Official Publication of the State Bar of New Mexico

Bar Bulletin

July 13, 2016 • Volume 55, No. 28

Ladder to the Cosmos, by L. Heath (see page 3) Gathering Artists, Bernalillo

Inside This Issue

—SPECIAL INSERT—
CLE Planner

2016

FREE CLE

3rd ANNUAL VEHICLE FORFEITURE CONFERENCE FOR NEW MEXICO COMMUNITIES

6.0 CREDITS, INCLUDING 1 HOUR OF ETHICS

Deadline for Registration August 29, 2016

Photo Credit: Maria Clokey

SEPTEMBER 14, 2016

SANTA FE, NEW MEXICO

SANTA FE COMMUNITY CONVENTION CENTER
Sweeney Ballroom A & B

Program information:
http://www.santafenm.gov/city_attorney and click on the link, "3rd Annual Vehicle Forfeiture Conference"
Or contact Irene Romero @ 505-955-6512

Javier M. Gonzales
Mayor, City of Santa Fe

VEHICLE FORFEITURE CONFERENCE
FOR NEW MEXICO COMMUNITIES

SEPTEMBER 14, 2016
SANTA FE COMMUNITY CONVENTION CENTE

Susana Martinez
Governor, State of New Mexico

STATE BAR of NEW MEXICO

Officers, Board of Bar Commissioners
J. Brent Moore, President
Scotty A. Holloman, President-elect
Dustin K. Hunter, Vice President
Gerald G. Dixon, Secretary Treasurer
Mary Martha Chicoski, Immediate Past President

Board of Editors
Bruce Herr, Chair
Jamshid Askar
Nicole L. Banks
Alex Cotoia
Curtis Hayes
Andrew Sefzik
Michael Sievers
Mark Standridge
Nancy Vincent
Carolyn Wolf

State Bar Staff
Executive Director Joe Conte
Communications Coordinator/Editor
Evann Kleinschmidt
505-797-6087 • notices@nmbar.org
Graphic Designer Julie Schwartz
jschwartz@nmbar.org
Account Executive Marcia C. Ulibarri
505-797-6058 • mulibarri@nmbar.org
Digital Print Center
Manager Brian Sanchez
Assistant Michael Rizzo

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

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

July 13, 2016, Vol. 55, No. 28

Table of Contents

Meetings

July

13
Children's Law Section BOD,
Noon, Juvenile Justice Center, Albuquerque

13
Taxation Section BOD,
11 a.m., teleconference

14
Business Law Section BOD,
4 p.m., teleconference

14
Elder Law Section BOD,
Noon, State Bar Center

14
Public Law Section BOD,
Noon, Montgomery & Andrews, Santa Fe

15
Family Law Section BOD,
9 a.m., teleconference

15
Trial Practice Section BOD,
Noon, State Bar Center

Workshops and Legal Clinics

July

13
Sandoval County Free Legal Clinic:
10 a.m.–2 p.m., 13th Judicial District Court, Bernalillo, 505-867-2376

14
Valencia County Free Legal Clinic:
10 a.m.–2 p.m., 13th Judicial District Court, Los Lunas, 505-865-4639

19
Cibola County Free Legal Clinic:
10 a.m.–2 p.m., 13th Judicial District Court, Grants, 505-287-8831

20
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 877-266-9861

26
Common Legal Issues for Senior Citizens Workshop:
10–11:15 a.m., workshop
Noon–1 p.m., POA AHCD clinic,
Alamo Senior Center, Alamogordo,
800-876-6657

About the Cover Image: *Ladder to the Cosmos*, photography
L. Heath (Linda L. Heath) was trained classically at the San Francisco Academy of Art and through intensive workshops. Growing up in New Mexico, she has always been fascinated by the blending of ancient cultures. She is inspired by ancient cultures, photos from NASA's Hubble telescope and the opening of Spaceport America in New Mexico. Her latest series reflect a pathway from here to eternity, led by ancient spiritual guides. Most are proportioned to the Golden Ratio, reflecting her mathematical background and connection to classical art. For more of her work, visit www.lindaheath.com.

Notices

Court News

Supreme Court of New Mexico

Publication for Comment of Recently Approved Amendments

The Supreme Court recently approved new and amended rules on a provisional basis, with a retroactive effective date of May 18, 2016, to coincide with the effective date of related, recently enacted statutory changes. See Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA; see also 2016 N.M. Laws, ch. 10, § 2 (H.B. 336, 52nd Leg., 2nd Sess.). The Court seeks public comment before deciding whether to revise or approve the provisional rule changes on a non-provisional basis. To view the amendments in their entirety and instructions for submitting comments, refer to the July 6 *Bar Bulletin* (Vol. 55, No. 26) or visit the Supreme Court's website. The comment deadline is Aug. 5.

Fifth Judicial District Court

Notice of Mass Reassignment

Gov. Susana Martinez has appointed Dustin K. Hunter to fill the judicial vacancy in Chaves County, Division X. Effective June 29, a mass reassignment of cases will occur pursuant to NMSC Rule 23-109. Judge Hunter will be assigned all cases previously assigned to Judge Steven L. Bell, Division X. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from July 27 to excuse Judge Hunter.

U.S. Court of Appeals for the Tenth Circuit

Notice of Bankruptcy Judge Vacancy, District of Colorado

The U.S. Court of Appeals for the Tenth Circuit seeks applications for a bankruptcy judgeship in the District of Colorado. Bankruptcy judges are appointed to 14-year terms pursuant to 28 U.S.C. §152. The position is located in Denver, Colorado and will be available January 4, 2017, pending successful completion of a background investigation. The current annual salary is $186,852. For qualification requirements and other details about the vacancy, visit www.ca10.uscourts.gov > About the Court > Employment or call 303-844-2067. To be considered, applications must be received by Aug. 15.

Professionalism Tip

With respect to the courts and other tribunals:
Before dates for hearings or trials are set, or immediately after dates have been set, I will verify the availability of participants and witnesses, and I will also notify the court (or other tribunal) and opposing counsel of any problems.

State Bar News

Attorney Support Groups

- July 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Aug. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Aug. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month). Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

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

Board of Bar Commissioners

Commissioner Vacancy on the Sixth Bar Commissioner District

A vacancy was created in the Sixth Bar Commissioner District (representing Chaves, Eddy, Lea, Lincoln and Otero counties) due to Dustin K. Hunter's appointment to the bench. The Board will make the appointment at the Aug. 18 meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2016. Active status members with a principal place of practice located in the Sixth Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for Sept. 30 (Albuquerque) and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and resume to Executive Director Joe Conte at jconte@nmbar.org by Aug. 8.

Children's Law Section

Annual Art Contest Fund

The Children's Law Section seeks donations for its annual art contest fund. The contest aims to help improve the lives of New Mexico's youth who are involved with the juvenile justice system. The generous donations received each year from the community help defray the cost of supplies, prizes and an award reception. Through the years, the contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. To make a tax deductible donation, make a check out to the New Mexico State Bar Foundation and write "Children's Law Section Art Contest Fund" in the memo line. Mail checks to: State Bar of New Mexico, Attn: Breanna Henley, PO Box 92860, Albuquerque, NM 87199. For more information contact Ali Pauk, alison.pauk@lopdnm.us.

Committee on Women and the Legal Profession

Professional Clothing Closet

The West Law Firm has volunteered to house the Committee on Women and the Legal Profession Clothing Closet at its offices while the Modrall Sperling Law Firm is under renovation. Those who want to look for a suit can stop by the office, located at 40 First Plaza NW, Suite 735 in Albuquerque during business hours. Call 505-243-4040 to set up an appointment. Those who want to donate to the closet are asked to drop off gently used, dry cleaned suits at the West Law Firm during business hours. Donations can also be given to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102, Albuquerque.

UNM

Law Library

Hours Through Aug. 21

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

Federal Bar Association, New Mexico Chapter

Annual Meeting in Santa Fe

The New Mexico Chapter of the Federal Bar Association will hold its annual meeting at 9:45 a.m., Aug. 19, at the Buffalo Thunder Resort & Casino during the State Bar Annual Meeting—Bench & Bar Conference. The meeting will include election of officers for 2016–2017, a treasurer's report, changes to chapter bylaws and an outline of proposed activities for the upcoming year. All current and prospective FBA members are urged to attend.

New Mexico Defense Lawyers Association

Annual Awards Nominations

The New Mexico Defense Lawyers Association is now accepting nominations for the 2016 NMDLA Outstanding Civil Defense Lawyer and the 2016 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is Aug. 12. The awards will be presented at the NMDLA Annual Meeting Luncheon on Oct. 14 at the Hotel Andaluz in Albuquerque.

New Mexico Hispanic Bar Association

CLE: Advocacy in All Venues of Government

The New Mexico Hispanic Bar Association presents a CLE "Effective Advocacy in All Venues: Judicial vs. Executive and Legislative" (3.0 G) on from 9 am.–noon, July 15, at the State Personnel Auditorium in Santa Fe. The CLE will explore the use of forms of advocacy in differing venues when appearing before decision makers in all three branches of government. Speakers include Tim Atler, Damian R. Lara and Clifford M. Rees. To register, visit www.nmhba.net.

Corrections to the *2016–2017 Bench and Bar Directory*

Active Members

Castellano-Lockhart, Bea **505-424-0656**
Bea Castellano Lockhart Law Firm
PO Box 28819
Santa Fe NM 87592-8819
F 505-424-9621
bealockhart1@msn.com

DeLaney, Jennifer E., Hon.....**575-543-1546**
Sixth Judicial District Court
855 S Platinum Ave
Deming NM 88030-4729
F 575-543-1606

Fischer, Kendall **505-466-2537**
PO Box 5835
Santa Fe NM 87502-5835
kendall99@comcast.net

Sitterly, Nicholas **505-314-1318**
Sitterly Law Firm
117 Bryn Mawr Dr SE #109
Albuquerque NM 87106-2209
F 866-610-0455
nick.sitterlylawfirm@gmail.com

Vick, Jonathan S. **562-653-3200**
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Dr S #300
Cerritos CA 90703-9364
F 562-653-3333
jvick@aalrr.com

Tenth Judicial District Court

Quay, Harding and DeBaca Counties

Division I
Chief Judge Albert J. Mitchell, Jr.
575-461-4422 F575-461-4498
Proposed Orders:
tucddiv1proposedtxt@nmcourts.gov

Note: Information for members is current as of April 6, 2016. Visit www.nmbar.org/FindAnAttorney for the most up-to-date information. To submit a correction, contact Pam Zimmer, pzimmer@nmbar.org.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges
888-502-1289
www.nmbar.org/JLAP

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

Lewis Roca Rothgerber Christie LLP
Chambers USA 2016:
Dennis Jontz (corporate/commercial and litigation: general commercial),

Modrall, Sperling, Roehl, Harris and Sisk, PA
Chambers USA 2016:
Daniel M. Alsup (corporate commercial), **Jennifer G. Anderson** (litigation: general commercial), **Larry P. Ausherman** (environment, natural resources and regulated industries), **Stuart R. Butzier** (environment, natural resources and regulated industries), **John R. Cooney** (environment, natural resources and regulated industries), **Peter L. Franklin** (corporate/commercial), **George R. McFall** (labor and employment), **Margaret L. Meister** (real estate), **Christopher P. Muirhead** (corporate/commercial), **Brian K. Nichols** (nationally ranked in Native American law), **Maria O'Brien** (environment (natural resources and regulated industries: water law), **James M. Parker** (corporate/commercial: tax, and labor and employment: employee benefits and compensation), **Debora E. Ramirez** (real estate), **Marjorie A. Rogers** (corporate/commercial: tax), **Ruth M. Schifani** (real estate), **Lynn H. Slade** (nationally ranked in Native American law; in New Mexico, Native American law star individual; and, environment, natural resources and regulated industries), **Walter E. Stern III** (nationally ranked in Native American law; in New Mexico, environment, natural resources and regulated industries; and, Native American law) and **R.E. Thompson** (litigation: general commercial).

Rodey, Dickason, Sloan, Akin and Robb, PA
Chambers USA 2016:
Mark K. Adams (environment, natural resources and regulated industries; water law), **Rick Beitler** (litigation medical malpractice and insurance defense), **Perry E. Bendicksen III** (corporate/commercial), **Henry M. Bohnhoff** (litigation: general commercial), **David P. Buchholtz** (corporate/commercial), **David W. Bunting** (litigation: general commercial), **Jeffrey Croasdell** (litigation: general commercial), **Nelson Franse** (litigation: general commercial; medical malpractice and insurance defense), **Catherine T. Goldberg** (real estate), **Scott D. Gordon** (labor and employment), **Alan Hall** (corporate/commercial), **Bruce Hall** (litigation: general commercial), **Justin A. Horwitz** (corporate/commercial), **Jeffrey L. Lowry** (labor and employment), **Robert L. Lucero** (real estate), **Donald B. Monnheimer** (corporate/commercial), **Sunny J. Nixon** (environment, natural resources and regulated industries: water law), **Theresa W. Parrish** (labor and employment), **John N. Patterson** (real estate), **John P. Salazar** (real estate), **Andrew G. Schultz** (litigation: general commercial), **Tracy Sprouls** (corporate/commercial: tax), **Thomas L. Stahl** (labor and employment), **Aaron C. Viets** (labor and employment) and **Charles J. Vigil** (labor and employment).

Sutin, Thayer & Browne
Chambers USA 2016:

Anne P. Browne (commercial/corporate law, real estate law), **Suzanne Wood Bruckner** (commercial/corporate law), **Eduardo A. Duffy** (commercial/corporate law), **Robert G. Heyman** (commercial/corporate law), **Jay D. Rosenblum** (commercial/corporate law), **Benjamin E. Thomas** (litigation: general commercial law) and **Sutin Firm** (Native American law).

Orlando Lucero

Orlando Lucero has been named to the College of Real Estate Lawyers. Lucero has worked in real estate services for more than 30 years, including 20 years as a partner and manager in several law firms in Albuquerque. In addition, he has been an active member of the American Bar Association for more than 25 years, where he currently serves on the Board of Governors. He currently serves as the secretary of the New Mexico Land Title Association.

Juan M. Marquez Jr.

Juan M. Marquez Jr. has joined the Rodey Law Firm in the litigation department. He is a member of the professional liability practice group, with an emphasis on medical malpractice defense. He also practices in the areas of railroad litigation, product liability defense, tort and wrongful death defense and general liability defense. Marquez attended the University of New Mexico School of Law (2008).

Robert L. Padilla

Robert L. Padilla, CEO of the Bernalillo County Metropolitan Court, was recently appointed chair of the New Mexico Court Executive Officers' Council. Padilla, an Albuquerque native, has been with the Metropolitan Court for 25 years and has served as its CEO for the past three years. Padilla will serve as chair for the next two years.

Atkinson & Kelsey, PA, awarded the annual Atkinson & Kelsey Award for Excellence in Family Law Scholarship to **Kristin Marie Bradford**, a student at the University of New Mexico's School of Law. Since 2006, one student from the UNM School of Law has been selected to receive the award based on academic performance and personal commitment to the ideals of the Atkinson & Kelsey. Since then, nearly $5,000 has been awarded to 10 students. Bradford, right, with UNM School of Law professor Camille Carey.

New Mexico Association of Legal Administrators' Community Connection

Back row: Julie Ziemendorf, Nina Patel, Eva Jaramillo, Larie Mora, Shannon Hidalgo, Dan Regan and Liz Regan; front row: Gale Johnson, Clara Martinez, Erica Nunez, Heather Artis, Pat Merville

On June 18, the New Mexico Association of Legal Administrators volunteered at the annual Crossroads for Women BBQ. Chartered in 1980, the New Mexico chapter of the Association of Legal Administrators includes more than 30 members of legal management professionals specializing in every aspect of law firm administration.

For more information about the NMALA or to become a member, visit www.nmala.org or contact President Eva Carter-Jaramillo at ejaramillo@cuddymccarthy.com.

NMALA


Steve Henry

Steven Craig Henry died June 19 at his home. His death from metastatic melanoma came five days after his 65th birthday. Henry was an attorney in private practice in Corrales and was active in community affairs. Born June 14, 1951, Henry grew up in Bellefontaine, Ohio, and graduated from the local high school. He attended Denison University in Granville, Ohio, and the University of South Florida in Tampa where he obtained a bachelor's degree in anthropology. He received his law degree in 1977 from Stetson University College of Law in St. Petersburg, Fla. At various times he worked as a criminal prosecutor in St. Petersburg, Colorado Springs and Albuquerque and as a public defender in Daytona Beach, Fla. and Albuquerque. From 1988 to 1990, he was chief staff attorney for the New Mexico Department of Insurance and spent most of the rest of his professional career working in personal injury and insurance matters. He was a frequent lecturer on insurance law, litigation against bad faith contracting, professional ethics and trial practices and he was an experienced mediator. A New Mexico resident for the past 33 years, Henry was dedicated to the preservation and enhancement of the New Mexico lifestyle, including hiking, camping and, especially, horseback riding. He was a former member of the Corrales Bosque Advisory Commission and the Corrales Equestrian Advisory Board. He was past president of Corrales Horse and Mule People and a board member of the Foundation for the Pure Spanish Horse. He was a volunteer and participant in countless community events. Henry was preceded in death by his parents, Irene Fehrman and Lloyd Henry; and sister Pamela. He is survived by his wife Robin Marshment Henry; son Scott; daughter Jennifer; their respective spouses Chelsey and Lisa; and by scores of friends and colleagues.

Christopher George Lackmann died June 21 at the age of 63. Born in Colorado Springs, Colo., to George Lackmann Jr. and Elizabeth (Ross) Lackmann, Lackmann began life as the middle brother to Stephanie (Lackmann) Padilla and Lawrence Lackmann. A graduate from the University of New Mexico School of Law, Lackmann dedicated most of his professional life to helping the state of New Mexico maintain justice. He was an extremely dedicated and hardworking chef deputy district attorney. He enjoyed mentoring young attorneys and was always known for finding the positive in every situation. He also loved being involved in shenanigans. Lackmann married Lisa Marcotte, the love of his life. He was a patient, generous and loving husband and father to his three girls. A resident of the East Mountains, Lackmann loved nature and building and working on his family home. He is survived by wife Lisa; daughters Amber (Lackmann) Brown and husband David Brown, Jordanne (Lackmann) Khatuntseva and husband Nikita Khatuntsev, and Justine Lackmann and fiance Matthew Prestifilippo; mother Elizabeth Lackmann; sister Stephanie (Lackmann) Padillaand and husband Arnold Padilla and their three children Emily Wiersma, Caitlin Padilla, and Alejandro Padilla; brother Larry Lackmann and wife Kathy Lackmann and their three children Joshua Lackmann, Connor Lackmann, and Cassandra Stovall; and a large extended family and many dear friends. His father George Lackmann Jr.,preceded him in death.


Mark Blaine Painter

Mark Blaine Painter died unexpectedly on June 2 in Albuquerque. Painter was born June 21, 1988, and grew up in White Rock. He was a graduate of Los Alamos High School and New Mexico State University. At the time of his death, he had just finished his second year of law school at the University of New Mexico. He had found a passion in law school, was doing well, and was looking forward to a great career. Painter enjoyed hiking, backpacking and camping. He enjoyed chess, fantasy football with friends and family and Pichenotte. He also took pleasure in playing music (keyboard and piano) and personal fitness. He was a beloved son, grandson, brother, nephew, uncle, cousin and friend. It was hard to walk away from talking with Painter without a smile on your face. He was a tender and sensitive soul and affected many lives for the better. He was good medicine to be around and eagerly listened to others without judgement. Painter is survived by his parents Steve and DeAnn Painter; siblings Amber Painter Richardson (spouse Eric Richardson), Clayton Painter (spouse Holly Painter), and Kelsi Painter; grandmother, Cleo Painter; mieces, Natanya Richardson, Naomi Richardson, and Emilia Painter; nephews, Cameron Richardson, Dean Painter, and Ian Painter; aunts, Connie Taylor and Nanette Wecker; and uncle, Greg Painter.

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

Legal Education

July

13 **Hydrology and the Law**
6.5 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

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

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

15 **The Trial Variety: Juries, Experts and Litigation (2015)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Writing and Speaking to Win (2014)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **The Ethics of Creating Attorney-Client Relationships in the Electronic Age**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Effective Advocacy in All Venues; Judicial vs. Executive & Legislative**
3.0 G
Live Seminar, Santa Fe
New Mexico Hispanic Bar Association
www.nmhba.net

19 **Essentials of Employment Law**
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

21 **Drafting Sales Agents' Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Reciprocity—Introduction to the Practice of Law in New Mexico**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Talkin 'Bout My Generation: Professional Responsibility Dilemmas Among Generations (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Everything Old is New Again - How the Disciplinary Board Works (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29–30 **Joint 2016 TADC & NMDLA Seminar**
5.0 G, 1.0 EP
Live Seminar, Ruidoso
New Mexico Defense Lawyers Association
www.nmdla.org

August

2 **Due Diligence in Real Estate Acquisitions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **I'm With Her! Women in the Courtroom VI: Uniting for Success**
4.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

9 **Charging Orders in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Role of Public Benefits in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11–12 **13th Annual Comprehensive Conference on Energy in the Southwest**
13.2 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

19–20 **2016 Annual Meeting–Bench & Bar Conference**
Possible 12.5 CLE credits (including at least 5.0 EP)
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

August

23 **Drafting Employment Separation Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

September

9 **2015 Fiduciary Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Wildlife and Endangered Species on Public and Private Lands**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Liquidated Damages in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
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, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **Spring Elder Law Institute (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Estate Planning for Firearms**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Guardianship in NM: the Kinship Guardianship Act (2016)**
5.5 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Tax Symposium**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Keeping Secrets or Telling Tales in Joint Representations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The US District Court: The Next Step in Appealing Disability Denials (2015)**
3.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Invasion of the Drones: IP-Privacy, Policies, Profits, (2015 Annual Meeting)**
1.5 G
Live Replay, Albuquerque
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 May 20, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16
No. 35,898	Rodriguez v. State	12-501	05/18/16
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16
No. 35,896	Johnston v. Martinez	12-501	05/16/16
No. 35,894	Griego v. Smith	12-501	05/13/16
No. 35,893	State v. Crutcher	COA 34,207	05/12/16
No. 35,891	State v. Flores	COA 35,070	05/11/16
No. 35,895	Caouette v. Martinez	12-501	05/06/16
No. 35,889	Ford v. Lytle	12-501	05/06/16
No. 35,886	State v. Otero	COA 34,893	05/06/16
No. 35,885	Smith v. Johnson	12-501	05/06/16
No. 35,884	State v. Torres	COA 34,894	05/06/16
No. 35,882	State v. Head	COA 34,902	05/05/16
No. 35,880	Fierro v. Smith	12-501	05/04/16
No. 35,873	State v. Justin D.	COA 34,858	05/02/16
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16
No. 35,870	State v. Maestas	COA 33,191	04/29/16
No. 35,864	State v. Radosevich	COA 33,282	04/28/16
No. 35,866	State v. Hoffman	COA 34,414	04/27/16
No. 35,861	Morrisette v. State	12-501	04/27/16
No. 35,863	Maestas v. State	12-501	04/22/16
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16
No. 35,853	State v. Sena	COA 33,889	04/15/16
No. 35,849	Blackwell v. Horton	12-501	04/08/16
No. 35,835	Pittman v. Smith	12-501	04/01/16
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,814	Campos v. Garcia	12-501	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. 35,771	State v. Garcia	COA 33,425	02/24/16
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. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,522	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. 35,422	State v. Johnson	12-501	07/17/15
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. 34,775	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. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
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. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16
No. 35,751	State v. Begay	COA 33,588	03/25/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,798	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. 34,929	Freeman v. Love	COA 32,542	04/13/16
No. 34,830	State v. Le Mier	COA 33,493	04/25/16
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	04/27/16
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	04/27/16
No. 35,297	Montano v. Frezza	COA 32,403	08/15/16
No. 35,214	Montano v. Frezza	COA 32,403	08/15/16

Writ of Certiorari Quashed:

			Date Order Filed
No. 33,930	State v. Rodriguez	COA 30,938	05/03/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,869	Shah v. Devasthali	COA 34,096	05/19/16
No. 35,868	State v. Hoffman	COA 34,414	05/19/16
No. 35,865	UN.M. Board of Regents v. Garcia	COA 34,167	05/19/16
No. 35,862	Rodarte v. Presbyterian Insurance	COA 33,127	05/19/16
No. 35,860	State v. Alvarado-Natera	COA 34,944	05/16/16
No. 35,859	Faya A. v. CYFD	COA 35,101	05/16/16
No. 35,851	State v. Carmona	COA 35,851	05/11/16
No. 35,855	State v. Salazar	COA 32,906	05/09/16
No. 35,854	State v. James	COA 34,132	05/09/16
No. 35,852	State v. Cunningham	COA 33,401	05/09/16
No. 35,848	State v. Vallejos	COA 34,363	05/09/16
No. 35,634	Montano v. State	12-501	05/09/16
No. 35,612	Torrez v. Mulheron	12-501	05/09/16
No. 35,599	Tafoya v. Stewart	12-501	05/09/16
No. 35,845	Brotherton v. State	COA 35,039	05/03/16
No. 35,839	State v. Linam	COA 34,940	05/03/16
No. 35,838	State v. Nicholas G.	COA 34,838	05/03/16
No. 35,833	Daigle v. Eldorado Community	COA 34,819	05/03/16
No. 35,832	State v. Baxendale	COA 33,934	05/03/16
No. 35,831	State v. Martinez	COA 33,181	05/03/16
No. 35,830	Mesa Steel v. Dennis	COA 34,546	05/03/16
No. 35,818	State v. Martinez	COA 35,038	05/03/16
No. 35,712	State v. Nathan H.	COA 34,320	05/03/16
No. 35,638	State v. Gutierrez	COA 33,019	05/03/16
No. 34,777	State v. Dorais	COA 32,235	05/03/16

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 July 1, 2016

Published Opinions

No. 33165	6th Jud Dist Luna CR-11-14, STATE v M GUTIERREZ (affirm)	6/27/2016
No. 34008	11th Jud Dist McKinley CV-10-276, ZUNI PUBLIC v PUBLIC EDUCATION (reverse and remand)	6/27/2016
No. 34478	11th Jud Dist San Juan CR-13-346, STATE v J LASSITER (affirm)	6/28/2016
No. 34319	2nd Jud Dist Bernalillo LR-13-119, STATE v M YAP (affirm)	6/29/2016
No. 34298	2nd Jud Dist Bernalillo LR-13-84, STATE v A MONTOYA (affirm)	6/29/2016

Unpublished Opinions

No. 34560	1st Jud Dist Santa Fe PB-11-160, A BARA v S GILBERT (affirm)	6/27/2016
No. 35002	6th Jud Dist Luna CR-12-238, STATE v B DUNIHOO (affirm)	6/27/2016
No. 35304	11th Jud Dist San Juan JR-14-134, STATE v JEREMIAH C (affirm)	6/27/2016
No. 35364	3rd Jud Dist Dona Ana DM-02-1279, R MUNOZ v E MUNOZ (reverse)	6/27/2016
No. 34863	2nd Jud Dist Bernalillo CR-12-3655, STATE v R SERNA (affirm)	6/27/2016
No. 35243	2nd Jud Dist Bernalillo JQ-13-63, CYFD v LORESSA V (affirm)	6/27/2016
No. 35336	2nd Jud Dist Bernalillo DM-09-813, V MENDOZA v A REZA (affirm)	6/27/2016
No. 35144	2nd Jud Dist Bernalillo CR-15-718, STATE v H HEAD (affirm)	6/28/2016
No. 35258	6th Jud Dist Luna CV-11-288, PURPLE LUPINE v SHERMAN & SHERMAN (reverse)	6/28/2016
No. 33697	2nd Jud Dist Bernalillo CR-10-3351, STATE v O ARVIZO (affirm in part, reverse in part and remand)	6/28/2016
No. 35041	1st Jud Dist Santa Fe CV-14-1710, V MILES v G MARCANTELL (affirm)	6/28/2016
No. 35271	3rd Jud Dist Dona Ana JR-15-198, STATE v ISAIAH H (affirm)	6/28/2016
No. 35378	3rd Jud Dist Dona Ana CV-15-1261, NATIONAL COLLEGIATE v D RAMZY (reverse)	6/28/2016
No. 34318	2nd Jud Dist Bernalillo LR-13-113, STATE v I MONK (affirm)	6/29/2016
No. 34300	7th Jud Dist Torrance CR-12-50, STATE v M MAURICIO (affirm)	6/30/2016

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

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

Dated July 1, 2016

Clerk's Certificate of Address and/or Telephone Changes

Aaron Christopher Baca
Office of the Attorney General
PO Box 1508
408 Galisteo Street (87501)
Santa Fe, NM 87504
505-827-6928
505-827-6081 (fax)
abaca@nmag.gov

Todd J. Bullion
Office of the First Judicial District Attorney
PO Box 2041
327 Sandoval Street (87501)
Santa Fe, NM 87504
505-827-5000
tbullion@da.state.nm.us

Joseph M. Campbell
908 Lomas Blvd. NW
Albuquerque, NM 87102
505-235-7907
crackahjoe@gmail.com

Susan J. Carter
8815 Fairbanks Road NE
Albuquerque, NM 87112
505-503-3507
susancarter13@yahoo.com

Robert Gary Cates
Office of the City Attorney
PO Box 20000
700 N. Main Street (88001)
Las Cruces, NM 88004
575-541-2128
rcates@las-cruces.org

Harry Sinclair Connelly Jr.
1905 Salinas Drive
Las Cruces, NM 88001
575-521-1726
petec@zianet.com

Carrie Louise Cook
McCarthy & Holthus, LLP
6501 Eagle Rock Avenue NE,
Suite A-3
Albuquerque, NM 87113
505-219-4896
505-750-9803 (fax)
ccook@mccarthyholthus.com

Daniel P. Dietz
811 Seventh Street NW
Albuquerque, NM 87102
408-838-0843
danielpeterdietz@gmail.com

Gretchen Elsner
Elsner Law & Policy, LLC
308 Catron Street
Santa Fe, NM 87501
505-303-0980
gretchen@elsnerlaw.org

Patrick Scott Field
New Mexico State University
PO Box 30001 MSC 3UGC
Las Cruces, NM 88003
575-646-2446
psfield@nmsu.edu

Marisa Yolette Garza
519 Culebra Road
San Antonio, TX 78201
210-334-5209
210-492-1601 (fax)
msalazarlaw@yahoo.com

J. Wayne Griego
6300 Second Street NW
Albuquerque, NM 87107
505-410-2989
505-554-3976 (fax)
waynegriego@gmail.com

Roberto Antonio Guillen Jr.
U.S. Army
5614 Doolittle Street
Burke, VA 22015
312-223-0927
robert.a.guillen4.mil@mail.mil

Paul T. Halajian
555 Rivergate Lane,
Suite B4-180
Durango, CO 87101
970-385-4401
paul@abadieschill.com

Eric Lewis Laurence
Law Offices of
Eric L. Laurence
PO Box 93100
Albuquerque, NM 87199
505-508-2502
505-288-3620 (fax)
elaurence@rplex.net

Alonzo Maestas
Martin E. Threet & Associates
6605 Uptown Blvd. NE,
Suite 280
Albuquerque, NM 87110
505-881-5155
505-881-5356 (fax)
alonzo.maestas@threetlaw.com

Daniel Marquez
1308 Montana Avenue,
Suite A
El Paso, TX 79902
915-270-9580
915-207-1930 (fax)
dan@damlawoffice.com

Lee Roy Montion
Law Offices of
Michael J. Gopin, PLLC
9001 Dyer Street
El Paso, TX 79904
915-751-1111
915-751-0505 (fax)
lmontion@hotmail.com

Charles L. Moore
5901-J Wyoming Blvd. NE
#154
Albuquerque, NM 87109
505-249-1418
moore7929@comcast.net

Britany J. Passalaqua
210 Amherst Drive NE
Albuquerque, NM 87106
505-697-8720
britaschaf@gmail.com

Mark (Brad) Perry
Trust Law Offices
5512 E. Main Street, Suite A2
Farmington, NM 87402
505-599-8172

Coleman M. Proctor
Adams and Reese LLP
1221 McKinney Street,
Suite 4400
Houston, TX 77010
713-308-0374
coleman.proctor@arlaw.com

Felicity Strachan
N.M. Office of the State Engineer
PO Box 25102
130 S. Capitol Street (87501)
Santa Fe, NM 87504
505-827-7972
505-827-3887 (fax)
felicity.strachan@state.nm.us

Arlene F. Strumor
332 Calle Sierpe
Santa Fe, NM 87501
505-983-1974
a_strumor@yahoo.com

Michael Antal Tighe
Office of the Fifth Judicial District Attorney
301 N. Dalmont Street
Hobbs, NM 88240
575-397-2471
575-397-6484 (fax)
mtighe@da.state.nm.us

Lawrence R. White
Miller Stratvert PA
3800 E. Lohman Avenue,
Suite H
Las Cruces, NM 88011
575-523-2481
575-526-2215
lrwhite@mstlaw.com

Laurence Eugene Garrett
3230 Blodgett Drive
Colorado Springs, CO 80919
719-447-7045
1legarrett@comcast.net

Gregory D. Griego
2936 Beach Road NW
Albuquerque, NM 87104
505-463-2640
gregorygriego587@yahoo.com

Meredith Jolie
Garfield Law Group LLP
1634 I Street NW, Suite 400
Washington, DC 20006
meredithjolie@gmail.com

Megan Spagnolo Lai
Wuliger & Wuliger
2003 St. Clair Avenue
Cleveland, OH 44114
216-781-7777
216-781-0621 (fax)
meganspagnolo@gmail.com

Debra Lautenschlager
Law Offices of the Public Defender
610 N. Virginia Avenue
Roswell, NM 88201
debra.lautenschlager@lopd-nm.us

Lee Ann McMurry
1206 Gonzales Court
Santa Fe, NM 87501

Sharice Ogas Pacheco
Law Office of
Jill V. Johnson Vigil
1745 N. Main Street, Suite E
Las Cruces, NM 88005
575-527-5405
575-527-1899 (fax)
sharice@jvjvlaw.com

Leisette G. Rodriguez
828 Magnolia Avenue
Long Beach, CA 90813
562-253-1731
ndngal510@yahoo.com

Michael L. Ross
Law Offices of the Public Defender
610 N. Virginia Avenue
Roswell, NM 88201
michael.ross@lopdnm.us

Tim Scheiderer
Office of the Eighth Judicial District Attorney
112 N. Third Street
Raton, NM 87740
575-445-5516 Ext. 155
575-445-0737 (fax)
tscheiderer@da.state.nm.us

Jill Valerie Johnson Vigil
Law Office of
Jill V. Johnson Vigil
1745 N. Main Street, Suite E
Las Cruces, NM 88005
575-527-5405
575-527-1899 (fax)
jill@jvjvlaw.com

John Howard
John Howard Attorney at Law
223 N. Guadalupe Street #533
Santa Fe, NM 87501
505-780-5264
johnhowardlawfirmsf@gmail.com

Slate James Stern
Law Office of Slate Stern
308 Catron Street
Santa Fe, NM 87501
505-814-1517
866-848-8240 (fax)
admin@slatestern.com

Clerk's Certificate of Change to Inactive Status

Effective June 10, 2016:
Arin Elizabeth Berkson
PO Box 260073
Madison, WI 53726

Effective July 1, 2016:
Michael David Wysocki
O'Neil Wysocki, PC
5323 Spring Valley Road, Suite 150
Dallas, TX 75254
972-852-8000
214-238-8271 (fax)
michael@owlawyers.com

Clerk's Certificate of Name Change

As of June 27, 2016
Mark Szuyu Chang f/k/a Szu-Yu Chang:
Chang Law Firm
1055 E. Colorado Blvd., 5th Floor
Pasadena, CA 91106
626-688-0625
626-240-4699 (fax)
changslaw@gmail.com

In Memoriam

As of June 21, 2016:
Chris G. Lackmann
Office of the Second Judicial District Attorney
520 Lomas Blvd. N.W.
Albuquerque, NM 87102

Clerk's Certificate of Admission

On June 28, 2016:
Kristin Kirk Nelson
5915 McCommas Blvd.
Dallas, TX 75206
512-657-3154
kristinekirk@yahoo.com

On June 28, 2016:
Gil I. Sapir
PO Box 6950
Chicago, IL 60680
773-650-1326

Clerk's Certificate of Withdrawal

Effective June 28, 2016:
Eduardo Andres Provencio
4985 Ironton Street
Denver, CO 80239

Effective July 5, 2016:
Jules B. Videau
PO Box 7700
Ruidoso, NM 88355

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective July 13, 2016

Pending Proposed Rule Changes Open for Comment:

		Comment Deadline
Rule 1-079	Public inspection and sealing of court records	08/05/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 5-123	Public inspection and sealing of court records	08/05/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 10-166	Public inspection and sealing of court records	08/05/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the Magistrate Courts		
Rule 6-506	Time of commencement of trial	05/24/16
Rules of Criminal Procedure for the Metropolitan Courts		
Rule 7-506	Time of commencement of trial	05/24/16
Rules of Procedure for the Municipal Courts		
Rule 8-506	Time of commencement of trial	05/24/16
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Second Judicial District Court Local Rules		
LR2-400	Case management pilot program for criminal cases	02/02/16

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

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-014

No. S-1-SC-35027 (filed March 14, 2016)

HEATHER SPURLOCK; SOPHIA CARRASCO; and NINA CARRERA,
Plaintiffs-Appellants/Cross-Appellees,
v.
ANTHONY TOWNES, in his individual capacity,
Defendant-Appellee,

and

BARBARA WAGNER, in her individual capacity;
and CORRECTIONS CORPORATION OF AMERICA,
Defendants-Appellees/Cross-Appellants.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
NEIL M. GORSUCH and JEROME A. HOLMES, Circuit Judges

PAUL JOHN KENNEDY
ARNE ROBERT LEONARD
PAUL KENNEDY & ASSOCIATES, P.C.
Albuquerque, New Mexico
for Plaintiffs-Appellants/Cross-Appellees

DEBORAH DENISE CROW WELLS
KENNEDY, MOULTON & WELLS, P.C.
Albuquerque, New Mexico

NICHOLAS D. ACEDO
CHRISTINA RETTS
STRUCK WIENEKE & LOVE, P.L.C.
Chandler, Arizona
for Defendants-Appellees/Cross-Appellants

Opinion

Charles W. Daniels, Justice

{1} The United States Court of Appeals for the Tenth Circuit has certified to us the question of the civil liability under New Mexico law of a private prison when an on-duty corrections officer sexually assaults inmates in the facility. *Spurlock v. Townes*, 594 F. App'x 463, 470-71 (10th Cir. 2014). We hold that the private prison is vicariously liable for damages caused by the intentional torts of its employee when those torts were facilitated by the authority provided to the employee by the prison. The liability of the prison may not be reduced by any fault attributed to the victims of the sexual assaults.

I. BACKGROUND

{2} Plaintiffs Heather Spurlock, Sophia Carrasco, and Nina Carrera are former inmates of the Camino Nuevo Correctional Center, a prison housing female offenders, directed by Third-Party Defendant Warden Barbara Wagner and privately operated by Third-Party Defendant Corrections Corporation of America (CCA). While incarcerated, Plaintiffs were sexually assaulted by Defendant Anthony Townes, a corrections officer employed by CCA.

{3} Townes approached Plaintiffs while they were on work detail or removed them from their cells in the middle of the night and then ordered them to other locations in the prison where he sexually assaulted them. Townes asked officers staffing the "master control" area where the prison's surveillance cameras were monitored to remotely "pop" doors open to allow him to move Plaintiffs around the facility, or he obtained permission from master control to open the doors himself. Master control was staffed at all times, and the surveillance cameras provided a view of most of the prison, including the area in front of the washer and dryer where Spurlock was raped. But Townes also took advantage of "blind spots" beyond range of the surveillance cameras, such as the officers' break room where he took Carrera to rape her.

{4} CCA policies allowed male corrections officers to escort female inmates around the facility alone. Prison rules that required male officers to announce their presence when they entered a housing unit and to maintain physical distance between officers and inmates were not enforced, and inmates had no effective way to obtain their enforcement. Plaintiffs presented evidence that "[the rapes] could have been . . . detected earlier, and . . . in all likelihood, they may not have occurred" if Townes had not "had so much access to the female inmates."

{5} Townes pleaded guilty in New Mexico state district court to four counts of second-degree criminal sexual penetration in violation of NMSA 1978, Section 30-9-11(E)(2) (2003, amended 2009) and four counts of false imprisonment in violation of NMSA 1978, Section 30-4-3 (1963). At his plea hearing, he stipulated to the truth of the allegations contained in the indictment on these eight counts, including that he had unlawfully restrained or confined Plaintiffs and caused them to engage in sexual intercourse while they were inmates and while he was in a position of authority over them and that he was able to use his authority to coerce Plaintiffs to submit to the acts.

{6} Plaintiffs filed suit in the United States District Court against Townes, CCA, and Wagner, seeking compensatory and punitive damages for the violation of Plaintiffs' Eighth Amendment civil rights under 42 U.S.C. § 1983 (2012), in addition to various state tort law claims. The federal district court concluded that Townes was judicially estopped from contesting the facts that he had specifically admitted during his plea hearing, including that he had intentionally restrained or confined Plaintiffs without their consent and had sexually assaulted them. On the basis of those admitted facts the court granted judgment as a matter of law against Townes on Plaintiffs' Eighth Amendment claim and on Plaintiffs' state tort law claims for the intentional torts of sexual assault and false imprisonment.

{7} The district court declined to hold the Third-Party Defendants CCA and Wagner vicariously liable for the judgments against Townes because the intentional torts were outside the scope of his employment. But the court did rule that the negligence of CCA and Wagner in failing to properly supervise Townes would make them liable for the damages he had caused. *See Medina v. Graham's Cowboys, Inc.*, 1992-NMCA-016, ¶ 21, 113 N.M. 471, 827 P.2d 859 (holding that the doctrine of respondeat superior could be extended to require "an employer who has negligently hired an employee to pay for all damages arising from an intentional tort of the employee when the tort was a reasonably foreseeable result of the negligent hiring"). The jury found CCA and Wagner not liable under the Eighth Amendment but liable for negligent supervision of Townes as to Plaintiffs Spurlock and Carrasco.

{8} The jury awarded each Plaintiff compensatory and punitive damages. Separate punitive damages were awarded against Townes and against CCA and Wagner, but the amount of the compensatory damages was based on the harm that was done to Plaintiffs and was not separately measured for each theory of liability. *See Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979) (holding that one compensatory damages award is appropriate when Eighth Amendment guarantees under § 1983 and state tort law on negligence protect the same interests, even when the defendants were found liable under both theories). Townes was held liable for compensatory damages under both § 1983 and state tort law.

{9} The federal district court ruled that any comparative negligence of Plaintiffs could not be considered in awarding damages against Townes but that an award against CCA and Wagner based on negligent supervision was subject to reduction for fault on the part of Plaintiffs. The jury apportioned a percentage of fault to Plaintiffs Spurlock and Carrasco as compared to CCA and Wagner, reducing the final compensatory damages award against CCA and Wagner accordingly. Because CCA and Wagner were not found liable for negligent supervision as to Plaintiff Carrera, she was awarded compensatory and punitive damages against Townes only.

{10} The Tenth Circuit Court of Appeals, sitting in review of posttrial motions in this case, certified to this Court the following question:

> When an inmate is sexually assaulted by a corrections officer, does New Mexico recognize the affirmative defense of comparative fault—permitting the comparison of the correctional facility/employer's alleged negligence with the alleged fault of the inmate victim—for the purpose of reducing the amount of a judgment entered on the inmate's state-law claim of negligent supervision of the tortfeasor-officer by the employer?

Spurlock, 594 F. App'x at 465; *see* Rule 12-607(A)(1) NMRA (allowing this Court to answer questions of law certified to it by a court of the United States).

{11} "Our goal in answering a question certified by the federal courts is not to finally dispose of all relevant issues in a case" but is rather to resolve "unsettled matters of New Mexico law." *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶¶ 17, 24, 124 N.M. 640, 954 P.2d 72 (concluding that this Court need not resolve the merits of a question certified by a federal court where the New Mexico Legislature had enacted a statute that rendered the question moot). We exercise our discretion to reformulate the question, *see* Rule 12-607(C)(4), and we limit our answer to the context of this case where a corrections officer employed by a privately run prison sexually assaulted inmates in the facility while on duty. Within this narrow scope, we hold that under New Mexico law CCA and Wagner are vicariously liable for all compensatory damages caused by the corrections-officer employee when he was aided in accomplishing his assaults by his agency relationship with CCA and Wagner who were his employers. No affirmative defense of comparative fault is available in this context because fault attributed to intentional tortfeasor Townes is not subject to reduction based on comparative negligence and because no fault on the part of the vicariously-liable CCA and Wagner is required. *See* NMSA 1978, § 41-3A-1(C)(1)-(2) (1987) (retaining joint and several liability for intentional tortfeasors and for vicarious liability); *Garcia v. Gordon*, 2004-NMCA-114, ¶¶ 6, 9-10, 136 N.M. 394, 98 P.3d 1044 (stating that New Mexico has statutorily adopted the majority rule that "fault should not be apportioned between an intentional tortfeasor and a merely negligent victim" but allowing damages for false imprisonment to be reduced based on the fault of the plaintiff only because the defendant had not acted with the intention of inflicting injury or damage (internal quotation marks and citation omitted)); *Medina*, 1992-NMCA-016, ¶ 17 ("Because liability is not predicated on the fault of the employer, the abolition of joint and several liability does not eliminate [an employer's] respondeat superior liability.").

{12} We decline to determine the availability of an affirmative defense alleging Plaintiffs' comparative fault in a claim of liability for negligent supervision of an intentional tortfeasor because the vicarious liability of CCA and Wagner makes this determination unnecessary. *See Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶ 47, 301 P.3d 387 ("[P]laintiffs may not . . . receive compensation twice for the same injury."); *Allstate Ins. Co. v. Stone*, 1993-NMSC-066, ¶ 7, 116 N.M. 464, 863 P.2d 1085 (declining to address unnecessary certified issues to avoid issuing an advisory opinion). Neither do we reach Plaintiffs' contention that CCA and Wagner are statutorily liable under New Mexico's mandatory financial responsibility statute for private correctional facilities. NMSA 1978, § 33-1-17(D)(2) (2013).

II. DISCUSSION

{13} "Under basic respondeat superior principles, an employer is liable for an employee's torts committed within the scope of his or her employment." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 29, 135 N.M. 539, 91 P.3d 58. The act of an employee is within the scope of employment if

> 1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and
> 2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

UJI 13-407 NMRA. "[A]n employer is not generally liable for an employee's intentional torts because an employee who intentionally injures another individual is generally considered to be acting outside the scope of his or her employment." *Ocana*, 2004-NMSC-018, ¶ 29.

{14} Nevertheless, "[u]nder the aided-in-agency theory, an employer may be held liable for the intentional torts of an employee acting outside the scope of his or her employment if the employee 'was aided in accomplishing the tort by the existence of the agency relation.'" *Id.* ¶ 30 (quoting

the Restatement (Second) of Agency § 219(2)(d) (1958)). New Mexico courts have frequently relied on the Restatement (Second) of Agency when deciding issues involving respondeat superior, and in *Ocana* we adopted the Restatement's aided-in-agency theory as consistent with the policies underlying New Mexico tort law that favor compensation of an injured victim, redistribution of economic loss, and deterrence of unreasonable and immoral conduct. *See* 2004-NMSC-018, ¶¶ 30-31.

{15} While *Ocana* involved an employee's claims of sexual harassment by her supervisor, we adopted the aided-in-agency theory in our consideration of the plaintiff's common-law claims for the intentional torts of assault, battery, and intentional infliction of emotional distress, and we did not limit the rule to the sexual harassment context. *See id.* ¶ 29. "[T]he basis for the aided-in-agency theory is that the employee 'may be able to cause harm *because of* [*the employee's*] *position as agent*' of the employer." *Id.* ¶ 32 (quoting the Restatement (Second) of Agency § 219(2) cmt. e).

{16} We acknowledge the concerns of other courts "that aided-in-agency as a theory independent of apparent authority risks an unjustified expansion of employer tort liability for acts of employees." *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1199 (Alaska 2009). We agree that the theory should not apply to all situations in which the commission of a tort is facilitated by the tortfeasor's employment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998) ("In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."). "[M]ore than the mere existence of the employment relation [must] aid[] in commission of the harassment." *Id.*; *see also Peña v. Greffet*, 110 F. Supp. 3d 1103, 1124 (D. N.M. 2015) ("[T]he tort cannot be of a nature that a mere coworker could have just as easily committed; rather, a specifically supervisory relationship must have aided the tort's commission.").

{17} But sexual harassment of a subordinate by a supervisor is not the only context in which job-created control over another justifies holding the employer who vests the tortfeasor with that authority vicariously liable for the damages caused by its abuse. We thus follow *Ayuluk* in limiting our adoption of aided-in-agency principles extending vicarious liability to "cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood." 201 P.3d at 1199. Requiring a relationship of job-created control between a tortfeasor, and his or her victim, holds the employer liable only when the tortfeasor has capitalized on the *power* that the employer gave the tortfeasor, and not merely the opportunity. Opportunity is generic: a factory worker who sexually assaults the coworker next to him on the assembly line might only have been able to do so because the factory stationed him next to his victim, but the factory did not increase the odds—at least as they were knowable to the employer at the time—of either that specific worker committing sexual assault or of that specific coworker being sexually assaulted. On the other hand, when an employer vests an employee with power over another person—whether the other person is a subordinate employee or a non-employee third party, like an inmate—the employer enables torts that might not otherwise happen—torts that are, essentially, an abuse of that power. There is danger inherent in granting one person extraordinary power over another, and the granting of that power should, thus, carry with it some accountability.

Peña, 110 F. Supp. at 1135. We agree also that "[w]hether a particular type of case falls within this category should be a question for the court, not a jury." *Ayuluk*, 201 P.3d at 1199.

{18} In order to prevail under an aided-in-agency theory, Plaintiffs had to prove that Townes was aided in accomplishing his assaults by his status as a corrections officer that afforded him substantial power and control over Plaintiffs. The "extraordinary power" wielded by law enforcement over ordinary citizens has influenced many courts to hold the officers' employers vicariously liable for the abuse of that power. *See, e.g.*, *Doe v. Forrest*, 2004 VT 37, ¶¶ 34-38, 853 A.2d 48 (discussing cases that found vicarious liability for sexual assaults by corrections and police officers). Corrections officers like Townes are vested with extraordinary authority over inmates, substantially more than the authority of police officers over nonincarcerated citizens.

> A prison guard has even more employer-vested power over an inmate than a private-sector supervisor has over a subordinate: the control that a prison guard exerts over an inmate extends into virtually every facet of the inmate's life; the relationship, unlike a private-sector supervisor-subordinate relationship, often involves the use of legitimate bodily force and physical violence; and, unlike a private-sector employee, an inmate cannot simply quit the job of being a prisoner.

Peña, 110 F. Supp. at 1134. A corrections officer may be, in fact, merely a conduit for the authority of the State as delegated to the private prison and exercised through the person of the officer, but the practical effect of this relationship is to place prison inmates under the continuous and nearly total control of the officer. *See id.* at 1135 ("[A]n inmate . . . likely feels as if she is not merely under the State's control, by way of its guards, but that she is under the control of the guard himself.").

{19} "[T]he prison guard-inmate relationship is an irreducibly unpleasant one . . . oriented around captivity and control . . . ." *Id.* at 1136. For two decades, the New Mexico Legislature has recognized the potential for abuse inherent in this relationship, specifically in the form of sexual assault. *See* § 30-9-11(E)(2) ("Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated . . . on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate."). The essential elements of Subsection (E)(2) are a legislative acknowledgment of the power disparity between inmate and corrections officer and a recognition that this disparity not only facilitates sexual assault of the vulnerable party but makes meaningful voluntary consent to sexual intercourse an unrealistic inquiry.

{20} Townes had the authority to enter Plaintiffs' residential block unescorted and unannounced, to remove Plaintiffs from their cells or from their work stations, to move Plaintiffs around the facility including to out-of-the-way areas, to exercise his authority at any hour of the day or night, and to bestow favors or impose sanctions for inmate behavior. Townes approached Plaintiff Spurlock multiple times when she was alone on work detail and assaulted her at her work station. He removed Plaintiffs Carrasco and Carrera from their cells and took them to other locations to rape them. Plaintiffs were told to follow the directions of the corrections officers quickly,

without question or argument, and feared retaliation if they did not obey Townes. Inmates who challenge the actions of an officer face stereotyping that reduces their credibility and increases the risk of retaliation for their complaints because they are not taken seriously. *Peña*, 110 F. Supp. at 1135 ("The credibility gap between prison guards and inmates is enormous in everyone's eyes, but especially in the eyes of the jail employees directly responsible for handling complaints—who are, after all, the tortfeasor's coworkers."). Although CCA did have a grievance procedure in place, Plaintiffs presented evidence that it was not effectively followed and that they had experienced retaliation for complaints. Based on these facts, we conclude that Townes used the authority vested in him by his position as a corrections officer to coerce Plaintiffs, who were inmates entrusted to his care, into submitting to sexual assault and false imprisonment.

III. CONCLUSION

{21} Because Townes was aided in the commission of his intentional torts by the agency afforded to him by his employers, Third-Party Defendants CCA and Wagner are vicariously liable under New Mexico law for all compensatory damages Plaintiffs suffered from these assaults. We do not decide whether defendants' vicarious liability extends to the punitive damages awarded against Townes because the question certified to this Court and addressed by the parties concerned only the compensatory award. Because CCA and Wagner are fully liable for that award under vicarious liability principles regardless of any direct negligence on their part, we do not reach the claim of negligent supervision nor any theories of comparative fault that might have been applicable to that theory.

{22} 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-015

No. S-1-SC-34933 (filed March 17, 2016)

NEW MEXICO EXCHANGE CARRIER GROUP,
Appellant,
v.
NEW MEXICO PUBLIC REGULATION COMMISSION,
Appellee,
and
SMITH BAGLEY, INC. and NAVAJO COMMUNICATIONS COMPANY,
Intervenors.

CONSOLIDATED WITH

Docket No. S-1-SC-35036

NEW MEXICO EXCHANGE CARRIER GROUP,
Appellant,
v.
NEW MEXICO PUBLIC REGULATION COMMISSION,
Appellee,
and
SPRINT COMMUNICATIONS COMPANY, L.P.; SPRINT SPECTRUM, L.P.;
SMITH BAGLEY, INC.; CTIA, THE WIRELESS ASSOCIATION; T-MOBILE WEST LLC;
and NAVAJO COMMUNICATIONS COMPANY,
Intervenors.

APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION

WILLIAM PHELPS TEMPLEMAN
JOSEPH EDWARD MANGES
COMEAU, MALDEGEN, TEMPLEMAN & INDALL, LLP
Santa Fe, New Mexico
for Appellant New Mexico Exchange Carrier Group

DAVID LAFURIA
LUKAS, NACE, GUTIERREZ & SACHS, LLP
McLean, Virginia
for Intervenors Smith Bagley, Inc. and Navajo Communications Company

RUSSELL R. FISK
MARGARET KENDALL CAFFEY-MOQUIN
Santa Fe, New Mexico
for Appellee New Mexico Public Regulation Commission

JEFFREY H. ALBRIGHT
LEWIS ROCA ROTHGERBER LLP
Albuquerque, New Mexico
for Intervenors Sprint, T-Mobile, and CTIA, The Wireless Association

PATRICIA SALAZAR IVES
CUDDY & MCCARTHY LLP
Santa Fe, New Mexico

Opinion

Edward L. Chávez, Justice

{1} In this opinion we address two orders issued by the New Mexico Public Regulation Commission (PRC) that affect the revenues of local telephone networks including rural telephone companies that make up the New Mexico Exchange Carrier Group. The first order is an annual order that must be issued by the PRC on or before October 1 each year that adopts a Surcharge Rate for the succeeding year. The Surcharge Rate is paid by consumers of all telephone communication services, both wired and wireless. The surcharge that is collected is placed in a State Rural Universal Service Fund (Fund) and distributed to local telephone networks. We will refer to this order as the "Surcharge Rate Order." On September 17, 2014, the PRC issued the Surcharge Rate Order, which adopted a 3% Surcharge Rate for calendar year 2015.

{2} The second order is a Rule Order that amends the 2005 rules which set forth the procedures for administering and implementing the Fund. The Rule Order was issued on November 26, 2014; the rule changes became effective on January 1, 2015. *See* 17.11.10.6 NMAC. We begin our analysis with a discussion of the Fund's background, followed by a discussion of the issues on appeal regarding each order and our reasons for reversing the PRC and remanding for further proceedings.

I. THE STATE RURAL UNIVERSAL SERVICE FUND

{3} Long-distance telephone carriers rely on local telephone networks on both ends of a long-distance telephone call to complete the long distance call. Some of these local networks are owned by Incumbent Local Exchange Carriers (ILECs), including numerous rural telephone companies that make up the N.M. Exchange Carrier Group. ILECs are owners of public switched telephone networks. *See* John Gasparini, *Hello, Congress? The Phone's For You: Facilitating the IP Transition While Moving Toward a Layers-Based Regulatory Model*, 67 Fed. Comm. L.J. 117, 123 n.25 (2014); 47 U.S.C. § 251(h) (2012). When someone places a call, the caller's ILEC transports the call to the long-distance carrier's network, which in turn transports the call for some distance before transferring the call to another ILEC on the receiving end. *See* Mark D. Schneider, Marc A. Goldman, & Kathleen R. Hartnett, *The* USTA *Decisions and the Rise and Fall of*

Telephone Competition, 22 Comm. Law., Summer 2004, at 1, 18. Long-distance carriers pay access charges to compensate ILECs for using their networks. The PRC regulates access charges that ILECs receive for *intrastate* long-distance calls, and the Federal Communications Commission (FCC) regulates access charges that ILECs receive for *interstate* long-distance calls and wireless calls. *See* NMSA 1978, § 63-9H-6(I) (2013); *see also* 47 U.S.C. §§ 151, 614 (2012); 47 C.F.R. § 61.26 (2012).

{4} In 1996, the FCC required ILECs to lower their access charges for interstate service. However, to compensate ILECs for the reduction in access-charge revenue, the FCC directed payments to ILECs from a federal universal service fund. *See In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 8780-86 (1997), *aff'd in part, rev'd in part sub nom. Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999). The PRC did not immediately follow the FCC's lead, and instead continued to allow ILECs to charge high intrastate access rates, which meant that New Mexico customers paid more for intrastate long distance calls than for interstate long distance calls.

{5} However, effective July 1, 1999, the Legislature enacted the Rural Telecommunications Act of New Mexico (the Act), NMSA 1978, §§ 63-9H-1 to -14 (1999, as amended through 2013), and directed the PRC to establish and administer a " 'state rural universal service fund,' " Section 63-9H-6(A), with a "surcharge on intrastate retail public telecommunications services to be determined by the [PRC]." Section 63-9H-6(B). The Legislature delegated broad authority to the PRC over the Fund.

> The [PRC] shall:
> (1) establish eligibility criteria for participation in the fund consistent with federal law that ensure the availability of service at affordable rates. . . .;
> (2) provide for the collection of the surcharge on a competitively neutral basis and for the administration and disbursement of money from the fund;
> (3) determine those services requiring support from the fund;
> (4) provide for the separate administration and disbursement of federal universal service funds consistent with federal law; and
> (5) establish affordability benchmark rates for local residential and business services that shall be utilized in determining the level of support from the fund. The process for determining subsequent adjustments to the benchmark shall be established through a rulemaking.

Section 63-9H-6(D).

{6} Later in 2005, the New Mexico Legislature amended the Act to require equal access charges for intrastate and interstate calls, which were to be set at the rate established by the FCC for interstate calls. *See* § 63-9H-6(I) (requiring a phase-in of equal charges by May 1, 2008). Like the FCC, the New Mexico Legislature determined that the ILECs' lost revenue for intrastate calls would be replaced with a combination of (1) limited increases in local rates up to an "affordability benchmark," and (2) subsidy payments to ILECs from the Fund. *See* § 63-9H-6(A), (D), (K). The Fund is financed by a surcharge on intrastate retail telephone service, which telecommunications carriers collect from their customers. *See* § 63-9H-6(B). All telephone companies operating in New Mexico, wired and wireless alike, charge their consumers the Surcharge Rate, and these monies are placed into the Fund and paid out to ILECs. *See* 17.11.10.20 & 17.11.10.22 NMAC.

{7} The PRC adopted regulations implementing the 2005 Act amendments. 17.11.10.8 to -30 NMAC (11/30/05, as amended through 12/28/05). The regulations required the size of the Fund to be set annually and to be "equal to the sum of [the ILECs'] revenue requirements . . . plus projected administrative expenses and a prudent fund balance." 17.11.10.19(A), (C) NMAC (citation omitted). The PRC defined each ILEC's revenue requirement as the amount of revenue the ILEC lost as a result of the intrastate access charges. *See* 17.11.10.19(E) NMAC. The PRC then determined that the size of each ILEC's revenue requirement—i.e., subsidy payment—should be calculated using the number of intrastate access minutes that the ILEC recorded in 2004. *See id.* The regulation remained unchanged from the end of 2005 to 2013, and each ILEC received a subsidy payment based on an equation that used its 2004 access minutes. *See id.*

{8} The PRC also appointed Solix, Inc. (Solix) to serve as a third party fund administrator pursuant to Section 63-9H-6(G) and 17.11.10.10 NMAC. Solix is responsible for the collection, administration, and disbursement of the Fund subject to the PRC's supervision and approval. *See* § 63-9H-6(G); 17.11.10.12 NMAC. Each year Solix submits a report to the PRC that offers a range of options for the Fund size and the Surcharge Rate for the following year as required by Section 63-9H-6(M), 17.11.10.19(A) NMAC, and 17.11.10.12(E) NMAC. The PRC has the ultimate responsibility to decide the amount of the Fund and the Surcharge Rate. *See* 17.11.10.19(B) & 17.11.10.20(B) NMAC; *see also* § 63-9H-6(A), (C). The regulations that governed the administration of the Fund from 2004 up to and including the Surcharge Rate Order at issue in this case requires the Fund size to be "equal to the sum of each [eligible ILEC's] revenue requirement[] . . . plus projected administrative expenses and a prudent fund balance." 17.11.10.19(C) NMAC.

> [T]he revenue requirement for each [ILEC] . . . shall be equal to the [eligible ILEC's] applicable [2004] intrastate access minutes multiplied by the difference between the allowable intrastate access rate . . . and the [eligible ILEC's] historical intrastate access rate, with the product of this computation multiplied by the [eligible ILEC's] historical collection factor, and then reduced by the [eligible ILEC's] imputed benchmark revenue. . . .[1]

17.11.10.19(E) NMAC (citation omitted).

{9} However, because of the expansion of wireless services, e-mail, text messaging, social media, and other new internet-based video and telephone communications, the use of wired telephone services has declined significantly. *See* Kevin Werbach, *Reflections on Network Transitions and Social Contracts for the Broadband World*, 13 Colo. Tech. L.J. 45, 46, 57 (2015). In New Mexico, there was an approximately 40% decline in access minutes occurring from 2004 through 2012. On November 27, 2012, the PRC issued a Notice of Proposed Rulemaking to address possible amendments to the Fund rules, to, among other things, change the Fund formula to apply 2012 access minutes

[1]Historically the formula has been represented arithmetically as "((Historical Rate Minus Allowable Rate) Times minutes Times Collection Factor) Minus Imputed Benchmark Revenue." 17.11.10.19(E) (2005).

November-December 2016

CLE Planner

Your Guide to Continuing Legal Education

The Center for Legal Education is offering a variety of CLE courses in November and December.

Look inside to see what's new!

Many Center for Legal Education courses include breakfast, lunch, materials and free WiFi access.

Reach us at 505-797-6020.

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

www.nmbar.org

Live Programs

Presented live at the State Bar Center in Albuquerque. Some courses can also be viewed by Live Webcast.

November

The Art of Effective Speaking for Lawyers

With national presenter Steven Stark, Esq.

Wednesday, Nov. 16, 2016
State Bar Center, Albuquerque

Credits coming soon

Save the date for this electric seminar with national presenter Steven Stark. More than any other profession, the practice of law depends on the effective use of words, communication and persuasion. Through the study of some of the great American political speeches and presentations of recent times, this practical program focuses on the basics of public speaking for lawyers. Spend the day with master speaker Steven Stark and learn his winning strategies for captivating audiences. A former litigator and now an international authority on speaking and writing skills for lawyers, Stark will teach attendees how to capture—and keep—the attention of clients, peers, judges and opponents. Learn his proven strategies for acing oral presentations, delivering better oral arguments and trial presentations, finessing delivery and controlling nervous butterflies.

Annual Institutes and Fall CLE Programs

Offered at the State Bar Center as Live Seminars or by Live Webcast

Indian Law CLE
Thursday, Nov. 3, 2016

Alternative Dispute Resolution Institute
Friday, Nov. 4, 2016

Probate Institute
Thursday, Nov. 17, 2016

Business Law Institute
Friday, Nov. 18, 2016

Live Programs

December

The Center for Legal Education is planning to roll out more CLE course offerings in December than ever before! Stay tuned for more information on these programs. Contact the Center for more information. We are here to answer your questions. Look online at www.nmbar.org for the most up-to-date list of courses.

Offered at the State Bar Center as Live Seminars or by Live Webcast

New **Medical Marijuana in New Mexico**
Thursday, Dec. 1, 2016

Paralegal Division CLE
Friday, Dec. 2, 2016

New **Courtroom Dogs!**
Monday, Dec. 5, 2016

New **Transgender Law and Advocacy**
Tuesday, Dec. 6, 2016

New **Federal Practice Tips: Taking and Giving Depositions**
Wednesday, Dec. 7, 2016

27th Annual Real Property Institute
Thursday, Dec. 8, 2016

Live Programs

December *continued*

Immigration Law Institute
Friday, Dec. 9, 2016

Ethicspalooza: Everything You Always Wanted to Know About Attorney Ethics
Monday, Dec. 12, 2016

New **Trials of the Century II**
Presented by national speaker Todd Winegar
Tuesday, Dec. 13, 2016

New **Attorney vs. Judicial Discipline**
Monday, Dec. 19, 2016

New **DWI: From the Streets to the Courtroom**
Tuesday, Dec. 20, 2016

Nationally known presenters Carole Levitt and Mark Rosch, Internet for Lawyers
Tuesday, Dec. 27, 2016

New **Human Trafficking**
Wednesday, Dec. 28, 2016

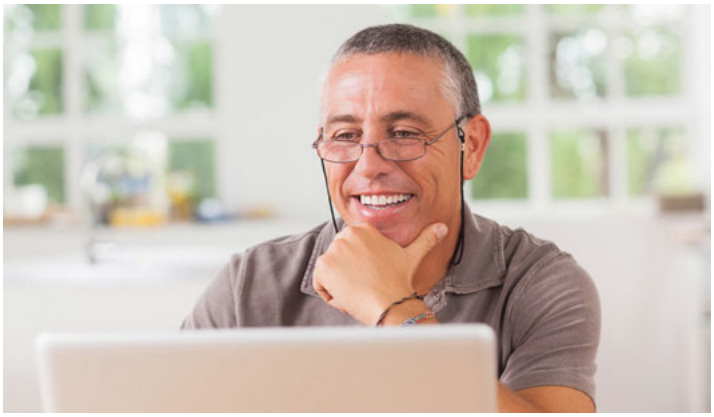
On-Demand Self Study

On-Demand

No time to come to the State Bar Center? Approximately 30 On-Demand courses are available to view for 2016 CLE credit. Earn up to four hours of credit from home or when you're on the move. View the full line-up online at www.nmbar.org.

- 3.0 G 1.0 EP **Best and Worst Practices and Ethics in Mediation (2016)**
- 3.0 EP **How to Become a Rock Star Lawyer the Ethical Way (2014)**
- 2.6 G **2015 Spring Elder Law Institute**
- 3.0 G 1.0 EP **District Court: The Next Step in Appealing Disability Denials (2015)**
- 2.0 G 1.0 EP **Federal Practice Tips and Advice (2015)**

Purchase self-study on-demand programs at **www.nmbar.org** and complete up to four hours of CLE in the comfort of your home or office.



Your purchase includes online access to the previously recorded program and accompanying course materials.

Credits are filed with New Mexico MCLE within 30 days of completion.

Contact the Center for Legal Education for more information.

State Bar of New Mexico
Center for Legal Education

Live Replays

State Bar Center, Albuquerque

The Center for Legal Education always offers a variety of course formats for State Bar members. Live video replays are offered throughout the year and qualify for live CLE credit. If you missed a program earlier this year, it may be available now by Live Replay. These courses are presented at the State Bar Center only.

Nov. 1

2.0 EP **Law Practice Succession- A Little Thought Now, a Lot Less Panic Later (2015)**

Nov. 22

3.0 G 1.0 EP **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**

3.0 EP **What Nascar, Jay-Z & the Jersey Shore Teach About Attorney Ethics – 2016 Edition**

3.0 EP **Tech Tock, Tech Toch, Social Media and the Countdown to Your Ethical Demise (2016)**

Nov. 30

3.0 EP **Talkin 'Bout My Generation: Professional Responsibility Dilemmas Among Generations (2015)**

Teleseminars

Short on time? These short one-hour teleseminars may be just the solution for you. All teleseminars are accessible via land line or mobile phone and count as live credit. Sign up for one today.

1.0 G **Nov. 2**
Estate Planning for Clients Beliefs

1.0 G **Nov. 10**
Acquisitions of Subsidiaries and Divisions

1.0 EP **Nov. 11**
Ethics and Identifying Your Client

1.0 G **Nov. 17**
2016 Attorney-Client Privilege Update

1.0 EP **Nov. 18**
Ethics and Dishonest Clients

1.0 G **Dec. 1**
The Entity Veil: Individual Liability for Business Acts

1.0 G **Dec. 8**
Structuring Minority Interests in Business

1.0 EP **Dec. 9**
The Duty to Disclose to the Tribunal

1.0 EP **Dec. 16**
Lawyers and Email: Ethical Issues in Practice

1.0 G **Dec. 20**
Escrow Agreements in Real Estate

1.0 G **Dec. 21**
Drafting Preferred Stock/Preferred Returns

1.0 EP **Dec. 23**
Ethics and Confidentiality

Registration Open! Visit www.nmbar.org/AnnualMeeting

2016 Annual Meeting– Bench & Bar Conference

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

Possible 12.5 CLE credits available including 5.0 EP Credits

Keynote Speaker:
Ruth Bader Ginsburg
Associate Justice, U.S. Supreme Court

Explore the Annual Meeting
www.nmbar.org/AnnualMeeting

For information on sponsorship opportunities, *Annual Meeting Program* advertising or exhibit space, contact Stephanie Wagner, development director, at swagner@nmbar.org or 505-797-6007

STATE BAR of NEW MEXICO

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

CLE REGISTRATION FORM

For more information about our programs visit www.nmbar.org

Four Ways to Register:

Online: www.nmbar.org **Fax:** 505-797-6071, 24-hour access **Phone:** 505-797-6020
Mail: Center for Legal Education, PO Box 92860, Albuquerque, NM 87199

Name_____NMBar#_____

Phone _____ Email _____

Program Title _____ Date of Program _____

Program Format ❒ Live ❒ Telecast/Teleseminar ❒ Webcast ❒ Live Replay ❒ Online/On-Demand

Program Cost _____ IMIS Code (For internal use only) _____

Payment

❒ Check or P.O. # _____ (Payable to *Center for Legal Education*)

❒ VISA ❒ MC ❒ American Express ❒ Discover *Payment by credit and debit card will incur a 3% service charge.*

Name on card if different from above: _____

Credit Card # _____

Exp. Date _____ Billing ZIP Code _____ CVV# _____

Authorized Signature _____

REGISTER EARLY! Advance registration is recommended to guarantee admittance and course materials. If space and materials are available, paid registration will be accepted at the door.

CLE Cancellations & Refunds: We understand that plans change. If you find you can no longer attend a program, please contact the CLE Department. We are happy to assist you by transferring your registration to a colleague or applying your payment toward a future CLE event. A full refund will be given to registrants who cancel two or more business days before the program date. A 3% processing fee will be withheld from a refund for credit and debit card payments. Cancellation requests received within one business day of the program will not be eligible for a refund, but the fees may be applied to a future CLE program offered in the same compliance year.

MCLE Credit Information: NMSBF is an accredited CLE provider.

Recording of programs is NOT permitted.

Financial Assistance: A 50% discount on registration fees is available to practicing attorneys who qualify.

Note: Programs subject to change without notice.

instead of 2004 access minutes and to establish a 3% surcharge cap. While the PRC was considering these rule changes, in 2013 the Governor signed into law House Bill 58, Chapter 194, Section 4 of New Mexico Laws of 2013, which amended NMSA 1978, Section 63-9H-6(J) (2005) and required the PRC to "establish a cap on the surcharge." Section 63-9H-6(J).

{10} It was against this backdrop that the PRC issued the November 26, 2014 Rule Order, which set the surcharge cap and amended the formula for calculating the Fund, effective January 1, 2015. The relevant details of the process involved in adopting the Rule Order will be described in the discussion of the merits of the N.M. Exchange Carrier Group's appeal of the Rule Order. However, because the amended regulations did not apply to the Surcharge Rate Order, we will first discuss the merits of the N.M. Exchange Carrier Group's appeal of the Surcharge Rate Order.

II. THE SURCHARGE RATE ORDER CASE (NMPRC Case No. 14-00279-UT; New Mexico Supreme Court Case No. S-1-SC-34933)

{11} On September 17, 2014, a three to two majority of the PRC issued the Surcharge Rate Order adopting a 3% Surcharge Rate and a Fund amount of approximately $21 million for calendar year 2015. On appeal, the N.M. Exchange Carrier Group contends that the Surcharge Rate Order is arbitrary and capricious because the PRC did not adhere to the regulations in existence at the time of its issuance of the Order, but rather anticipated what it might do with respect to amending the funding formula and establishing a surcharge cap in the Rule Order case. The N.M. Exchange Carrier Group emphasizes that had the PRC adhered to the existing regulations it could not have adopted a 3% Surcharge Rate because doing so results in a projected deficit of $3,870,813 at the end of 2015—a clear violation of 17.11.10.19(C) NMAC, which requires the Fund to have "a prudent fund balance." The N.M. Exchange Carrier Group also contends that the Surcharge Rate Order is not supported by substantial evidence because the Fund administrator (Solix), the PRC's Fund Advisory Board, and the PRC's own counsel agreed that a 3.62% Surcharge Rate was the appropriate rate and would result in a Fund size of $25,057,152 with a projected net balance of $327,153 at the end of 2015.

{12} In response, the PRC contends that the 2013 legislative amendments to the Act required the PRC to cap the Surcharge Rate, and the 3% Surcharge Rate is supported by substantial evidence because the 3.62% rate recommended by Solix, the Fund Advisory Board, and PRC general counsel would have been the highest in the history of the Fund, which would conflict with the PRC's responsibility under Section 63-9H-6(J) to keep the Surcharge Rate to a minimum. As evidence of the latter point, the PRC refers us to *In re Implementation of the State Rural Universal Service Fund*, NMPRC Case No. 06-00026-UT, for each of the orders setting a Surcharge Rate beginning in calendar year 2007. The Surcharge Rates from calendar years 2007 through 2014 were as follows:

2007 = 3.0%
2008 = 2.5%
2009 = 2.15%
2010 = 2.45%
2011 = 3.00%
2012 = 3.30%
2013 = 3.45%
2014 = 3.45%

Utilizing this evidence, the PRC argues that "the 3% surcharge rate [it adopted for 2015] is *higher* than the median of the surcharge rates previously set by the [PRC], which was 2.725%, and higher than the average of those rates, which was 2.9125%."

{13} A party challenging a PRC order must establish that the order is "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted); *see also* NMSA 1978, § 63-9H-13(B) (1999). Under NMSA 1978, Section 63-9H-11 (2013), we must uphold a PRC order if the order substantially complies with the Act.

{14} The annual determination of the Fund is governed by 17.11.10.19 NMAC as it existed before the 2015 amendments. *See Gen. Tel. Co. of Sw. v. Corp. Comm'n* (*In re Gen. Tel. Co. of Sw.*), 1982-NMSC-106, ¶ 29, 98 N.M. 749, 652 P.2d 1200 (stating that an agency is bound by its existing rules and regulations). "The administrator[, Solix,] shall determine the amount of the fund annually, subject to [PRC] approval, on or before October 1 of each year . . . ." 17.11.10.19(A) NMAC (2005). "The amount of the fund shall be equal to the sum of each [eligible ILEC's] revenue requirements, calculated pursuant to this section . . . plus projected administrative expenses and a prudent fund balance." 17.11.10.19(C) NMAC (2005). Although the Legislature amended the Act in 2013 to require the PRC to establish a cap on the surcharge, the required cap is the subject of the Rule Order case docketed as 35,036, not case no. 34,933, the Surcharge Rate Order case. The Surcharge Rate Order was issued on September 17, 2014. Final comments in the Rule Order case were not due until September 19, 2014, a public hearing was not scheduled until October 1, 2014, and the record was not closed until October 15, 2014. The PRC still did not have all of the evidence in the Rule Order case, and therefore it was not in a position to make a decision regarding what cap to impose on the Surcharge Rate in future years. Moreover, the prospective cap is irrelevant to the Surcharge Rate Order because even the 2015 rule amendments require that the annual surcharge be large enough to include "a prudent fund balance." *Compare* 17.11.10.19(C) NMAC (2005) *with* 17.11.10.19(C) NMAC (2015).

{15} Historically Solix had recommended that the PRC maintain an annual Fund balance of approximately $2 million, which represents the cost of operating the Fund for one month. In 2012, the PRC for the first time rejected Solix's rationale for maintaining a Fund balance of approximately $2 million because "the rule only calls for a 'prudent' contingency." Accordingly, for calendar year 2013 the PRC approved a 3.45% Surcharge Rate—less than the 3.5 to 3.6% rate suggested by Solix and the PRC Advisory Board—which resulted in a $1.5 million dollar surplus to begin calendar year 2013. This was the first time the Fund's surplus had been less than $2 million. The Fund surplus to begin calendar year 2015 was projected to be $875,660.

{16} The PRC's justification for approving a 3% Surcharge Rate for 2015 was the 2013 amendment to the Act, as well as the fact that the 3% rate is higher than the median or average rates since 2008. However, the amendment to the Act does not specify a formula to be used by the PRC in calculating the eligible ILECs' revenue requirements, *see* 2013 N.M. Laws, ch. 294, § 4; the amended formula is the subject of the Rule Order case, not the Surcharge Rate Order case. In addition, the 2013 amendment to the Act does not prohibit the PRC from including in the annual fund a prudent Fund balance, as evidenced by the fact that the PRC continues to have a prudent Fund balance requirement in its

rules. *See* 17.11.10.19(C) NMAC. We do not interpret the "minimum" surcharge requirement in Section 63-9H-6(J) as authority to operate the Fund at a deficit.

{17} It is also immaterial that the 3% Surcharge Rate is higher than the median or average of previous Surcharge Rates. Never in the history of setting Surcharge Rates had the PRC approved a Surcharge Rate that resulted in a projected deficit. The record reflects that surcharge rates of less than 3% were approved by the PRC when the beginning Fund balance was well over $2 million—the amount Solix recommended as a prudent Fund balance. Once the projected Fund balance was approximately $2 million, as recommended by Solix, the PRC approved Surcharge Rates of 3.30%, and twice at 3.45%. The PRC consistently applied the 2005 version of Rule 17.11.10 through its 2013 Surcharge Rate Order. In fact, in its 2013 Surcharge Rate Order, the PRC commented that Rule 17.11.10 was being reexamined, but because the workshops addressing potential rule revisions were still ongoing, the PRC was not in a position to know the results of the workshops—that is, it would not know what rule changes or surcharge cap would result from its reexamination of the rules.

{18} Solix recommended a 3.62% Surcharge Rate for 2015, which would result in a projected surplus of $327,153. A 3.57% Surcharge Rate was projected to result in a nearly zero Fund balance. Solix projected that a 3% Surcharge Rate for 2015 would result in a $3,870,813 deficit at the end of 2015. Although the PRC Advisory Board concurred in Solix's recommendation, the PRC rejected it, despite Solix's projected deficit and the fact that the PRC had never before approved a Surcharge Rate that was projected to result in a Fund deficit. We are persuaded that the PRC Surcharge Rate Order is arbitrary, not supported by substantial evidence, and is a clear violation of its own rules, which require that the surcharge be large enough to allow for a prudent Fund balance. Accordingly, we reverse the PRC's Surcharge Rate Order.

III. THE RULE ORDER CASE (NMPRC Case No. 12-00380-UT; New Mexico Supreme Court Case No. S-1-SC-35036)

{19} The PRC issued the Rule Order on November 26, 2014, to be effective January 1, 2015. Among provisions not relevant to this appeal, the Rule Order set a 3% surcharge cap and switched from a fixed calculation based on the ILEC's 2004 access minutes to a rolling approach that uses an ILEC's "intrastate access minutes for the calendar year that is two years prior to the year for which the calculation is made." 17.11.10.19(E) NMAC. Each year the PRC issues an order determining the Fund size for the upcoming year. *See* 17.11.10.19(A) NMAC. Under the new rules that will be effective in 2017, an ILEC's payment will be based on its intrastate access minutes from 2015. *See* 17.11.10.19(E) NMAC.

{20} The N.M. Exchange Carrier Group argues on appeal that the PRC was arbitrary in its adoption of the aforementioned provisions for several reasons. We first address the contention that the PRC prejudged the Rule Order by virtue of its adoption of the Surcharge Rate Order approving a 3% Surcharge Rate. Specifically, the N.M. Exchange Carrier Group points to paragraph 7 of the Surcharge Rate Order wherein the PRC references the pending rulemaking and states that the changes " '*will reduce* the payments from the Funds in 2015.' " As additional evidence of the PRC's alleged prejudgment, the N.M. Exchange Carrier Group refers to a statement by one commissioner that the Surcharge Rate Order was "just laying some ground work" for the Rule Order. Both the Surcharge Rate Order and the commissioner's statement were made before the Rule Order case was scheduled to be closed and before the public hearing regarding the proposed rule changes. If in fact the Surcharge Order, which was issued ten weeks prior to the Rule Order, preordained the results of the Rule Order, the Rule Order should be set aside. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (setting aside an agency order when a draft order circulated before the comment period had expired). An agency that is considering rule changes must maintain an "open-minded attitude" until the rule is adopted so that interested parties can offer the benefit of their expertise to the agency through commentary. *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

{21} It is difficult to understand what the PRC meant by its language in paragraph 7 of the Surcharge Rate Order. Without including the footnotes, the language provides in its entirety:

> Guided by the statutory directive that the surcharge "be held to a minimum,"[3] the [PRC] disapproves the recommended increase,[4] which would result in the highest surcharge rate in the history of the Fund.[5] Moreover, the recommendation of Solix is based on "business as usual," ignoring the 2013 statutory mandate to establish a cap on the surcharge and the pending rulemaking that will be completed this year.[6] These changes will reduce the payments from the Funds in 2015. Accordingly, the [PRC] finds that a projected Fund size of $21,186,339[7] and a 3.0% surcharge for calendar year 2015 should be approved at this time.

(The footnotes noted in this quotation have not been included in this opinion.) It is evident from the language of the Surcharge Rate Order that the PRC did not set a cap; it approved a 3% Surcharge Rate for calendar year 2015. In addition, the formula utilized by Solix and accepted by the PRC for deciding both the Fund size and the Surcharge Rate for the 2014 Surcharge Rate Order was the formula set forth in the 2005 version of Rule 17.11.10.19(E), not the formula that was proposed in the rulemaking case. However, the PRC's footnote 6, which addresses the pending rulemaking, states "[t]o the extent that Rule 17.11.10 (including 17.11.10.19(C) NMAC) requires the [PRC] to ignore these changes to the Fund, the [PRC] finds good cause for a variance." Footnote 6 strongly suggests that (1) the PRC was considering the pending rulemaking when it decided the Surcharge Rate case, and (2) the PRC did not follow the existing rules.

{22} By contrast, a year earlier, when the PRC adopted the Surcharge Rate for 2014, at a time when the rulemaking was also pending, the PRC made it clear that the rulemaking proceeding was not a consideration in setting the 2014 rate. The PRC stated in its Surcharge Rate Order that "[i]f revisions to Rule 17.11.10 require a change in the surcharge rate, the [Commission] can address the change when the revisions to the rule are implemented."

{23} Although the language we have quoted from the 2014 Surcharge Rate Order is troubling, the process followed by the PRC and the evidence that supports its adoption of the Rule Order persuade us that the PRC did not prejudge the rule amendments. Nonetheless, we agree with the N.M. Exchange Carrier Group that the amendments are not supported by substantial evidence.

{24} The rulemaking proceeding began on November 27, 2012, when the PRC issued a Notice of Proposed Rulemaking to (1) consider changes to residential

and business affordability benchmarks, (2) update the data for determining a provider's revenue requirements to 2012 access minutes, (3) implement a 3% cap on the Surcharge Rate, and (4) establish exceptions to the surcharge cap. On January 23, 2013, the PRC entered an order vacating the rulemaking and procedural schedule under the Notice of Proposed Rulemaking and scheduled the first in a series of workshops for April 8, 2013. The order also asked participants to be prepared to discuss, among issues not relevant to this case, whether the PRC should (1) substitute 2012 intrastate access minutes for 2004 minutes in the formula used to determine an eligible ILEC's revenue requirements under Rule 17.11.10.19, and (2) establish a cap on the Surcharge Rate. Written comments were due by March 25, 2013.

{25} The PRC received eleven sets of comments on March 25, 2013. Comcast favored a 3% surcharge cap because based on the thirteen states in which Comcast operates that have similar funds, ten states had surcharges under 3%, and eight states had surcharges below 2%. Verizon opined that the PRC should impose a cap of less than 3% and that the subsidy should be based on need. None of the remaining comments favored a cap. Just three days before the first workshop was scheduled, Governor Susana Martinez signed House Bill 58 into law resulting in the 2013 Amended Act, which in relevant part amended Section 63-9H-6(J) to require the PRC to establish a surcharge cap as part of the PRC's rulemaking. *See* 2013 N.M. Laws, ch. 194, § 4.

{26} On July 10, 2013, the PRC issued an order setting workshop schedules, requiring data from eligible ILECs, and soliciting comments regarding updating affordability benchmark rates, changing the formula for the determination of the annual fund, and implementing the 2013 amendments to the Act by considering a Surcharge Rate cap. In August 2013, the PRC received an additional fourteen sets of comments, with some supporting a 3% cap. Four workshops were conducted in 2013, with additional comments filed through January 24, 2014.

{27} The PRC issued a second Notice of Proposed Rulemaking on July 23, 2014, proposing to amend the surcharge rules to, among other things, implement a 3% cap on the Surcharge Rate and to begin a four-year transition from using 2004 access minutes to using 2012 access minutes to calculate the annual Surcharge Rate. The second Notice of Proposed Rulemaking also required those who wanted to comment on the proposed rule amendments to file written comments by August 22, 2014, with responses to the comments due no later than September 19, 2014. A public hearing was scheduled for October 1, 2014, and the record was scheduled to close on October 15, 2014.

{28} The N.M. Exchange Carrier Group contends that the permanent 3% surcharge cap is not supported by substantial evidence because the majority of those who commented regarding the second Notice of Proposed Rulemaking opposed the 3% cap, thus proving that the PRC arbitrarily committed itself to a 3% cap before the Rule Order case was complete. We are required to review the whole record, including the evidence both in favor of and contrary to the PRC's decision, when determining whether its decision is supported by substantial evidence, while looking at the evidence in the light most favorable to the PRC decision. *PNM Gas Servs. v. N.M. Pub. Util. Comm'n* (*In re PNM Gas Servs.*), 2000-NMSC-012, ¶ 4, 129 N.M. 1, 1 P.3d 383. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rinker v. State Corp. Comm'n*, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783. After reviewing the record in its entirety, we are persuaded that the PRC's decision to impose a 3% cap is not supported by substantial evidence.

{29} The PRC acknowledges that in response to the second Notice of Proposed Rulemaking, "[m]ost commenters oppose[d] the 3% cap," including the N.M. Exchange Carrier Group, Mescalero Apache Telecommunications, Inc., Navajo Communications, La Jicarita, Sacred Wind, the Attorney General of New Mexico, and the PRC staff. The PRC cited T-Mobile West, LLC as the only entity that supported a 3% cap. However, Comcast and Verizon had previously expressed their support for a 3% or lower cap. Notwithstanding the overwhelming opposition, the PRC adopted the 3% Surcharge Rate cap for a three-year period, believing that "the changes to the Access Reduction Support formula" would result in lower Fund payments, leaving sufficient "headroom for additional support" pursuant to 17.11.10.25 NMAC, if the need for additional support was established.

{30} Our review is not as simple as comparing the number of entities in favor of the 3% cap with those who either oppose the 3% cap or take no position on the cap. Our review requires us to look at the whole record and determine whether there is evidence to support the PRC's decision. *See In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 4. In this case, the PRC states in its order that the change in Fund formula will result in lower Fund payments, which will leave a balance sufficient to address an eligible ILEC's proven needs. Two significant problems arise from this statement. First, the PRC admits that the "true sufficiency or insufficiency of the Access Reduction Support is not known." This is problematic because Section 63-9H-6(C) requires the Fund to provide "a specific, predictable and sufficient support mechanism" for eligible ILECs. In addition, payment to eligible ILECs is to be "in an amount equal to the reduction in revenues that occurs as a result of reduced intrastate switched access charges." Section 63-9H-6(K). Although a cap certainly offers specificity and predictability, the Fund must still be sufficient, and the PRC does not point to any evidence to establish that the new formula provides sufficient support. The record contains a report filed by Ken Smith, an economist for the Staff of the Telecommunications Bureau of the Utility Division, indicating that in 2012 ILECs were processing 125,719,653 total access minutes, which amounted to a reduction of almost 40% in traffic from 2004. *See Staff Comments on First Workshop Issues and Data Tables* at 7 (August 5, 2013). According to Smith, "[m]oving the base to 2012 minutes could reduce the payments from the fund by approximately 8-9 million." *Id.* However, the accuracy of the data was questionable, and in any event, PRC staff recommended "a four-year phase-in of the 2012 minutes on a percentage basis." PRC staff also commented that projecting the demand side of the formula was made more complicated by House Bill 58, and it was therefore virtually impossible to establish the cap because of the uncertainty of demand. PRC staff went on to recommend a 3.5% cap with an emergency escape clause because Fund revenues have been declining annually and Solix needed to provide realistic Fund balance projections.

{31} The second problem with the PRC's reliance on lowering fund payments based on need is that the PRC admits that the support required by the Act does not require a showing of need to qualify for Access Reduction Support because Section 63-9H-6(K), which provides for Access

Reduction Support, is independent from the need-based support in Section 63-9H-6(L). Amended Rule 17.11.10.25(A) allows an eligible ILEC serving in a high-cost area to petition "for support from the fund when such payments are needed to ensure the widespread availability and affordability of residential local exchange service in the high-cost area of the state served by the [eligible ILEC]." However, if the Fund is not "equal to the sum of each [eligible ILEC's] revenue requirements . . . plus projected administrative expenses and a prudent fund balance" as required by Rule 17.11.10.19(C), there will not be resources in the Fund from which to supplement the funds of an eligible ILEC that demonstrates need. For these reasons, we are not satisfied that the record in this case supports the PRC statement that "the changes to the Access Reduction Support formula" will result in lower Fund payments, leaving sufficient "headroom for additional support" pursuant to 17.11.10.25 NMAC. Perhaps the actual experience during calendar year 2015 will provide the evidence that supports the PRC Rule Order, but the evidence in the record before us does not do so.

{32} Although we conclude that the PRC has the authority to modify the funding formula as part of its rulemaking authority and it should establish a surcharge cap as required by the 2013 Act, we remand this matter to the PRC for further proceedings. The record must have substantial evidence to support a finding that the newly adopted funding formula is adequate to satisfy the requirements of Section 63-9H-6(C) and (K) and Rule 17.11.10.19(C), and that the surcharge cap has not been arbitrarily established.

IV. CONCLUSION

{33} We reverse the PRC's Surcharge Rate Order in NMPRC Case No. 14-00279-UT and also reverse the PRC's Rule Order in NMPRC Case No. 12-00380-UT. We remand both matters to the PRC for further proceedings consistent with this opinion.

{34} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
JUDITH K. NAKAMURA, Justice, not participating

Certiorari Denied, March 15, 2016, No. S-1-SC-35765

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-033

No. 31,678 (filed January 20, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
ARMANDO PEREZ,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
H.R. QUINTERO, District Judge

HECTOR H. BALDERAS
Attorney General
MARGARET E. MCLEAN
Assistant Attorney General
M. ANNE KELLY
Assistant Attorney General
JOEL JACOBSEN
Assistant Attorney General
Albuquerque, New Mexico
for Appellant

JORGE A. ALVARADO
Chief Public Defender
NINA LALEVIC
Assistant Appellate Defender
Santa Fe, NM
for Appellee

Opinion

Michael E. Vigil, Chief Judge

{1} The State appeals the district court's order excluding the testimony of an eight-year-old girl (C.S.) in a case alleging multiple counts of sexual abuse against her by Defendant-Appellee Armando Perez (Defendant) on the basis that C.S. was incompetent to testify as a witness. This case presents two issues: first, whether the district court's ruling that C.S. was incompetent to testify was an abuse of discretion, and second, whether the case should be reassigned to a different district court judge upon remand. We conclude that the district court's determination that C.S. was incompetent to testify was in error, but reassignment on remand is not required.

I. BACKGROUND

{2} This case originated in December 2010, when C.S. disclosed to, Fatima P. (Mother), that Defendant had been molesting her. Mother took C.S. to the hospital, where she was seen by a nurse; C.S. again disclosed the sexual abuse to the nurse. Defendant was eventually charged with ten counts of criminal sexual penetration in the first degree, *see* NMSA 1978, § 30-9-11(A), (D)(1) (2009), and five counts of criminal sexual contact of a minor in the second degree. *See* NMSA 1978, § 30-9-13(A), (B) (2003).

{3} In July 2011, Mother gave a handwritten note to a defense investigator in what appeared to be a child's writing. The note, which contained C.S.'s first name at the bottom, stated: "Armando didn't do anything it was all [illegible] that did it, the voices told me to blame it on Armando. My mom will read this I have pictures look through all of them. [C.S.]" As a result of this note, just two days before the jury trial was scheduled to commence, the district court *sua sponte* issued an emergency order setting a pre-trial conference to determine the competency of C.S. to testify as a witness, expressing concern about the voices referenced in the note. Neither party had raised the issue of competency.

{4} At the hearing, the prosecutor maintained that competency was not an issue, while defense counsel stated that a psychological evaluation was appropriate pursuant to NMSA 1978, Section 30-9-18 (1987).[1] The district court ordered a psychological evaluation of C.S. to determine her competency to testify at the jury trial, as well as her competency at the preliminary hearing that had already occurred, and appointed Dr. David Sachs to complete an evaluation and report.

{5} Dr. Sachs testified at the competency hearing. With respect to the issue of whether C.S. was hearing voices that were making her do things, Dr. Sachs opined in the negative, stating that he "didn't have the impression that she was responding to command hallucinations[.]" The following exchange then took place during the prosecutor's questioning of Dr. Sachs:

> [Prosecutor]: . . . [Y]our report shows a capacity to differentiate between the truth and a lie?
> [Dr. Sachs]: Yes.
> [Prosecutor]: And she knows there are consequences for not telling the truth?
> [Dr. Sachs]: Yes.
> [Prosecutor]: She is generally aware of the truth and the difference between the truth and a lie?
> [Dr. Sachs]: Yes.
> [Prosecutor]: She understands the oath and promise?
> [Dr. Sachs]: Yes.
> [Prosecutor]: She has adequate intelligence and memory?

[1]Section 30-9-18 states in full:
In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, if the alleged victim is under thirteen years of age, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation of the alleged victim, provided however, that if a psychological evaluation is ordered it shall be conducted by only one psychologist or psychiatrist selected by the court who may be utilized by either or both parties; further provided that if the alleged victim has been evaluated on the issue of competency during the course of investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement officials, the psychological evaluation, if any, shall be conducted by a psychologist or psychiatrist selected by the court upon the recommendation of the defense.

[Dr. Sachs]: Potentially, yes. I stated that I do not think her memory was adequate or like anything I encountered in the course of doing prior assessments of abused or allegedly abused children, but, overall, I think her memory was adequate.
[Prosecutor]: She has the ability to observe?
[Dr. Sachs]: Yes.
[Prosecutor]: To recall and communicate?
[Dr. Sachs]: Yes.
[Prosecutor]: And you have questions about her thought process?
[Dr. Sachs]: Very much so.

{6} Dr. Sachs nevertheless opined that C.S. was incompetent to testify as a witness, primarily basing his conclusion on the following concerns: her vagueness and lack of specificity in describing the abuse, vapid speech, inconsistencies in her description of the abuse, inability to maintain focus, the confusion that she showed, poor decision making and judgment as indicated by her performance on the Rorschach test, "signs of a thinking disorder" or "a quality of a schizophrenia spectrum disorder," and the absence of anxiety or post-traumatic stress disorder. Dr. Sachs stated: "I don't think she's malingering, I don't think she's fabricating, I just think everything is just very vague in her head."

{7} The district court found Dr. Sachs' testimony to be credible and ruled that C.S. was incompetent to testify at trial. Additionally, the district court ruled that the State could not use any of C.S.'s prior statements, neither the sworn testimony from the preliminary hearing, nor the recorded interview with the forensic examiner. At the hearing on the State's motion for reconsideration, the district court explained that Dr. Sachs' "identifi[cation of] a degree of perceptual disturbance related to a schizophrenic spectrum disorder and indications of developing Axis II issues . . . rendered [C.S.] not competent."

{8} When asked to make a retrospective opinion about C.S.'s competency to testify at the preliminary hearing, which took place nearly nine months earlier, Dr. Sachs explained that his report did not discuss this, and he did not evaluate C.S. at that time, but he would lean in [the] direction [that C.S.] probably was not competent at the time of her preliminary testimony, based on the vague nature of C.S.'s testimony at the hearing and his observations of her during his evaluation. Upon denial of the State's motion for reconsideration, or in the alternative, recusal, the State appealed the district court's exclusionary ruling.

{9} This appeal came before this Court previously, and our memorandum opinion addressed only the issue of whether the State's lack of certification language in its notice of appeal was a limitation on our exercise of appellate jurisdiction. *State v. Perez*, No. 31,678, mem. op. (N.M. Ct. App. Sept. 19, 2012) (non-precedential), *rev'd sub nom. State v. Vasquez*, 2014-NMSC-010, ¶¶ 32-33, 36, 326 P.3d 447. The Supreme Court reversed, holding that the State's efforts satisfied the statutory purpose of the certification requirement, and we now address the merits of the State's appeal. *Id.* ¶¶ 32-33, 36.

II. DISCUSSION

A. The District Court's Ruling That C.S. Was Incompetent to Testify as a Witness Was an Abuse of Discretion

{10} We turn first to the State's argument that the district court erred by applying the wrong legal standard in finding C.S. incompetent to testify both at trial and at the preliminary hearing. The State makes the following general contentions: first, that Dr. Sachs' testimony established that C.S. was competent to testify, and the district court abused its discretion in concluding otherwise by applying the wrong legal standard and considering matters outside of the scope of evidence; and second, the district court erred by making a retroactive determination that C.S. was incompetent to testify at the preliminary hearing. In response, Defendant suggests that the district court applied the correct legal standard, sufficient evidence was presented to support the district court's exclusionary ruling, and matters outside of the record, although discussed by the district court, did not factor into the district court's ruling. We conclude that the district court applied an incorrect legal standard in finding C.S. incompetent to testify. Accordingly, we reverse.

1. Standard of Review

{11} We review the district court's determination regarding the competency of a witness to testify for an abuse of discretion. *See State v. Hueglin*, 2000-NMCA-106, ¶ 23, 130 N.M. 54, 16 P.3d 1113. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). "An abuse of discretion may also occur when the district court exercises its discretion based on a misunderstanding of the law." *State v. Favela*, 2013-NMCA-102, ¶ 16, 311 P.3d 1213 (internal quotation marks and citation omitted). We review de novo the propriety of the legal standard applied by the district court in determining whether C.S. was competent to testify as a witness. *See State v. Ruiz*, 2007-NMCA-014, ¶ 20, 141 N.M. 53, 150 P.3d 1003.

2. C.S.'s Competency to Testify as a Witness

{12} Our case law has established "a general presumption that all persons are competent to appear as witnesses." *Id.* ¶ 23. This principle stems from Rule 11-601 NMRA, which states that "[e]very person is competent to be a witness unless these rules provide otherwise." *See Hueglin*, 2000-NMCA-106, ¶ 22. Our Rules of Evidence state only four general exceptions: first, a witness must have personal knowledge, *see* Rule 11-602 NMRA; second, a witness must be able to understand the oath to truthfully testify, *see* Rule 11-603 NMRA; third, a judge is incompetent to testify in a trial over which he or she is presiding, *see* Rule 11-605 NMRA; and fourth, a juror is incompetent to testify in a trial for which he or she is serving on the jury, with certain exceptions, *see* Rule 11-606 NMRA.

{13} In *Hueglin*, this Court explained that federal evidentiary principles are persuasive in interpreting our rules regarding witness competency and that recent federal commentary has shifted toward "convert[ing] questions of competency into questions of credibility." 2000-NMCA-106, ¶ 22 (internal quotation marks and citation omitted); *see also Ruiz*, 2007-NMCA-014, ¶ 23 (explaining that "a core principle of modern civil and criminal procedure" is to give questions of credibility to the jury, and not to the judge). In light of this change, "a witness wholly without capacity is difficult to imagine [and t]he question is one particularly suited to the jury as one of weight and credibility." *Hueglin*, 2000-NMCA-106, ¶ 22 (alteration, internal quotation marks, and citation omitted). The commentary to Federal Rules of Evidence, Rule 601 notes that "[s]tandards of mental capacity have proved elusive in actual application. . . . [F]ew witnesses are disqualified on that ground." 34 Geo. Wash. L. Rev. 53 (1965) (citing Henry Weihofen, *Testimonial Competence and Credibility*). Fed. R. Evid. 601.

{14} We summarized the standard for a district court to determine competency under Rule 11-601as requiring a witness to possess "a basic understanding of the difference between telling the truth and lying, coupled with an awareness that lying is wrong and may result in some sort of punishment." *Hueglin*, 2000-NMCA-106, ¶ 24 (internal quotation marks and citation omitted). Thus, when the competency of a witness is at issue, the district court is required to determine only whether "he or she meets a minimum standard, such that a reasonable person could put any credence in their testimony." *Ruiz*, 2007-NMCA-014, ¶ 23 (internal quotation marks and citation omitted).

{15} Upon examination of Dr. Sachs' report and his testimony at the competency hearing, as well as the transcript of the competency hearing and hearing on the motion for reconsideration, we conclude that the district court applied an incorrect legal standard in concluding that C.S. was incompetent to testify. At the hearing on the motion for reconsideration, the district court stated that the facts in *Hueglin* were not applicable to the instant case because *Hueglin* dealt with the competency of a victim to provide video testimony under NMSA 1978, Section 38-6-8 (1993). *Hueglin*, 2000-NMCA-106, ¶ 9. The district court also determined that *Hueglin* was inapposite because the expert in that case concluded that the victim was competent to testify. While we acknowledge the factual differences in posture between this case and *Hueglin*, we disagree with the district court that *Hueglin* does not apply and conclude that the legal principles articulated in *Hueglin* regarding witness competence apply to the present case. Although Dr. Sachs' testimony stated that he believed, based on his opinion as a psychologist, that C.S. was incompetent to testify, it was incumbent upon the district court to apply the legal standard set forth in *Hueglin* to Dr. Sachs' testimony.

{16} Dr. Sachs testified that C.S. had the capacity to tell the difference between the truth and a lie and knew that there were consequences for lying, which meets the minimum standard for witness competence. *See Hueglin*, 2000-NMCA-106, ¶ 24. We acknowledge Defendant's argument that Dr. Sachs testified that although C.S. knew the difference between the truth and a lie, it appeared that C.S. had an altered perception of the difference between fantasy and reality. This, Defendant argues, presents a "different, but related" question from whether or not a witness can differentiate between the truth and a lie and is also relevant to the question of competency. Relevant to this, Dr. Sachs' report reveals that he asked C.S. a series of questions to determine her ability to differentiate the truth and a lie. For example, when Dr. Sachs asked C.S. whether the statement that he ate a gorilla for breakfast is the truth or a lie, C.S. responded by saying, "[t]hat would be hard to do because it's furry and big." Dr. Sachs noted that this response indicated that "[s]he did not register the concept that the statement was not happening and took my example as being literal." Dr. Sachs' report also indicated that C.S. stated that if she broke a vase but did not tell her mother, that would be a lie; however, Dr. Sachs stated that this example is a secret, not a lie, and indicates that "there is some inconsistency in her ability to verbalize and differentiate between truth and lie."

{17} Despite Dr. Sachs' concerns that C.S. was unable to articulate the more subtle distinctions between a lie and a secret and his concern that C.S.'s responses to his questions were too literal, these finer distinctions did not ultimately alter Dr. Sachs' conclusion that C.S. was capable of telling the truth at a basic level, which satisfies the standard for witness competence. *See id*. In *Hueglin*, this Court upheld the district court's ruling that a victim was competent to testify even though she had Down Syndrome, an IQ of 36, had a mental age of a child slightly younger than six years, and possessed a "concrete simple understanding of the difference between a truth and a lie." *Id.* ¶¶ 2, 23 (alteration and internal quotation marks omitted). When the expert who testified in *Hueglin* was asked about the victim's ability to tell the truth, he stated that "[f]or her truth is telling what she remembers as best as she can remember it and a lie would be something else than that" and that "if you said you'd tell the truth to her, the truth will be saying what she remembers, not in a very sophisticated way, but only in the sense that when you ask a six year old to tell the truth." *Id.* ¶ 23 (internal quotation marks omitted).

{18} Dr. Sachs testified that C.S. was able to tell the difference between the truth and a lie, that she was not fabricating her statements, and that she understood that there are consequences for not telling the truth. Applying the holding and principles articulated in *Hueglin* to Dr. Sachs' testimony, any concerns about C.S.'s inability to clearly articulate the difference between the truth and a lie, her thought process, vagueness, and possible undefined schizophrenic spectrum disorder are not instructive of her capacity to tell the truth and understand the consequences for not doing so, at the most basic level. *See generally* 1 *McCormick on Evidence* § 62 (7th ed. 2013) ("[P]roof of mental deficiency ordinarily has the effect of reducing the weight to be given to testimony rather than keeping the witness off the stand.").

{19} We now turn to the State's argument that the district court also erred by retroactively excluding C.S.'s testimony from the preliminary hearing. The State argues that the district court lacked authority to rule on the competency of a witness who testified before another judge, or in the alternative, that Dr. Sachs' testimony failed to establish that C.S. was incompetent to testify at the preliminary hearing. Dr. Sachs' conclusion, which the district court adopted, was premised on his presumption that, based on relevant scientific literature, there was nothing that indicated that the same thought disorder he believed C.S. was suffering from at the time of his examination did not exist nearly nine months prior at the time of the preliminary hearing. Importantly, Dr. Sachs did not testify that C.S.'s ability to tell the truth or her knowledge of the consequences for not telling the truth would not have been present at the time of the preliminary hearing. Applying the foregoing legal principles regarding competency, we conclude that the district court erred in excluding C.S.'s preliminary hearing testimony on the grounds that C.S. was incompetent.

B. On Remand, Assignment to a Different District Court Judge Is Not Warranted

{20} We turn to the State's final argument that if this Court reverses for any reason, the case should be assigned to a different district court judge on remand. The State does not request this Court to determine whether the district court erred by refusing to recuse itself at the State's request below.

{21} The State contends that reassignment is appropriate because the district court judge's denial of the State's motion for reconsideration was based, at least in part, on knowledge stemming from an extrajudicial source. *See State v. Bonilla*, 2000-NMSC-037, ¶¶ 11, 15, 130 N.M. 1, 15 P.3d 491 (vacating a defendant's sentence and holding that a judge's comments about a defendant's decision to proceed to trial warranted a remand to a different judge

to avoid any appearance of impropriety). Specifically, the State references the following comments made by the district court at the competency hearing when announcing its ruling:

> I have been in this community for... twenty-eight years, and I'm well aware that the very same forensic, in quotes, forensic examiner that conducted this forensic examination has been challenged before for leading children, and there has been at least one prior court case by a prior judge who found that the form of that examination was not consistent with standards for examining children who are alleged to have been sexually abused.

{22} The State argues that because no one had raised any issue regarding the forensic examiner, "[t]he only possible source of the judge's strong feelings must necessarily have arisen outside of the events which occurred at the hearing itself." Defendant's answer brief "does not contest the State's assertions regarding matters outside the record" and states that the district court made no "attempt to hide its opinion of that interviewer[.]" However, Defendant contends that "[t]he [district] court's consideration of the identity of the interviewer only went to its decision to order an evaluation, a decision that is not challenged."

{23} We do not believe that the district court judge's comments regarding the forensic examiner rise to the level of requiring reassignment on remand, and we have confidence that the district court will preside over future proceedings in this case with fairness. *See In Re Esperanza M.*, 1998-NMCA-039, ¶¶ 31-34, 124 N.M. 735, 955 P.2d 204 (expressing disapproval about a district court judge's comment regarding the parents' decision not to testify but asking their daughter to do so, but concluding that the comment did not necessitate appellate intervention). *But see Quintana v. Bravo*, 2013-NMSC-011, ¶ 31, 299 P.3d 414 (remanding for reassignment to a different judge where the original district court judge failed to sanction one of the parties for non-compliance with a deadline, but did not do the same when the other party failed to comply with a procedural rule).

III. CONCLUSION

{24} The order of the district court is reversed and the case is remanded.

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
LINDA M. VANZI, Judge

Certiorari Granted, April 14, 2016, No. S-1-SC-35641

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-034

No. 33,310 (filed November 16, 2015)

NATALIE F. GARCIA,
Plaintiff-Appellant,
v.
HATCH VALLEY PUBLIC SCHOOLS,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
DOUGLAS R. DRIGGERS, District Judge

DANIELA LABINOTI
LAW FIRM OF
DANIELA LABINOTI, P.C.
El Paso, Texas
for Appellant

ETHAN D. WATSON
ELIZABETH L. GERMAN
GERMAN & ASSOCIATES, LLC
Albuquerque, New Mexico
for Appellee

Opinion

M. Monica Zamora, Judge

{1} In this reverse discrimination claim under the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007), Plaintiff Natalie Garcia appeals from a summary judgment entered by the district court against her. We conclude that the district court erred in determining that Plaintiff's employer, Hatch Valley Public Schools (HVPS), was entitled to summary judgment as a matter of law. We also conclude that Plaintiff presented sufficient evidence below to create genuine issues of material fact. We reverse and remand for further proceedings consistent with this Opinion.

BACKGROUND

{2} Plaintiff, who has a Hispanic surname by marriage, but identifies herself as Caucasian and of German descent, was employed as a bus driver for HVPS. In March 2010, Plaintiff's job performance was evaluated. The evaluation form included eleven categories of competence to be evaluated. For each category, competence was to be described as meeting expectations, needing improvement, or unsatisfactory.

{3} Plaintiff's evaluation, signed by her supervisor on March 17, 2010, indicated that her performance met expectations in five of the eleven categories, and needed improvement in four of the categories. Two categories were marked both as meeting expectations and needing improvement. Plaintiff's performance was not evaluated as unsatisfactory in any category. The notes on Plaintiff's evaluation indicated that she needed improvement with regard to the upkeep and cleanliness of her bus as well as her interpersonal relationships. The notes also indicated that Plaintiff was meeting expectations with regard to her attitude and willingness to assume extra duties, constructive use of her time, taking initiative, and acceptance of her supervisor's recommendations.

{4} In April 2010, HVPS notified Plaintiff it would not renew her employment contract, citing an "unsatisfactory evaluation." Plaintiff exhausted her administrative remedies with the New Mexico Human Rights Commission (NMHRC) and filed the present action in state court claiming that HVPS had unlawfully discriminated against her. Plaintiff's initial complaint alleged that HVPS had discriminated against Plaintiff on the basis of her race and national origin, in violation of the NMHRA, and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1) to -(17) (2012) (Title VII). Plaintiff claimed that she had been subjected to discrimination "because of her race and/or national origin being of Caucasian descent" and that she was treated differently from her co-workers because she was not Hispanic. Plaintiff subsequently amended her complaint omitting her Title VII claims.

{5} HVPS moved for a judgment on the pleadings, arguing that Hispanics are by definition, the same race as Caucasians, and Plaintiff therefore, had failed to state a claim as to discrimination based on race. HVPS further argued that Plaintiff failed to state a claim as to discrimination based on national origin because the complaint did not specify Plaintiff's national origin. Plaintiff argued that her complaint, which alleged discrimination based on her status as a non-Hispanic, sufficiently alleged that she belonged to a protected class and adequately stated both racial and national origin related discrimination claims. The district court found that Plaintiff had not set forth the elements necessary to state a cause of action for discrimination based on national origin, but did not make any finding as to whether Plaintiff had properly alleged her claim of racial discrimination. Plaintiff was permitted to amend her complaint to set forth the elements "necessary to go forward with her claims."

{6} Plaintiff filed a second amended complaint and a subsequent "corrected" second amended complaint, which alleged that HVPS discriminated against her on the basis of her national origin. Plaintiff identified herself as being of German descent, but maintained that she experienced disparate treatment because she was not Hispanic. HVPS moved for summary judgment, which the district court granted. This appeal followed.

DISCUSSION

Standard of Review

{7} We review a grant of summary judgment de novo. *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548. "All reasonable inferences from the record should be made in favor of the non-moving party." *Id.* The non-moving party must come forward and establish with admissible evidence that a genuine issue of material fact exists. *Id.* ¶ 15. "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." *Id.* ¶ 8 (internal quotation marks and citation omitted).

{8} The NMHRA tracks the language of Title VII, which makes it unlawful for an employer to discriminate against an individual on the basis of race, national origin, or ancestry. When interpreting the NMHRA our Supreme Court has

looked to federal decisions for guidance.[1] *Smith*, 1990-NMSC-020, ¶ 9. For claims of unlawful discrimination the Court has used the burden shifting methodology set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶¶ 20-21, 129 N.M. 586, 11 P.3d 550.

{9} Under this framework Plaintiff bears the initial burden of demonstrating a prima facie case of discrimination by showing "that [she] is a member of the protected group, that [she] was qualified to continue in [her] position, that [her] employment was terminated, and that [her] position was filled by someone not a member of the protected class[,]" or that "[she] was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained." *Smith*, 1990-NMSC-020, ¶ 11 (citing *Hawkins v. CECO Corp.*, 883 F.2d 977, 982 (11th Cir.1989). A plaintiff "then has the opportunity to rebut the employer's proffered reason as [pretextual]." *Juneau*, 2006-NMSC-002, ¶ 9.

Non-Hispanics are a Protected National Origin Group Under the NMHRA

{10} In its motion for summary judgment, HVPS argued that since it was unaware of Plaintiff's German descent, it could not have discriminated against her on that basis, and that there was a legitimate business purpose for not renewing Plaintiff's employment contract, which was not shown to be pretextual. Plaintiff, in turn, argued that HVPS *was* aware that she was not Hispanic and that she was subject to discrimination based on her status as a non-Hispanic. The district court found that HVPS was not aware of Plaintiff's asserted national origin, therefore, Plaintiff's national origin could not, as a matter of law, have been a motivating factor in the decision to terminate her employment. The court did not address Plaintiff's contention that the discrimination was based on her status as a non-Hispanic. We conclude that this was error on the part of the district court.

{11} Though Plaintiff eventually identified herself as being of German descent, her primary contention from the outset was that HVPS was aware that she was not Hispanic, and discriminated against her on that basis. HVPS challenges the description of non-Hispanic as a protected national origin group under the NMHRA. Plaintiff argues that discrimination based on ethnic distinctions, such as Hispanic and non-Hispanic can appropriately be brought as claims for national origin discrimination. Our Supreme Court has not expressly addressed this issue. As we previously stated, where there is no New Mexico precedent which resolves issues regarding the NMHRA, we look to federal law interpreting Title VII for guidance. *Smith*, 1990-NMSC-020, ¶ 9.

{12} The United States Supreme Court has stated that the term " 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). However, in *Espinoza* the Court also noted that hiring applicants "of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry" or "Spanish-speaking background" would constitute national origin discrimination, suggesting that the term national origin can be interpreted broadly and does not require the identification of a specific country of origin. *Id.* at 92 n.5, 95.

{13} Following *Espinoza*, courts have interpreted the concept of national origin to "embrace a broader class of people," and found the term to be "better understood by reference to certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation." *Kanaji v. Children's Hosp. of Phila.*, 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003). Courts have also interpreted national origin discrimination to encompass discrimination based on ethnic distinctions. *See Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672-73 (9th Cir. 1988) (holding that national origin discrimination could include discrimination based on membership in ethnic groups); *see also Beltran v. Univ. of Tex. Health Sci. Ctr.*, 837 F. Supp. 2d 635, 641 (S.D. Tex. 2011) (stating that "Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics" (emphasis, internal quotation marks, and citation omitted)).

{14} Classifications such as Caucasian, white, and non-Hispanic have been widely accepted as protected in cases involving national origin discrimination claims. *See Turney v. Hyundai Constr. Equip. USA Inc.*, 482 F. App'x. 259, 260 (9th Cir. 2012) (holding that the plaintiff who identified as Caucasian "belongs to a protected class for purposes of his national origin discrimination claim because Title VII applies to any racial group, whether minority or majority" (internal quotation marks and citation omitted)); *Hawn v. Exec. Jet Mgmt., Inc.*, 546 F. Supp. 2d 703, 711, 717 (D. Ariz. 2008) (holding that the plaintiff who identified his national origin as "Caucasian American of European descent" was a member of a protected class); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 639-40 (8th Cir. 2002) (treating non-Hispanic as a protected class and reversing summary judgment on the plaintiff's race and national origin discrimination claims), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 306, 312 (2d Cir. 1997) (finding that a "white American male of Eastern European origin" satisfied a prima facie case for national origin discrimination); *Cameron v. St. Francis Hosp. & Med. Ctr.*, 56 F. Supp. 2d 235, 238-39 (D. Conn. 1999) (memo.) (accepting classification of "white, non-Hispanic male of Scottish/European origin" as protected class for national origin discrimination claim (internal quotation marks omitted)).

{15} These decisions are consistent with the EEOC's definition of national origin discrimination, which includes, but is not limited to "the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (2015). We also note that according to the EEOC's Compliance Manual, "[n]ational origin discrimination . . . includes discrimination against anyone who does *not* belong to a particular ethnic group, for example, less favorable treatment of anyone who is not Hispanic." EEOC Compl. Man., Nat'l Origin Discrimination, § 13-II(B) (2002), *available at* http://eeoc.gov/policy/docs/national-origin.html (last visited October 28, 2015). We find these authorities persuasive. We reject HVPS' argument and conclude that national origin discrimination claims based on the ethnic distinction between Hispanics and

[1]The Court has cautioned that its "reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as [its] own." *Smith v. FDC Corp.*, 1990-NMSC-020, ¶ 9, 109 N.M. 514, 787 P.2d 433.

non-Hispanics are actionable under the NMHRA.

Reverse Discrimination Under the NMHRA

{16} By claiming that she was subject to discrimination on account of being white and non-Hispanic, Plaintiff alleges that she was subject to reverse discrimination. *See Black's Law Dictionary* 567 (10th ed. 2014) (defining "reverse discrimination" as the "[p]referential treatment of minorities, [in] a way that adversely affects members of a majority group; [specifically], the practice of giving unfair treatment to a group of people who have traditionally been privileged in an attempt to be fair to the group of people unfairly treated in the past").

{17} The prima facie case, as originally applied in race and national origin discrimination cases, required a plaintiff to demonstrate that they belonged to a racial minority. *McDonnell Douglas Corp.*, 411 U.S. at 802. This test cannot be strictly applied in reverse discrimination cases. *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999) (stating that the plaintiff—a white male—clearly did not satisfy prong one of the prima facie case of discrimination (which requires a showing that the plaintiff is a member of a protected minority class) and that "if strictly applied, the prima facie test would eliminate all reverse discrimination suits").

{18} Our Supreme Court has not addressed the applicability of the *McDonnell Douglas* methodology to claims of reverse discrimination, or how a plaintiff alleging reverse discrimination can demonstrate that he belongs to a protected group. Accordingly, we once again look to federal law. *See Smith*, 1990-NMSC-020, ¶ 9.

Title VII and Reverse Discrimination

{19} The United States Supreme Court has acknowledged that although Title VII was intended to eradicate discriminatory practices that disadvantaged minority citizens, its plain language prohibits discriminatory preference for *any* racial group. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971) (stating that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees[,]" but recognizing that in enacting Title VII, Congress proscribed "[d]iscriminatory preference for *any group, minority or majority*" (emphasis added)); *see also McDonnell Douglas*, 411 U.S. at 800 (same).

{20} In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), Title VII's applicability to claims of reverse discrimination was officially recognized. The United States Supreme Court applied the *McDonnell Douglas* framework even though the plaintiffs in that case could not satisfy the first requirement by demonstrating that they belonged to a racial minority. *McDonald*, 427 U.S. at 279 n.6, 280 (holding that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they [members of a racial minority]" and noting that the specification of the prima facie proof required under *McDonnell Douglas* "is not necessarily applicable in every respect to differing factual situations").

{21} Courts recognize that a strict application of the *McDonnell Douglas* framework would preclude reverse discrimination claims because the first prong would disqualify majority plaintiffs. *Mills*, 171 F.3d at 454. *McDonald* establishes that this result would be contrary to the language and scope of Title VII. 427 U.S. at 279-80, 282-83. The United States Supreme Court has not provided explicit guidance as to how the *McDonnell Douglas* framework should be adapted or modified in reverse discrimination cases, and federal circuit courts are divided on how to resolve the question. Generally, federal circuits have approached the issue in one of two ways; either heightening the standard for reverse discrimination of plaintiffs by requiring evidence of discrimination at the outset, or not.

Heightening the Standard—The Background Circumstances Requirement

{22} The background circumstances standard was introduced by the United States Court of Appeals for the District of Columbia in *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1017-18 (1981). The Court explained the *McDonnell Douglas* framework was "not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has not yet freed itself from a legacy of hostile discrimination." *Parker*, 652 F.2d at 1017. The Court determined that the first prong of the prima facie case should be modified in reverse discrimination cases so that, instead of showing membership in a protected minority class, a majority plaintiff would be required to show background circumstances that support the suspicion that the defendant is the unusual employer who discriminates against the majority. *Id.*

{23} The Sixth Circuit followed *Parker* but held that reverse discrimination plaintiffs must show two things under the first prima facie prong: (1) that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority"; and (2) "that the employer treated differently[,] employees who were similarly situated but not members of the protected group." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (internal quotation marks and citation omitted). The court recognized that applying the background circumstances standard heightens the burden for majority plaintiffs by essentially requiring a demonstration of intentional discrimination at the outset. *Id.*

The Tenth Circuit Standard—A Modified Test

{24} The Tenth Circuit attempted to ease the burden on majority plaintiffs with its modified version of the background circumstances test. *Notari v. Denver Water Dep't*, 971 F.2d 585, 589 (10th Cir. 1992). The court determined that a heightened burden for majority plaintiffs was appropriate in light of the purpose of Title VII, but that where a majority plaintiff is unable show background circumstances through direct evidence, he should be entitled to proceed beyond the prima facie stage by presenting evidence sufficient to raise a reasonable inference of discrimination. *Id.* at 590. Under the modified test, a majority plaintiff may state a prima facie case by either using the background circumstances test or by showing "indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status [as a member of the majority] the challenged [action] would have favored the plaintiff." *Id.*

{25} Though *Notari* attempted to lower the background circumstances standard by providing an alternative way for majority plaintiffs to make out a prima facie case of discrimination, it is not clear how the alternative test is any easier to meet. In order for a plaintiff to meet the "but for" test, he would have to show facts indicating regular discrimination against the majority—a requirement similar to the *Parker* standard. *See Mills*, 171 F.3d at 456 (affirming the requirement of direct evidence, and stating that, where a majority plaintiff has no direct evidence and has failed to establish

background circumstances, he must produce "other indirect evidence sufficient to support a reasonable probability[,] that but for his status as a white male the challenged employment decision would not have occurred" (alterations, internal quotation marks, and citation omitted)).

Pros and Cons of a Heightened Standard

{26} Proponents of the heightened standard point out that the primary purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminating practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Murray*, 770 F.2d at 67 (internal quotation marks and citation omitted). Moreover, proponents assert the inference of discrimination raised by the *McDonnell Douglas* prima facie case is based on the presumption that minorities are disadvantaged in the workplace, a presumption that does not apply to majority plaintiffs. *See Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993).

{27} Critics of this approach argue that it places an unconscionably high burden on majority plaintiffs and virtually eliminates the burden shifting framework of *McDonnell Douglas*, which was designed to allow Title VII plaintiffs to proceed with their claims despite the unavailability of direct evidence. *See Collins v. Sch. Dist. of Kansas City*, 727 F. Supp. 1318, 1321 (W.D. Mo. 1990) (stating that the *McDonnell Douglas* framework was "a procedural embodiment of the recognition that employment discrimination is difficult to prove with only circumstantial evidence" and that "*Parker* shifts the entire burden back to the plaintiff in one fell swoop").

{28} It should also be noted that imposing a heightened burden on majority plaintiffs is difficult to reconcile with United States Supreme Court precedent. *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that the prima facie case, as stated in *McDonnell Douglas*, "was never intended to be rigid, mechanized, or ritualistic" and that the "central focus of the inquiry in a [discrimination] case . . . is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin" (internal quotation marks and citation omitted)); *see also McDonald*, 427 U.S. at 279 n.6, 280 n.8 (1976) (holding that "Title VII prohibits racial discrimination against the white petitioners in this case upon the *same standards* as would be applicable were they [members of a racial minority]" and noting that the specification of the prima facie proof required under *McDonnell Douglas* "is not necessarily applicable in every respect to differing factual situations" (emphasis added) (internal quotation marks and citation omitted)).

{29} Another potential pitfall of the background circumstances approach is that the application of the standard would require courts to determine "which groups are 'socially favored' and which are 'socially disfavored.'" *Collins*, 727 F. Supp. at 1322. This is an unseemly task where "minority status for purposes of a prima facie case could have regional or local meaning." *Id.* at 1322 n.2 (internal quotation marks and citation omitted).

{30} Currently, the background circumstances approach is followed by the United States Court of Appeals for the District of Columbia, as well as the Sixth and Eighth circuit courts. *See Woods v. Perry*, 375 F.3d 671, 673 (8th Cir. 2004), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *Murray*, 770 F.2d at 67; *Parker*, 652 F.2d at 1017. The modified background circumstances test is followed by the Tenth and Seventh Circuits. *See Notari*, 971 F.2d at 589; *see also Mills*, 171 F.3d at 457.

{31} State courts in New Jersey and Ohio have also adopted the heightened standard. *See Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 799 (N.J. 1990) (stating that "when a complainant is a member of the majority and not representative of persons usually discriminated against in the work place, discrimination directed against that person is unusual" and "modification of the *McDonnell[]Douglas* first-prong is appropriate" (internal quotation marks omitted)); *see also Jones v. MTD Consumer Grp., Inc.*, 2015-Ohio-1878, ¶ 27, 32 N.E.3d 1030 (holding that in order to establish a prima facie case of reverse discrimination, "a plaintiff must demonstrate background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority" (alteration, internal quotation marks, and citation omitted)).

Rejection of the Heightened Standard

{32} Several circuit courts have declined to apply a heightened standard in reverse discrimination cases. In *Iadimarco v. Runyon*, the Third Circuit expressly rejected *Parker*, *Notari*, and their progeny. *Iadimarco*, 190 F.3d at 161-62. The court identified several problems with the background circumstances approach including: (1) Title VII and United States Supreme Court precedent do not support a heightened standard; (2) a heightened standard undermines *McDonnell Douglas* by eliminating some of the burden shifting to the employer; (3) the concept of background circumstances is "irremediably vague and ill-defined," which has prevented courts using the standard from clearly defining this standard; and (4) application of the standard may lead to jury confusion since evidence of background circumstances will likely duplicate or overlap evidence of pretext. *Iadimarco*, 190 F.3d at 160-63.

{33} The Third Circuit also noted that while the *McDonnell Douglas* framework provided an allocation of burdens and order of presentation of proof for a discrimination claim, the central focus in discrimination cases should be on "whether the employer is treating some people less favorably than others because of their race." *Iadimarco*, 190 F.3d at 160 (internal quotation marks and citation omitted). The court concluded that a plaintiff alleging reverse discrimination should only be required to provide sufficient evidence "to allow a fact finder to conclude that the employer is treating [him or her] less favorably than others based upon a [protected] trait." *Id.* at 161.

{34} The Second, Fourth, and Fifth Circuits have altered the first *McDonnell Douglas* prong such that plaintiffs are not required to show that they belong to a minority class, but rather that they belong to a protected group. *See McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001) (stating that the first prong of the prima facie case can be satisfied by a showing that a plaintiff is "within a protected group"); *see also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000) (acknowledging a marked retreat from the "racial minority" requirement and holding that a plaintiff need not show that he belongs to a racial minority in order to make out a prima facie case of reverse discrimination under Title VII); *Lucas v. Dole*, 835 F.2d 532, 533 (4th Cir. 1987) ("To establish a prima facie case under *McDonnell Douglas*, a plaintiff must show [that] she is a member of a protected group[.]").

{35} All three circuits have held that majority plaintiffs are a protected group under Title VII and have not imposed a heightened burden of proof in reverse discrimination cases. *See McGuinness*, 263 F.3d at 53-55 (holding that the plaintiff established a prima facie Title VII case based on race by proffering evidence that

she was white); *see also Byers*, 209 F.3d at 426 (rejecting the argument that the plaintiff had failed to make out a prima facie case of discrimination because he was not a minority); *Lucas*, 835 F.2d at 534 (stating that the plaintiff "is a member of a protected group, whites").

{36} The Eleventh Circuit has adopted a similar standard. *See Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1103 (11th Cir. 2001), *overruled on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008). In the context of traditional race discrimination cases, the Eleventh Circuit has adopted a formulation of *McDonnell Douglas* that requires the plaintiff to show that he belongs to a protected class rather than to a protected minority. *Hawkins v. CECO Corp*., 883 F.2d 977, 982 (11th Cir.1989) (in banc). Considering the elements of a prima facie case of reverse discrimination the Court stated that "[r]acial discrimination against whites is just as repugnant to constitutionally protected values of equality as racial discrimination against blacks. Therefore, we will treat [the plaintiff's claims] as discrimination claims, not as 'reverse discrimination' claims, and we will analyze [them] exactly as we would any racial discrimination claim." *Bass*, 256 F.3d at 1103-04.

Pros and Cons of Abandoning the Heightened Standard

{37} Courts seem to be trending away from imposing a heightened burden on reverse discrimination plaintiffs. Even the Sixth Circuit, which currently uses the most stringent formulation of the background circumstances test, has questioned whether it should modify its approach. *See Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002) (expressing concern that "the background circumstances prong, only required of reverse discrimination plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of discrimination" (internal quotation marks and citation omitted)); *see also Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir.1994) (stating "[w]e have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts").

{38} Proponents of the heightened standard fear that abandoning the background circumstances test will "stifle legitimate employment decisions to diversify and correct the historical imbalance for which Title VII was enacted[,]" and undermine the legislative intent of Title VII. *See* Ryan Mainhardt & William Volet, *The First Prong's Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims*, 30 Hofstra Lab. & Emp. L.J. 219, 259-60 (2012).

{39} However, the trend toward a more "holistic assessment" of evidence in Title VII claims is consistent with current United States Supreme Court precedent, sidesteps the trappings of the background circumstances test, provides a uniform standard for all plaintiffs while maintaining the burden shifting framework of *McDonnell Douglas*, and is more workable in regions where it is becoming more common for a white person to be in the minority. Mainhardt & Volet, *supra*, at 258-59.

{40} Currently, the Second, Fourth, Fifth, and Eleventh Circuits have rejected a heightened standard, along with state courts in Florida, Michigan, and Texas. *See McGuinness*, 263 F.3d at 53; *see also Iadimarco*, 190 F.3d at 161; *Lucas*, 835 F.2d at 533; *Byers*, 209 F.3d at 426; *Bass*, 256 F.3d at 1103; *Scholz v. RDV Sports, Inc.*, 710 So. 2d 618, 623 (Fla. Dist. Ct. App. 1998) (requiring that a plaintiff alleging a claim of reverse discrimination prove that he or she belongs to a class rather than requiring "the plaintiff to show the existence of background circumstances which support the suspicion that the defendant is that unusual employer who discriminates against the majority" (alteration, internal quotation marks, and citation omitted)); *Lind v. City of Battle Creek*, 681 N.W.2d 334, 335 (2004) (holding that in order to establish a prima facie case of intentional disparate treatment under the *McDonnell Douglas* framework, a reverse discrimination plaintiff need not establish "background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority" (internal quotation marks and citation omitted)); *Piazza v. Cinemark, USA, Inc.*, 179 S.W.3d 213, 215 (Tex. Ct. App. 2005) (treating a reverse discrimination plaintiff as a member of a protected class and applying *McDonnell Douglas* without imposing a heightened burden).[2]

***McDonnell Douglas* in New Mexico**

{41} In *Smith*, the New Mexico Supreme Court considered how a prima facie case of discrimination could be made out under the NMHRA. 1990-NMSC-020, ¶¶ 9-11. The Court looked to *McDonnell Douglas* for guidance concerning the shifting of evidentiary burdens. *Smith*, 1990-NMSC-020, ¶¶ 9-10. However, the Court recognized that the *McDonnell Douglas* framework "is not a required method of proof; it is only a tool to focus the issues and to reach the ultimate issue of whether the employer's actions were motivated by impermissible discrimination." *Smith*, 1990-NMSC-020, ¶ 10.

{42} The Court determined that the first prong of a prima facie case of discrimination could be satisfied upon a "showing that the plaintiff is a member of the *protected group.*" *Id.* ¶ 11 (emphasis added). It is worth noting that, in addition to recognizing the *McDonnell Douglas* framework as a tool rather than a mechanical formula, the Court chose the more neutral term "protected group" in setting out the first requirement of a prima facie case of discrimination, and the Court relied on precedent from federal circuits that take the more holistic and less rigid approach to analyzing reverse discrimination claims. *Smith*, 1990-NMSC-020, ¶¶ 9-11.

{43} After reviewing these authorities, we conclude that Plaintiff is not required to meet a heightened standard. Applying

[2]California and Delaware have also rejected the heightened burden, however the relevant decisions in those states are unpublished. *See Ennis v. Del. Transit. Corp.*, C.A. No. S13C-09-028 THG, 2015 WL 1542151, at 5 n.46, (Del. Super. Ct. Mar. 9, 2015) ("A white plaintiff alleging disparate treatment in a reverse discrimination case is not expected to prove any additional *prima facie* elements to satisfy his initial *McDonnell Douglas* burden. A reverse discrimination plaintiff is only required to establish that which a minority is expected to prove in the typical employment discrimination case." (internal quotation marks and citation omitted)); *Berro v. Cnty. of Los Angeles*, No. B223515, 2014 WL 7271181, at 6 n.6, (Cal. Ct. App. Dec. 22, 2014) (noting that while some federal courts have imposed an increased burden on Caucasian plaintiffs alleging racial discrimination under Title VII, "no California court has required a Caucasian plaintiff to make such a heightened showing in order to establish a claim under [the California Fair Employment and Housing Act, Ann. Cal. Gov. Code, §§ 12940 to 12956.2 (1980, as amended through 2015)] for reverse racial discrimination, and we decline to impose such a requirement here").

a formulation of the *McDonnell Douglas* prima facie case that holds both discrimination and reverse discrimination plaintiffs to the same standards reflects the purpose and philosophy behind Title VII as expressed by the United States Supreme Court. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (O'Connor, J., plurality opinion) (stating that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" and "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination"); *see also Bass*, 256 F.3d at 1103 (" 'Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.' ") (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part) ("In the eyes of government, we are just one race here. It is American."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (plurality opinion) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."). Accordingly, we will analyze a reverse discrimination claim as we would any racial discrimination claim.

Plaintiff's Case Against Summary Judgment

{44} In its motion for summary judgment, HVPS argued that Plaintiff failed to make out a prima facie case of discrimination. HVPS also asserted that it had a legitimate purpose for terminating Plaintiff's employment, citing an unsatisfactory evaluation and performance issues. Among the evidence of Plaintiff's purported performance issues was evidence that she had been involved in minor traffic accidents while driving her bus.

{45} Arguing against summary judgment, Plaintiff identified her protected group as white, or non-Hispanic. She presented her performance evaluation form, which did not describe her competence in any of the eleven evaluated categories as being unsatisfactory. Plaintiff also presented evidence concerning her training and experience, as well as evidence that other HVPS drivers, who did not belong to the protected class, had similar performance issues and were not terminated. Thus, Plaintiff has satisfied the prima facie case requirement to show that the circumstances of her termination give rise to an inference of discrimination and the burden shifts to HVPS to provide a legitimate purpose for Plaintiff's termination. *Smith*, 1990-NMSC-020, ¶ 11.

{46} HVPS claims that Plaintiff failed to raise a genuine issue of material fact that HVPS' reasons for not renewing her employment contract were pretext. A plaintiff can show pretext by introducing "evidence of the falsity of the proffered reason for the employment action." *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 45, 130 N.M. 25, 16 P.3d 1084. As the New Mexico Supreme Court has noted, "[i]t is rare a defendant keeps documents or makes statements that directly indicate a retaliatory motive for terminating an employee." Therefore, "whether a proffered justification is legitimate, or is merely an excuse to cover up illegal conduct, is largely a credibility issue and often requires the use of circumstantial evidence." *Juneau*, 2006-NMSC-002, ¶ 23. "[S]ummary judgment is not an appropriate vehicle for courts" to weigh the evidence and judge the credibility of witnesses. *Id.* ¶ 27. Here, Plaintiff's evidence was sufficient to raise a question as to pretext. *See id.* ¶ 25 ("[The p]laintiff is not required to show disputed issues of fact for every element of the claim[.]").

{47} HVPS argues that the deposition testimony of Byron Adams identifying a Hispanic male as one about whom he complained regarding the cleanliness of his bus, and was not fired—is hearsay and should not be considered. Plaintiff's counsel questioned Mr. Adams as follows:

> Q. And you have complained to those people also—for those people, also, to Stephanie Brownfield?
>
> A. To Vicky.
>
> . . . .
>
> Q. Okay. But to your knowledge, those people whom you've made complaints about their bus not being clean still work for the—
>
> A. Yes.
>
> Q. All right. Can you give me some names?
>
> . . . .
>
> A. Henry Avalos.

It was Mr. Adams who made the complaint and Plaintiff's counsel qualified her secondary question by basing it on his knowledge. It is clear that Mr. Adams' testimony was based on personal knowledge and does not fall within the realm of hearsay. *See* Rule 11-602 NMRA ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."); *cf.* Rule 11-801(C)(1), (2) NMRA (defining "[h]earsay" as "a statement that . . . the declarant does not make while testifying at the current trial or hearing, and . . . a party offers in evidence to prove the truth of the matter asserted in the statement" (internal quotation marks omitted)).

{48} We conclude that Plaintiff put forward sufficient evidence below to create genuine issues of material fact with respect to her discrimination claim against HVPS. *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 17, 128 N.M. 830, 999 P.2d 1062 (stating that the nonmoving party does not need to present enough evidence to support all elements of the case, only that one or two factual issues are contested).

CONCLUSION

{49} We reverse the district court's summary judgment dismissing Plaintiff's claim for the reasons stated in this Opinion and remand it to the district court for proceedings consistent with this Opinion.

{50} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
TIMOTHY L. GARCIA, Judge

Thank You to

MONTGOMERY & ANDREWS, P.A.

for its Generous Support of the Civil Legal Clinic!

The First Judicial District Court Access to Justice Committee and the Volunteer Attorney Program would like to thank the law firm of Montgomery & Andrews, its attorneys, and staff for volunteering their time and expertise at its June 3, 2016 Civil Legal Clinic in Santa Fe. The 2016 Santa Fe Civil Legal Clinics take place the first Friday of every other month at the First Judicial District Courthouse in the 1st Floor Jury Room from 10 a.m. until 1 p.m. Eighteen individuals received assistance at the June clinic thanks to the dedication of six attorneys and a staff member from Montgomery & Andrews and one Santa Fe attorney. Thank you:

Randy Bartell
Sheila Brown
Alexia Constantaras
Seth McMillan
Suzanne Odom
Sharon Shaheen
Carolyn Wolf
Yolanda Salazar (paralegal)

If you or your firm is interested in sponsoring a clinic, please contact Aja Brooks at ajab@nmlegalaid.org or 505-814-5033.

Thank You!

Classified

Positions

Assistant General Counsel
The Assistant General Counsel position provides high level legal support to the Aging and Long-Term Services Department. The position will be assigned to the Capital Projects Bureau, and, as such will review and negotiate complex contracts while keeping the General Counsel informed of legal and policy issues and recommendations. The Assistant General Counsel will work closely with the State Board of Finance and other governmental entities to move capital projects forward and remove conditions and requires advanced knowledge of the State Procurement Code. This position will also negotiate contracts with outside entities to ensure compliance with state and federal law and protect the Department's interests. In addition to supporting the Capital Projects Bureau, the Assistant General Counsel will work closely with the Department's Inspection of Public Records Act custodian and provide legal advice to the records custodian. This position will provide advice in regard to regulatory issues, client services, legislative advocacy, human resources, quality standards and any other duties as assigned. Please contact General Counsel Leslie Schaar at leslie.schaar@state.nm.us with questions. For complete information including closing dates, minimum requirements, and instructions on how to apply for the Assistant General Counsel position, please visit https://www.governmentjobs.com/careers/newmexico.

Law Clerk Position
Busy litigation Firm looking for Law Clerk with a desire to work in tort and insurance litigation. Please send resume and recent writing sample to: Guebert Bruckner P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Taos County
County Attorney
Taos County seeks a County Attorney with a strong desire to live and work in the unique community of Taos, New Mexico. As an integral part of county government, the successful candidate will be an active participant in the important issues to this historic, multi-cultural, artistic and recreational community. Candidates must be graduates of an American Bar Association accredited law school and have a New Mexico law license. The ideal candidate should possess experience in litigation and local government legal issues. County government faces a wide range of challenging legal issues that require strong analytical, courtroom and diplomatic skills complimented by a good measure of common sense. Salary range is dependent on experience and qualifications. This position offers a benefit package consisting of medical and dental insurance, paid vacation, sick leave and retirement. Taos County is an equal opportunity employer. To view the complete job description please visit the Taos County website, www.taoscounty.org, and click on "Departments", then "Human Resources" and then "Job Opportunities," or contact the Human Resources Department at 575-737-6309. Applicants should submit a letter of interest, resume and three professional letters of reference to Renee Weber, Human Resources Director, as a hard copy to 105 Albright Street, Suite J., Taos, NM 87571, or as a PDF email attachment to renee.weber@taoscounty.org. Interested candidates should submit all information by 5:00pm June 28, 2016.

Hiring Managing Attorney
Young, busy civil litigation firm looking for an experienced managing attorney to manage a 6 person firm with approximately 250-300 cases. Must have excellent writing, interpersonal and management skills. Salary and profit sharing is competitive and negotiable based on years of legal experience. 401K available. Send resume to nmlaw505@gmail.com. Applications kept strictly confidential.

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

Associate Attorney
Busy insurance defense firm seeks experienced civil litigation ASSOCIATE ATTORNEY with at least three (3) years experience in a litigation firm. The position requires a self-starter, with excellent organizational skills, attention to detail and a willingness to work as a team player in a high volume office. Please email applications to bmcdonald@brucemcdonaldlaw.com

Legal Assistant
Civil defense firm seeks full-time legal assistant with minimum four years experience in insurance defense and civil litigation. Position requires a team player with exceptional paralegal skills, proficiency with Word Perfect and Word, electronic filing experience and superior clerical and organizational skills. Competitive salary and benefits. Send resume and references to Riley, Shane & Keller, P.A., Office Manager, 3880 Osuna Rd., NE, Albuquerque, NM 87109 or e-mail to mvelasquez@rsk-law.com

COO / Law Office Manager
Exceptional compensation and benefits for a manager who will improve the firm's operation and success, and achieve across the board efficiencies in the delivery of world class legal and client service. Smart, with strong written and verbal communication skills. Positive interpersonal and leadership skills to deal with individuals at all levels in a professional and respectful manner. Ability to review systems, identify efficiencies, create new systems, analyze facts and data to form objective conclusions, make sound recommendations and exercise good judgment. Organized. Computer skills a must. Ability to multitask and meet deadlines in a fast-paced environment. Detail oriented yet able to see the big picture. MBA or advanced degree preferable. Minimum 5 years COO / management experience, preferably in a law firm setting. Send cover letter and resume to Bert@ParnallLaw.com. Inquiries kept confidential.

Legal Assistant
Legal Assistant for insurance defense downtown law firm. 3+ years experience. Strong organizational skills and attention to detail necessary. Must be familiar with Outlook and Word. Full time, salary DOE, great benefits inc. health & life ins. and 401K match. Fax resume to 505-764-6082. or mail to Civerolo, Gralow & Hill, PA, PO Box 887, Albuquerque NM 87103.

Legal Assistant
Chapman and Charlebois, a civil litigation defense firm, is seeking a legal assistant with 5+ years experience in civil litigation. Extensive experience with practice management, calendaring, word processing, state and federal court filings required. Must be highly organized and detail oriented with good customer service and multi-tasking skills. Position needs include support for multiple attorneys producing a high volume of work. Email letter of interest with three professional references, salary requirements and resume to: Tonnie@cclawnm.com

Litigation Paralegal
Hinkle Law Firm in Santa Fe seeking litigation paralegal. Experience (2-3 years) required in general civil practice, including labor and employment. Candidates must have experience in trial preparation, including discovery, document production, scheduling and client contact. Degree or paralegal certificate preferred, but will consider experience in lieu of. Competitive salary and benefits. All inquires kept confidential. Santa Fe resident preferred. E-mail resume to: gromero@hinklelawfirm.com

Paralegal
Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Services

Vocal Presentation Coach
Open and close with a BANG. Seasoned writer/WB recording artist/Licensed Speech Pathologist. Refs. bigvoice4u@gmail.com

Get it done
Contract paralegal with proven record in civil litigation. I produce favorable results. Research, briefs, all aspects of case management. tracydenardo.sf@gmail.com. 505-699-4147

Freelance Attorney
Licensed in NM and VA. Former judicial law clerk and Assistant DA seeking work in writing, research, litigation prep, etc. Email kate.telis@gmail.com for rates/resume/references.

Experienced Paralegal
Experienced paralegal available for civil litigation cases, working from my own office. Excellent references. civilparanm@gmail.com.

All Commercial Contracts/Leases Reviewed
Experienced Fortune 250 Corporate Attorney will advise on, draft, review, or edit all your commercial contracts/leases. Contact Astravalle@comcast.net

Office Space

820 Second Street NW
820 Second Street NW, offices for rent, one to two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170.

503 Slate NW
503 Slate NW, Affordable, five large offices for rent, with secretarial area, located within one block of the courthouses. Rent includes parking, utilities, phones, fax, wireless internet, janitorial services, and part-time bilingual receptionist. All offices have large windows and natural lighting with views of the garden and access to a beautiful large conference room. Call 261-7226 for appointment.

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.

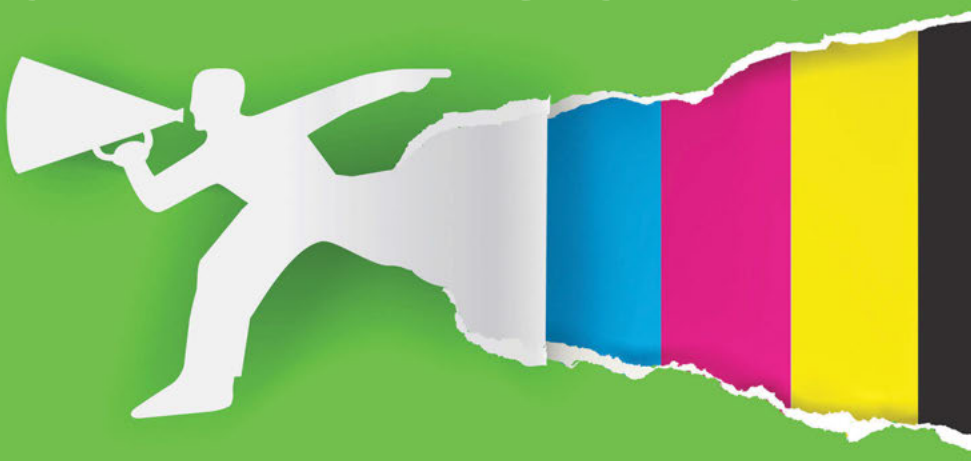
Award-Winning Journal Center Office for Lease
6,380± RSF. Six private offices, three conference rooms with focus group room and much more. 7411 Jefferson St NE. Contact Dan Newman or Debbie Dupes with CBRE at 505-837-4999.

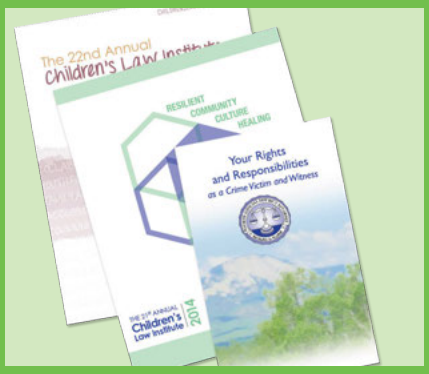
Santa Fe Office Rentals
LOCATION, LOCATION, LOCATION. Quiet Environment. Compatible tenants. Walking distance to District Court, State Capitol, Downtown. Utilities (except phone), Janitorial and Parking. Private individual offices starting at $325 per month. 1322 Paseo de Peralta. 505-501-1387.

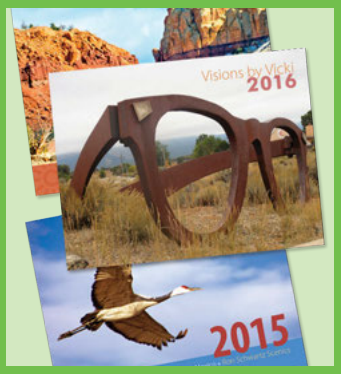
Santa Fe Office Space
Three offices for rent, separately or together, furnished or unfurnished, ranging from $500 to $550 per office. Rent includes parking, janitorial services and a receptionist. Access to copier, fax and postage meter on a per use basis. Call (505) 988-4575 ext. 105 or email dwells@bbpcnm.com for an appointment.

Digital Print Center

Quality, **full-color** printing. Local service with fast turnaround.







Business Cards • Letterhead • Envelopes • Booklets
Brochures • Calendars • Greeting Cards • Invitations • and much more!

For more information, contact Marcia Ulibarri at
505-797-6058 or mulibarri@nmbar.org

*Ask about **YOUR** member discount!*

STATE BAR of NEW MEXICO
DIGITAL PRINT CENTER

2016
Annual Meeting
Golf Tournament

Thursday, Aug. 18 • 1:30 p.m.
Sunrise Course,
The Club at Las Campanas
132 Clubhouse Drive, Santa Fe, NM 87506

Hole-in-one Contest

2017 Audi Q5 (valued at $49,000)
provided by Mercedes-Benz of Albuquerque

Winner pays registration, tax and license fees.

Golf lovers - Make a team with your friends, family or colleagues. Tickets are available through registration.

www.nmbar.org/AnnualMeeting

Thank you to our sponsor!

Lewis Roca
ROTHGERBER CHRISTIE

For sponsorship information, contact Stephanie Wagner, 505-797-6007 or swagner@nmbar.org.

STATE BAR of NEW MEXICO

THE CLUB AT LAS CAMPANAS
SANTA FE