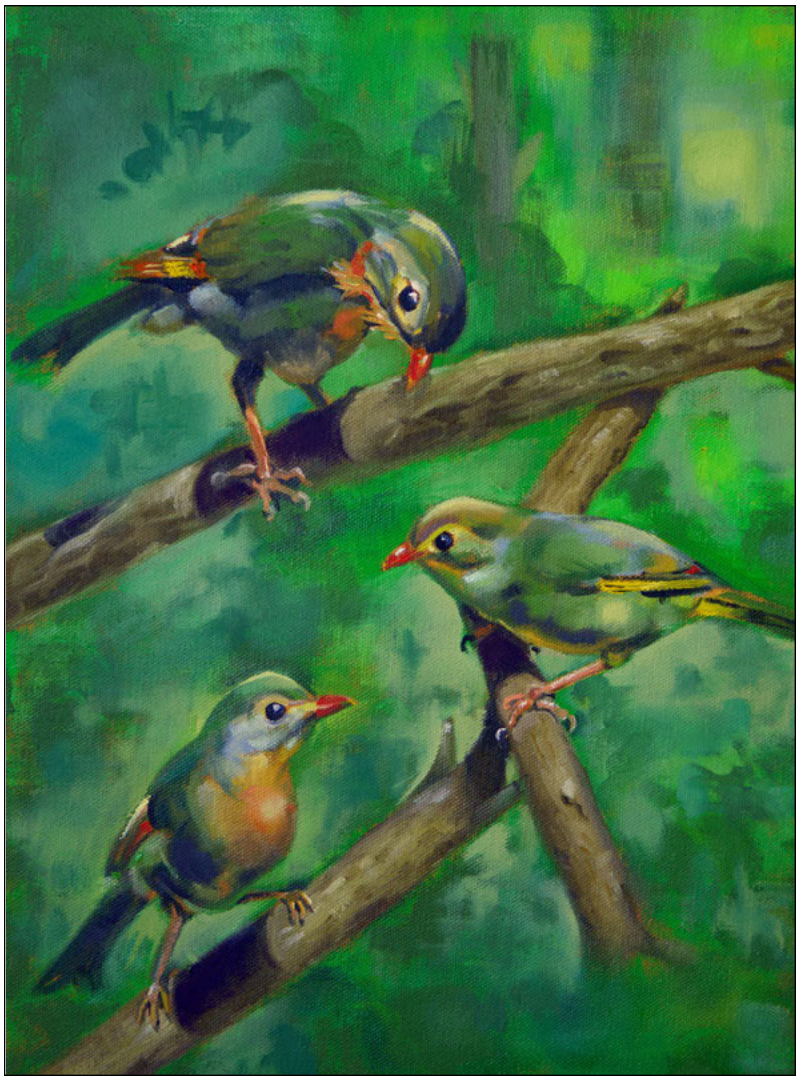
BAR BULLETIN

Official Publication of the State Bar of New Mexico

March 30, 2016 • Volume 55, No. 13



Friends by Bhavna Misra www.bhavnamisra.com

Inside This Issue

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

Seven Night Roundtrip from Fort Lauderdale

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

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

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

Plus taxes and fees

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

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

State Bar of New Mexico
Center for Legal Education

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

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

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8
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13
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April

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

12
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20
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

27
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

Cover Artist: Bhavna Misra is a full-time painter. She works out of her Fremont, Calif., based art studio. Portraiture and wildlife are her preferred genres but she paints other things as well. She creates with love in her heart, respect towards the subject matter, and a complete dedication for a well-crafted artwork. She has participated in more than 17 exhibitions including five solo shows. She has won multiple awards for her work in juried fine arts shows and has been featured in newspapers including *Fremont Bulletin*, *Milpitas Post*, *Tri City Voice*, *Cupertino Courier*, *Ohlone Monitor* and *ArtAscent* art magazine. She lives in Fremont with her husband and two children. In spare time, she likes to take photos and spend time with her family. View more of her work at www. bhavnamisra.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 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/.

Second Judicial District Court

Reassignment of Cases

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

Fifth Judicial District Court

Announcement of Vacancy

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

Ninth Judicial District Court

Notice of Exhibit Destruction

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

Professionalism Tip

With respect to opposing parties and their counsel:
I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected.

State Bar News

Attorney Support Groups

- 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#.
- April 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

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

Board of Bar Commissioners

Appointments

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

ABA House of Delegates

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

Civil Legal Services Commission

The BBC will make one appointment to

the Civil Legal Services Commission for a three-year term. The deadline is April 15.

Judicial Standards Commission

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

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. The deadline is March 31.

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.

Paralegal Division

Law Day CLE

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

Young Lawyers Division

Volunteers Needed for Wills for Heroes Event in Santa Fe

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

Featured Member Resource

New Mexico Lawyers and Judges Assistance Program

Confidential help is available to lawyers, judges, and law students troubled by substance abuse, depression, stress, and other issues. Contact Jill Ann Yeagley, 505-797-6003 or visit http://www.nmbar.org/JLAP/JLAP.html. Free helpline services are available during non-business hours at 505-228-1948 or 1-800-860-4914 and through the Judges Helpline at 1-888-502-1289.

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

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

UNM

Law Library

Hours Through May 14

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

Other Bars

Albuquerque Bar Association

April Membership Luncheon

Attend "Dick Minzner's 2016 Legislative Update" (1.5 G) from 11:30 a.m. to 1 p.m. (networking at 11 a.m.), April 5, at the Embassy Suites Hotel in Albuquerque as part of the Albuquerque Bar Association's April membership luncheon. Those attending as guests of an Association member can receive the member rate. Visit www.abqbar.org to register.

Albuquerque Lawyers Club

April Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, April 6, at Seasons Rotisserie & Grill. Jean Bernstein, CEO of Flying Star Cafes and Satellite Coffee, will be presenting. The luncheon is free for members and for $30 non-members. For more information, email ydennig@Sandia.gov.

American Bar Association Criminal Justice Section

Spring Meeting in Albuquerque

The American Bar Association Criminal Justice Section's Spring Meeting, co-sponsored by the State Bar of New Mexico, will be "Neuroscience: Paving the Way for Criminal Justice Reform." The meeting will be held April 28-30 at Hotel Albuquerque at Old Town in Albuquerque. Topics include how neuroscience is paving the way to criminal justice reform, neuroscience and environmental factors, neuroscience and solitary confinement and the neuroscience of hate: the making of extremist groups. New Mexico Supreme Court Justice Charles W. Daniels will be the luncheon keynote speaker. Roberta Cooper Ramo, the first woman to become president of the American Bar Association, will provide opening remarks. State Bar of New Mexico members can register for the discounted rate of $75. For more information and to register, visit: http://ambar.org/cjs2016spring.

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.

New Mexico Criminal Defense Lawyers Association

Civil Rights Solitary Confinement CLE Program

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

New Mexico Trial Lawyers Foundation

Tort Law CLE

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

Other News

Christian Legal Aid

Training Seminar

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

Law Day Call-in Program

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

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

During the Young Lawyers Division Law Day Call-in Program

Saturday, April 30 • 9 a.m. to noon

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

Alamogordo, Albuquerque, Farmington, Las Cruces and Roswell

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

Earn pro bono hours!

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

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

State Bar of New Mexico
Young Lawyers Division

Legal Education

March

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

31 **Working With Expert Witnesses**
3.0 G
Live Seminar and Webcast
Center for Legal Education of NMSBF
505-797-6020
www.nmbar.org

April

5 **Planning Due Diligence in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April

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

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

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

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

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

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

May

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 March 18, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,813	State v. Salima J.	COA 34,904	03/17/16
No. 35,812	State v. Tenorio	COA 34,994	03/17/16
No. 35,814	Campos v. Garcia	12-501	03/16/16
No. 35,811	State v. Barreras	COA 33,653	03/16/16
No. 35,810	State v. Barela	COA 34,716	03/16/16
No. 35,809	State v. Taylor E.	COA 34,802	03/16/16
No. 35,805	Trujillo v. Los Alamos Labs	COA 34,185	03/16/16
No. 35,804	Jackson v. Wetzel	12-501	03/14/16
No. 35,803	Dunn v. Hatch	12-501	03/14/16
No. 35,802	Santillanes v. Smith	12-501	03/14/16
No. 35,795	Jaramillo v. N.M. Dept. of Corrections	COA 34,528	03/09/16
No. 35,794	State v. Brown	COA 34,905	03/09/16
No. 35,793	State v. Cardenas	COA 33,564	03/09/16
No. 35,792	State v. Garcia-Ortega	COA 33,320	03/08/16
No. 35,789	State v. Cly	COA 35,016	03/03/16
No. 34,559	State v. Thompson	COA 34,559	03/03/16
No. 35,786	State v. Pacheco	COA 33,810	03/02/16
No. 35,785	State v. Aragon	COA 34,817	03/02/16
No. 35,784	State v. Diaz	COA 35,079	03/02/16
No. 35,783	State v. Jason R.	COA 34,562	02/29/16
No. 35,782	Washington v. Board of Regents	COA 35,205	02/29/16
No. 35,781	State v. Bersame	COA 34,686	02/29/16
No. 35,779	State v. Harvey	COA 33,724	02/26/16
No. 35,777	N.M. State Engineer v. Santa Fe Water Resource	COA 33,704	02/25/16
No. 35,776	State v. Mendez	COA 34,856	02/25/16
No. 35,775	Northern N.M. Federation v. Northern N.M. College	COA 33,982	02/25/16
No. 35,772	Castillo v. Arrieta	COA 34,108	02/24/16
No. 35,771	State v. Garcia	COA 33,425	02/24/16
No. 35,758	State v. Abeyta	COA 33,461	02/15/16
No. 35,751	State v. Begay	COA 33,588	02/12/16
No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
No. 35,747	Sicre v. Perez	12-501	02/04/16
No. 35,739	State v. Angulo	COA 34,714	02/04/16
No. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,730	State v. Humphrey	COA 34,601	01/29/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,713	Hernandez v. CYFD	COA 33,549	01/22/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14

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

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 34,830	State v. Le Mier	COA 33,493	10/24/14
No. 34,929	Freeman v. Love	COA 32,542	12/19/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	08/31/15
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	08/31/15
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
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 and Submitted to the Court:

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

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,774	State v. Damon C.	COA 33,962	03/17/16
No. 35,773	State v. Simpson	COA 33,723	03/17/16
No. 35,768	State v. Begay	COA 34,409	03/17/16
No. 35,767	State v. Gallegos	COA 34,698	03/17/16

No. 35,586	Saldana v. Mercantel	12-501	03/17/16
No. 35,765	State v. Perez	COA 31,678	03/15/16
No. 35,764	State v. Kingston	COA 32,962	03/15/16
No. 35,759	State v. Pedroza	COA 33,867	03/15/16
No. 35,707	Marchand v. Marchand	COA 33,255	03/15/16
No. 35,647	Buick v. N.M. Taxation and Revenue Dept.	COA 33,849	03/15/16
No. 35,576	Oakleaf v. Frawner	12-501	03/15/16
No. 35,523	McCoy v. Horton	12-501	03/15/16
No. 35,435	Simpson v. Hatch	12-501	03/15/16
No. 35,754	Valenzuela v. A.S. Horner Inc.	COA 33,521	03/10/16
No. 35,572	Alonzo v. Horton	12-501	03/10/16
No. 35,570	Mark v. Franco	12-501	03/10/16
No. 35,555	Flores-Soto v. Wrigley	12-501	03/10/16
No. 35,554	Rivers v. Heredia	12-501	03/10/16
No. 35,763	State v. Marcelina R.	COA 34,683	03/08/16
No. 35,760	State v. Gabaldon	COA 34,770	03/08/16
No. 35,753	State v. Erwin	COA 33,561	03/08/16
No. 35,750	State v. Norma M.	COA 34,768	03/08/16
No. 35,543	State v. Glover	12-501	03/08/16

Opinions

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

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

Effective March 18, 2016

Published Opinions

No. 33889	13th Jud Dist Valencia CR-11-178, STATE v G SENA (reverse and remand)	3/15/2016
No. 33378	2nd Jud Dist Bernalillo CR-04-3132, STATE v M CARMONA (affirm)	3/17/2016

Unublished Opinions

No. 33401	2nd Jud Dist Bernalillo CR-12-1932, STATE v T CUNNINGHAM (affirm)	3/15/2016

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated March 11, 2016

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Clerk's Certificate of Indefinite Suspension from Membership in the State Bar of New Mexico

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Clerk's Certificate of Withdrawal

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Effective March 10, 2016:
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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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), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Before the Disciplinary Board of the Supreme Court of the state of New Mexico

Disciplinary No. 08-2015-727

In The Matter Of **Daniel Edwin Duncan, Esq.,** An Attorney Licensed to Practice Law before the Courts of the State of New Mexico

Formal Reprimand

You are being issued this Formal Reprimand pursuant to the Conditional Agreement Admitting the Allegations and Consent to Discipline ("Consent -Agreement") which-was approved by-both a Hearing Committee and a Disciplinary Board Panel.

A disciplinary complaint was filed regarding your representation of a secured creditor in an estate matter which was consolidated with a foreclosure action. The decedent died intestate in 2009, but he and his wife were indebted to the creditor because of a manufactured home purchase. The widow and the estate defaulted on the loan in late 2010.

As a creditor of the decedent, on behalf of your client, you filed an *Application for Informal Appointment of Personal Representative* in the estate. You stated in pertinent part, "Applicant is a creditor of the decedent, and is therefore, a person interested in the settlement of the estate of decedent, is not disqualified to serve as a personal representative, and there are no other persons having a prior or equal right to the appointment. Applicant intends to file Mortgage foreclosure action against the Estate." §45-3-203(E) NMSA states in pertinent part; however, "Appointment of one who does not have highest priority ...may be made only in **formal proceedings."** (emphasis added). §45-3-203(A) NMSA states the order of priority for persons seeking appointment and specifies that and "interested person" such as a creditor is last. You did not attempt to mislead the Court and identified those individuals who did have higher priority. Your client was appointed as the personal representative of the estate.

You then filed a *Complaint for Enforcement of Contract and Foreclosure of Security Interest and Mortgage* in a separate foreclosure action against the widow and the Estate. Acting as counsel for your client, who was both the secured creditor and personal representative, you never filed an answer to the *Complaint for Enforcement of Contract and Foreclosure of Security Interest and Mortgage* with the clear intention that the matter would proceed to default. You never investigated or prepared an inventory of assets of the Estate despite a mandate to do so within three (3) months after appointment. This was the first such case you addressed where the Court determined that there was an issue with your representation.

Prior to this particular case, you had filed *Applications for Informal Appointment of Personal Representative* in no less than seventeen (17) matters and followed the same procedure seeking foreclosure. You also filed *Applications for Informal Appointment of Personal Representative* in no less than four (4) matters where there were actually no heirs listed or known with higher priority. Inall of those matters Default Judgements were entered and foreclosure sales ordered.

In the case which gave rise to the disciplinary complaint, the Court entered an *Ex Parte Order* removing the personal representative and appointing a different personal representative. Your client ultimately entered into a confidential settlement with the widow and the Estate and a Consent Decree with the Attorney General agreeing to pay compensatory damages.

You have been found to have violated the following New Mexico Rules of Professional Conduct:

A. Rule 16-101, by failing to provide competent representation to a client;
B. Rule 16-107(A)(1), by representing one client who is directly adverse to another client;
C. Rule 16-107(A)(2) by representing clients when the representation is materially limited by the lawyer's responsibilities to the other client;
D. Rule 16-108(B) by using information relating to the representation of a client to the disadvantage of the client without informed consent;
E. Rule 16-301, by bringing a proceeding with no basis in law that is not frivolous and has no good faith for extension, modification or reversal of existing law; and
F. Rule 16-804(A) by violating the Rules ofProfessional Conduct.

Itis notable that in your forty-three (43) years practicing law you have had no discipline and you were extremely cooperative toward the disciplinary proceeding. While you may have believed that you were simply addressing a gap in existing law you failed to note a glaring conflict of interest. Therefore, you are hereby formally reprimanded for these acts of misconduct pursuant to Rule 17-206(A)(5) of the Rules Governing Discipline. The Formal Reprimand will be filed with the Supreme Court in accordance with 17-206(D), and will remain part of your permanent records with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against you. Inaddition, in accordance with Rule 17-206(D), the entire text of this Formal Reprimand will be published in the State Bar of New Mexico *Bar Bulletin*.

Dated March 18, 2016

The Disciplinary Board
of the New Mexico Supreme Court

Margaret Graham, Esq.
Board Vice-Chair

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-002

No. S-1-SC-34,546 (filed November 19, 2015)

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,
Petitioner-Appellant,
and
ALBERTSONS,
Employer,
v.
NANCY GARDUÑO,
Respondent-Appellee.

ORIGINAL PROCEEDING ON CERTIORARI
RAYMOND Z. ORTIZ, District Judge

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ELIZABETH A. GARCIA
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Opinion

Petra Jimenez Maes, Justice

{1} Following a determination that Respondent Nancy Garduño (Garduño) was ineligible for unemployment benefits because her employer terminated her for misconduct connected with her employment, the Cabinet Secretary of the New Mexico Department of Workforce Solutions (the Department) ordered Garduño to repay $11,256 in overpaid unemployment benefits. The Court of Appeals majority held that due process precluded the Department from collecting the overpaid unemployment benefits from Garduño where she received benefits payments during the ongoing appeals process because she was unaware of her employer's appeal for 130 days. *See N.M. Dep't of Workforce Solutions v. Garduño*, 2014-NMCA-050, ¶25, 324 P.3d 377 (Hanisee, J., concurring in part and dissenting in part), *cert. granted* 2014-NMCERT-003. We reverse the Court of Appeals and hold that Garduño's procedural due process rights were not violated because the Department provided Garduño with constitutionally adequate procedural protections prior to terminating her benefits and ordering her to reimburse the Department for the overpaid benefits.

I. FACTS AND PROCEDURAL HISTORY

{2} On February 5, 2010, Albertsons, a grocery store chain, terminated Garduño from her job as a front-end clerk for violation of the associate-purchase policy, which prohibited giving away "free merchandise of any kind." This included giving deep discounts, a practice called "sweethearting." Surveillance cameras recorded Garduño charging a coworker and his wife $2.82 for merchandise that should have totaled approximately $17.00. An investigation conducted by Albertsons' management revealed that an incident that occurred on January 14, 2010, was not an isolated one and that Garduño gave at least one other employee an unauthorized discount.

{3} Garduño filed for unemployment insurance benefits on February 14, 2010. The Department's claims examiner issued a notice of claim determination awarding Garduño $402 in weekly benefits. The notice stated that the determination was final "unless an appeal is filed within fifteen calendar days from: 03/12/2010." Additionally, the notice stated, "If your employer challenges a decision allowing benefits to you and the appeal decision is against you, you will be required to repay those benefits." *See* 11.3.300.308 NMAC (1/1/03) On March 26, 2010, Albertsons appealed the claim determination. The Department continued to pay Garduño benefits during the ongoing appeals process.

{4} The Department did not notify Garduño of the Albertsons appeal until August 3, 2010, when the Department mailed Garduño a notice of hearing. The notice of hearing stated that "the appeal hearing" in front of the Department's appeals tribunal was scheduled for August 19, 2010, and listed the legal issues to be addressed. After receiving the notice of hearing, Garduño continued filing weekly claims for benefits, collecting an additional $2,010 in unemployment benefits. At the appeal hearing on August 19, 2010, an administrative law judge (ALJ) began hearing testimony but ultimately elected to continue the hearing to give Garduño the chance to resubmit documents and request subpoenas. On August 23, 2010, the Department issued a notice stating that the hearing would resume on September 9, 2010. On that day, the ALJ heard testimony from Garduño, the store manager, an employee, and the store's loss prevention investigator, and considered evidence consisting of written statements, policies, receipts, and surveillance video. On September 14, 2010, the ALJ issued a decision disqualifying Garduño from benefits eligibility due to her employee misconduct. That same day, the Department issued an overpayment notice informing Garduño of her disqualification from benefits because she had "claimed and received benefits to which [she was] not entitled," and she was therefore required to refund the overpayment, totaling $11,256.

{5} Garduño appealed the ALJ's decision. The board of review, which provides a second-tier administrative review of Department decisions, affirmed Garduño's disqualification on November 23, 2010.

Garduño did not seek review of the board's decision. However, she did appeal to the appeals tribunal the Department's decision to recoup the $11,256 overpayment. The tribunal held a hearing on December 29, 2010, on the issue of the overpayment and issued a decision the next day affirming the Department's decision to recoup the overpayments. On January 13, 2011, Garduño appealed the tribunal's decision to the Department's cabinet secretary. Citing NMSA 1978, Section 51-1-38 (1993), the cabinet secretary affirmed the decision of the tribunal on January 28, 2011, and ordered Garduño to repay the Department for the overpaid benefits.

{6} Having exhausted her administrative remedies, Garduño appealed the cabinet secretary's decision to state district court. Garduño asserted that the Department should be equitably estopped from pursuing collection of overpayments because the Department failed to comply with federal timeliness standards for processing appeals. Garduño also argued that the Department violated her right to notice and hearing under the Due Process Clause of the Fourteenth Amendment. In an order reversing the cabinet secretary's decision, the district court held that (1) the appeals tribunal's hearing, conducted six months after Garduño started receiving benefits, violated the timeliness requirements for processing appeal claims under state and federal law; (2) the doctrine of equitable estoppel barred the Department from claiming and collecting an overpayment from Garduño; and (3) the overpayment claims process violated Garduño's due process rights by failing to provide Garduño with timely notice and hearing. The Department appealed the district court's order to the Court of Appeals.

{7} At the time of the Department's appeal, the Court of Appeals had another pending case with similar facts. *See Millar v. N.M. Dep't of Workforce Solutions*, 2013-NMCA-055, 304 P.3d 427. Despite the Department's motion to consolidate this case with *Millar*, the Court of Appeals decided them separately. *See Garduño*, 2014-NMCA-050, ¶ 28 n.1 (Hanisee, J., concurring in part and dissenting in part). In *Millar*, the Court of Appeals rejected the claimant's equitable estoppel and federal timeliness regulation arguments, holding that the claimant did not have "a right to unemployment compensation benefits to which he was not entitled and which [the Department] has a statutory obligation to recover." 2013-NMCA-055, ¶¶ 16, 23. Procedural due process was not at issue in *Millar*. *See id.* ¶ 1.

{8} After the *Millar* opinion was filed, a majority of a different Court of Appeals panel held that Garduño's federal and state timeliness and equitable estoppel arguments lacked merit for the same reasons set forth in *Millar*. *See Garduño*, 2014-NMCA-050, ¶ 13. The majority concluded, however, that the Department's failure to provide Garduño with timely notice of the employer's appeal from the notice of claim determination awarding Garduño benefits violated her right to procedural due process so as to preclude the Department from collecting the overpaid benefits. *Id.* ¶¶ 21, 26. Judge Hanisee did "not agree that Garduño's due process rights were violated, even assuming she ha[d] a legitimate property interest," because the "proceeding was conducted 'in a reasonable time and manner.'" *Id.* ¶ 34 (Hanisee, J., concurring in part and dissenting in part). The Department appealed to this Court. We granted certiorari to consider whether the Court of Appeals erred by (1) holding that Garduño had a constitutionally protected property interest in unemployment benefits she received before being found ineligible for such benefits, (2) holding that Garduño's procedural due process rights were violated, and (3) providing Garduño with a remedy contrary to law and the public interest in preserving the unemployment fund.

II. STANDARD OF REVIEW

{9} Generally, we review "an administrative order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law." *N.M. Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 9, 309 P.3d 89 (internal quotation marks and citations omitted). Because Garduño did not appeal the Department's eligibility determination, the only issue on appeal is the constitutionality of the Department's procedures leading to the administrative order. The constitutionality of the Department's procedures presents this Court with a question of law, which we review de novo. *See Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 19, 148 N.M. 21, 229 P.3d 494 (citations omitted).

III. DISCUSSION

{10} The Due Process Clauses of the United States and New Mexico Constitutions require the government to afford certain procedural protections prior to depriving any person of a constitutionally protected interest in life, liberty, or property. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."); N.M. Const. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law."). Accordingly, "[a]dministrative hearings that affect a property or liberty interest must comply with due process." *Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 31, 137 N.M. 161, 108 P.3d 1019.

{11} In New Mexico state courts, "[t]he *Mathews* test is the appropriate analytical framework for a due process issue." *Archuleta*, 2005-NMSC-006, ¶ 31 (citation omitted). The *Mathews* test evaluates the following factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) " the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

A. New Mexico's Unemployment Compensation Law creates a constitutionally protected property interest in unemployment benefits

{12} The first factor of the *Mathews* test requires considering the private property interest affected by state action. *See Mathews*, 424 U.S. at 335, 340-43. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of . . . the private interest that has been affected by governmental action." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). The Department argues that Garduño does not have a property interest in overpaid benefits because she failed to appeal the question of her eligibility. The Department agrees that an individual can have a constitutionally protected property interest in unemployment benefits that are improperly denied, but here, Garduño was deemed ineligible for the benefits and has never challenged that determination. Garduño contends that the interest of an individual in continued receipt of governmentally created benefits is a constitutionally protected "property"

interest. Garduño argues that, once the Department issued a notice finding her eligible for unemployment benefits, she had a protected property right in the those benefits. We hold that Garduño acquired a constitutionally protected property interest in unemployment benefits when she began receiving payments and that Garduño's retention of those benefits cannot be terminated without due process.

{13} Property interest in a benefit was defined by the United States Supreme Court in *Board of Regents of State Colleges v. Roth*:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

{14} A statutory scheme providing for the receipt of government benefits may give rise to property interests protected by the due process clause. In *Mathews*, the United States Supreme Court determined that the private interest affected by state action was the claimant's continued receipt of benefits, which was a source of income, pending a final decision on his claim for Social Security disability benefits. *See* 424 U.S. at 339-40. Similarly, a private interest affected by state action is a claimant's continued receipt of welfare benefits. *See Goldberg v. Kelly,* 397 U.S. 254, 267, 90 S.Ct 1011, 25 L.Ed.2d 287 (holding that "the pre-termination hearing has one function only; to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." (citations omitted)); *Roth*, 408 U.S. at 576 ("a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process." (citations omitted)); *see also Wilkinson v. Abrams*, 627 F.2d 650, 664 (3d Cir. 1980) ("State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process." (citation omitted)).

{15} New Mexico's Unemployment Compensation Law articulates the great importance of this source of income to unemployed claimants. *See* NMSA 1978, § 51-1-3 (1936) ("[The purpose of the statute is to] lighten [the] burden which now so often falls with crushing force upon the unemployed worker and [the worker's] family."). Lacking independent resources, a claimant's "need to concentrate upon finding the means for daily subsistence . . . adversely affects his ability to seek redress from the [state's] bureaucracy." *Goldberg*, 397 U.S. at 264. Unemployment benefits are significant to the recently unemployed worker because they "give prompt if only partial replacement of wages to the unemployed, to enable workers to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief." *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 131, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1970) (internal quotation marks, citation, and footnote omitted) (discussing the legislative purpose behind the Federal unemployment insurance scheme). Further, "[u]nemployment benefits provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels . . . ." *Id.* at 131-32 (internal quotation marks, citation and footnote omitted). The security provided by unemployment benefits during a period of unemployment is also important in "assisting a worker to find substantially equivalent employment . . . [because] [t]hey should not be doing anything else but looking for a job." *Id.* at 132 (internal quotation marks omitted).

{16} Because New Mexico's unemployment compensation scheme provides for the payment of unemployment compensation benefits, *see generally* NMSA 1978, §§ 51-1-1 to -59 (1936, as amended through 2013); 11.3.300 NMAC (07/15/1998, as amended through 07/31/2013) (specifying the administration of unemployment benefits claims), claimants for such benefits possess a property interest protected by due process. *See Wilkinson*, 627 F.2d at 664 ("State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process." (citation omitted)); *Roth*, 408 U.S. at 576 ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.").

{17} The Court of Appeals majority concluded that "Garduño has a property right in receiving unemployment benefits by virtue of the Unemployment Compensation Law." *Garduño*, 2014-NMCA-050, ¶ 17 (citations omitted). Judge Hanisee disagreed that Garduño had a legitimate property interest because she "abandon[ed] any challenge to the Tribunal's determination that she was substantively ineligible for unemployment benefits." *Id.* ¶ 31 (Hanisee, J., dissenting in part). Judge Hanisee wrote that, "Garduño's desire to keep—and not repay to [the Department]—the overpaid benefits does not give rise to a 'legitimate claim of entitlement.' Rather, her interest is of the type disallowed by *Roth*: that for which a claimant has an 'abstract need or desire' or a 'unilateral expectation.'" *Id.* (citations omitted).

{18} The characterization of Garduño's claim makes little difference when determining the existence of a protected property interest. Whether Garduño is seeking to keep her benefits—benefits she was initially found eligible for—or whether she is seeking continued receipt of those benefits is irrelevant. Garduño's constitutionally protected property interest in the benefits arose when the claims examiner made the initial eligibility determination and she began receiving benefit payments. Once this property interest arose, procedural due process protections began protecting the security of that interest, and the Department could neither discontinue payments nor recoup earlier payments based on a disqualification and termination of benefits without affording Garduño due process. Indeed, the United States Supreme Court has held that "[r]elevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg*, 397 U.S. at 262 (citations omitted); *see also Wilkinson*, 627 F.2d at 664–65 n.18 ("Our conclusion that claimants for state unemployment compensation benefits have a protected property interest applies no less to claimants, like the Wilkinson class, seeking to establish eligibility in the first instance, than to claimants . . . seeking to establish

continued eligibility." (citation omitted)).

{19} We affirm the Court of Appeals' holding that "Garduño has a property right in receiving unemployment benefits by virtue of the Unemployment Compensation Law." *Garduño*, 2014-NMCA-050, ¶ 17 (citations omitted). Judge Hanisee is correct that Garduño did not challenge the substantive determination that she was ineligible for benefits. But that alone does not give the Department authority to terminate and recoup her unemployment benefits without affording Garduño due process. The next step in our procedural due process analysis is to determine whether the Department employed constitutionally adequate procedures in depriving the claimant of that interest. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 38, 289 P.3d 1232.

B. There was no due process violation where there was neither erroneous procedural deprivation of the private interest nor probable value in the additional or substitute procedural safeguards

{20} The second *Mathews* test requires examining both the risk that the private interest will be erroneously deprived with the procedures used and any probable value of additional or substitute procedural safeguards. *See Mathews*, 424 U.S. at 335.

1. Erroneous procedural deprivation

{21} In examining the potential risk of erroneous deprivation, we look to the procedures as a whole. *See In re Comm'n Investigation Into 1997 Earnings of U.S. West Commc'ns, Inc.*, 1999-NMSC-016, ¶ 26, 127 N.M. 254, 980 P.2d 37 (citations omitted). To prevent erroneous deprivation in the administrative context, due process requires "'reasonable notice and opportunity to be heard and present any claim or defense.'" *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, ¶ 20, 319 P.3d 639 (citation omitted); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 31-14, 70 S.Ct. 652, 94 L.Ed 865 (1950) (requiring that an adjudication for deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case"). However, "constitutional due process does not require an agency to afford a petitioner all elements of a traditional judicial proceeding." *Archuleta*, 2005-NMSC-006, ¶ 32 (citing *Miller v. County of Santa Cruz*, 796 F. Supp. 1316, 1319 (N.D. Cal. 1992), aff'd, 39 F.3d 1030 (9th Cir. 1994)).

{22} Because Garduño did not challenge the substantive determination that she was ineligible for benefits, this is not the usual procedural due process case involving a prehearing deprivation of benefits. Garduño does not argue that she was deprived of her benefits by a lack of process provided in the hearing. The essence of her deprivation is that she continued to receive the benefits during the ongoing appeals process unaware of her employer's appeal for 130 days and that she was actually incurring a debt. According to Garduño, "[d]ue process requires *prompt* notice with the opportunity to be heard *at a meaningful time* and in a meaningful manner." She points to an alleged deficiency in notice and hearing and argues that she should have received an earlier notice and hearing.

{23} We are therefore called to assess the significance of prompt notice and disposition of first-level appeals on a claimant's interest in unemployment benefits when the initial determination found the claimant eligible and the claimant received benefit payments through the first level of administrative appeal. The New Mexico Unemployment Compensation statute provides that upon appeal by any party of a initial determination of eligibility, the Department must provide a "reasonable opportunity for a fair hearing." NMSA 1978, Section 51-1-8(D) (2013, amended in 2015). The Department's regulations further provide that "[o]nce an initial determination is made and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard . . . ." 11.3.300.308(E) NMAC (1/1/2003).

{24} Notice is important to due process because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314. "Due process does not require the same form of notice in all contexts; instead, the notice should be appropriate to the nature of the case." *Rayellen*, 2014-NMSC-006, ¶ 19 (internal quotation marks and citations omitted). Put simply, we must determine whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 (citations omitted).

{25} The goal of the Unemployment Compensation Law, and the importance behind unemployment benefits, centers around promptly providing support for the innocent workers who have become unemployed through no fault of their own. *See* Section 51-1-3. The Court of Appeals in *Millar* observed that this system "necessarily results in some payments being made upon an initial determination of eligibility that are subsequently overturned. As a result, the [Department] advises the claimant that if the appeal decision is against him, he will be required to repay the benefits received." 2013-NMCA-055, ¶ 8.

{26} We agree with the Court of Appeals in *Millar* that "prompt payment is not the only consideration of procedural fairness to a claimant[;] prompt notice of benefits being in jeopardy must be [considered] as well." 2013-NMCA-055, ¶ 17. However, the importance in avoiding administrative delay is of less significance where the initial determination is one of eligibility and the claimant is receiving payments during the appeal process. Here, the claims examiner's initial determination concluded that Garduño was eligible, and she continued to receive benefits until the ALJ's determination following the hearing at the first level of appeal. We do not hold that *any* claim of late notice of an appeal or *any* late timing of the hearing cannot result in a due process violation. Instead, our holding requires weighing a claimant's deprivation of an important private interest, such as unemployment benefits, relative to procedures used in such a deprivation. *See Welch v. Thompson*, 20 F.3d 636, 639 (5th Cir. 1994) (requiring that if there is a deprivation, "we must determine whether the procedures relative to that deprivation were constitutionally sufficient." (citation and footnote omitted)).

{27} In New Mexico, the distinguishing factor used to determine whether there was or was not a violation of due process rights depends on whether the defective notice deprived the claimant of the ability to participate in the proceeding. *See Franco v. Carlsbad Mun. Schs.*, 2001-NMCA-042, ¶¶ 6, 14, 130 N.M. 543, 28 P.3d 531 (holding that a notice recommending termination of an employee to the board without notice to the employee of employee's right to attend and dispute the claims violated due process), *recognized in Lobato v. N.M. Env't Dep't*, 2012-NMSC–002, ¶ 13, 267 P.3d 65. There is at least one instance when *eventual* notice was deemed constitutionally sufficient in

the administrative context because claimant was not deprived of an opportunity to be heard by participating in the proceeding. In *Uhden v. N.M. Oil Conservation Comm'n* a lessee of oil and gas interests provided notice by publication of two adjudications purporting to increase well spacing on a landowner's property, which the landowner did not receive, and subsequently the landowner did not attend or participate in the hearing. 1991-NMSC-089, ¶¶ 4,5, 112 N.M. 528, 817 P.2d 721. However, three months later the lessee notified the landowner of two resulting orders and retained subsequent royalty payments to offset the overpayments. *Id.* ¶ 5. The landowner filed an application for a hearing to obtain relief from the two orders. *Id.* The landowner tlineattended and participated in that hearing and a third order was issued denying her application for relief. *Id.* ¶ 5. In the subsequent appeal to this Court, we declared the first two orders void reasoning that service by publication in that context violated due process requirements of reasonable notice. *Id.* ¶ 13. As to the third order, this Court stated, "We do find that Uhden eventually had notice and an opportunity to be heard on the issue of spacing . . . . " *Id.* The Court determined that eventual notice coupled with the ability to participate in the proceedings met the requirements of due process. *See Id.* ¶¶ 10, 13.

{28} Even though Garduño did not receive notice of her employer's appeal for 130 days, we cannot conclude that the risk of erroneous deprivation of unemployment benefits is unnecessarily high as a consequence of the procedures utilized by the Department. In this case, the Department completely adhered to the protocols outlined in the Unemployment Compensation statutes and accompanying regulations as described in *Millar*, including not ceasing payments without prior notice and an opportunity to be heard. *See Millar*, 2013-NMCA-055, ¶¶ 7-9; *see also* 11.3.300.308(E) NMAC (1/1/2003) ("Once an initial determination is made and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard.") The erroneous deprivation that Garduño alleges would occur during the delay in the decision of a second-tier appeal which could reverse the initial determination. But prior to and during the appeal, Garduño was receiving her benefits and was deprived of nothing. Moreover, during the appeals process, Garduño was afforded abundant process that included a hearing and opportunities to obtain counsel, present evidence, and confront and cross-examine adverse witnesses.

2. Probable value of earlier notice or of additional or substitute procedural safeguards

{29} We next examine any possible value of the additional safeguards proffered by Garduño. Garduño argues that she should have received an earlier notice and hearing. Inherent in this question is whether the outcome would have been different if the Department had provided the additional process Garduño requests. *Cf. State ex rel. Children, Youth & Families Dep't v. Christopher B.*, 2014-NMCA-016, ¶ 7, 316 P.3d 918 ("[I]n order to show a denial of due process, we do require the [claimant] to 'demonstrate that there is a reasonable likelihood that the outcome *might* have been different[]' had the denied procedure been afforded." (Third alternation and emphasis in original) (internal quotation marks and citation omitted)).

{30} Garduño relies on *Waters-Haskins v. Human Services Department, Income Support Division* to argue that DWS's late notice of the pending appeal amounted to "a false representation or concealment of material facts," which implied "'representations that are contrary to the essential facts to be relied on, even when made innocently or by mistake.'" 2009-NMSC-031, ¶ 24, 146 N.M. 391, 210 P.3d 817 (citation omitted) (holding that because the agency clearly knew of claimant's ineligible status but continued to pay her food stamp benefits for eight years while the claimant had no way of knowing she was ineligible, the agency was estopped from later attempting to recoup the paid benefits). In that case, this Court applied a theory of equitable estoppel, an issue which Garduño does not argue on appeal. Further, the *Waters-Haskins* holding is not dispositive because Garduño was made aware of the possibility of appeal and of the possibility of having to pay back benefits should she lose on appeal. The notice to Garduño stated, "If your employer challenges a decision allowing benefits to you and the appeal decision is against you, you will be required to repay those benefits." Garduño appears to be making an equitable estoppel argument couched in procedural due process; however, because Garduño did not cross-appeal the Court of Appeals' adverse equitable estoppel determination, the issue is not before us.

{31} Here, the delayed notice of appeal Garduño received is more analogous to the eventual notice received in *Uhden*. Despite the delay, Garduño still received notice of the hearing and appeal prior to the hearing, and the delay did not prevent Garduño from attending and participating in the DWS appeal hearing. *See* 11.3.500.10(A)(1) NMAC (1/1/2003). At the appeal hearing, the ALJ heard testimony from Garduño, the store manager, an employee, and the store's loss prevention investigator; and the ALJ considered evidence consisting of written statements, policies, receipts, and surveillance video. Like *Uhden,* Garduño was not deprived of an opportunity to be heard on the issue of repayment of unemployment benefits.

{32} The Minnesota Court of Appeals considered a due process argument similar to Garduño's and added another element requiring notice of the interest at stake. In *Schulte v. Transportation Unlimited, Inc*., a discharged employee received notice of a hearing requested by his employer to challenge the unemployment benefits he had already received. 354 N.W.2d 830, 831 (Minn. 1984). Because the employee was reemployed before the hearing and was not informed of the potential requirement of repayment upon reversal of the initial decision to award benefits, the employee did not attend the hearing. *Id.* at 831-32. The Minnesota Court held that the notice was "affirmatively misleading" and resulted in a denial of due process because it failed to communicate the interest at stake. *Id.* at 835; *see also Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (holding a due process violation for lack of notice of the possible decrease in a food stamp allotment because notice did not meaningfully inform persons so they could protect their interest)).

{33} Garduño's case is more like cases from the Court of Appeals of Minnesota that distinguish *Schulte* where the Court ultimately held that there was no constitutional violation when the employee *did* participate in the hearing. *See Comm'r of Nat. Res. v. Nicollet Cty. Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 30 (Minn. Ct. App. 2001) (affirming an appellate denial of the appellant's due process claim based on constitutionally valid notice of the hearing because the appellant knew the potential consequences of a reversal of the initial decision and participated in the appeal with counsel); *see also Aubin v. Family Dollar, Inc.,* No. A14-0483, 2014 WL 6724937, at *4-5 (Minn. Ct. App. Dec. 1, 2014) (holding that online system of appeals did not violate due process rights because it "was not affirmatively

misleading" and it adequately explained the "potential consequences" of failing to file a timely appeal (citations omitted)); *Koch v. Sheldahl*, No. A03-1562, 2004 WL 1878786, at *4 (Minn. Ct. App. Aug. 19, 2004) (determining that employee was not entitled to notice of consequences of losing an unemployment benefits appeal until she received notice that the employer had, in fact, appealed and concluding that when faced with the decision of whether to participate in the appeal, the employee also had notice of the consequences of losing an appeal thus there was no due process violation). In Garduño's case, like the *Nicollet* case, the late notice did not prevent Garduño from participating in the appeal hearing. The facts also indicate that Garduño, like *Nicollet* was given notice of the potential consequences of losing an appeal. Garduño's participation in the appeal hearing coupled with her notice of the potential consequences was not "affirmatively misleading."

{34} Even though Garduño was unaware of her employer's appeal for a substantial time, Garduño's argument overlooks that the notice of claim determination dated March 12, 2010 stated that "[i]f your employer challenges a decision allowing benefits to you and the appeal decision is against you, you will be required to repay those benefits." Further, the August 3, 2010, notice of hearing the Department mailed to Garduño informed Garduño of the issues to be addressed, including the issue of whether she left her employment without good cause or was discharged for misconduct. The notice contained references to the legal and regulatory bases related to those issues. The notice included information required by the regulations meant to inform Garduño of the issues to be addressed so she could prepare for the hearing. *See* 11.3.500.9(D) NMAC; 11.3.500.9(D)(1), (3) NMAC.

{35} We are not persuaded that there was probable value to Garduño's proffered additional procedural protection in receiving earlier notice. The requested additional procedures would not have changed the outcome of the final eligibility determination. Garduño was discharged from employment for her own misconduct, and no amount of time would have permitted her to show otherwise. Indeed, before the district court, Garduño's counsel acknowledged that the Department's eligibility decision was probably correct. Additionally, Garduño cannot prove that earlier notice would have led to a smaller overpayment debt where, even after she received actual notice of the appeal, she continued to collect benefits voluntarily increasing the risk that she would have a higher overpayment debt.

{36} There would be no added value in a speedier notice and hearing where it would not have afforded additional protections from an erroneous deprivation of the continuation of benefits or from a wrongful order to repay benefits. The Court of Appeals in this case failed to view the process as a whole by focusing on the lack of a specific type of notice and not considering the abundant process and safeguards afforded to Garduño. Accordingly, the late notice did not violate due process.

{37} We also note that the Department has the legal right to recoup overpaid benefits, even those benefits mistakenly overpaid by the Department. *See, e.g.*, *Ellender v. Schweiker*, 575 F. Supp. 590, 593, 600 (S.D.N.Y. 1983) ("We do not question the Government's legal right to collect back all legitimate overpayments of [Federal Supplemental Social Security Income] benefits from recipients who are presently able to repay their debts after they obtain their full [Social Security] checks."); *see generally* Section 51-1-38 (describing a claimant's liability for unemployment benefit overpayment).

C. The Government's interest includes the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement entails

{38} The third factor of the *Mathews* test is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. *Mathews* described this factor as a consideration of "the public interest" which includes "the administrative burden and other societal costs" associated with providing the proposed additional procedural safeguards. *Id.* at 347. In discussing this test, *Mathews* looked both to the financial burden on the administration and to the effect the costs of additional procedures for undeserving recipients may have on deserving recipients. *Id.* at 347-48. The Department argues that the government's interest at issue here is in recouping benefits erroneously paid to claimants who did not deserve them. We disagree. The added procedural safeguards Garduño requests are more timely notice and hearing. Thus, we must determine the added burden on the Department to provide a more timely notice and hearing. It appears to us that the added burden of notifying claimants of an employer's appeal sooner is minimal. Significantly, the Department does not contest our conclusion. In fact, at oral argument before this Court, the Department stated that claimants are currently provided with notice of appeal and an appeal hearing much sooner than occurred in Garduño's case.

{39} While the private interest in the continuation of benefits is important, there is a very low risk of erroneous deprivation under the procedures utilized by the Department. The interest in the continuation of benefits was attenuated where Garduño received benefits through the first level of administrative appeal. Unemployment benefits hearings must comport with due process and be conducted in such a manner as to ascertain the substantial rights of parties; fundamental fairness is the essence of due process. More specifically, a claimant is entitled to a full, fair, and impartial hearing which conforms to the fundamental principles of due process and which includes the right to confront and cross-examine witnesses. In this case, the Department provided and Garduño received adequate notice and a fundamentally fair, full, and impartial hearing.

IV. CONCLUSION

{40} Garduño was not deprived of a protected property interest where she continued to receive benefits up until it was determined that she was ineligible for the benefits. The Department's late notice of a pending appeal did not deprive Garduño of due process of law where the late notice neither prejudiced her ability to defend against the employer's assertion that she had been fired for misconduct nor prejudicially delayed her merits hearing.

{41} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
RICHARD C. BOSSON, Justice, Retired, Sitting by Designation

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-003

No. S-1-SC-34146 (filed December 10, 2015)

MARY ANN MADRID,
Plaintiff-Petitioner,
v.
BRINKER RESTAURANT CORPORATION d/b/a
CHILI'S GRILL & BAR, RANDI RUSSELL,
Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
JOHN F. DAVIS, District Judge

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Opinion

Barbara J. Vigil, Chief Justice

{1} Mary Ann Madrid (Plaintiff) appeals the grant of summary judgment in favor of Brinker Restaurant Corporation and its employee Randi Russell (Defendants) on the issue of causation. The district court granted summary judgment on the basis that Plaintiff failed to raise an issue of material fact to rebut Defendants' assertion that the sole cause of the underlying accident was the negligence of a third party, rather than Defendants. The Court of Appeals affirmed the district court, concluding that the expert testimony proffered to establish an issue of material fact lacked sufficient foundation or was otherwise inadmissible evidence and was not sufficient to establish a material fact dispute. Plaintiff petitioned this Court for a writ of certiorari, which we granted. We hold that the evidence presented was sufficient to establish an issue of material fact, and therefore summary judgment was improper. Accordingly, we reverse.

I. BACKGROUND

{2} This case arises from a tragic motorcycle accident that occurred in Belen, New Mexico on the night of August 27, 2006. Plaintiff was a passenger on a motorcycle driven by Quin Sanchez (Sanchez) that was heading north on a major thoroughfare, when the driver of a van heading west on a cross street failed to observe a stop sign and entered the path of the motorcycle. The motorcycle collided with the driver's side of the van, instantly killing Sanchez and severely injuring Plaintiff.

{3} Plaintiff brought suit against Defendants alleging, among other things, that Defendants were liable for her injuries because they served Sanchez alcohol to the point of intoxication prior to the accident. She alleged that Defendants' negligent conduct was a proximate cause of the accident and her resultant injuries.

{4} Defendants moved for summary judgment on the sole issue of causation, arguing that their alleged over-serving of alcohol to Sanchez was not the cause of the accident resulting in Plaintiff's damages. Defendants argued that the facts indicated that the accident was unavoidable even to a sober driver, and therefore, regardless of Sanchez's intoxication, the van driver's negligence in running the stop sign was the sole cause of the accident. In support of their motion, Defendants provided, among other things, deposition testimony from Plaintiff's accident reconstruction expert, Michael Miranda, indicating that, in his opinion, the accident was unavoidable by simply applying the brakes, and that attempting any evasive maneuver could have resulted in even more severe consequences.

{5} Plaintiff opposed the motion, arguing that issues of material fact remained as to whether Sanchez's intoxication was the cause of the accident. She argued that "[b]ased upon the evidence, reasonable minds could differ" on the issue of whether the accident was necessarily unavoidable, even for a sober driver. For this assertion, Plaintiff relied on Mr. Miranda's testimony that:

> 1) a reduced impact speed (with emergency braking) would have resulted in a better chance of survival and reduced injuries; and 2) a sober motorcyclist would have had *several other options available* for evasive action, besides hard braking. The sober motorcyclist could have: 1) swerved to the right and gone around the van, which was still moving forward; 2) driven off into the open field to the side of the road; 3) laid the bike down, putting the bike between him and the van and lowering his center of gravity so that he went under the van instead of head-on into the side of it.

Plaintiff argued that based on these alternatives, it is possible that "her body would have been in a different position or she would have fallen off the motorcycle before it hit the van, or that she could have avoided injury altogether." Plaintiff also offered a portion of Mr. Miranda's accident reconstruction report, in which he provided various alleged facts about the accident and concluded that:

> Mr. Sanchez, though driving at a reasonable speed, was also under the influence of intoxicating liquor. Mr. Sanchez would have had decreased perception and reaction time also. He may have been able to stop his motorcycle but his level of intoxication did not allow for him to correctly and quickly perceive the Ford van as a hazard.

{6} The district court, unpersuaded by Plaintiff's argument, entered an order granting summary judgment in favor of Defendants. In its order, the district court stated that there was no genuine issue of material fact but did not further articulate its reasoning.

{7} Plaintiff then asked the district court to reconsider its ruling. She maintained

that material facts were in dispute regarding the influence of alcohol on Sanchez's ability to employ an evasive maneuver or avoid the accident. In support of her motion for reconsideration, Plaintiff attached an affidavit from Mr. Miranda, which focused on the potential evasive maneuvers mentioned above, as well as the possibility that a sober and alert motorcycle driver could have avoided the accident altogether. Defendants moved to strike these additional materials on the grounds that the materials were inadmissible evidence, the affidavit was insufficient to raise a material issue of fact, and the affidavit was a sham. Defendants further opposed the motion by asserting, among other things, that Plaintiff failed to carry her burden of establishing an issue of material fact, had not raised any new argument, and was simply restating the arguments she made in response to summary judgment and that Mr. Miranda's affidavit contradicted his deposition testimony.

{8} The district court reconsidered its grant of summary judgment and allowed Defendants to file a supplemental brief in response to Mr. Miranda's affidavit. Defendants did so and continued to argue that Plaintiff's response to the motion for summary judgment, as well as the affidavit, failed to establish an issue of material fact. Defendants maintained that Mr. Miranda's affidavit lacked foundation, and that like his deposition testimony, was not admissible because it was largely speculative, and therefore it could not suffice to create an issue of material fact. The district court was again persuaded by Defendants' arguments, and for a second time it entered an order granting summary judgment in their favor. After reviewing the additional materials attached to Plaintiff's motion to reconsider, the district court found that "the attachments and the opinions expressly therein were, at times, contradictory to the deposition testimony of Michael Miranda, included opinions for which no foundation was provided and were speculative or inadmissable on other grounds."

{9} The Court of Appeals agreed with the district court and affirmed by memorandum opinion. *Madrid v. Brinker Rest. Corp.*, No. 31,244, mem. op. ¶ 1 (N.M. Ct. App. Apr. 8, 2013) (non-precedential). In deciding the case, the Court of Appeals reviewed the three main pieces of evidence Plaintiff provided in her attempt to combat the motion for summary judgment: the excerpt from Mr. Miranda's report, his deposition testimony, and his affidavit. *Id.* ¶¶ 14, 18, 23.

A. Mr. Miranda's Report

{10} The Court of Appeals concluded that Mr. Miranda's opinion that Sanchez would have had decreased perception and reaction time and that he would have been able stop the motorcycle before it impacted the van were unfounded and speculative. *Id.* ¶¶ 10-12, 17. The Court of Appeals noted that in forming his opinion, Mr. Miranda

> reviewed various reports, diagrams, narratives, and photographs; visited the accident scene and inspected the area a little over two years after the accident; took measurements of the intersection, noted the layout and conditions of the traveling lanes; and determined visibility from all directions of the intersection. He also determined the posted speeds for both roads at the intersection.

Id. ¶ 15. However, the Court of Appeals stated that it was "unable to find anything in the record to indicate that the intersection was in substantially the same condition on September 26, 2008 [when Mr. Miranda inspected it] as it was on August 27, 2006 [the date of the accident]." *Id.* ¶ 16. With respect to Mr. Miranda's statements about average reaction and perception time for an unexpected event, the Court of Appeals determined that Mr. Miranda did not "explain[] how he got to the specific time frames." *Id.* ¶ 17. It further stated that "[t]hese deficiencies in testimony eliminate the foundation for [Mr. Miranda's] opinions that Sanchez would have had decreased perception and reaction time and consequently did not adequately perceive the van as a hazard in time to stop his motorcycle." *Id.*

B. Mr. Miranda's Deposition Testimony

{11} The Court of Appeals then analyzed Mr. Miranda's deposition testimony. *Id.* ¶ 18. First it determined that he failed to establish that the accident reconstruction software program he used to determine the motorcycle's speed generated a result that was scientifically valid. *Id.* Then it examined Mr. Miranda's assertions about the evasive maneuvers Sanchez could have made, including "slowing the motorcycle down and taking a right turn, laying the motorcycle down, or veering into the oncoming lane." *Id.* ¶ 19. The Court of Appeals concluded that "[t]here was no evidence of the traffic conditions at the time of the collision." *Id.* Further, it reasoned that "[Mr. Miranda] also premised these opinions on the actions of a sober and experienced driver and he assumed, without putting forth evidence, that Sanchez was an experienced motorcyclist." *Id.* Next, the Court of Appeals stated that Mr. Miranda failed to establish that his sources for determining reaction and perception time "are the type reasonably relied upon by an expert in the area of accident reconstruction." *Id.* ¶¶ 20, 21. The Court of Appeals then concluded that Mr. Miranda's opinion regarding the effect of alcohol on Sanchez lacked foundation because "nothing in the record [sets] forth the details of his training or his teaching curriculum to provide a sufficient foundation" to support this conclusion. *Id.* ¶ 21. Finally, it noted that "[Mr. Miranda] did not visit the scene at night until after he had . . . opined as to the conditions of the scene at the time of the accident." *Id.* ¶ 22.

C. Mr. Miranda's Affidavit

{12} The Court of Appeals also analyzed Mr. Miranda's affidavit. *Id.* ¶ 23. It determined that no facts were presented to establish that Sanchez had not been scanning for hazards just before the crash. *Id.* On that point, it noted that "[Mr. Miranda's] opinions are based on a sober and experienced motorcyclist scanning for hazards as he approaches the intersection, recognizing that the van driver might not stop at the stop sign, and thus perceiving the van as a potential danger." *Id.* ¶ 24. The Court of Appeals also noted, however, that there was no evidence to show that Sanchez was an experienced driver, stating, "[Mr. Miranda] assumes Sanchez was an experienced motorcyclist . . . [; however, there] is nothing in the record to support how long Sanchez had been driving a motorcycle, whether a safety training class was required to obtain the driver's [motorcycle] endorsement, or whether he was otherwise experienced with operating a motorcycle." *Id.*

{13} The Court of Appeals ultimately concluded that Mr. Miranda's opinions were incomplete and would not be helpful to the fact-finder. *Id.* ¶ 31. It based this conclusion on the fact that the "[e]xpert's ultimate opinion that alcohol played a significant role in this tragic accident is significantly undermined by speculation and a lack of foundation." *Id.* ¶ 25.

{14} Plaintiff appealed to this Court, maintaining that a genuine issue of material fact exists with respect to causation. She asserts that the Court of Appeals

affirmed the district court on perceived defects in Mr. Miranda's testimony that Defendants never raised, and therefore, she had no reason to know she would need to address. Plaintiff further asserts that both lower courts made improper determinations about the expert's credibility in granting, then affirming, summary judgment. Finally, Plaintiff argues that if this Court overrules the Court of Appeals, a new judge should be assigned to the case on remand to the district court.

{15} For the reasons that follow, we overrule the lower courts and remand for further proceedings. We hold that Plaintiff presented enough evidence to raise a genuine issue of material fact as to the cause of the accident; therefore, summary judgment was inappropriate. Because we resolve the case on this issue, we do not address Plaintiff's remaining contentions concerning the summary judgment determination. Further, we decline Plaintiff's request to remand the case to a new judge.

II. DISCUSSION

{16} This case comes to the Court from an order granting summary judgment. An order granting summary judgment "is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Tafoya v. Rael*, 2008-NMSC-057, ¶ 11, 145 N.M. 4, 193 P.3d 551 (internal quotation marks and citation omitted). This Court reviews an order granting summary judgment de novo. *Beggs v. City of Portales*, 2009-NMSC-023, ¶ 10, 146 N.M. 372, 210 P.3d 798. "We resolve all reasonable inferences in favor of the party opposing summary judgment, and we view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in the light most favorable to a trial on the merits." *Weise v. Wash. Tru Sols.,* 2008-NMCA-121, ¶ 2, 144 N.M. 867, 192 P.3d 1244. Our review is conducted in light of our traditional disfavor of summary judgment and our preference for trials on the merits. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280 ("New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits."). That disfavor is founded on the principle that summary judgment is "a drastic remedy to be used with great caution." *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 6, 310 P.3d 611 (internal quotation marks and citation omitted).

A. Plaintiff's Evidence in Opposition to Defendants' Motion for Summary Judgment Was Sufficient to Establish a Genuine Issue of Material Fact Regarding Causation so as to Preclude Summary Judgment

{17} The single material fact dispute in this case is what caused the accident. The facts suggest that Sanchez must not have been aware of the van's presence, indicated by the occurrence of the impact itself and by Sanchez's apparent failure to react. However, the parties disagree concerning how these facts inform the determination of causation. Defendants argue that the van driver's negligence was the sole cause of the accident, giving rise to the possible inference that even if he had been sober, Sanchez would not have been aware of the van any sooner and could not have done anything to change the outcome. Conversely, Plaintiffs argue that Sanchez was oblivious to the van's presence because he was intoxicated, but had he been sober, and thereby more attentive, he could have avoided the accident. We conclude that Mr. Miranda's testimony raised a logical inference that Sanchez might have been able to avoid the accident. This inference was sufficient to raise an issue of material fact.

{18} In the face of a motion for summary judgment, a non-moving party must establish that issues of material fact remain that require a trial on the merits. *See Romero*, 2010-NMSC-035, ¶ 10 (holding that in response to a motion for summary judgment, a non-moving party "must adduce evidence to justify a trial on the issues" (internal quotation marks and citation omitted)). The "evidence adduced must result in reasonable inferences." *Id*. "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Id*. (internal quotation marks and citation omitted). In this case, the disputed material issue of fact is whether Sanchez's intoxication caused the accident and Plaintiff's resulting injuries. Mr. Miranda testified that Sanchez's intoxication was the cause because a sober and experienced motorcyclist would have been alerted to the van's presence and could have avoided the accident once he or she realized the van was not going to stop. The lower courts dismissed this testimony as mere speculation or guesswork, *Madrid*, No. 31,244, mem. op. ¶¶ 17, 30, but we view it as raising a reasonable inference that the accident could have been avoided.

{19} Plaintiff brought this suit under NMSA 1978, Section 41-11-1(H) (1986), which provides: "No person may seek relief in a civil claim against a licensee . . . for injury or death . . . which was proximately caused by the sale, service or provision of alcoholic beverages except as provided in this section." "Proximate cause is a necessary, factual element of [a p]laintiff's negligence claims . . . ." *Padilla v. Intel Corp.*, 1998-NMCA-125, ¶ 8, 125 N.M. 698, 964 P.2d 862. "Where the facts are not in dispute and the reasonable inferences from those facts are plain and consistent, proximate cause becomes an issue of law." *Galvan v. City of Albuquerque*, 1973-NMCA-049, ¶ 12, 85 N.M. 42, 508 P.2d 1339.

{20} Plaintiff adduced sufficient evidence to establish a genuine dispute as to whether Sanchez's intoxication prevented him from avoiding the accident. We reach this conclusion based on the traditional principles of summary judgment in which (1) all logical inferences are to be resolved in favor of the non-moving party and (2) all inferences must be viewed in a light most favorable to a trial on the merits. *See Romero*, 2010-NMSC-035, ¶ 7. In reviewing the evidence presented to establish that a genuine issue of material fact existed, the lower courts were overly technical in their evaluation of the foundation of Mr. Miranda's testimony, and both courts failed to abide by these principles in reaching the conclusion that summary judgment was appropriate.

{21} Mr. Miranda's deposition testimony, report, and affidavit were used in an attempt to refute Defendants' assertion that the facts in this case establish that the van driver's negligence was the sole cause of the accident. *Madrid*, No. 31,244, mem. op. ¶ 3. The Court of Appeals took this presentation to task for failing to establish the foundations upon which his assertions were based. *Id*. ¶¶ 17, 19, 21, 25. Mr. Miranda's conclusions were premised on the notion that a sober and experienced driver who was free from distraction and had a clear view of the scene before him, would have taken some evasive maneuver or avoided the collision. The Court of Appeals examined the trial testimony and concluded that the record does not support, and the expert provided no foundation for, whether Sanchez was an experienced driver or what was the particular effect on him of the alcohol he consumed. *Id*. ¶¶ 17, 19, 24. Further, it concluded that there was no foundation for Mr. Miranda's assertion that the accident

could have been avoided altogether. *Id.* ¶ 19. Our review of the record, weighing all logical inferences in favor of Plaintiff and viewing the facts in favor of a trial on the merits, indicates otherwise.

{22} Finally, as stated above, with respect to the potential for avoiding the accident, Mr. Miranda testified at his deposition that under certain hypothetical parameters offered by defense counsel he did not believe the accident could have been avoided. In his affidavit, however, he alternatively asserted that a sober and experienced motorcyclist would have perceived the van at some distance before it ran the stop sign, noticed the possibility that it would not stop, and decelerated or stopped as a result. The district court concluded that this testimony was contradictory to Mr. Miranda's affidavit and speculative. It was improper for the district court to consider whether the statements were contradictory. That amounted to weighing the credibility of Mr. Miranda's statements, which is distinctly the province of the fact-finder at trial. *See State v. Hughey*, 2007-NMSC-036, ¶ 16, 142 N.M. 83, 163 P.3d 470 ("It is the role of the fact[-]finder to judge the credibility of witnesses and determine the weight of evidence.").

{23} We conclude that both the district court and the Court of Appeals took an overly technical view of the evidence which did not resolve all logical inferences in favor of Plaintiff and did not view the facts in the light most favorable to a trial on the merits.

B. Reassignment of the Case to a Different Judge on Remand Is Not Warranted

{24} Plaintiff requests that this Court remand to the district court with instructions to reassign the case to a different judge. Both parties agree that the district judge showed no evidence of bias against Plaintiff; however, Plaintiff argues that the district judge would have difficulty putting out of his mind previously-expressed views now determined to be erroneous, therefore making reassignment appropriate.

{25} Defendants correctly highlight the "extraordinary nature" of an order requiring reassignment. In contemplating whether such an order is appropriate, we consider "whether the original judge would reasonably be expected . . . to have substantial difficulty in putting out of his or her mind previously-expressed views or findings." *State v. Ruiz*, 2007-NMCA-014, ¶ 18, 141 N.M. 53, 150 P.3d 1003 (omission in original) (internal quotation marks and citation omitted). However, we also "[presume] that judges will be able to set aside previously-expressed opinions and preside in a fair and impartial manner on remand." *Id.* ¶ 19. Without evidence of bias or some other showing that the assigned judge cannot reasonably be expected to follow the law in accordance with this opinion, we are not persuaded that Plaintiff has overcome that presumption. Accordingly, we decline to require reassignment on remand.

III. CONCLUSION

{26} For the reasons stated, we reverse the grant of summary judgment on the matter of causation and remand to the district court for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice, Retired
Sitting by designation
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-004

No. S-1-SC-35049 (filed December 10, 2015)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
DANNY SURRATT,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
STEVEN L. BELL, District Judge

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Opinion

Charles W. Daniels, Justice

{1} Following a second trial, Defendant Danny Surratt was convicted of criminal sexual penetration of a minor. Defendant appealed his conviction, claiming the district attorney serving as special prosecutor at the second trial lacked the authority to prosecute the case because his appointment by the first special prosecutor, also a district attorney, was invalid. Defendant maintained that the Lea County District Court was thereby divested of jurisdiction over his criminal proceedings. The Court of Appeals agreed with Defendant and reversed his conviction, effectively remanding the case for a third trial. *See State v. Surratt*, 2015-NMCA-039, ¶ 16, 346 P.3d 419. We hold that a properly appointed special prosecutor is given all the authority and duties of the appointing district attorney to prosecute the case for which that special prosecutor was appointed, including the authority to name another special prosecutor if unable to proceed for an ethical reason or other good cause. Defendant does not raise any additional grounds for reversal on appeal. Accordingly, we reverse the Court of Appeals and reinstate Defendant's conviction.

I. BACKGROUND

{2} On August 31, 2010, following an investigation by the New Mexico State Police, Defendant Danny Surratt was charged in Lea County Magistrate Court with several counts stemming from allegations of inappropriate sexual conduct with his two minor stepgranddaughters. Defendant served for many years as a law enforcement officer in Lea County and was a deputy sheriff at the time the allegations arose. Janetta Hicks, who was then the district attorney for the Fifth Judicial District where Lea County is located, determined that Defendant's position and relationship with the Lea County Sheriff's Department created a conflict of interest for her office. As a result, she appointed the district attorney for the Twelfth Judicial District, Diana Martwick, or her designee as special prosecutor for the State in Defendant's case. The signed and notarized appointment was filed with the Lea County Magistrate Court on September 1, 2010.

{3} On December 13, 2010, a Lea County Magistrate found probable cause to order the case bound over for trial in the district court. An assistant district attorney from Martwick's office filed a four-count criminal information against Defendant in the Lea County Fifth Judicial District Court. At the conclusion of the State's case, the district court dismissed two counts, a jury found Defendant guilty on one count of criminal sexual penetration of a child between the ages of thirteen and eighteen, and the court declared a mistrial on the final count because the jury could not reach consensus. Prior to sentencing, new counsel for Defendant moved for a new trial on the basis of an improper jury instruction pertinent to the charge for which Defendant was convicted. The district court granted Defendant's motion, set aside the verdict, and ordered a second trial.

{4} At the time the case was remanded for a second trial, Martwick determined that her office could no longer effectively prosecute the State's case against Defendant. She believed the assistant district attorney assigned to the case lacked the requisite experience to conduct a retrial, a conflict had developed between the alleged victims and the State's prosecutors in the first trial during the course of that trial, and she herself was precluded from participating in a new trial because she was quite ill and undergoing extensive medical treatment. Ultimately, Martwick "felt that it would be in the best interest of justice to re-assign the case" to the office of another district attorney. She contacted Hicks regarding the case reassignment. They agreed that because Hicks' office was conflicted out of the case, Martwick herself should appoint another special prosecutor.

{5} Martwick appointed Matthew Chandler, the Ninth Judicial District Attorney at that time, or his designee as special prosecutor in her place. The appointment was filed with the Lea County District Court on July 6, 2012. Chandler's chief deputy entered her appearance in the case three days later. Prior to the second trial, the district court granted Defendant's motion to sever the two remaining charges against him. The State first proceeded against Defendant on one count of criminal sexual penetration of a child under the age of thirteen, and the jury found Defendant guilty. Once again before sentencing, Defendant's counsel filed a motion for a new trial, indicating that he had received a telephone call from an unidentified individual stating that "the jury had and used improper information" in Defendant's case. The district court issued an order permitting Defendant's counsel to interview jurors to determine whether the anonymous allegation had merit. The court sentenced Defendant to eighteen years of imprisonment but delayed entering the final judgment pending the outcome of defense counsel's investigation.

{6} Defense counsel did not uncover any juror misconduct in his investigation but stated in a motion to dismiss the complaint and set aside Defendant's sentence that, "[i] n the process of investigation, [he] became aware for the first time of defects in the appointment of counsel for the State serving as Special Prosecutor." Specifically, Defendant challenged Martwick's appointment of Chandler, arguing Martwick was not

authorized to make the appointment and therefore it was "without legal effect." Defendant argued Chandler therefore lacked legal authority to prosecute him, and absent that authority "no jurisdiction exist[ed] for criminal prosecution of the matter." The district court allowed both parties to submit further briefing before hearing the issue.

{7} The State's briefing included affidavits from District Attorneys Hicks, Martwick, and Chandler. In her affidavit, Hicks indicated that "[o]nce this conflict appointment took place, [she] no longer had any authority whatsoever over the case" and that "the appropriate manner to handle th[e] matter was in [District Attorney Martwick's] sole discretion," including decisions regarding any further appointment deemed appropriate. In addition to expounding her reasons for reassigning the case, Martwick stated in her affidavit that she "made the appointment as [she] was the current assigned Special Prosecutor in the matter and the Fifth Judicial District [Attorney] had already been conflicted out of the proceeding." Martwick further indicated that when she spoke with Hicks prior to appointing Chandler, both agreed that Hicks was conflicted out and that Martwick "should be the one to do the appointment." Finally, Chandler stated in his affidavit that when Martwick approached him for assistance, he agreed to represent the State in Defendant's case and accordingly filed the appointment and oath of special prosecutor.

{8} The district court denied Defendant's motion and formally entered the judgment and sentence against Defendant for the first degree felony conviction of criminal sexual penetration in violation of NMSA 1978, Section 30-9-11(D)(1) (2009). The State dismissed the remaining charge of criminal sexual penetration in the second degree without prejudice for "judicial efficiency." All trial court proceedings in Defendant's case were heard in the Lea County Fifth Judicial District Court before the same judge.

{9} Defendant appealed the district court's ruling on his motion to dismiss the complaint and set aside his sentence, asserting that Martwick's improper appointment of Chandler divested the district court of jurisdiction to hear the second trial. The Court of Appeals reversed the district court, holding that (1) District Attorney Martwick lacked lawful authority to appoint District Attorney Chandler, (2) District Attorney Chandler lacked authority to prosecute the State's case against Defendant, and (3) the District Court lacked jurisdiction over Defendant's second trial. *See Surratt*, 2015-NMCA-039, ¶ 16.

{10} We granted certiorari, 2015-NMCERT-002, 346 P.3d 371, to consider the authority of a properly appointed special prosecutor to appoint another special prosecutor when an ethical conflict or other good cause arises altogether preventing continued participation of the original appointee in the criminal proceeding.

II. DISCUSSION

{11} We must determine the scope of a special prosecutor's authority under NMSA 1978, Section 36-1-23.1 (1984), in order to then address the question whether the Lea County Fifth Judicial District Court retained jurisdiction over Defendant's criminal proceedings. We turn to principles of statutory construction to guide our analysis.

A. Standard of Review

{12} "Statutory construction is a matter of law we review de novo." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. The primary goal in construing a statute is to "ascertain and give effect to the intent of the Legislature." *State v. Tafoya*, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (internal quotation marks and citation omitted). The Court begins by "examin[ing] the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Nick R.*, 2009-NMSC-050, ¶ 11 (internal quotation marks and citation omitted). "This Court has rejected a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.

B. Section 36-1-23.1 Applies to a District Attorney's Appointment of Another Elected District Attorney When a Conflict of Interest Arises

{13} The office of the district attorney is a constitutional office with duties prescribed and delimited by the Legislature. *See State ex rel. Att'y Gen. v. Reese*, 1967-NMSC-172, ¶ 26, 78 N.M. 241, 430 P.2d 399 ("The constitution and statutes clearly prescribe and delimit [the district attorney's] authority."); *see* N.M. Const. art. VI, § 24 (establishing the office of district attorney and authorizing legislation to prescribe duties and qualifications for the office); NMSA 1978, §§ 36-1-1 to -28 (1909, as amended through 2001) (prescribing duties, administrative and operational provisions, jurisdiction, and requirements for the office of district attorney). Pursuant to the authority granted by the New Mexico Constitution, the Legislature has determined various responsibilities of the district attorney, as well as circumstances in which the district attorney may be succeeded in the exercise of these responsibilities. *See, e.g.*, NMSA 1978, § 8-5-3 (1933) (authorizing the attorney general to act "upon the failure or refusal of any district attorney to act"as otherwise authorized "in any criminal or civil case" in the interest of a "county, state, or any department thereof"); § 36-1-19(A) (giving the offices of the attorney general and district attorney concurrent jurisdiction in representing interests of the state or a county); § 36-1-23.1 (authorizing a district attorney whose office is unable to "prosecute a case for ethical reasons or other good cause" to "appoint a . . . special assistant district attorney"); *see also State v. Naranjo*, 1980-NMSC-061, ¶¶ 5, 10-11, 94 N.M. 407, 611 P.2d 1101 (describing circumstances in which the attorney general, exercising powers concurrent with a district attorney's powers, appointed a special prosecutor when both the district attorney and the attorney general "recused their offices . . . from prosecuting" the county sheriff).

{14} Under New Mexico law, "[e]ach district attorney shall . . . prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested." Section 36-1-18(A)(1). As an elected representative of the people, a district attorney has broad discretion in determining "what charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico." *State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368, 981 P.2d 782 (internal quotation marks and citation omitted). Accordingly, "courts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys, and we will require clear evidence of an intent by the Legislature to limit prosecutorial discretion." *State v. Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456.

{15} One exception to the authority to appear on behalf of the state arises when the district attorney is disqualified from acting in a particular case. *See generally State v. Gonzales*, 2005-NMSC-025, ¶¶ 14-19, 138 N.M. 271, 119 P.3d 151 (discussing New Mexico case law pertaining to a court's disqualification of prosecutors). This includes occasions where "prosecution by a

member of the district attorney's office is inconsistent with a particular standard of professional conduct," such as improper influence from private interests or existence of a prior professional relationship. *Id.* ¶¶ 28, 38, 44. A district attorney aware of a conflict of interest or for other good cause may also voluntarily recuse in a particular case to avoid the conflict or appearance of impropriety. *See* § 36-1-23.1; *see also State v. Hill*, 1975-NMCA-093, ¶ 14, 88 N.M. 216, 539 P.2d 236 ("Public confidence in the [district attorney's] office in the exercise of broad powers demands that there be no conflict of interest or the appearance of a conflict."). When a district attorney "cannot prosecute a case for ethical reasons or other good cause," Section 36-1-23.1 titled "Special prosecutors in conflict cases" provides,

> Each district attorney may . . . appoint a practicing member of the bar of this state to act as special assistant district attorney. Any person so appointed shall have authority to act only in the specific case or matter for which the appointment was made. An appointment and oath shall be required of special assistant district attorneys in substantially the same form as that required for assistant district attorneys in Section 36-1-2 NMSA 1978.

{16} As a threshold matter, the State suggests that Section 36-1-23.1 is not invoked when an elected district attorney requests, for a specific case, that another elected district attorney prosecute the case instead. Applying well established rules of statutory construction, we disagree. An ordinary reading of the statute's plain language suggests the Legislature intended the statute to apply to the appointment of both private counsel and other public prosecutors. While the terms "special prosecutor" and "special assistant district attorney" are not specifically defined within the statute, its text is inclusive of both private counsel and other public prosecutors in its generic reference to "a practicing member of the [New Mexico] bar." This plain-language reading is consistent with the definition of special prosecutor adopted by the National District Attorney's Association as "any person who performs the prosecution function in a jurisdiction who is not the chief prosecutor elected or appointed in the jurisdiction, or an assistant or deputy prosecutor in the jurisdiction." National District Attorney's Association, *National Prosecution Standards* 2 (3d ed. 2009), *available at* http://www.ndaa.org/pdf/NDAA NPS 3rd Ed. w Revised Commentary.pdf (last visited Dec. 7, 2015).

{17} Unless an alternative source of legal authority grants the district attorney power to assign a case to another district attorney's office, Section 36-1-23.1 must control here. There is a line of statutory authority in addition to Section 36-1-23.1 that allows a district attorney to appoint assistants. Sections 36-1-2 and 36-1-5 permit a district attorney to appoint assistant district attorneys as regular employees to aid in the discharge of the legally prescribed duties of the office. But in *State v. Hollenbeck*, the Court of Appeals construed these statutory provisions together and determined that Sections 36-1-2 and 36-1-5 were not implicated under circumstances comparable to those presented here, and that "only" Section 36-1-23.1 applied. *See* 1991-NMCA-060, ¶ 11, 112 N.M. 275, 814 P.2d 143.

{18} In *Hollenbeck*, the state sought to avoid statutory noncompliance for appointing a special prosecutor absent an ethical reason or other good cause by arguing that the appointment of a Medicaid Providers Fraud Control Unit attorney as special prosecutor was authorized under Sections 36-1-2 and 36-1-5 and that Section 36-1-23.1 was inapposite. *See Hollenbeck* ¶¶ 8-9. Applying the general/specific statute rule of construction, the Court of Appeals rejected the state's suggestion of "an inherent or general statutory power to appoint a special prosecutor for an individual case despite a specific statutory provision governing the appointment of such special prosecutors" and held that Section 36-1-23.1 alone, being "the more specifically applicable" statute, was implicated. *Id.* ¶¶ 11-12; *see also Santillanes*, 2001-NMSC-018, ¶ 7 (explaining that under the general/specific statute rule of construction, "if two statutes dealing with the same subject conflict, the more specific statute will prevail over the more general statute . . .").

{19} The State here fails to advance an alternative source of legal authority for assigning a case to another district attorney's office when a conflict of interest arises, nor do we perceive one. We agree with the *Hollenbeck* Court that Section 36-1-23.1, the provision "deal[ing] specifically with appointments of assistant district attorneys for individual cases," is the only provision that could authorize the appointment of another district attorney to prosecute Defendant's case. *See* 1991-NMCA-060, ¶ 11. Accordingly, we conclude that the Legislature intended Section 36-1-23.1 to apply to the appointment of any practicing member of the New Mexico bar, public or private counsel, as special prosecutor.

{20} Having determined that Section 36-1-23.1 is the controlling legal authority in this case, we now turn to the scope of a special prosecutor's authority under the statute to appoint another elected district attorney as special prosecutor.

C. District Attorney Martwick, as Special Prosecutor, Had the Authority to Take Any Action She Deemed Appropriate in Prosecuting Defendant's Case

{21} New Mexico courts have not yet addressed the full scope of a special prosecutor's authority to act pursuant to Section 36-1-23.1, but the practice of appointing a special prosecutor or attorney pro tempore when the elected district attorney is disqualified or has had to recuse from participating in criminal proceedings is not unique to New Mexico.[1] Nevertheless,

[1]*See, e.g.*, Ala. Code § 12-17-189 (1940) ("When any district attorney is suspended, the court shall appoint a district attorney pro tem, who shall perform the duties of the office of district attorney. . . ."); Colo. Rev. Stat. § 20-1-107(4) (2002) ("If the district attorney is disqualified in any case which it is his or her duty to prosecute or defend, the court having criminal jurisdiction may appoint a special prosecutor to prosecute or defend the cause."); Mich. Comp. Laws § 49.160(1) (2003) ("If the prosecuting attorney . . . determines himself or herself to be disqualified by reason of conflict of interest . . . , he or she shall file with the attorney general a petition stating the conflict . . . and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney. . ."); Mo. Ann. Stat. § 56.110 (2014) ("If the prosecuting attorney . . . be interested . . . in any case . . . , the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."); Tenn. Code Ann. § 8-7-106(a) (West 1996) ("If the district attorney general fails to attend the circuit or criminal court, or is disqualified from acting, or if there is a vacancy in the office, the court shall appoint some other attorney to supply such district attorney general's place temporarily. The acts of such district attorney general pro tem shall be as valid as if done by the regular officer, and the district attorney general pro tem shall be entitled to the same privileges and emoluments.").

our state is unique in that the Legislature granted the district attorney who perceives a conflict the authority and discretion to appoint a special prosecutor without seeking leave of the court or permission from the attorney general prior to making the appointment. *See* § 36-1-23.1. This is consistent with the high value New Mexico places on "public . . . confidence" in the integrity of the office of the district attorney, *Gonzales*, 2005-NMSC-025, ¶¶ 37, 51, and with the desire to maintain a prosecutor's "distinctive role of disinterested and impartial public advocate[]," *State v. Robinson*, 2008-NMCA-036, ¶¶ 16-17, 143 N.M. 646, 179 P.3d 1254.

{22} In construing statutory sources of authority, we are careful to avoid restricting a district attorney's prosecutorial discretion. *See Santillanes*, 2001-NMSC-018, ¶ 21 (discussing flexible application of a rule of construction so as not to "infringe unnecessarily on the broad charging authority of district attorneys"). This has been true in our limited construction of Section 36-1-23.1. For example, in *State v. Cherryhomes* this Court looked at the statutory language and, in the absence of an implicit or explicit Legislative restriction, determined that the Legislature did not intend the appointment to be personal to the appointee but rather allowed a special prosecutor to delegate responsibilities associated with the appointment. *See* 1996-NMSC-072, ¶ 11, 122 N.M. 687, 930 P.2d 1139. In fact, we noted in *Cherryhomes* that the language of Section 36-1-23.1 only places restrictions on a special prosecutor's scope of authority to act in "'the specific case or matter for which the appointment was made.'" *Id.* ¶ 8 (quoting Section 36-1-23.1). The statute places no other constraints on a special prosecutor's authority to act in a given case provided an appointment is made and an oath taken. *See* § 36-1-23.1; *see also Cherryhomes*, 1996-NMSC-072, ¶ 6 ("[T]he rationale for requiring authorization for prosecution is to avoid prosecution by persons who are not held accountable or subject to the oath of office." (internal quotation marks and citation omitted)).

{23} Many other jurisdictions have decided that a special prosecutor steps into the shoes of the district attorney and has the same power and authority in relation to the specific case for which that special prosecutor was appointed as the district attorney would have if not otherwise conflicted in the case. *See, e.g.*, *Petition of Padget*, 678 P.2d 870, 874 (Wyo. 1984) (explaining that the state statute permitting a court to direct or permit any member of the bar to act in the place of a district attorney where a disqualifying conflict of interest arises allows that attorney to assume the same duties and responsibilities as those of the district attorney); *People v. Hastings*, 903 P.2d 23, 25 (Colo. App. 1994) ("When a special prosecutor is appointed, that person becomes the district attorney for that particular case, exercising plenary power."), *as modified on denial of reh'g* (Feb. 16, 1995).

{24} In *State v. Rosenbaum*, the Texas Court of Criminal Appeals addressed whether a special prosecutor appointed to replace a disqualified district attorney had authority to file an appeal absent authorization from that district attorney. *See* 852 S.W.2d 525, 526 (Tex. Crim. App. 1993) (en banc). Under state statute, a prosecuting attorney had to personally supervise and authorize appeals undertaken by his office on behalf of the state. *See id.* The defendant argued the appellate court was without jurisdiction because the special prosecutor lacked such authority. *See id.* at 527. Like New Mexico, Texas statute allows a district attorney to recuse in a case "for good cause." *See* Tex. Code Crim. Proc. Ann. art. 2.07(b-1) (West 1999). Once the state's attorney is disqualified, the court "may appoint any competent attorney to perform the duties of the office" during the absence or disqualification of the state's attorney. *Id.* art. 2.07(a). The *Rosenbaum* Court determined that "an attorney *pro tem* or special prosecutor *takes the place of* the disqualified district attorney assuming all the district attorney's powers and duties in the case," and "is not subject to the direction of the disqualified district attorney as is a subordinate, but, for that case, he *is* the district attorney." 852 S.W.2d at 528.

{25} Under the facts in *Rosenbaum*, the judge and the disqualified and appointed district attorneys properly followed statutory procedure, and the court indicated that by requesting to be disqualified "the district attorney manifested his intention to give his full power and authority to the special prosecutor in the case." *Id.* at 527. In fact, the district attorney filed a motion asking the court to allow him to abstain from signing the notice of appeal, thereby demonstrating his belief that the special prosecutor retained full power and control over the case. *See id.* The court found that the special prosecutor "was given *all* the powers and duties of the district attorney by the court order to 'investigate' and 'prosecute' the case" and that such powers included the authority of a district attorney to file an appeal. *Id.* at 528.

{26} Similarly here, Martwick was given all the powers and duties of Hicks by the appointment as special prosecutor to prosecute in Defendant's case. It would be absurd to construe the legislative mandate that a district attorney altogether precluded from proceeding for an ethical reason or other good cause could appoint a special prosecutor but limit the authority of that special prosecutor solely in this one area of responsibility over a case. Within constitutional limits, a district attorney has broad authority to control key aspects of a prosecution, including determinations about whom and whether to prosecute and what charges to bring. *See State v. Estrada*, 2001-NMCA-034, ¶¶ 10-11, 130 N.M. 358, 24 P.3d 793 ("Prosecutorial discretion, while broad, is not limitless and is bound by constitutional constraints."). Within the bundle of authorities the Legislature granted a district attorney is the ability to appoint a special prosecutor under circumstances permitted by statute. *See* § 36-1-23.1. "A special prosecutor does not displace the prosecuting attorney from his constitutional office, but in order . . . to be effective in the investigation and prosecution of the matters for which he has been appointed, he must have the right to proceed in the same manner as the prosecuting attorney." *Weems v. Anderson*, 516 S.W.2d 895, 901 (Ark. 1974).

{27} Defendant suggests that such a reading could give "unlimited discretion" to substitute prosecutors that would result in irresponsible reappointments and "unpredictable results," but the hypothetical situations he sets forth are neither before this Court nor, in our view, likely to occur.

{28} The case before us involves three elected district attorneys in the State of New Mexico, subject to the oath of office and obligated to the public. *See* N.M. Const. art. XX, § 1 ("Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability."); § 36-1-1(requiring for each elected district attorney "an oath of office as prescribed for other officers"); § 36-1-2 (requiring for each appointed assistant district attorney "an oath of office as is now prescribed by law for district

attorneys"); § 36-1-23.1 (requiring for each appointed special assistant district attorney "an oath . . . in substantially the same form as that required for assistant district attorneys"). A special prosecutor is no less obligated than a district attorney to protect the public interest and the rights of the accused impartially and free from conflict. While not required, both Hicks and Martwick strictly complied with the appointment provisions of Section 36-1-23.1. *See Cherryhomes*, 1996-NMSC-072, ¶¶ 6, 18 (holding that *strict* compliance with the appointment and oath provisions of Section 36-1-23.1 is not required but that "the appointment and oath of a special prosecutor be in '*substantially* the same form' as the appointment and oath of an assistant district attorney" (emphasis added)). Hicks appointed Martwick or her designee specifically and solely to prosecute Defendant's case and filed that appointment with the court that had been vested with jurisdiction over the case. Martwick filed an oath to faithfully and impartially discharge her duties as special prosecutor and act only within the bounds of the case for which she was appointed.

{29} In making the appointment, Hicks manifested her intention to give her full power and authority to Martwick in this specific case because her office had a conflict of interest that made it ethically inappropriate to have future participation in the case. Hicks renewed her belief that Martwick retained full control of the case during her consultation with Martwick about Chandler's appointment by reaching agreement that Martwick should make the appointment. Once Hicks had disqualified herself and appointed a special prosecutor, Martwick had the full duty, authority, and discretion to make decisions concerning Defendant's case. This included the authority to decide which charges to file, which charges to dismiss, which experts and evidence to introduce, and which motions to file. That full control over the case encompassed the authority to appoint a special prosecutor when an ethical reason or other good cause to do so arose during the proceedings. If Hicks was displeased with any of these decisions, she would not have had the authority to challenge them. *See People v. Dellavalle*, 259 A.D.2d 773, 775 (N.Y. App. Div. 1999) ("[T]he appointment of a Special Prosecutor to replace the District Attorney in a particular matter terminates the latter's authority with respect to any further proceedings in the case . . . ."). If the public was displeased with Hicks' choice of special prosecutor and events stemming therefrom, voters could voice their opinion at the polls. *See Quillen v. Crockett*, 928 S.W. 2d 47, 51 (Tenn. Crim. App. 1995) ("If voters are in disagreement with a prosecutor's charging determinations, they have the ultimate veto at the ballot box.").

{30} Under the facts of this case, we conclude that District Attorney Martwick, as the duly appointed special prosecutor, stepped into the shoes of elected District Attorney Hicks for all matters relating to the prosecution of this specific case in accordance with Section 36-1-23.1. Martwick, having the same power and authority in Defendant's case as Hicks would have absent the conflict of interest, had sole discretion and authority to appoint a special prosecutor when ethical reasons or other good cause arose that impeded her own office from remaining on the case. Having been properly appointed by Martwick in accordance with Section 36-1-23.1, District Attorney Chandler had authority to prosecute Defendant's case.

{31} Because we conclude that Chandler had authority to proceed on behalf of the State, Defendant's challenge does not raise an issue of subject matter jurisdiction, and we need not reach the State's argument that a prosecutor's lack of authority to conduct a criminal case is a procedural rather than jurisdictional defect. *See People v. Scott*, 116 P.3d 1231, 1233 (Colo. App. 2004) (determining that because the district attorney's acts were valid, defendant's challenge to the district attorney's prosecutorial authority did not raise an issue of subject matter jurisdiction). The district court properly obtained subject-matter jurisdiction over these criminal proceedings when the charges were initially filed and did not lose jurisdiction over the case as a result of any substitution of the prosecutor.

III. CONCLUSION

{32} We hold that the lawful appointment of District Attorney Martwick as Special Prosecutor vested her with all the powers and duties of the original district attorney to investigate and prosecute this case, including the authority to appoint another special prosecutor pursuant to Section 36-1-23.1. Because we conclude that Martwick had the authority to appoint District Attorney Chandler as special prosecutor in her place, we reverse the Court of Appeals and reinstate Defendant's conviction.

{33} IT IS SO ORDERED.
CHARLES W. DANIELS, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
JUDITH K. NAKAMURA, Justice, not participating

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-005

No. S-1-SC-35,075 (filed December 21, 2015)

PAMELA J. CLARK,
Petitioner,
v.
HON. ALBERT J. MITCHELL, JR., Tenth Judicial District Court Judge,
Respondent.

ORIGINAL PROCEEDING

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for Respondent

Opinion

Petra Jimenez Maes, Senior Justice

{1} In this case we are once again called upon to interpret the 1988 amendments to the New Mexico Constitution governing judicial selection. The question before the Court is whether Article VI, Section 33 of the New Mexico Constitution prohibits a district judge who loses a nonpartisan retention election from being appointed to fill the resulting vacancy created by that judge's nonretention. We hold that the New Mexico Constitution does not prohibit a judicial nominating commission from considering and nominating, or the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. We recognize that our holding may seem counterintuitive at first glance. However, our holding is governed by our Constitution's provisions governing judicial succession, not retention.

BACKGROUND

{2} There is only one judge on the Tenth Judicial District Court which has jurisdiction over the counties of Quay, DeBaca, and Harding. *See* NMSA 1978, § 34-6-1(J) (1992); § 34-6-13 (1968). In 2008, Albert J. Mitchell, Jr. won a contested election for Tenth Judicial District judge against Judge Donald Schutte. Pursuant to Article VI, Section 33 of the New Mexico Constitution, Judge Mitchell ran for retention in the 2014 general election. *See* N.M. Const. art. VI, § 33(A). ("Each . . . district judge . . . shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such . . . judge shall be subject to retention or rejection on a nonpartisan ballot."). Prior to the retention election, the Judicial Performance Evaluation Commission evaluated Judge Mitchell and recommended that voters retain him in the general election.[1] Despite the Commission's recommendation, on November 4, 2014, Judge Mitchell was not retained, failing to garner at least fifty-seven percent of the votes cast on the question of his retention as required by Article VI, Section 33 of the New Mexico Constitution.[2]

{3} A district court judges nominating committee ("nominating committee") was convened to solicit and evaluate applicants to fill Judge Mitchell's impending vacancy. *See* N.M. Const. art. VI, § 34 (stating that the office of a judge who is not retained becomes vacant on January 1 immediately following the election at which the judge is not retained); *id.* art. VI, § 35 (stating that the appellate judges nominating commission "shall actively solicit, accept and evaluate applications from qualified lawyers for the position" and "shall meet within thirty days" of the judicial vacancy); *id.* art. VI, § 36 (applying the provisions of Section 35 to "the district judges nominating committee"). Judge Mitchell and former Judge Shutte applied for the vacancy.

{4} Before the nominating committee could meet, Petitioner asked this Court to prevent the nominating committee from accepting or considering Judge Mitchell's application. *See Clark v. Tenth Jud. Dist. Nominating Comm.*, No. 34,983 petition for writ of prohibition and/or superintending control (N.M. Sup. Ct. Nov. 19, 2014). Following oral argument, we denied Petitioner's request on the grounds that the matter would not be ripe for review until the nominating committee and the governor had an opportunity to exercise their respective constitutional authorities. *See Clark*, No. 34,983, order (N.M. Sup. Ct. Dec. 3, 2014).

{5} On December 11, 2014, the nominating committee met to interview and evaluate Judge Mitchell and former Judge Schutte for the impending vacancy. The fact of and reasons for Judge Mitchell's nonretention by the voters of the Tenth Judicial District were the subject of extensive discussion. The nominating committee ultimately submitted the names of both applicants to the governor for consideration.

{6} On January 9, 2015, Governor Susana Martinez appointed Judge Mitchell to the vacancy on the Tenth Judicial District Court. According to Judge Mitchell, the fact of and reasons for his nonretention were raised during his interview with the governor. In appointing Judge Mitchell the governor acknowledged,

> This decision presents an unusual choice between two candidates who each have lost judicial elections in their district. Donald Schutte, appointed in 2007, lost a contested election against Mitchell in 2008. In the most recent election in 2014, although Mitchell received support from a majority of voters in his district,

[1] *See* http://www.nmjpec.org/en/judge-evaluation?election_id=260&year=2014; last visited 12/16/15.

[2] According to the official results from the Secretary of State's Office, the vote total was 1,883, or 49.97 percent, for retention and 1,885, or 50.03 percent, against retention. *See* http://electionresults.sos.state.nm.us/resultsSW.aspx?type= JDX&map=CTY; last visited 11/5/2015.

> he did not receive the higher number of votes needed in a retention election. The Judicial Performance Evaluation Commission had recommended that Mitchell be retained as a judge. Under state law, Mitchell will be required to stand for re-election in a contested race in the next general election.[3]

{7} On January 12, 2015, Petitioner filed a petition for a writ of quo warranto seeking to remove Judge Mitchell from the bench. After hearing oral argument, we denied the writ requested by Petitioner. We issue this opinion to explain our reasoning.

DISCUSSION

{8} "One of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and we must liberally interpret the quo warranto statutes to effectuate that purpose." *State ex rel. Anaya v. McBride*, 1975-NMSC-032, ¶ 16, 88 N.M. 244, 539 P.2d 1006. A petition for a writ of quo warranto may be brought by a private person when the district attorney refuses to act. *See* NMSA 1978, § 44-3-4 (1919) ("When the attorney general or district attorney refuses to act . . . such action may be brought in the name of the state by a private person on his own complaint."). Petitioner requested that the district attorney pursue a quo warranto action against Judge Mitchell and the district attorney refused. Therefore, we proceed to the merits of Petitioner's claim.

{9} Petitioner contends that Judge Mitchell is not constitutionally authorized to be appointed to the Tenth Judicial District Court due to his nonretention in the 2014 general election. In arguing for removing Judge Mitchell from the bench, Petitioner relies exclusively on Article VI, Section 33(A) of the New Mexico Constitution which states:

> Each . . . district judge . . . shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such . . . judge shall be subject to retention or rejection on a nonpartisan ballot. *Retention of the judicial office shall require at least fifty-seven percent of the vote cast on the question of retention or rejection*.

(Emphasis added). Petitioner asserts that this language precludes the nominating committee from considering and nominating, and the governor from appointing, Judge Mitchell to the vacancy created by his nonretention. Finally, Petitioner argues that Judge Mitchell's appointment defeats the will of the voters of the Tenth Judicial District.

{10} Judge Mitchell counters that this case is governed by the Constitution's rules of judicial succession, rather than judicial retention. In that regard, the text of the Constitution does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified applicant to fill a vacant judicial office based on the applicant's nonretention in the immediately preceding election.

I. Judge Mitchell's appointment to his former office did not constitute "retention of the judicial office" under Article VI, Section 33

{11} Petitioner argues that by being appointed to the vacancy created by his nonretention Judge Mitchell is, in effect, "retaining" his office. Petitioner urges us to take a "common-sense" approach in viewing the concept of retention.

{12} "It is presumed that words appearing in a constitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent." *State ex rel. Gomez v. Campbell*, 1965-NMSC-025, ¶ 40, 75 N.M. 86, 400 P.2d 956 (internal quotation marks and citation omitted). Black's Law Dictionary (10th ed. 2014), defines the word "retain" as "[t]o hold in possession or under control; to keep and not lose, part with, or dismiss." In applying this definition of "retain" to Article VI, Section 33, it follows that the phrase "retention of the judicial office" does not contemplate a break in service. Judge Mitchell, however, suffered a break in service as a result of the November 2014 retention election. He was forced to vacate the office of Tenth Judicial District Court judge on December 31, 2014, and was unemployed until he was appointed by the governor on January 9, 2015. Therefore, under the plain language of Article VI, Section 33, Judge Mitchell did not retain his office. We next consider whether Article VI, Section 33 otherwise prohibits Judge Mitchell from being appointed to his former judicial office.

II. Judge Mitchell's nonretention in the immediately preceding election did not disqualify him from lawfully succeeding himself

{13} Petitioner's core argument is that Judge Mitchell's nonretention in the 2014 general election disqualifies him from being considered for and appointed to his former judicial office. Therefore, we must determine whether the language of Article VI, Section 33 prohibits a judicial nominating commission from considering and nominating, or the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election.

A. Article VI, Section 33 does not expressly prohibit a judicial nominating commission from considering and nominating, or the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election

{14} "In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers." *In re Generic Investigation into Cable Television Servs. v. N.M. Corp. Comm'n*, 1985-NMSC-087, ¶ 10, 103 N.M. 345, 707 P.2d 1155. "[T]o determine the meaning of a constitutional provision, we begin with the language used in the provision and the plain meaning of that language." *Hem v. Toyota Motor Corp.*, 2015-NMSC-024, ¶ 10, 353 P.3d 1219 (internal quotation marks and citation omitted). "The historical purposes of the constitutional provision are instructive in determining the obvious spirit . . . utilized in [its drafting]." *State v. Boyse*, 2013-NMSC-024, ¶ 16, 303 P.3d 830 (alterations and omission in original) (internal quotation marks and citation omitted).

{15} Article VI, Section 33 contains no affirmative language prohibiting a nominating commission from considering and nominating, and the governor from appointing, a judicial applicant based upon the applicant's nonretention in the immediately preceding election. Nevertheless,

[3]*See* Press Release, Office of the Governor, Governor Susana Martinez Announces Judicial Appointments (Jan. 9, 2015), *available at* http://www.governor.state.nm.us/ uploads/PressRelease/191a415014634aa89604e0b4790e4768/Governor_Susana_Martinez_Announces_Judicial_Appointments_Jan_9_2015.pdf.; last visited 11/06/15.

Petitioner argues that "[e]ven if this Court should determine that [Article VI,] Section 33 is somehow ambiguous because it does not contain a specific provision prohibiting a non-retained judge from seeking appointment to his own vacancy, this Court should interpret [Article VI,] Section 33 to include such a prohibition . . . ." "We will not read into the Constitution language which is not there, especially when it makes sense as it is written." *In re Rescue EcoVersity Petition*, 2012-NMCA-008, ¶ 6, 270 P.3d 104 (internal quotation marks and citation omitted), *rev'd on other grounds by Convisser v. EcoVersity*, 2013-NMSC-039, ¶ 30, 308 P.3d 125.

{16} Furthermore, the history and context of Article VI, Section 33 do not indicate any intent by the framers to prohibit nonretained judges from applying for and being appointed to judicial vacancies. *See New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 11, 138 N.M. 785, 126 P.3d 1149 ("If the meaning of a clause is not clear, by virtue of having more than one fair and reasonable interpretation, then we may consider history and context to shed light on the terms used and to ascertain the will of the people."). The provision of Article VI, Section 33 on which Petitioner relies was adopted by voters in 1994. *See* 1994 N.M. Laws, S.J.R. No. 1, Constitutional Amendment 10. The purpose of the 1994 amendment was simply to increase the percentage of the vote necessary to retain a judge. *See id.* ("Increasing the number of votes required for judicial retention elections."). Before 1994, only a majority vote was necessary to retain a judge. *See* N.M. Const. art. VI, § 33 (1989) ("Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot.").

B. Article VI, Section 33 does not govern the process of judicial succession

{17} "The provisions of the Constitution should not be considered in isolation, but rather should be construed as a whole." *In re Generic Investigation into Cable Television Servs.*, 1985-NMSC-087, ¶ 13. Petitioner's argument relies on interpreting Article VI, Section 33 in isolation. Article VI, Section 33 only addresses the requirements for winning a retention election. As Judge Mitchell points out, this case is governed by the constitutional provisions governing nomination and appointment to judicial vacancies, or judicial succession, rather than the constitutional provisions governing retention elections.

{18} The judicial succession process is separate and apart from the retention election process and is governed by two different sections of the New Mexico Constitution, Article VI, Sections 35 and 36. Article VI, Section 35 governs the judicial succession process for appellate court vacancies. *See* N.M. Const. art. VI, § 35 (creating an "appellate judges nominating commission"). However, the provisions of Article VI, Section 35 are made applicable to district court vacancies through Article VI, Section 36. *See* N.M. Const. art. VI, § 36 ("Each and every provision of Section 35 of Article 6 of this constitution shall apply to the 'district judges nominating committee' . . . .").

{19} When a judge is not retained, that judge's office becomes vacant the following January 1. *See* N.M. Const. art. VI, § 34 ("The office of any . . . judge . . . becomes vacant on January 1 immediately following the general election at which the . . . judge is rejected by more than forty-three percent of those voting on the question of retention or rejection . . ."). The occurrence of an actual vacancy triggers the convening of a district court judges nominating committee. *See* N.M. Const. art. VI, § 35 ("Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days . . . ."); *id.* art. VI, § 36 (applying the provisions of Article VI, Section 35 to the "district judges nominating committee"). The nominating committee is required to "actively solicit, accept and evaluate applications from qualified lawyers for the position . . . ." *See* N.M. Const. art. VI, § 35. "[T]he commission shall meet within thirty days [of the occurrence of the vacancy] and within that period submit to the governor the names of persons *qualified for the judicial office* and *recommended for appointment* to that office by a majority of the commission." *See id.* (emphasis added). Therefore, under Section 35, to be appointed by the governor a judicial applicant must be: (1) "qualified for the judicial office," and (2) "recommended for appointment" by the nominating committee based on its evaluation of the application. *See State ex rel. Richardson v. Fifth Jud. Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 19, 141 N.M. 657, 160 P.3d 566 ("The Commission . . . determines, based on a variety of factors and by a majority vote, which applicants are 'qualified for the judicial office' and 'submit[s] to the governor the names of [such] persons,' both qualified and recommended." (alterations in original) (citations omitted)); *see also* Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. Rev. 177, 189 (2000) ("This language requires the commission to make two decisions: (1) whether the applicant is qualified, and (2) should the applicant, if qualified, be recommended to the governor based on the evaluation of the application.").

{20} As a preliminary matter, neither of the two requirements for appointment to a judicial vacancy described above specifically include not losing a retention election. Article VI, Section 35 contains no express language precluding a nominating commission from considering and nominating, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. "We will not read into the Constitution language which is not there, especially when it makes sense as it is written." *In re Rescue EcoVersity Petition*, 2012-NMCA-008, ¶ 6 (internal quotation marks omitted).

{21} Under the New Mexico Constitution, district judges must (1) be at least thirty-five years old, (2) have been in the actual practice of law for at least six years preceding their assumption of office, (3) have resided in this state for at least three years immediately preceding their assumption of office, and (4) reside in the district in which they seek appointment. *See* N.M. Const. art. VI, § 8 ("No person shall be qualified to hold the office of justice of the supreme court unless that person is at least thirty-five years old and has been in the actual practice of law for at least ten years preceding that person's assumption of office and has resided in this state for at least three years immediately preceding that person's assumption of office."); *id.* art. VI, § 14 ("The qualifications of the district judges shall be the same as those of justices of the supreme court except that district judges shall have been in the actual practice of law for at least six years preceding assumption of office. Each district judge shall reside in the district for which the judge was elected or appointed."); *see also* Romero, *supra*, at 188 ("To be qualified for the position of district judge, a person must be thirty-five years of age, have actually practiced law for six years, and be a resident in the district in which the judicial position is located." (footnote omitted)). Petitioner concedes that Judge Mitchell

meets these qualifications. Given that Judge Mitchell meets these requirements, the nominating committee was required to accept and consider his application. *See id.* ("The commission *shall* actively . . . accept and evaluate applications from qualified lawyers for the position . . . ." (emphasis added)).

{22} While we hold that the nominating committee was required to accept and consider Judge Mitchell's application, we also hold that in the course of its evaluation of an applicant, a nominating committee may take into consideration the fact that an applicant previously lost a retention election for the judicial office in question. The fact and reasons for a judge's nonretention may warrant consideration among the many factors a nominating committee evaluates. *See* N.M. Const. art. VI, § 35 (stating that the nominating committee "may require an applicant to submit any information it deems relevant to the consideration of his application."); *see also* Romero, *supra*, at 189-90 (listing the evaluative criteria the nominating committee uses to assess applicants).

{23} In this case, the fact and reasons of Judge Mitchell's nonretention were considered by the nominating committee. Ultimately, the nominating committee, in its discretion, recommended Judge Mitchell to the governor. Petitioner would have us control the discretion of the committee by reading into the Constitution a disqualification that does not exist. This Court has been hesitant to disturb a nominating commission's discretion to recommend qualified applicants to the governor. "It is the Commission alone that decides who to recommend to the governor. We will neither trammel upon, nor diminish in any way, that core function reposed in the Commission by our Constitution." *Richardson*, 2007-NMSC-023, ¶ 18. Therefore, we will not second-guess the nominating committee's decision to recommend Judge Mitchell to the governor.

{24} We are equally hesitant to disturb the governor's authority to appoint a judge from a list of qualified and recommended applicants. "In designing the merit selection system, the drafters envisioned limiting the pool from which the governor could appoint based on the merit of the applicants. The drafters did not, however, envision nor intend to foreclose the governor's choice altogether." *Id.* ¶ 16. Therefore, under Article VI, Section 35, the governor, as the elected representative of the people, was free to appoint Judge Mitchell so long as he was "one of the persons nominated by the commission for appointment to that office." *See* N.M. Const. art. VI, § 35; *see also Richardson*, 2007-NMSC-023, ¶ 16 ("[T]he drafters vested the governor, as the elected representative of the people of the State of New Mexico, with ultimate authority in selecting the individual to fill a judicial vacancy.").

C. Other states have expressly prohibited judges who lose retention elections from succeeding themselves

{25} While the 1988 amendments that resulted in the adoption of Article VI, Sections 33, 35, and 36 do not include any express prohibition against the appointment of a judge who loses a retention election to fill the resulting vacancy, the constitutions and statutes of at least six other states with retention elections do provide such a prohibition. *See* Alaska Const. art. IV, § 6 (providing for retention elections for judges and justices); Alaska Stat. § 22.05.100(J) (1980) ("[T]he rejected justice may not be appointed to fill any vacancy in the supreme court, court of appeals, superior court, or district courts of the state for a period of four years thereafter."); *see also* Cal. Const. art. VI, § 16(d)(1) (1966, as amended through 2002); Okla. Const. art. VII-B, § 2 (1967); Kan. Stat. Ann. § 20-2908 (1974, as amended through 1989); § 20-3006(C) (1975, as amended through 2013); Okla. Stat. Ann. tit. 20, § 30.16 (1987, as amended through 1996);Tenn. Code Ann. § 17-4-110(b) (2009); Utah Code Ann. § 20a-12-201(6) (1995, as amended through 2014).

{26} The silence of New Mexico's constitution regarding the appointment of nonretained judges stands in stark contrast to the states listed above. We recognize that "[l]egislative silence is at best a tenuous guide to determining legislative intent . . . ." *Swink v. Fingado*, 1993-NMSC-013, ¶ 29, 115 N.M. 275, 850 P.2d 978 (internal citation omitted). It is certainly possible that the drafters of the 1988 amendments simply never thought of and considered whether to prohibit nonretained judges from seeking appointment to vacant judicial offices. Nevertheless, "[t]he Legislature is presumed to know existing statutory law and to take that law into consideration when enacting new law." *Gutierrez v. W. Las Vegas Sch. Dist.*, 2002-NMCA-068, ¶ 15, 132 N.M. 372, 48 P.3d 761. The prohibitions in Alaska, California, Kansas, and Oklahoma were adopted prior to 1988. Theoretically, the drafters of the 1988 amendments could have drawn on these existing state statutes and constitutions in crafting the 1988 amendments. In fact, the historical record demonstrates that the drafters considered at least one state. The original proposal submitted to the Legislature was based on the Missouri plan. *See* Romero, *supra*, at 182 ("The proposal called for a nomination-appointment-retention election system for selecting judges similar to the Missouri plan."). The Missouri plan does not contain a prohibition on the appointment of nonretained judges. *See* Mo. Const. art. V, § 25(c)(1)(1945, as amended through 1976). ("If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment . . . .").

III. Judge Mitchell's appointment does not defeat the will of the voters

{27} Petitioner argues that Judge Mitchell's appointment defeats the will of the voters of the Tenth Judicial District. While we are not unsympathetic to Petitioner's argument, we disagree for two reasons. First, the electorate's role in the process of judicial succession is indirect and the process by which Judge Mitchell was appointed proceeded according to the dictates of the Constitution. Second, Judge Mitchell's nonretention has practical and legal consequences.

A. The role of the electorate in the process of judicial succession is and has always been indirect

{28} Although the voters play a central role in the selection of judges during partisan and retention elections, the electorate's role in the appointment of judges has always been indirect. "For most of our state's history, our Constitution required partisan election of the entire judiciary, with the governor filling judicial vacancies by appointment." *Richardson*, 2007-NMSC-023, ¶ 16 (citations omitted). "In 1988, the Constitution was amended to institute a merit selection system, in which the governor now fills judicial vacancies by appointment from a list of applicants who are evaluated on a variety of merit-based factors and recommended by a judicial nominating commission." *Id.* Although the 1988 amendments placed a limitation on who the governor may appoint, "the drafters [still] vested the governor, as the elected representative of the people of the State of New Mexico, with ultimate authority in selecting the individual to fill a judicial vacancy." *See id.*

{29} The electorate played its role under Article VI, Section 33 in not retaining Judge Mitchell. However, as we have explained, the nominating committee and the governor equally played their roles under Article VI, Sections 35 and 36 in nominating and appointing Judge Mitchell. Although the end result may be disappointing to some, the process by which Judge Mitchell was appointed proceeded according to the dictates of the Constitution.

B. Judge Mitchell must run in a partisan election to keep his seat

{30} Judge Mitchell's nonretention and appointment is not without consequence. Indeed, it was only because of his nonretention that a nominating committee was convened, applications to fill the vacancy were solicited and accepted, the committee met and interviewed the applicants, and the governor filled the vacancy. Due to his nonretention in the 2014 general election, in order to remain on the bench, Judge Mitchell will be required to run in a partisan election in the 2016 general election, instead of a nonpartisan retention election in 2020. *See* N.M. Const. art. VI, § 33(C) ("Each district judge shall be subject to retention or rejection in like manner at the general election every sixth year."); *id.* art. VI, § 35 ("Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term.").

CONCLUSION

{31} The New Mexico Constitution contains no affirmative language disqualifying an applicant for a vacant judicial office based upon the applicant's nonretention in the immediately preceding election. Despite its appeal, adopting Petitioner's argument would require us to read language into the Constitution that does not exist.

{32} Accordingly, we appropriately denied Petitioner's petition for a writ of quo warranto. Judge Mitchell lawfully succeeded himself. It is the prerogative of the New Mexico Legislature to propose, and the voters to adopt, a constitutional amendment if they wish to avoid such a result following future retention elections.

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

PETRA JIMENEZ MAES, Justice

WE CONCUR:
BARBARA J. Vigil, Chief Justice
MICHAEL D. BUSTAMANTE, Judge
Sitting by designation
JONATHAN B. SUTIN, Judge
Sitting by designation
CYNTHIA A. FRY, Judge
Sitting by designation

Santa Fe, Rio Arriba, and Los Alamos Counties
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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

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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 Assistant
Stiff, Keith & Garcia, a small, downtown law firm seeks experienced legal assistant. Must have college degree and 2 years of experience in insurance defense as lead secretary or 5 years of experience in insurance defense or personal injury. Requires independent work and client contact. People skills are a must to effectively work with our team. Excellent salary and benefits. Send resume and references to resumesub400@gmail.com.

Legal Assistant or Paralegal
Jones & Smith Law Firm, LLC, a two-attorney firm in Albuquerque, is seeking a legal assistant or paralegal to work 25-35 hours per week to perform a broad range of clerical, administrative, and paralegal work. Applicant must be personable; work well with clients; have excellent communication, organizational, and computer skills; and have at least three years of experience as a legal assistant or paralegal. Proficiency in Microsoft Word is required. Experience with QuickBooks, Timeslips, and Excel is preferred. Hours and compensation are negotiable. Please send resume by fax to (505) 244-0020 or by e-mail to jennifer@jones-smithlaw.com.

Paralegal
Need a team member for small law firm. Must have at least 3 years legal experience and have knowledge and experience with court filing, including e-filing; legal research; scheduling; client/court contact; working knowledge of Microsoft Office Suite programs; document formatting; working with computers; and AP/AR. Excellent working atmosphere. Email resume to applicants@mickeylawyer.com or Fax to (505) 888-7907.

Full-Time Paralegal
Solo practitioner seeking an experienced, professional, full-time paralegal for a litigation practice. Practice is limited to probate, probate litigation, guardianships, and plaintiff's personal injury. Experience in those areas preferred. The ideal candidate will be professional in dress, appearance, and demeanor; will have an excellent command of the English language; will possess above-average writing and speaking skills; and will have experience with Timeslips and e-filing. Position offers a very pleasant working environment with a collegial atmosphere. Salary $17 - $22 per hour, depending upon experience. Please send a cover letter along with your resume via email to benjamin.hancock@gmail.com.

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

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.

Offices For Rent
Offices for rent, one block from courthouses, all amenities: copier, fax, telephone system, conference room, internet, phone service, receptionist. Call Ramona at 243-7170.

620 Roma N.W.
620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

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 sgalietti@allegiancesw.com.

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.

Office Wanted

Santa Fe Office Wanted
Attorney seeks office share/office in Santa Fe. 930-2407.

Miscellaneous

Search for Will
Re: WILDA BROWN, last known address: 737 Fairway Rd., N.W., Albuquerque, NM 87107-5718. Year of Death: 2009. If any attorney or person represents the interests of the late WILDA BROWN, please contact me. I am seeking, inter alia, a copy of her Last Will and Testament, and status of the probate of her estate. James I. Lowenstein, Esq., 201-794-3371; 22-02 Radburn Rd., Fair Lawn NJ 07410; e-mail: dlowens999@aol.com."

2016 Annual Meeting– Bench & Bar Conference

Aug. 18-20, 2016 • Buffalo Thunder Resort & Casino • Santa Fe

THE SANTA FE OPERA

Save the date!

DON GIOVANNI

Saturday, Aug. 20 at 8 p.m.

Tickets will be available in the orchestra and mezzanine sections. There will also be a preview buffet option as well as a backstage tour option. *Tickets will be available through Annual Meeting registration starting in May.*

STATE BAR of NEW MEXICO

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