:

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5.0 G

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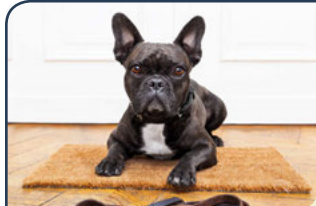


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\$249: Standard Fee

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Legal Technology Academy for New Mexico Lawyers

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4.0 G

2.0 EP

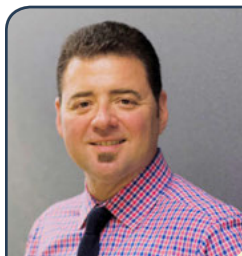


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3.0 EP



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Presented by Stuart Teicher, Esq., the CLE 'Performer'

3.0 EP



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Preliminary schedule. Visit our website for more details.



Working with Expert Witnesses

3.0 G



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2.0 EP



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5.0 G, 1.5 EP
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\$265

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2.0 G, 1.0 EP
9 a.m.–Noon
\$145

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1.5 G
1–2:30 p.m.
\$79

May 20

Social Media and the Countdown to Your Ethical Demise (2016)

3.0 EP
8:30–11:45 a.m.
\$145

The New Lawyer—Rethinking Legal Services in the 21st Century

4.5 G, 1.5 EP
9 a.m.–4:15 p.m.
\$249

Legal Writing—From Fiction to Fact (Morning Session 2015)

2.0 G, 1.0 EP
9 a.m.–12:15 p.m.
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3.0 EP
1–4:15 p.m.
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As Updated by the Clerk of the New Mexico Supreme Court

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

Effective March 9, 2016

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

Comment Deadline

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

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2015 NMRA:

SECOND JUDICIAL DISTRICT COURT LOCAL RULES

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

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

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

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-114

No. 32,340, (filed August 20, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SEAN GODKIN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

MICHAEL E. MARTINEZ, District Judge Pro Tempore

HECTOR H. BALDERAS
Attorney General
JAMES W. GRAYSON
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JORGE A. ALVARADO
Chief Public Defender
B. DOUGLAS WOOD III
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Roderick T. Kennedy, Judge

{1} Revocation proceedings, even if they include necessary competency determinations, must be completed prior to the expiration of the defendant's probation, else the district court's jurisdiction expires and the defendant must be discharged. Under NMSA1978, Section 31-20-8 (1977), a criminal defendant is fully discharged from further obligation to the court, and the district court loses jurisdiction over the case, whenever the period for which the sentence was suspended expires without being revoked. This loss of jurisdiction is unaffected by a defendant's waiver of the time limits within which a revocation hearing must be held under Rule 5-805 NMRA after a violation of probation is alleged. Staying revocation proceedings to determine the defendant's competency likewise does not toll the district court's loss of jurisdiction under Section 31-20-8. {2} In resolving this interlocutory appeal of the denial of Defendant's motion to dismiss for lack of jurisdiction following our remand, we also correct any misconceptions generated by our memorandum opinion in *State v. Godkin*, No. 31,638,

mem. op. (N.M. Ct. App. May 23, 2012) (non-precedential). In that opinion, we reversed the district court's denial of Defendant's requested continuance to finish evaluating Defendant's competency prior to revoking his probation. Since the district court could not revoke Defendant's probation absent first resolving the question of Defendant's competency, we also reversed the revocation, as well as the habitual offender enhancement imposed as a result of the revocation. We intended our remand to allow the court to accomplish such proceedings as might be appropriate to resolve the competency issue and the probation revocation. However, Defendant's probation expired without a valid revocation, leaving the district court without jurisdiction to proceed any further. On remand, Defendant's motion to dismiss should have been granted; we therefore remand the case to the district court for the discharge of the Defendant and closing of his case.

I. BACKGROUND

{3} Defendant's probation was scheduled to conclude on August 13, 2011. The State filed a second motion to revoke probation toward the end of Defendant's period of probation in April 2011. A revocation hearing in June 2011 was continued twice by Defendant, who waived the time limits in

which to commence the hearing under Rule 5-805(H) and (J). In the meantime, the case was assigned to a judge pro tempore, who ordered a competency evaluation based on Defendant's motion of July 8, 2011.

{4} The results of the evaluation were to be presented to the district court during a revocation hearing set for July 21, 2011. Yet, Defendant was not transported to his July 18 evaluation appointment. Defendant's attorney who had raised competency resigned from the Public Defender's Office and new counsel entered her appearance on July 12. On July 21, prior to the hearing commencing, new counsel requested a continuance, asserting that her lack of preparation and the incomplete evaluation would render her representation ineffective were she to proceed that day as Defendant's attorney. The district court denied the motion to continue, saying Defendant's previous attorney had "promise[d]" the court that evidence on competency would be available at that hearing. The probation revocation hearing commenced with the State's first witness.

{5} Prior to Defendant's cross-examination of this witness, the district court expressed a changed desire to grant the continuance. The State informed the court that its jurisdiction would lapse on August 12, 2011¹ and absent revoking Defendant's probation, he would be "scot-free." Defense counsel agreed, stating that, "Once the jurisdiction runs on this case, it's done, whether it's stayed for competency or not." After defense counsel stated that it was not certain whether the competency evaluation could be performed before the deadline, the district court again denied the motion to continue and proceeded with the hearing, explicitly stating that it was the continuance, not the motion regarding competency, that was denied. After closing arguments, the district court found Defendant competent:

I find that in a previous proceeding[,] competency was raised, and the [c]ourt was given assurances that evidence would be presented on the issue of competence. There has been no evidence, other than raising the issue provided. There [have] been past determinations that . . . Defendant was competent[] and, therefore, for purposes of today's hearing, I find [Defendant] is competent and has violated probation.

¹The record and briefs lack a clear statement as to the date that the district court lost jurisdiction over Defendant. Our previous opinion uses August 13, 2011, and since the variations are of no consequence to our ruling, we adopt August 13, 2011 as the final date of Defendant's probation, on which the district court's jurisdiction lapsed.

An arraignment and habitual offender proceeding immediately followed this determination. The district court entered its order on August 11, 2011, revoking Defendant's probation and sentencing him to an additional eleven years as an habitual offender.

{6} Defendant appealed the district court's denial of his motion to continue, as well as the sentence enhancement. We issued the memorandum opinion referenced above. In that opinion, we acknowledged the "lapse in jurisdiction on August 13, 2011," *Godkin*, 31,368, mem. op. at 4, and held that the district court abused its discretion in refusing to grant a continuance for the competency evaluation. We reversed the orders of the district court and remanded for a new hearing. Our remand was intended to permit three things: "for Defendant to expressly waive the adjudicatory deadline, for the competency evaluation to take place, and for a new revocation hearing, if applicable." *Id.* at 5. Our mandate issued on July 18, 2012. {7} On the July 19, 2012 hearing on remand, the district court repeated our instructions and called on Defendant to waive adjudicatory time limits, but defense counsel stated that there no longer remained anything waivable, because jurisdiction ran the previous August, and the commencement of a revocation hearing under Rule 5-805 was no longer the legal question. The State responded that it had previously argued, as noted in our memorandum opinion (*Id.* at 4), that Rule 5-805 would no longer be applicable were jurisdiction to lapse on August 13. It maintained that we knew of the jurisdictional problem, and "just kind of disregarded it." The State maintained that even if the Defendant did not waive the deadline, we had remanded for at least a new sixty-day period under Rule 5-805 within which to have an adjudicatory probation revocation hearing. At the State's request, and in light of our second directive to have an evaluation performed, the district court stayed proceedings pending a new evaluation of Defendant's competency. The district court scheduled another hearing more than a month later, to allow for the evaluation to be completed.

{8} Defendant filed a motion to dismiss for lack of jurisdiction, arguing that the August 13, 2011, time limit was jurisdictional and could not be waived, and the absence of a valid probation revocation hearing prior to the probationary period expiring had divested the district court of jurisdiction. The State conversely argued that by re-

manding for a hearing "if applicable," we had recognized that the competency evaluation might postpone further hearings, and had tacitly acknowledged that jurisdiction could be extended following defendant's waiver of time limits under Rule 5-805. The district court denied Defendant's motion, but certified the matter for an interlocutory appeal, which we granted.

II. DISCUSSION

{9} A district court's authority to sentence an offender is conferred by statute, is an issue of subject matter jurisdiction, and cannot be waived. *State v. Frost*, 2003-NMCA-002, ¶ 8, 133 N.M. 45, 60 P.3d 492. Section 31-20-8 states: "Whenever the period of suspension [of sentence] expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime." This section was intended by the Legislature to limit the district court's jurisdiction over a defendant and terminate his criminal liability when his probation term expires. *State v. Travarez*, 1983-NMCA-003, ¶ 4, 99 N.M. 309, 657 P.2d 636. Because a defendant has a reasonable expectation of finality in his case, once the sentence is completely served, the trial court loses jurisdiction over it, including any ability to enhance the sentence. *See State v. Roybal*, 1995-NMCA-097, ¶ 8, 120 N.M. 507, 903 P.2d 249. Here, we must determine whether the probationary period can be tolled, or whether Defendant's motion to dismiss for lack of jurisdiction was erroneously denied.

A. Standard of Review

{10} We review the district court's application of Section 31-20-8 de novo. *See State v. Lara*, 2000-NMCA-073, ¶ 4, 129 N.M. 391, 9 P.3d 74 (stating that the interpretation of a statute is an issue of law to be reviewed de novo). Similarly, to the extent it may apply, we also review the application of Rule 5-805(J) de novo. *See State v. Maestas*, 2007-NMCA-155, ¶ 28, 143 N.M. 104, 173 P.3d 26.

B. We Have Not Previously Decided the District Court's Jurisdiction

{11} The State urges us to continue with what it characterizes as an "issue of jurisdiction already implicitly resolved in the first appeal" based on the law of the case doctrine. *See State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶¶ 20-27, 145 N.M. 769, 205 P.3d 816 (outlining law of the case doctrine). If applicable, this doctrine is one that is applied with flexibility. *See also Reese v. State*, 1987-NMSC-110, ¶ 5, 106 N.M. 505, 745 P.2d

1153 ("[T]he law of the case is merely one of practice or court policy, and not of inflexible law, so that appellate courts are not absolutely bound thereby, but may exercise a certain degree of discretion in applying it[.]" (internal quotation marks and citation omitted)).

{12} The State characterizes the decision reached in our memorandum opinion as an implicit determination that jurisdiction did not lapse on August 13, 2011. This assertion is grounded in the opinion's pointing to defense counsel's willingness at that point to waive the sixty-day limit within which adjudicatory hearings on revocation must be commenced under Rule 5-805(J) and reversing so Defendant could again "expressly waive the adjudicatory deadline" for the probation revocation and proceed with the competency determination. Unfortunately, our focus on the probation adjudication deadline and competency process obscured the issue of jurisdiction itself. Although we said that Defendant's evaluation scheduled for August 3 was ten days prior to the "lapse in jurisdiction on August 13, 2011[.]" in the next paragraph we called it the "adjudicatory deadline" and later the "[NMRA] Rule 5-805(H) deadline on August 13." *Godkin*, No. 31,368, mem. op. at 4-5.

{13} Also, the attention given in our memorandum opinion to the mandatory stay of proceedings required when a competency evaluation is ordered, missed "the lapse in jurisdiction on August 13" that we had noted earlier (emphasis added). The State now uses this discrepancy between adjudicatory and jurisdictional time limits in our opinion to conclude that we implicitly or explicitly determined jurisdiction could be waived, or that because of Defendant's waiver there would not be a bar to the district court's continued jurisdiction on remand.

{14} Because jurisdiction cannot be waived, *Frost*, 2003-NMCA-002, ¶ 8, there is no "law of the case" here. *Farmers' State Bank of Texhoma, Okla. v. Clayton Nat'l Bank*, 1925-NMSC-026, ¶ 24, 31 N.M. 344, 245 P. 543 (stating that, "when we conclude that a former decision is erroneous, and we still have the opportunity to correct it as affecting those parties whose interests are concerned in the original ruling, we should apply the law of the land rather than the law of the case"). Our mandate requiring Defendant "to expressly waive the adjudicatory deadline" is ineffectual if the district court's continued jurisdiction to hear the case has ended.

C. The Plain Language of Section 31-20-8 Divests the District Court of Jurisdiction When A Probationary Term Expires

{15} When a defendant's probation term ends without being revoked, the defendant is relieved of any obligations imposed by the court and has completely satisfied all criminal liability for the crime. *See* § 31-20-8; *State v. Apache*, 1986-NMCA-051, ¶ 9, 104 N.M. 290, 720 P.2d 709. The jurisdictional nature of the statute is clear in our holding in *Lara*, where owing to Section 31-20-8, we held that a "court lacks further jurisdiction over the defendant, even though the motion to revoke the sentence has . . . been filed[]" before the end of the probation term. *Lara*, 2000-NMCA-073, ¶ 11. Our Supreme Court, agreeing with this proposition, has similarly held a district court has no jurisdiction to hear a pending motion to revoke "once the probationary period has expired[.]" *State v. Ordunez*, 2012-NMSC-024, ¶ 9, 283 P.3d 282.

{16} Defendant cannot waive the expiration of the district court's jurisdiction. *See Frost*, 2003-NMCA-002, ¶ 8. Our Supreme Court observed that this has been the case "[f]or decades[.]" *Ordunez*, 2012-NMSC-024, ¶ 9. Although revoking probation after the maximum term of suspension had expired was once permitted, the enactment of Sections 31-20-8 and -9 eliminated the district courts' power to do so. *See Travarez*, 1983-NMCA-003, ¶ 4 (recognizing that statutes and previous case law permitting the practice had been abrogated by the Legislature). A bright-line rule promotes the strong policy interest that "defendants who have completed their sentences have a reasonable expectation in the finality of their sentences[.]" *State v. Davis*, 2007-NMCA-022, ¶ 10, 141 N.M. 205, 152 P.3d 848. The State cautions us that interpreting Section 31-20-8 to divest the district court of jurisdiction when the probationary period expires leaves the court without "the power to monitor the probationer for 'all' of the term of probation[.]" The State is incorrect; no provision exists to toll a probation term absent wrongful actions by the defendant because after it expires, there is no more "term of probation" and the district court has no jurisdiction to revoke a term of probation that no longer exists.

{17} This jurisdictional provision also stands apart from flexible time limits to commence trial, or waivable periods within which to commence a probation revocation hearing. *See, e.g.*, Rule 5-805(H), (J). The State argues based on *Trujillo v.*

Serrano, 1994-NMSC-024, ¶ 14, 117 N.M. 273, 871 P.2d 369, that the jurisdictional line drawn by Section 31-20-8 is "a 'more equivocal' type of jurisdiction[.]" The implied "discretion to overlook technical violations" conferred by *Trujillo*, 1994-NMSC-024, ¶ 13, does not extend to loosening the grip of a statute that explicitly ends a district court's jurisdiction to revoke probation or enhance a sentence.

{18} Next, contending that the district court's jurisdiction to revoke Defendant's probation, is "not a true jurisdictional limit" and should be subject to waiver, the State points to our opinion in *State v. Baca*, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533. In *Baca*, the defendant challenged the district court's probation revocations and imposition of new probation periods based on NMSA 1978, Sections 31-21-15(B) (1989) and 31-20-5(A) (2004), *Baca*, 2005-NMCA-001, ¶ 8. *Baca* involved re-imposing new terms of probation within the time allowed by Section 31-20-8. *Baca*, 2005-NMCA-001, ¶ 12, and does not apply here. Against this legal background, we now consider propriety of the district court's denial of Defendant's motion to dismiss.

D. The Stay of Proceedings Required to Determine Competency Does Not Toll Probation

{19} The State argues that Section 31-9-1, by staying pending proceedings in the court, also operates to toll defendant's probation. Section 31-9-1, though staying proceedings for competency determinations, is silent as to tolling jurisdiction. The state's argument is otherwise unsupported by any authority or circumstance apart from a frail analogy to being a fugitive. In the absence of any other authority that might support tolling, we assume no such authority exists. *See State v. Casares*, 2014-NMCA-024, ¶ 18, 318 P.3d 200. The sole basis in law for tolling a probation term is predicated on a wrongful act of absconding committed by the defendant. *See* § 31-21-15(C) (establishing fugitive status and allowing time spent as a fugitive to be deducted from time spent on probation); *State v. Sosa*, 2014-NMCA-091, ¶ 11, 335 P.3d 764 (noting that Section 31-21-15(C) is based on the maxim that "one should not benefit from one's own wrongdoing"). A defendant about whom competency has been raised, in a manner that has resulted in a court issuing an order for such an evaluation, has engaged in no wrongdoing, nor has absconded, but has unequivocally remained under the power of the court. Such a person cannot be adjudicated while his competency is in doubt

and he is under the court's protection. A defendant in this position has not done anything to justify tolling his probation as a penalty for any delay. We conclude that the Legislature's directive to stay proceedings while competency is determined does not affect the running of time spent on probation or, as a result, the jurisdictional time limit in Section 31-20-8, and decline to adopt a position permitting its tolling.

E. Absent A Valid Revocation of Probation, The District Court Was Without Jurisdiction To Impose An Habitual Offender Enhancement

{20} A person may be charged as an habitual offender "so long as the [district] court retains jurisdiction over the defendant." *March v. State*, 1989-NMSC-065, ¶ 5, 109 N.M. 110, 782 P.2d 82 (stating that the actual time during which the state may enforce a habitual offender enhancement is limited to the time before an offender has an objectively reasonable expectation of finality in the sentence). We held that where a defendant "[C]ompletely serves the valid underlying sentence before the state proves he is a habitual offender, he has extinguished his criminal liability and there is no sentence left to enhance." *State v. Gaddy*, 1990-NMCA-055, ¶ 8, 110 N.M. 120, 792 P.2d 1163. "Once a defendant has completely served his or her underlying sentence, the [district] court loses jurisdiction to enhance that sentence, even if the [s]tate filed the supplemental information before the defendant finished serving the underlying sentence." *Roybal*, 1995-NMCA-097, ¶ 4. As discussed above, the hearing during which the district court found Defendant to be an habitual offender occurred when all proceedings should have been stayed. Because the enhancement hearing should never have commenced, and the jurisdictional time has now expired, we also reverse the habitual enhancement of Defendant's sentence.

III. CONCLUSION

{21} Since the district court lost jurisdiction over Defendant as of August 13, 2011, pursuant to Section 31-20-8, it was without jurisdiction to proceed further in this case after that date. Accordingly, we reverse the district court's denial of Defendant's motion to dismiss and remand for final discharge of Defendant.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

**MICHAEL D. BUSTAMANTE, Judge
J. MILES HANISEE, Judge**

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-115

No. 34,061, (filed August 20, 2015)

STATE OF NEW MEXICO, ex rel., CHILDREN, YOUTH & FAMILIES DEPARTMENT.
Petitioner-Appellee,
v.
CHRISTINA L.,
Respondent-Appellant,
and
IN THE MATTER OF JUSTIN L.,
Child.

**APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
JOHN F. DAVIS, District Judge**

CHARLES E. NEELLEY
Chief Children's Court Attorney
KELLY P. O'NEILL
Children's Court Attorney
CHILDREN, YOUTH AND FAMILIES
DEPARTMENT
Albuquerque, New Mexico
for Appellee

GINA M. MAESTAS
LAW OFFICE OF GINA M. MAESTAS
Albuquerque, New Mexico
for Appellant

SHERRIE LEE TRESCOTT, Esq.
Rio Rancho, New Mexico
Guardian Ad Litem

Opinion

Cynthia A. Fry, Judge

{1} Mother appeals the district court's judgment of adjudication concluding that her child was neglected on the basis of Mother's inability to care for the child due to a mental disorder or incapacity. On appeal, Mother argues that the evidence was insufficient to support this conclusion because no evidence of a psychological or medical diagnosis of mental disorder or incapacity was presented. We conclude that the district court's findings do not support a determination that Child was neglected pursuant to NMSA 1978, § 32A-4-2(E)(4) (2009). Accordingly, we reverse.

BACKGROUND

{2} This is Mother's second appeal of a judgment of adjudication concluding that Child is neglected. Child was initially taken into the Children, Youth, and Families Department's (CYFD) custody in 2009 based on allegations that domestic violence toward Mother was taking place in the home. In the first case, the district court found that Child was neglected and abused pursuant to Section 32A-4-2(B)(1), (4), and (E)(2) ("[A]bused child means a child . . . who has suffered or who is at

risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian . . . [or] whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health. . . . [A] 'neglected child' means a child . . . who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them[.]"). In Mother's appeal in the first case, this Court concluded that the district court abused its discretion in admitting 911 dispatch logs and that without these logs there was insufficient evidence to support the district court's conclusion that Child was abused or neglected. *State ex rel. Children, Youth & Families Dep't*, No. 31,151, mem. op. 2, 10 (N.M. Ct. App. Sept. 18, 2012) (non-precedential). We remanded the case to the district court to determine whether Mother should regain custody of Child. *Id.* at 12.

{3} On remand, the district court adopted a permanency plan for reunification.

Mother participated with CYFD in the reunification plan over the next several months; however, CYFD subsequently filed a motion for leave to file a supplemental abuse and neglect petition on the basis of Section 32A-4-2(E)(4) (stating that one basis of determining that a child is neglected is when the "parent, guardian or custodian is unable to discharge that person's responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity"). In support of CYFD's allegation that Mother suffers from a mental disorder or incapacity, CYFD stated that Mother had submitted to a "mind map assessment" by Dr. Craig Pierce, a psychologist. The petition alleged that the mind map determined Mother's mental capacity to be functionally equivalent to an eight- to ten-year-old child. CYFD moved to consolidate the two cases. Although the district court did not specifically rule on this motion, an adjudicatory hearing was scheduled to determine whether Child was neglected pursuant to the allegations in CYFD's supplemental petition.

{4} At the hearing, Dr. Pierce was qualified as an expert in child and family psychology. Dr. Pierce described the mind map as a non-diagnostic therapeutic tool to assess an individual's developmental history. Dr. Pierce described the process as "relatively simple" and includes gathering information regarding the individual's family history and adverse childhood events that may have impacted the individual's brain development. Dr. Pierce testified that the mind map relies on a nine-page questionnaire to gather this information. He further testified that the mind map uses this self-reported information to evaluate cognitive and relational brain development, as well as sensory integration and self-regulation, and compares the results in those categories to "age typical" results. Dr. Pierce testified that Mother's results showed her to be in the fortieth percentile for people her age. Dr. Pierce concluded that, based on the mind map, Mother's brain development in the areas covered by the mind map were "significantly compromised" and that she functioned mentally at a lower age range to comparably aged adults. Dr. Pierce testified that, based on the results, Mother's ability to parent a small child was affected by her limitations, such as her ability to exercise sound judgment and prioritize the needs of Child. On cross-examination, however, Dr. Pierce clarified that the purpose of the mind map

was to direct therapy and assist Mother in learning parenting skills, not to diagnose a mental disorder or condition or to act as a standardized test for determining an individual's intelligence, such as an IQ test.

{5} Child's therapist, Brenda Lee, also testified at the hearing. Lee testified that while Mother showed aptitude in learning about Child's various mental diagnoses, Lee was frustrated by Mother's resistance to the "understanding training" Lee attempted to impart. Lee testified that Mother attempted to speak secretly to Child during supervised visits despite CYFD's instruction to Mother not to discuss Child's foster situation with Child. Lee testified that Mother's visits incited Child to exhibit reactive behaviors when he returned to his foster parents. Lee also testified that Mother threatened her on one occasion.

{6} Testimony by CYFD representatives echoed Lee's testimony. One representative testified that, although Mother was eager to meet with CYFD representatives, she had difficulty accepting constructive feedback and focusing on treatment goals. Mother also withdrew during meetings where she disagreed with discussions. Mother became resistant to further training by Lee after she was instructed on the results of the mind map.

{7} Sarah Blackwell, a CYFD representative, further testified regarding her concerns arising from a home assessment at Mother's residence. Blackwell noted that at the time of the visit, she observed that Mother had five dogs and a number of pet rats living at the residence. She testified that due to these animals, the home smelled of urine or feces. Blackwell also noted overflowing trash cans and general clutter throughout the home. Blackwell also expressed concern for the way in which Mother stored her medications and the presence of alcohol stored near Mother's bed.

{8} Mother also testified at the hearing. Pertinent to her testimony was the introduction of certificates showing Mother's successful completion of various parenting classes, including certificates awarded by Lee.

{9} Finally, although psychological evaluations of Mother were performed by Dr. Christopher Alexander and Dr. Nesha Morse, neither was called to testify. A CYFD representative was questioned regarding the findings of the psychological evaluations but could not recall the results. Reports of the evaluations were not otherwise introduced into evidence.

{10} At the conclusion of the hearing, the district court concluded that Child was neglected pursuant to Section 32A-4-2(E)(4). In issuing its ruling, the district court made repeated statements to the effect that Mother was a "bright woman," "capable of learning and mastering information," and that she possessed an "intellectual ability that seems to hold promise." The district court concluded, however, that Mother's defiance toward CYFD evidenced an inability to safely parent Child. The district court equated Mother's defiance with a lack of judgment and with mental incapacity. The district court found that Mother was unwilling to accept training from CYFD for the benefit of Child but was instead insistent on vindictively acting out against CYFD. Accordingly, the district court concluded that the evidence was clear and convincing under Section 32A-4-2(E)(4) that Child was neglected. Mother appeals this determination.

DISCUSSION

Standard of Review

{11} "To meet the standard of proof in an abuse or neglect proceeding, the fact finder must be presented with clear and convincing evidence that the child was abused or neglected." *State ex rel. Children, Youth & Families Dep't v. Shawna C.*, 2005-NMCA-066, ¶ 7, 137 N.M. 687, 114 P.3d 367. "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.* (internal quotation marks and citation omitted). "We employ a narrow standard of review and do not re-weigh the evidence." *State ex rel. Children, Youth & Families Dep't v. Amanda H.*, 2007-NMCA-029, ¶ 19, 141 N.M. 299, 154 P.3d 674. Instead, "we review to determine whether, viewing the evidence in the light most favorable to the prevailing party, the fact finder could properly determine that the clear and convincing evidence standard was met." *Id.*

{12} To the extent Mother's arguments require interpretation of Section 32A-4-2(E)(4), we review such arguments de novo. *In re Mahdjid B.*, 2015-NMSC-003, ¶ 12, 342 P.3d 698 ("Statutory interpretation is a question of law, which we review de novo." (internal quotation marks and citation omitted)).

Section 32A-4-2(E)(4)

{13} We begin with Mother's argument that there was insufficient evidence to support the district court's conclusion that

Child was neglected under Section 32A-4-2(E)(4) because the district court made no findings supporting a conclusion that Mother suffers from a mental disorder or incapacity. Mother highlights statements made by the district court during its ruling indicating that Mother was mentally capable. Mother argues that the district court erred in equating Mother's defiant attitude toward CYFD with a mental disorder or incapacity.

{14} Section 32A-4-2(E)(4) defines a neglected child as one "whose parent, guardian or custodian is unable to discharge that person's responsibilities to and for the child because of [a] . . . mental disorder or incapacity[.]" This section requires proof by clear and convincing evidence that the individual suffers from a mental disorder or incapacity and that such mental disorder or incapacity "render[s] the parent unable to provide proper parental care or discharge his or her responsibilities to the child." *Amanda H.*, 2007-NMCA-029, ¶ 25; See Section 32A-4-2(E)(4).

{15} The terms "mental disorder" and "mental incapacity" as used in Section 32A-4-2(E)(4) have not been specifically construed. In construing this provision, "we must ascertain and give effect to the intention of the Legislature." *Stang v. Hertz Corp.*, 1969-NMCA-118, ¶ 17, 81 N.M. 69, 463 P.2d 45. "[T]he plain language of a statute is the primary indicator of legislative intent." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted). Furthermore, we consider the language of the statute as a whole and construe it "so that no word and no part of the statute is rendered surplusage or superfluous." *Stang*, 1969-NMCA-118, ¶ 17.

{16} In accordance with these principles, two points are readily apparent. First, the Legislature intended the conditions listed under Section 32A-4-2(E)(4) to be grounds for adjudicating a child neglected distinct from those found in Section 32A-4-2(E)(2) (stating that a "neglected child means a child . . . who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them"). Second, the Legislature intended mental incapacity to be a separate condition from mental disorder.

{17} In first considering the distinction between Section 32A-4-2(E)(2) and 32A-4-2(E)(4), the distinguishing feature under Section 32A-4-2(E)(4) is the requirement that CYFD establish by clear and convincing evidence that one of the listed conditions—such as a mental disorder or incapacity—is the cause of the parent’s inability to discharge his or her responsibilities to the child. See *Amanda H.*, 2007-NMCA-029, ¶ 25 (stating that establishing one of the conditions listed in Section 32A-4-2(E)(4) is insufficient to support an adjudication that the child is neglected but must instead be the reason the parent is unable to discharge his or her responsibilities to the child). In contrast, under Section 32A-4-2(E)(2) it is sufficient that the parent’s failure to care for the child’s well-being is a result “of the faults or habits of the . . . parent.” This provision, as opposed to Section 32A-4-2(E)(4), requires culpability on the part of the parent. See *Shawna C.*, 2005-NMCA-066, ¶ 29; see also *Amanda H.*, 2007-NMCA-029, ¶ 21 (“To properly find that [the c]hild was neglected under [Section 32A-4-2(E)(2)], the district court must have been presented with clear and convincing evidence of Mother’s culpability through intentional or negligent disregard of [the c]hild’s well-being and proper needs.”). Thus, when CYFD proceeds under Section 32A-4-2(E)(4), it is not required to prove culpable behavior of the parent, but it also cannot rely on evidence of the parent’s negligent or intentional disregard of the child’s needs. Instead, CYFD must establish the “status” that makes the individual unable to discharge his or her parental responsibilities and show the connection between that status and the neglect or abuse. See *Shawna C.*, 2005-NMCA-066, ¶ 29; see also *Amanda H.*, 2007-NMCA-029, ¶ 25 (“The unfavorable personal status of the parent . . . is relevant only to the extent that it prompts either the harms defined as abuse, or the neglect.” (internal quotation marks and citation omitted)).

{18} Second, the plain meaning of the terms “mental disorder or incapacity” in Section 32A-4-2(E)(4) indicates that the Legislature intended these terms to refer to two separate conditions. In *Shawna C.*, this Court noted that the statute was amended in 1987 to include the word “disorder” to clarify “the circumstances in which a parent’s inability to function as a parent would constitute neglect without a showing of culpability.” 2005-NMCA-066, ¶ 35. We believe the purpose of this amendment

was to clarify that mental illness was an included “status” under Section 32A-4-2(E)(4). In this regard, *Black’s Law Dictionary* 1135 (10th ed. 2014) defines “mental disorder” and “mental illness” synonymously. Mental illness is defined as evidencing “a disorder in thought or mood so substantial that it impairs judgment, behavior, perceptions of reality, or the ability to cope with the ordinary demands of life.” This definition comports with the definition of mental disorder used elsewhere in our statutes. See NMSA 1978, § 43-1-3(O) (2013) (defining mental disorder as the “substantial disorder of a person’s emotional processes, thought or cognition that grossly impairs judgment, behavior or capacity to recognize reality, but does not mean developmental disability[ies]”).

{19} The term “incapacity,” on the other hand, is defined in *Black’s Law Dictionary* 878 (10th ed. 2014) as a “[l]ack of physical or mental capabilities.” In this case, we are concerned with mental capabilities. In *State ex rel. Health & Social Services Department v. Natural Father*, this Court stated that “a child is neglected if the parents lack the mental capacity to provide the care or control necessary for the child’s well-being.” 1979-NMCA-090, ¶ 9, 93 N.M. 222, 598 P.2d 1182. Consistent with *Black’s Law Dictionary* and *Natural Father*, our probate code, in the context of the parent/child relationship, defines “incapacity” as the “inability of an individual to function as a parent of a child because of the individual’s physical or mental condition[.]” NMSA 1978, § 45-2-115(H) (2011). In construing a similar term, the Nebraska Supreme Court distinguished “mental deficiency” from “mental illness” in defining mental deficiency as “an impairment in learning capacity such that one is unable to profit from instruction and acquire parenting skills.” *In re D.L.S.*, 432 N.W.2d 31, 38 (Neb. 1988) (internal quotation marks and citation omitted). Taking these definitions into consideration, we believe that the Legislature intended mental incapacity to encompass those circumstances in which an individual, due to an intellectual disability, is unable, as opposed to unwilling, to discharge his or her responsibilities to the child.

{20} Turning to the district court’s decision in this case, we determine that the district court’s findings did not support a conclusion that Child was neglected pursuant to Section 32A-4-2(E)(4). The district court entered no written findings of fact. We therefore consider its statements

at the conclusion of the hearing to clarify the basis of its decision. See *Ledbetter v. Webb*, 1985-NMSC-112, ¶ 36, 103 N.M. 597, 711 P.2d 874 (indicating that the district court’s verbal comments can be used to clarify ruling). The district court did not make any finding that Mother suffered from a mental disorder or illness. Nor did it find that Mother suffered from mental incapacity. The district court explicitly stated that Mother was “capable of learning and mastering info” and that she was a “bright woman” who showed a “capacity to learn.” We understand these findings to be in direct contradiction to a determination that Mother lacked the intellectual capacity to “profit from instruction and acquire parenting skills.” *D.L.S.*, 432 N.W.2d at 38. {21} Furthermore, the determinative factor in the district court’s decision was Mother’s defiant attitude toward CYFD. Testimony at the hearing indicated that Mother displayed an unwillingness to accept feedback and instruction from CYFD with which she disagreed and that this dynamic grew worse after Mother was given the results of the mind map assessment. While the district court stated that Mother’s defiant attitude was affecting her ability to recognize the conditions she needed to improve in order to safely parent Child, we conclude that such findings may be relevant to establishing that the faults and habits of Mother render her unwilling to provide proper parental care under Section 32A-4-2(E)(2), but they are not sufficient to show that Child is neglected under Section 32A-4-2(E)(4). Stated another way, we are unprepared to conclude that evidence of a defiant attitude toward CYFD constitutes a mental disorder or incapacity under the Abuse and Neglect Act. Accordingly, the district court erred in concluding that CYFD established by clear and convincing evidence that Child was neglected pursuant to Section 32A-4-2(E)(4).

Dr. Pierce’s Testimony

{22} While the parties’ briefing largely focused on Dr. Pierce’s testimony regarding Mother’s mind map and whether, as a general matter, expert testimony is required to establish the existence of a mental disorder or incapacity sufficient to adjudicate a child neglected under Section 32A-4-2(E)(4), we need not address it. The district court’s comments did not suggest any reliance on Dr. Pierce’s testimony, and the court’s verbal findings regarding Mother’s defiance of CYFD were not supported by Dr. Pierce’s testimony. Indeed,

Dr. Pierce testified that the mind map was not a diagnostic tool. While we acknowledge that there may be cases in which expert testimony is not required, *cf. Richter v. Presbyterian Healthcare Servs.*, 2014-NMCA-056, ¶ 19, 326 P.3d 50 (noting that in some instances expert testimony is not required to prove instances of medical negligence), *cert. denied*, 2014-NMCERT-005, 326 P.3d 1111, we observe that it is unlikely that a finding of neglect under the “mental disorder or incapacity” element of Section 32A-4-2(E)(4) could be sustained by any-

thing other than a diagnosis supported by the evidentiary reliability of the underlying scientific knowledge. *See State v. Torres*, 1999-NMSC-010, ¶ 24, 127 N.M. 20, 976 P.2d 20 (explaining that “it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge”). Accordingly, to the extent the district court’s order can be construed as relying on Dr. Pierce’s opinion that Mother functions at a lower cognitive ability, we

do not believe this opinion was properly supported.

CONCLUSION

{23} For the foregoing reasons, we reverse the district court’s judgment of adjudication and remand for proceedings consistent with this Opinion.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, October 23, 2015, No. 35,539

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-116

Nos. 33,255/33,078 (filed September 3, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

CARLOS HERRERA,
Defendant-Appellant.

Consolidated With

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

DANIEL HERRERA,
Defendant-Appellant.**APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

DOUGLAS R. DRIGGERS, DISTRICT JUDGE

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Opinion**Michael D. Bustamante, Judge**

{1} Appellants' motion for rehearing is granted. The opinion filed in this case on August 13, 2015, is withdrawn and this Opinion is substituted in its place.

{2} In these consolidated cases, Defendants Carlos and Daniel Herrera, brothers, appeal their convictions for kidnapping, aggravated assault, and conspiracy to commit kidnapping. We affirm.

BACKGROUND

{3} Seventeen-year-old Samuel Brown (Brown) and his mother's boyfriend, Joe Azure (Azure), went to Defendant Carlos Herrera's (Carlos) apartment to meet with another person who would help Brown record Brown's music. Defendant

Daniel Herrera (Daniel) was also at the apartment. Several other people were also present. Brown and Azure sat at the kitchen counter to wait for the person with the recording equipment. Within a few minutes, Carlos accused Azure and/or Brown of stealing some of his cocaine. An argument ensued. Carlos left the kitchen briefly and returned with Daniel, who picked up a kitchen knife. During the ensuing altercation, Daniel held the knife at Brown's throat. Carlos told Brown and Azure that they could not leave the apartment until the cocaine was found and "yell[ed] and forc[ed] the door shut as [Brown and Azure] were trying to open it." Daniel told Brown that he was going to kill Brown.

{4} At some point, Carlos made a phone call and within minutes a third man ar-

rived. The parties refer to this man as "Zack." Zack hit Azure over Azure's left eye with a weapon that Azure initially thought was "a sidearm that an officer would carry." Azure testified that later he concluded that the gun was "a BB gun or a pellet gun," but that he "felt [they] were still in danger[.]" Azure required stitches to close the resulting injury. Then, while Zack brandished the gun, Carlos, Daniel, and Zack told Brown and Azure to turn out their pockets, strip to their underwear, and sit on the couch. Carlos, Daniel, and Zack searched Brown's and Azure's clothes for the cocaine and removed the money and identification they found. They copied down the information on Azure's identification and kept Brown's student identification card, as well as Azure's money. Brown testified that Carlos punched Azure repeatedly in the face while Brown sat on the couch and Daniel held the knife to Brown's throat. Azure fell into unconsciousness. When he awoke, he and Brown were told to leave and warned not to call the police. They picked up their clothes and left without putting them on. Brown testified that he and Azure were at Carlos's apartment for at least an hour and a half.

{5} Carlos and Daniel were each indicted for two counts of kidnapping, two counts of aggravated assault, and one count of conspiracy to commit kidnapping, one count of armed robbery, and one count of aggravated battery. Carlos was also indicted for one count of battery. After a jury trial, in which they were tried together, Carlos and Daniel were convicted of all charges except for aggravated battery and armed robbery.

DISCUSSION

{6} On appeal, Carlos and Daniel (collectively, Defendants) make the same three arguments. First, they argue that the district court erred in denying their request for a jury instruction on kidnapping based on *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, *cert. quashed*, 2015-NM-CERT-003, 346 P.3d 1163. Second, they argue that the convictions for aggravated assault and kidnapping violate their right to be free from double jeopardy. Finally, they argue that there was insufficient evidence to support their convictions for kidnapping, aggravated assault, and conspiracy. Carlos does not challenge his conviction for battery.

{7} As a preliminary matter, we first address the State's contention that Defendants' kidnapping jury instruction argument was not preserved, and therefore, "[t]his Court is precluded from considering the question." "Generally, to preserve er-

ror on a [district] court's refusal to give a tendered instruction, the [a]ppellant must tender a legally correct statement of the law." *State v. Jernigan*, 2006-NMSC-003, ¶ 10, 139 N.M. 1, 127 P.3d 537. "However, if the record reflects that the judge clearly understood the type of instruction the [d]efendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review." *Id.* Here, the district court heard argument from both parties on the requested instruction and took a recess to examine it and *Trujillo*. In denying Defendants' request, it ruled that "there [are] significant differences in the . . . facts of [*Trujillo*] . . . and this case." We conclude that Defendants' argument was sufficiently preserved in the district court for appellate review.

{8} However, Defendants failed to ensure that the requested instruction was included in the record proper nor was the substance of the requested instruction read into the trial record. "It is . . . the general rule that an appellate court will decline to review claims of error regarding jury instructions if the instructions are not contained in the record on appeal." *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 17, 128 N.M. 434, 993 P.2d 751; *cf. Trujillo v. Baldonado*, 1980-NMCA-184, ¶¶ 3-4, 95 N.M. 321, 621 P.2d 1133 (considering the propriety of giving jury instructions even though the instructions were not in the record because the instructions given were the uniform jury instructions prescribed by rule). Although they had an opportunity under Rule 12-209(C) NMRA to supplement the record, Defendants failed to do so, even after the State pointed out the omission in its answer brief. In the absence of the proposed instruction, any statements as to the propriety of the jury instruction would be speculative and akin to an advisory opinion.¹

{9} As to the district court's denial of the instruction, we agree with the district court that the facts here are readily distinguishable from those in *Trujillo*. In *Trujillo*, this Court held that "the Legislature did not intend to punish as kidnapping restraint or movement

that is merely incidental to another crime." 2012-NMCA-112, ¶ 1. There, the defendant restrained the victim during a two- to four-minute fistfight. *Id.* ¶ 3. We concluded that the defendant's kidnapping conviction must be vacated, stating that, "the factual circumstances of [that] case . . . allowed us to determine as a matter of law that the Legislature did not intend [the d]efendant's conduct to constitute kidnapping." *Id.* ¶ 42. We also observed that the facts there did "not present a 'close call.'" *Id.* ¶ 39.

{10} Here, Brown testified that Carlos told him and Azure that they could not leave until the cocaine was found and that Carlos prevented them from opening the door to the apartment as they tried to leave. In addition, Brown testified that he and Azure were prevented from leaving the apartment for between one and a half and two hours. Such a prolonged period of restraint is simply not incidental to or inherent in aggravated assault under any of the tests described in *Trujillo*. *See id.* (applying three tests for kidnapping to the facts in that case). The facts here thus do not present "[a] more complicated factual scenario" that must be submitted to the jury. *See id.* ¶ 42; *State v. Bunce*, 1993-NMSC-057, ¶ 8, 116 N.M. 284, 861 P.2d 965 ("A defendant is entitled to have the jury instructed on his theories of the case if that theory is supported by the evidence").

{11} Defendants' remaining arguments are, for the most part, a variation on their first. Defendants argue in essence that there is insufficient evidence to support the kidnapping and aggravated assault convictions because either (1) there is no evidence of the force required for kidnapping beyond that which forms the basis for aggravated assault, or (2) there is insufficient evidence of the use of a deadly weapon required for aggravated assault beyond that which forms the basis for kidnapping. They argue, "Either way, whether the restraint was incidental to the assault, or if the assaults were done in furtherance of the kidnapping, the evidence at most supports only one theory or the other, and thus, can only sustain one conviction or the other."² Similarly, Defendants argue that the conduct underlying

the kidnapping and aggravated assault convictions was "unitary [because] the same continuous struggle gave rise to the aggravated assault and kidnapping convictions." They maintain that the Legislature did not intend to impose multiple punishments for kidnapping and aggravated assault based on unitary conduct and that, therefore their convictions violate their right to be free of double jeopardy. *See* U.S. Const. amends. V and XIV, § 1; N.M. Const. art. II, § 15; *State v. Armijo*, 2005-NMCA-010, ¶ 15, 136 N.M. 723, 104 P.3d 1114 (stating that in an analysis of double jeopardy, we ask "whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes" and then, if the conduct is unitary, "whether the [L]egislature intended to impose multiple punishments for the unitary conduct" (internal quotation marks and citation omitted)).

{12} We address these two arguments together because their resolution depends on the same analysis: whether there is sufficient evidence of independent factual bases for each conviction. "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted). In reviewing the evidence, "we resolve all disputed facts in favor of the [s]tate, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* (internal quotation marks and citation omitted). Likewise, when reviewing whether conduct is unitary in the double jeopardy context, we "indulge in all presumptions in favor of the verdict." *State v. Urioste*, 2011-NMCA-121, ¶ 19, 267 P.3d 820 (internal quotation marks and citation omitted).

{13} The jury was instructed that, in order to convict Defendants for kidnapping, it must find that "[Defendants] restrained or confined [Brown and Azure] by force, intimidation[,], deception; [and Defendants] intended to hold [Brown and Azure] against

¹ The Uniform Jury Instruction (UJI) Committee has proposed revisions to the UJI for kidnapping based in part on the *Trujillo* holding. *See* Proposed Revisions to the Uniform Jury Instructions for Criminal Cases, available at <https://nmsupremecourt.nmcourts.gov/rules> (see Proposal 51).

² The jury was instructed that each Defendant could be found guilty of a crime even if he did not commit the acts necessary for the crime if "[t]he defendant intended that the crime be committed[,], . . . [t]he crime was committed[,], and] . . . [t]he defendant helped, encouraged[,], or caused the crime to be committed." UJI 14-2822 NMRA. Thus, although only Daniel wielded the knife, it is possible the jury found Carlos guilty of the charges related to the knife or found Daniel guilty of charges based on Carlos's conduct, based on an accessory theory. *See State v. Bahney*, 2012-NMCA-039, ¶ 27, 274 P.3d 134 ("[A] person who aids or abets in the commission of a crime is equally culpable and faces the same punishment as a principal." (internal quotation marks and citation omitted)). It is not clear whether the jury so found. Neither Carlos nor Daniel makes an argument based on accessory liability.

[their] will[] to inflict physical injury or for the purpose of making the victim[s] do something or . . . keeping the victim[s] from doing something[.]” See UJI 14-403 NMRA; NMSA 1978, § 30-4-1 (2003). “The crime of kidnapping is complete when the defendant, with the requisite intent, restrains the victim, even though the restraint continues through the commission of a separate crime.” *State v. Dominguez*, 2014-NMCA-064, ¶ 10, 327 P.3d 1092, *cert. denied*, 2014-NMCERT-005, 326 P.3d 1111.

{14} The premise behind Defendants’ argument is that it was only the brandishing and use of the knife that prevented Brown and Azure from leaving Carlos’s apartment. They contend that “[t]he evidence at trial established that in order to recover Carlos’[s] belongings, Daniel held the knife to Brown’s throat. That action, in essence, also served to prevent Brown [and] Azure from leaving.” But this premise ignores the other evidence already discussed, to wit, that Carlos shouted at Brown and Azure, told them they couldn’t leave until his property was found, and pushed the door shut when they tried to open it. The jury could have found that kidnapping was complete, but continuing, at that point. There was also testimony that Carlos and Daniel prevented Brown and Azure from leaving the apartment for at least an hour and a half and that they made Brown and Azure sit on the couch while they searched for the cocaine. This testimony is sufficient to support the kidnapping verdicts.

{15} Moreover, the jury could reasonably have concluded that Brown and Azure were confined in the apartment by force or intimidation when Carlos told Brown and Azure that they couldn’t leave, yelled at them, and closed the door when they tried to leave, conduct that is independent of and distinct from Daniel’s wielding of the knife. See *Urioste*, 2011-NMCA-121, ¶ 28 (holding that there was no unitary conduct where “the jury could reasonably have inferred an independent factual basis for all three of [the d]efendant’s convictions” and stating that “we do not second-guess the factual conclusions of a jury”). Since the conduct underlying the two charges was not unitary, our double jeopardy analysis is concluded. *State v. Contreras*, 2007-NMCA-045, ¶ 20, 141 N.M. 434, 156 P.3d 725 (“If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation.” (internal quotation marks and citation omitted)).

{16} As to aggravated assault, the jury was instructed that the following elements must be met:

1. [Defendants] brandished a knife [or] held a knife to the throat of . . . Brown;

2. [Defendants’] conduct caused [Brown or Azure] to believe [Defendants were] about to intrude on [their] bodily integrity or personal safety by touching or applying force to [them] in a rude, insolent[,] or angry manner; [and]

3. A reasonable person in the same circumstances as [Brown or Azure] would have had the same belief[.]

See UJI 14-305 NMRA; NMSA 1978, § 30-3-2(A) (1963). Brown and Azure testified that, after Carlos retrieved him from another room in the apartment, Daniel held the knife at Brown’s throat. Brown testified that Daniel told Brown that he was going to kill Brown. He further testified that Daniel held the knife at his throat while he was sitting on the couch in his underwear and while Azure was being punched by Carlos. Other than their argument that the factual basis for the aggravated assault conviction is the same as that for the kidnapping convictions which we have already addressed, Defendants argue only that there was no evidence that a reasonable person in Azure’s position would feel threatened when Daniel held the knife to Brown’s throat. We disagree. See *State v. Arrendondo*, 2012-NMSC-013, ¶ 14, 278 P.3d 517 (stating that to convict for assault “the [prosecution’s] evidence must satisfy both a subjective and an objective standard”). Azure testified that he and Carlos were “yelling back and forth at each other” about the missing cocaine and that they continued arguing while Daniel held the knife to Brown’s throat. He also testified that he was “maybe about five, six feet” from Brown when Daniel first appeared with the knife and held it to Brown’s throat. Brown testified that later Carlos punched Azure repeatedly in the face while Brown sat on the couch and Daniel held the knife to Brown’s throat. These facts alone, not to mention others already outlined, are sufficient to support the jury’s finding that a reasonable person in either victim’s position would believe that his bodily integrity was threatened by Daniel’s use of the knife. See *State v. Phillips*, 2000-NMCA-028, ¶ 14, 128 N.M. 777, 999 P.2d 421 (stating that “the jury was free to use [its] common sense to look through testimony and draw inferences from all the surrounding circumstances” (internal quotation marks and citation omitted)).

{17} In summary, we conclude that Defendants’ convictions for kidnapping and aggravated assault are (1) supported by the evidence and (2) based on independent factual bases such that Defendants’ double jeopardy rights are not implicated.

{18} Finally, Defendants argue that there was insufficient evidence presented to support their convictions for conspiracy to commit kidnapping. “Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.” NMSA 1978, § 30-28-2(A) (1979). A conspiracy may be formed by words or acts. UJI 14-2810(1) NMRA. “In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy.” *State v. Trujillo*, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). “The agreement need not be verbal, but may be shown to exist by acts [that] demonstrate that the alleged co-conspirator knew of and participated in the scheme.” *Id.* A conspiracy “may be established by circumstantial evidence.” *Id.*

{19} Here, Brown and Azure testified that after the argument started, Carlos went into another room and returned with Daniel, who shortly thereafter picked up a knife and held it to Brown’s throat. They testified that both Carlos and Daniel made them strip to their underwear and sit on the couch. Finally, both Carlos and Daniel, along with Zack, searched Brown’s and Azure’s clothes for the cocaine and removed the money and identification they found. Viewed in the light most favorable to the verdict, this testimony supports an inference that Carlos and Daniel worked together to confine Brown and Azure in the apartment. We conclude that the evidence is sufficient to support the convictions for conspiracy to commit kidnapping.

CONCLUSION

{20} We discern no error in the district court’s denial of a jury instruction based on *Trujillo*. We also conclude that there was sufficient evidence to support Defendants’ convictions for kidnapping, aggravated assault, and conspiracy to commit kidnapping, and that none of the convictions violates the prohibition against double jeopardy. We affirm all of Defendants’ convictions.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge

Certiorari Denied, November 5, 2015, No. 35,546

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-117

No. 33,396 (filed September 3, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.ADRIA LEFTHAND,
Defendant-Appellee.**APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

SARAH C. BACKUS, District Judge

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for Appellee**Opinion****Roderick T. Kennedy, Judge**

{1} The State appeals from dismissal of an indictment against Defendant on one count of custodial interference for improper venue. We reverse the district court, holding that the place where a person, with a right of custody, was deprived of that right by the wrongful actions of another establishes a proper venue for the trial of the crime. In this case, the person with whose custody Defendant interfered resided in and has the right to custody of the child in Taos County. This is sufficient to confer venue on the district court in Taos County. The case is remanded with an order to reinstate the indictment against Defendant in the Taos County district court.

FACTS AND PROCEDURAL BACKGROUND

{2} Defendant and Gilbert Martinez lived in Taos, New Mexico, and have a son who was born in Taos. As the result of Defendant's petition to determine paternity, custody, and support, the Taos County district court entered a stipulated order in 2007 governing support and custody and granting Gilbert Martinez visitation with his child.

{3} After the order was entered, Defendant moved to Albuquerque, while Martinez

remained in Taos. After problems with Defendant's compliance with ordered time sharing, Martinez requested the Taos County district court to modify the prior order; the district court found that Martinez had made a good faith effort to maintain time-sharing with his child, and Defendant had thwarted those efforts. The district court entered an order containing a new time-sharing plan to begin on August 10, 2010.

{4} Martinez was unable to exercise his rights to custody under the time-sharing plan from August 2012 through January 2013 because Defendant did not abide by the new plan. Orders to show cause elicited no response from Defendant. Subsequently, Defendant was indicted by a Taos County grand jury for custodial interference. Defendant moved to dismiss the indictment for improper venue, maintaining that since she had failed to deliver the child to Martinez in Santa Fe, where the August 2012 order directed the exchange of custody to take place, venue was not proper in Taos County.

{5} The district court agreed with Defendant and dismissed the indictment. Its order of dismissal found that "the only connection to Taos County in the above styled case is that the parenting plan was entered into in Taos County and the al-

leged victim resides in Taos County". It further found that "none of the material elements of the crime were alleged to have been committed in Taos County, and thus venue is improper in Taos County." The State appealed.

DISCUSSION

{6} We review de novo questions involving the statutory interpretation of the essential elements that must be proven to constitute a criminal offense. *State v. Roybal*, 2006-NMCA-043, ¶ 25, 139 N.M. 341, 132 P.3d 598. Questions involving the statutory interpretation of what essential elements must be proven to constitute a criminal offense are likewise reviewed de novo. *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768 82 P.3d 939. When construing a statute, we first refer to the statute's plain meaning, avoiding constructions that would produce an absurd result; if absurdity would result, we construe the statute according to its obvious spirit or reason. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 19, 117 N.M. 346, 871 P.2d 1352. Venue is not an element of an offense and does not relate to the guilt or innocence of the defendant; as a result, "it may be established by a mere preponderance of the evidence." *Roybal*, 2006-NMCA-043, ¶ 19.

{7} Defendant does not dispute that Martinez has custody rights from the court order setting time sharing with their son, that all acts alleged in the case occurred in New Mexico, or that the child was present within New Mexico at all relevant times. Defendant states that "[t]he alleged acts or omissions in this case took place in either Santa Fe or Bernalillo County." According to Defendant, Bernalillo County would be a proper venue in which to try the allegation that she detained the child by refusing to leave her home there, and Santa Fe County would have venue over the allegation that she did not turn the child over to Martinez in that county as ordered by the Taos County district court, possibly satisfying the "failing to return" element. This focus on the various methods of committing the crime begs question of what constitutes the elements of custodial interference, in order to determine where Defendant transgressed any that might be essential.

A. Constitutional and Statutory Provisions Governing This Case**1. Custodial Interference**

Custodial interference consists of any person, having a right to custody of a child, maliciously

taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

NMSA 1978, § 30-4-4(B) (1989).

“‘[R]ight to custody’” means the right to physical custody or visitation of a child arising from:

- (a) a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or
- (b) a custody determination.

§ 30-4-4(A)(5)(a)(b).

2. Constitutional and Statutory Provisions Regarding Venue

All trials of crime shall be had in the county in which they were committed. In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed.

NM Const., art. II, § 14.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person . . . [and] to have . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

NMSA 1978, § 30-1-14 (1963).

B. Nature of the Custodial Interference Offense

1. Defendant's Arguments and the District Court's Order

{8} Defendant asserts that the *actus reus*—the wrongful deed—is solely the act of detaining or failing to deliver the child. She insists that the elements of the crime are limited to “the alleged actions of the accused, not the effect those actions have on other people.” Defendant asserted to the district court that her failure to deliver the child to his father in Santa Fe was the only alleged element or act of custodial interference. She has expanded this view on appeal to include detaining the child in Bernalillo County where she resides, but insists that because none of the things she allegedly did to transgress the elements of the crime “took place in Taos County[,]” venue in Taos County was improper.

{9} The district court appears to have agreed with Defendant's arguments in dismissing the indictment. The district court set out the *actus reus* elements as “taking, detaining, concealing, enticing away or failing to return [a] child,” and the *mens rea* as doing the acts maliciously “with the intent to deprive permanently or for a protracted period of time another person having a right of custody of that child of his right to custody.” It found that Defendant failed to turn over the child to his father in Santa Fe County and that “none of the material elements of the crime were alleged to have been committed in Taos County[.]” The State asserts that this is not the sum of the essential elements. We must determine what the elements of the offense are.

2. Deprivation of Custodial Rights is the Gravamen of the Offense and a Necessary Element of Custodial Interference

{10} The ultimate goal in statutory construction “is to ascertain and give effect to the intent of the Legislature.” *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. The title of a statute is frequently useful to directing its construction. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 18, 289 P.3d 1232. Here, the statute is entitled “[C]ustodial [I]nterference,” and it “is intended to prevent persons with custodial rights from disrupting another person's right to custody.” *State v. Munoz*, 2006-NMSC-005, ¶ 16, 139 N.M. 106, 129 P.3d 142. The gravamen of a criminal offense is the “burden or gist of a charge; the grievance or injury specially complained of.” *Black's Law Dictionary* 547 (2d ed. 1910). We still emphasize the “wrong or evil the statute is designed to remedy.” *State v. Hernandez*, 2001-NMCA-057 ¶ 18, 130 N.M. 698, 30 P.3d 387. The gist of this offense is to punish the intentional disruption or deprivation of the established custody rights of another.

{11} The elements cited by the Taos County district court, such as taking, detaining, concealing, or enticing away, are no more than various *means* of accomplishing the gravamen of the offense, which is an unlawful deprivation of, or interference with, the right of custody. See *State v. Sung*, 2000-NMCA-031, ¶ 9, 128 N.M. 786, 999 P.2d 430 (describing “detaining” and “failing to return” a child as “forms of custodial interference” (internal quotation marks and citation omitted)); cf. *State v. Swick*, 2012-NMSC-018, ¶ 40, 279

P.3d 747 (holding that additional elements aggravating the crime of burglary only modified the crime[,]) but “do not change the gravamen of the crime,” which was unlawful entry (internal quotation marks omitted)).

{12} In *Munoz*, our Supreme Court determined that interference with the right to custody may be accomplished either by “taking interference,” or “failing to return interference.” 2006-NMSC-005, ¶ 14. Both types of interference “require malice and the intent to deprive permanently or for a protracted time another person of his or her custodial rights.” *Id.* ¶ 15. Commission of the crime requires malice and the specific intent to deprive the custodial parent of his or her right to custody. Section 30-4-4(B). Congruence between the required intent and the stated subject matter of the crime “demand[s] the inclusion of intent as an element of the crime.” *State v. Lawson*, 1955-NMSC-069 ¶ 10, 59 N.M. 482, 286 P.2d 1076.

a. The Crime Is Not Completed Until the Intended Result is Achieved

{13} Where the indictment alleges that Defendant “did maliciously take, detain, conceal or entice[] away or fail[] to return said child” with the requisite intent, and those elements are found by the district court to have occurred elsewhere than Taos County, our inquiry cannot end if there is another essential element to the crime that was not considered. Prohibited acts, like detaining and failing to return the child, do not complete the crime. The crime of custodial interference is only complete once the person who has the right to custody suffers the malicious and intended harm the custodial interference statute seeks to prevent. Thus, when Defendant concedes the State's argument “that an essential element of the crime is deprivation of the lawful right to custody of a child[,]” but insists that it is the acts, not the result accomplished, that are the elements of the offense, Defendant paints an incomplete picture.

{14} In the context of custodial interference, most other states that have considered the elements of custodial interference hold that it is deprivation of the custodial right—the “prohibited result, rather than the proscribed conduct *per se*, that is the gravamen of the offense.” *Wheat v. State*, 734 P.2d 1007, 1010 (Alaska Ct. App. 1987); see *Foster-Zahid v. Comm.*, 477 S.E.2d 759, 762, (Va. Ct. App. 1996) (pointing out that the act of withholding is the gravamen of the offense; doing so

outside the commonwealth is the element elevating a misdemeanor to a felony); *State v. Spina*, 99 S.W.3d 596, 598 (Tenn. Crim. App. 2002) (“[T]he gravamen of the State’s prosecution is that the Defendant knowingly detained the child ‘from the vicinity where the child . . . is found’”). Idaho included deprivation of custody as something accomplished by one who “[t]akes, entices away, keeps or withholds any minor child from a parent or other person . . . having . . . visitation or other parental rights[.]” *State v. Doyle*, 828 P.2d 1316, 1320 (Idaho 1996) (emphasis omitted). Arizona, whose statute forbids a person knowingly taking, enticing, or keeping for lawful custody any child, likewise recognizes the prohibited result of the crime as “the deprivation of ‘lawful custody.’” *State v. Aussie*, 854 P.2d 158, 160 (Ariz. Ct. App. 1993). In New Mexico, when a defendant maliciously acts with requisite specific intent “to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody[.]” deprivation of a person’s right to custody is an intended harmful result of committing the crime. *Munoz*, 2006-NMSC-005, ¶ 14. It follows that deprivation is an essential element of the offense; emphasizing actions like enticing, withholding, detaining, or failing to return a child to their custodial parent highlights the means to the end.

{15} In short, the *actus reus*—Defendant’s conduct—and its intended result are both separate and complementary material elements of the crime. “Where, however, a statute, in addition to prohibiting conduct, includes within its definition of the offense a specific result, then the crime is not completed until that result occurs. And if the prohibited result occurs in a place other than the conduct which occasioned it, the location of the result may fairly be deemed the place where the crime is ‘consummated.’” *Trindle v. State*, 602 A.2d 1232, 1236 (Md. 1992) (quoting *Wheat v. State*, 734 P.2d 1007, 1009), *abrogated on other grounds by Surland v. State*, 895 A.2d 1034 (Md. 2006). Acting in certain ways with the intent to deprive a person of custody of a child is only complete when the victim custodial parent’s right to custody has suffered the interference. See 51 C.J.S. *Kidnapping* § 31 (2015) (“Deprivation of custodial rights is a requisite element of the offense of custodial interference.”).¹

{16} In light of our Supreme Court’s holding in *Munoz* that the purpose of the statute is to prevent interference with a person’s custody, we hold that interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference. Thus, we regard the district court’s order as erroneously leaving from its consideration the necessary element of Defendant’s deprivation of Martinez’s right of custody with his son. Instead, the court concentrated on the places where the methods were employed by which the interference or deprivation was accomplished. The venue statute is clear: “In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed.” Section 30-1-14. Because deprivation is an element, where it occurred is critical for a determination of venue.

3. Determining Where Deprivation of Custody Rights Occurred

{17} The fact that some elements of the offense may have occurred elsewhere does not defeat venue as long as *any* material element of the crime was committed in the county in which the defendant is charged. Section 30-1-14; *State v. Smith*, 1979-NMSC-020, ¶ 11, 92 N.M. 533, 591 P.2d 664. We now join the majority of states that have concluded that deprivation of custody is an element of custodial interference and held venue to be proper in the county in which the custodial parent who suffered the deprivation resides. In Virginia, the gravamen of the offense is not the taking or abduction but the “withholding the child from the child’s custodial parent[.]” and venue is proper in the county where the harm resulted from the criminal act, namely, where the parent entitled to custody resided when deprived of it by the defendant. *Foster-Zahid*, 477 S.E. 2d at 762; see *State v. Young*, 2007 MT 323, ¶ 29, 340 Mont. 153, 174 P.3d 460 (holding venue proper where deprivation occurred); *Spina*, 99 S.W.3d at 599 (holding that the trial court of the county in which the custodial parent resides has venue). In Idaho, “the duty to return the child to the custodial parent follows the custodial parent.” See *Doyle*, 828 P.2d at 1321.

{18} Defendant conceded the necessary element of deprivation of custody in the crime of which she is accused. She cites to no contrary authority from any state that, having recognized the element, has failed

to establish venue in the county where the deprivation occurred. We therefore hold that deprivation of custodial rights is an essential element of the crime of custodial interference and that the element is satisfied in the county where the result of the defendant’s actions is felt by the person so deprived.

{19} We are not persuaded by Defendant’s attempts at distinguishing various cases we have cited, including *Aussie*, *Foster-Zahid*, and *Wheat*. Suffice it to say that the specifics of those cases that purportedly distinguished them from the present case are not relevant in light of the holdings in those cases, which firmly establish that deprivation of custody is the gravamen of the offense and that venue may be found in the county where the element of deprivation occurs. The right to custody enjoyed by the person injured by the crime in this case must be established by proving the existence of a court order. Section 30-4-4(A)(5)(b), (B) (requiring that a custody order establish a right to custody or visitation in the person whose rights have been transgressed). Martinez was given custody by an order of the district court in Taos County, and he resides in Taos County.

{20} We conclude that his right to custody was thwarted by Defendant in Taos County. His “right to custody” is based on an order issued by a Taos county district court, and Defendant violated that court order by depriving Martinez of that right. See *Sung*, 2000-NMCA-031, ¶ 12 (accepting that custodial interference “essentially amounts to violating a duty that arises in this state”). Given that Martinez’s right to custody was based on a court order from Taos County, Section 30-4-4(A)(5), and was denied by Defendant’s actions, venue will lie in Taos County district court, and Defendant violated that court order by depriving Martinez of that right. See, e.g., *People v. Caruso*, 519 N.E.2d 440, 442-43 (Ill. 1987) (rejecting the argument that the crime is committed where the children were concealed and establishing venue in the county in which the detrimental effects of the actions are felt); *Trindle*, 602 A.2d at 1236 (holding that venue lies in the county in which the custodial parent was deprived of custody and the court’s authority was flouted). The locus of the legal right to custody suggests another well-recognized reason to recognize venue in the Taos County district court. If the violation of

¹We note that the elements stated in this section of the C.J.S. are nearly identical to those in Section 30-4-4.

the right imposed by a court order is part of the offense, then venue should certainly lie in the court whose order was violated. *Dugie*, 1999-NMSC-002, ¶ 6.

4. Venue Is Proper In Taos County

{21} Because venue must be supported by no more than a preponderance of the evidence, *see Roybal* 2006-NMCA-043, ¶ 19, we conclude that burden is amply met here. The source of Martinez's custody right and its deprivation are both essential elements, proof of which is to be found in Taos County. Martinez's right of custody of the child exists with him in his county of residence, the county in which he was

given custody, and, most importantly, the county in which he was deprived of the custody of his son by the Defendant. The custody order, to the extent it might have sought to facilitate matters of exchange by providing that the exchange itself would occur in Santa Fe County or by allowing Defendant to reside in Bernalillo County with their child, does not change these facts. We hold that under our statute criminalizing custodial interference, a person may be charged in the place where the harm sought to be prevented by the statute results—even if the actions that started the events causing the harm oc-

curred elsewhere. We hold that venue is proper in the Taos County district court.

CONCLUSION

{22} We reverse the district court, and remand with instructions to reinstate the indictment against the Defendant on the Taos County district court's trial docket.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

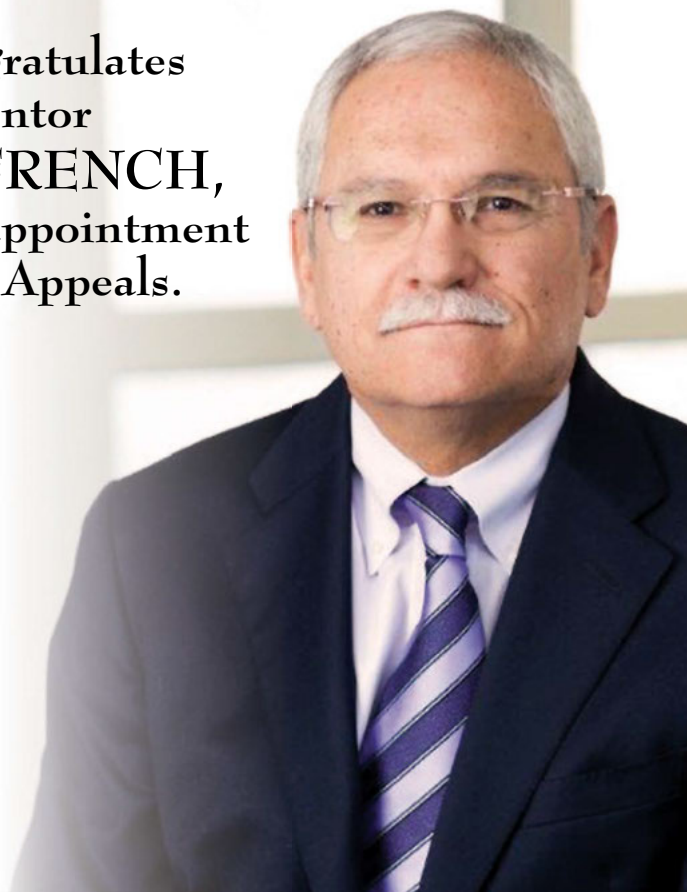
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Davis Miles McGuire Gardner, PLLC is the New Mexico provider firm for LegalShield. We seek a part-time attorney in our downtown Albuquerque office. We offer telecommuting after a training period. Our attorneys do not have a case load. However, they enjoy the opportunity to assist people on a variety of legal issues each day. New Mexico residents preferred. New Mexico Bar membership required. Our requirements include the following: a minimum of three years practice experience (may be a combination of NM and other state); excellent communication and writing skills; experience in a variety of practice areas – generalized practice a plus; ability to review contracts, draft letters, render advice on non-litigation matters and render limited advice on litigation matters; ability to work in a fast-paced call center environment; telecommuting attorneys need home office with high-speed internet access (following comprehensive in-office training lasting approximately 10-16 weeks depending on the individual); and Bi-lingual (English/Spanish) preferred. Please fax resume and cover letter to 505 243 6448, Attn: Office Administrator

Request for Proposals:

Mountain States Insurance Group, located in Albuquerque, seeks proposals from law firms or licensed NM attorneys to provide legal services in the defense of our insureds related to civil claims and workers' compensation in New Mexico and Texas. Firms or attorneys interested in submitting a proposal may request a packet from Stacey Scherer, sscherer@msig-nm.com. Proposals will be due by May 1, 2016.

Request for Applications

City of Albuquerque

Assistant City Attorney Position

ASSISTANT CITY ATTORNEY: Assistant City Attorney position available with Municipal Affairs Program working directly in the City's Municipal Development Department with oversight by the Office of the City Attorney. The City of Albuquerque is seeking a well-qualified, results-oriented contract lawyer with preferred government business experience. Litigation experience is also preferred. This position will be responsible for a wide variety of contracts, assisting other attorneys and many City departments on various design and municipal construction procurement and administration issues. Prefer: expertise in State and local procurement law and regulation, particularly New Mexico; ability to draft complex, routine and non-routine contractual instruments; knowledge of contract concepts and applicable State and local contract acquisition law and regulations, excellent analytical and communication skills; use of independent judgment and creativity applied to resolution of contract issues and excellent internal and external negotiation skills. Prior knowledge of City of Albuquerque policies and procedures is preferred. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package included Salary range of \$41,900.00 to \$90,000.00 depending on experience. Please submit résumé to attention of "DMD Attorney Application"; c/o: Penny Louder, Senior Personnel/Labor Relations Officer; Department of Municipal Development, P.O. Box 1293, Albuquerque, NM 87103. Application deadline is March 23, 2016.

Associate Attorney Position

Riley, Shane & Keller, P.A., an Albuquerque AV-rated defense firm, seeks an Associate to help handle our increasing case load. We are seeking a person with one to five years experience. Candidate should have a strong academic background as well as skill and interest in research, writing and discovery support. Competitive salary and benefits. Please fax or e-mail resumes and references to our office at 3880 Osuna Rd., NE, Albuquerque, NM 87109 c/o Office Manager (fax) 505-883-4362 or mvelasquez@rsk-law.com

Trial Attorney

Intuition, skill, honesty and a fundamental belief in the need for regular people to have access to justice are required attributes for this attorney position. We are primarily a medical negligence firm that represents patients, with some work in sexual abuse cases for the victim. This position requires a well-rounded attorney. Meaning, the attorney must have some years of experience, be detail oriented, an excellent legal writer, a team member and good on their feet. Resumes with a legal writing sample and a statement about what the attorney sees as his or her future in the law should be sent to Curtis & Lucero, 301 Gold Ave., S.W., Suite 201, Albuquerque, NM 87102. Thank you.

Assistant District Attorney

The Second Judicial District Attorney's office in Bernalillo County is looking for both entry-level and experienced prosecutors. Qualified applicants will be considered for all divisions in the office. Salary and job assignments will be based upon experience and the District Attorney Personnel and Compensation Plan. If interested please mail/fax/e-mail a resume and letter of interest to Jeff Peters, Human Resources Director, District Attorney's Office, 520 Lomas Blvd., N.W., Albuquerque, NM 87102. Fax: 505-241-1306. E-mail: jpeters@da2nd.state.nm.us., or go to www.2nd.nmdas.com.

Associate Attorney

Riley, Shane & Keller, P.A., an AV-rated defense firm in Albuquerque, seeks an associate attorney for an appellate/research and writing position. We seek a person with appellate experience, an interest in legal writing and strong writing skills. The position will be full-time with flexibility as to schedule and an off-site work option. We offer an excellent benefits package. Salary is negotiable. Please submit a resumes, references and several writing samples to 3880 Osuna Rd., NE, Albuquerque, NM 87109 c/o Office Manager, (fax) 505-883-4362 or mvelasquez@rsk-law.com

Attorney

The civil litigation firm of Atkinson, Thal & Baker, P.C. seeks an attorney with strong academic credentials and 2-10 years experience for a successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Thal & Baker, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Proposal Request for Public Defender Services

The Mescalero Apache Tribe is seeking proposals to provide Public Defender Services to the Mescalero Tribal Court for criminal cases. SUMMARY: The Mescalero Apache Tribal Court is a court of general jurisdiction addressing crimes under the Mescalero Apache Law and Order Code. All crimes do not exceed one year sentencing. Attorneys licensed and in good standing with the State of New Mexico Bar is required; Proposed fees may be based on an hourly rate or a flat rate; Proposed fees may NOT exceed \$60,000.00 per budget year; Final terms of submitted proposals are negotiable. SUBMIT PROPOSALS TO THE MESCALERO TRIBAL ADMINISTRATOR: DUANE DUFFY, MESCALERO APACHE TRIBE, MESCALERO, NM 88340 575-464-4494 EXT. 211

9th Judicial District Attorney-Senior Trial Attorney, Assistant Trial Attorney, Associate Trial Attorney

The Ninth Judicial District Attorney is accepting resumes and applications for an attorney to fill one of the following positions depending on experience. All positions require admission to the New Mexico State Bar. Senior Trial Attorney- This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. A minimum of five years as a practicing attorney are also required. Assistant Trial Attorney - This is an entry to mid-level attorney. This position requires misdemeanor and felony caseload experience. Associate Trial Attorney - an entry level position which requires misdemeanor, juvenile and possible felony cases. Salary for each position is commensurate with experience. Send resumes to Dan Blair, District Office Manager, 417 Gidding, Suite 200, Clovis, NM 88101 or email to: Dblair@da.state.nm.us.

FY17 Legal Notice RFP Ad

The Administrative Office of the Courts is soliciting proposals from licensed New Mexico attorneys to provide professional legal services for parties to abuse/neglect cases arising under the N.M. Children's Code. Proposals will be accepted for all attorney types in all judicial districts. The Request for Proposal will be issued on March 20, 2016 at 6:00am, and will be posted at nmcourts.gov. Proposals must be received via email no later than April 22, 2016 at 5:00pm. Questions may be e-mailed to caaffbid@nmcourts.gov or call the CAAF Program office at (505) 827-4354. RFP packets will not be mailed or faxed. The Procurement Code, NMSA 1978, '13-1-28 to -199, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

Associate Attorney – Santa Fe

The Santa Fe office of The Rothstein Law Firm seeks an associate attorney with 3 plus years of litigation experience. Candidates should have a strong academic background and excellent research and writing skills. Please email a resume and writing sample to info@rothsteinlaw.com.

Paralegal

Experienced paralegal needed for busy family law firm in Albuquerque. Family law experience preferred. We are looking for a highly organized professional who can work independently. Exceptional people skills are needed due to substantial client interaction. Must be able to multi-task in a fast paced environment. Excellent work environment, benefits and salary. Please provide resume to ninap@waltherfamilylaw.com.

Legal Secretary/Assistant

Small, fast-paced and established civil litigation law firm seeking full-time, bright, conscientious, hard-working, self-starting, mature and meticulous legal secretary/assistant with 3-5 years' experience. Knowledge of the NM legal system, local court rules and filing procedures with excellent clerical, organizational, computer, word processing, critical thinking and multi-tasking skills a must. Collections experience, Windows 10 and TABs time entry also desirable. Hours are 8- 5 with 1 hour lunch. If you can work independently, pay attention to detail, want to learn, and are willing to do what it takes to serve our clients, e-mail resume to twall@binghamhurst.com. No phone calls, please.

Transactional Legal Assistant

The Rodey Law Firm is accepting resumes for a Transactional Legal Assistant position for its Albuquerque Office. Must have a minimum of three years' experience working in a mid- or large-sized law firm. Applicants must have experience providing legal and litigation support for commercial real estate transactions, financing transactions and various types of business transactions. Must have solid working knowledge of general office procedures, experience handling client billing, conflict checking and file opening. Working knowledge of a document management system a plus. Applicants must possess the ability to work in a fast-paced and deadline-driven environment. Requires flexibility and ability to manage multiple deadlines. Needs to be a self starter, willing to take initiative and work as a member of team. Firm offers congenial work environment, competitive compensation and excellent benefit package. Please send resume to hr@rodey.com or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

Secretary/Legal Assistant

F/T secretary/legal assistant for litigation and business matters. Applicants should have a minimum of 3 years of experience. Must be detail oriented, organized, self-motivated & able to undertake a variety of tasks in a fast-paced environment. Salary DOE. Please email your resume to lori@srklawnm.com.

Paralegal

Must have at least 3 years experience with court filing, including efilings; legal research; scheduling; client/court contract; and AP/AR. Small office. Good working atmosphere. Fax resume to (505) 888-7907.

Services

Briefs, Research, Appeals—

Leave the writing to me. Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Contract Paralegal

Paralegal with 25+ years of experience available for work in all aspects of civil litigation on a freelance basis. Excellent references. civilparanm@gmail.com.

Office Space

Need Office Space?

Plaza500 located in the Albuquerque Plaza Office building at 201 3rd Street NW offers all-inclusive office packages with terms as long or as short as you need the space. Office package includes covered parking, VoIP phone with phone line, high-speed internet, free WiFi, meeting rooms, professional reception service, mail handling, and copy and fax machine. Contact Sandee at 505-999-1726 or sgaliatti@alliancesw.com.

Newly Constructed Turnkey Permanent or Temporary Full Service Office Space and Conference Rooms in Santa Fe

Plaza 810 in Santa Fe is offering up to nine (9) fully furnished offices, available secretarial spaces, high speed internet, free Wi-Fi, telephone, copying services, three conference rooms (2 with AV capability) receptionist, on-site parking, easy access to courthouses and the Round House, available now, please call 505-955-0770. info@plaza810.com, www.plaza810.com.

Downtown Office Space

Two executive office suites available. Parking, receptionist, utilities, use of conference rooms, and telephones w/voicemail included. For more information contact (505) 842-8057.

Office Space Available

Near Downtown Albuquerque

We have office space available near downtown Albuquerque at 1429 Central Avenue. With two separate offices, private bathrooms and lounge space, the approx 510 sq ft modern space is perfect for two people. Office space is available at \$18/ft and comes with two parking spots included. For further information contact Cibola Land Corporation at 505-242-2050 and ask for Kathryn.

3500 Comanche NE

SOPHISTICATED fully furnished office plus separate space for legal assistant. Rent includes utilities, wifi, parking, shared conference room, kitchen, referrals and collaboration with other attorneys. \$550 - \$900/month depending upon your need. Contact jmarshall@rainesdivorcelaw.com.

Downtown Law office located at 1st and Gold

Eight private offices, open areas, reception, conference room, kitchen, built-in rolling file storage room and private balconies on the 2nd floor. \$4,500/month including utilities and three onsite parking spaces. Call Brent or Cheryl at Maestas & Ward @ 878-0001

For Sale

Law Books For Sale

New Mexico Reports Volumes 1-135 (1852 – 2004) Includes rare leather bound volumes 1-21 (1852 – 1916) All books in good condition and would make a classy and useful addition to any office. \$750.00 Inquiries 575-526-5872 tsh1959@hotmail.com

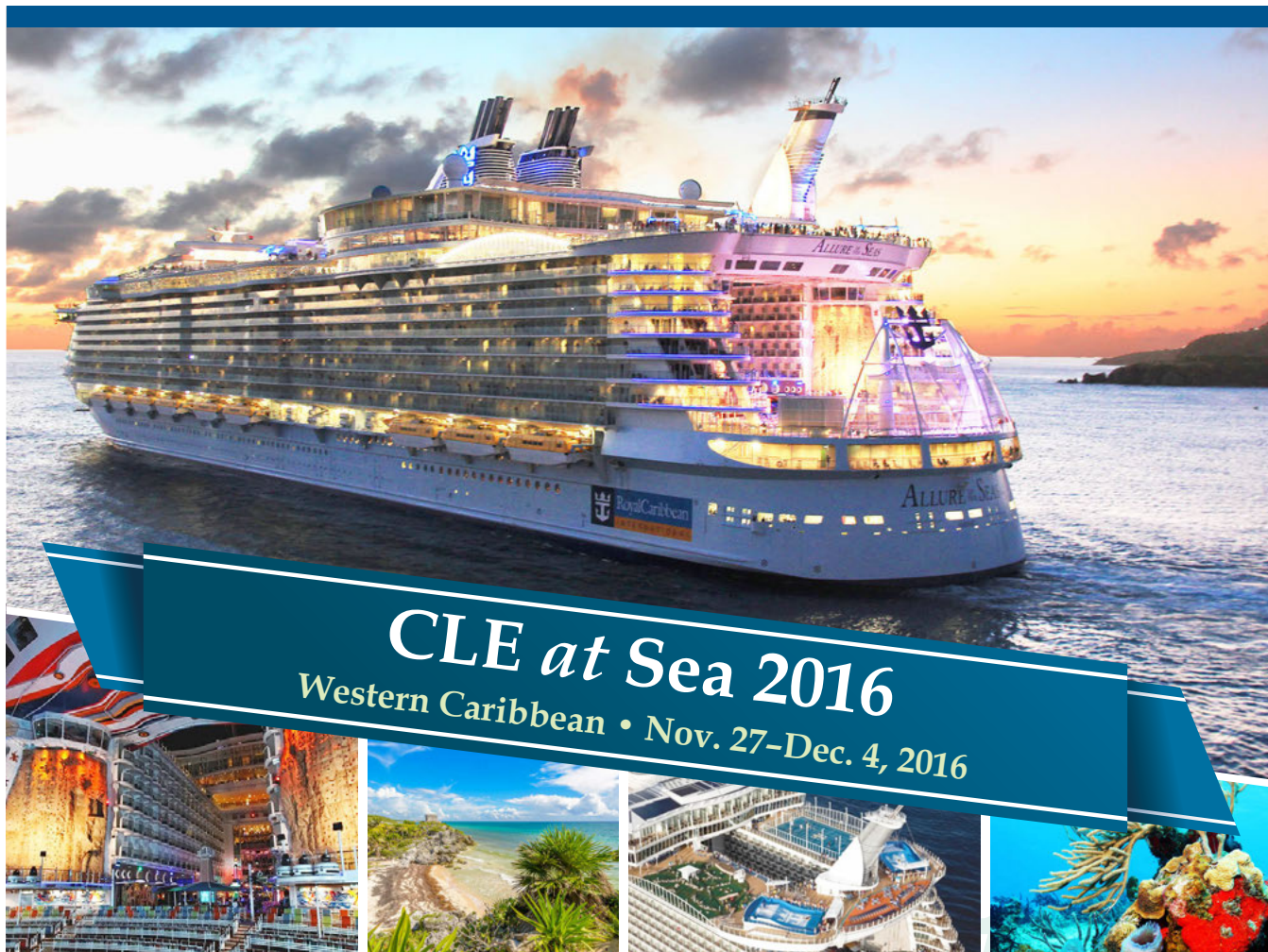
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Official Publication of the State Bar of New Mexico

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All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

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