BAR BULLETIN

Official Publication of the State Bar of New Mexico

July 27, 2016 • Volume 55, No. 30

Where Hatch Chilies Come From, by Richard Prather (see page 3)

InArt Santa Fe Gallery, Santa Fe

Inside This Issue

Thank You, Wills for Heroes Volunteers 5

Clerk's Certificates 13

From the New Mexico Court of Appeals

2016-NMCA-040, No. 34,108: Castillo v. Arrieta 17

2016-NMCA-041, No. 34,185: Trujillo v. Los Alamos National Laboratory 22

2016-NMCA-042, No. 33,564: State v. Cardenas 28

2016-NMCA-043, No. 34,320: State of New Mexico, ex rel. Children, Youth and Families Department v. Nathan H. 32

A Message From State Bar President J. Brent Moore

Page 6

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 27, 2016, Vol. 55, No. 30

Table of Contents

Notices 4
Thank You, Wills for Heroes Volunteers 5
A Message from State Bar President J. Brent Moore 6
Continuing Legal Education Calendar 8
Writs of Certiorari 10
Court of Appeal Opinions List 12
Clerk's Certificates 13
Recent Rule-Making Activity 16
Opinions
From the New Mexico Court of Appeals
2016-NMCA-040, No. 34,108: Castillo v. Arrieta 17
2016-NMCA-041, No. 34,185: Trujillo v. Los Alamos National Laboratory 22
2016-NMCA-042, No. 33,564: State v. Cardenas 28
2016-NMCA-043, No. 34,320: State of New Mexico, ex rel. Children, Youth and Families Department v. Nathan H. 32
Advertising 36

Meetings

July

28
Natural Resources, Energy and Environmental Law Section,
Noon, teleconference

August

1
Committee on Diversity in the Legal Profession,
Noon, State Bar Center

2
Bankruptcy Law Section BOD,
Noon, U.S. Bankruptcy Court

2
Health Law Section BOD,
9 a.m., teleconference

3
Employment and Labor Law Section BOD,
Noon, State Bar Center

5
Criminal Law Section BOD,
Noon, Kelly & Boone, Albuquerque

9
Appellate Practice Section BOD,
Noon, teleconference

Workshops and Legal Clinics

July

27
Common Legal Issues for Senior Citizens Workshop:
10–11:15 a.m., workshop
Noon–1 p.m., POA AHCD clinic,
Alamo Senior Center, Alamogordo
1-800-876-6657

27
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

28
Common Legal Issues for Senior Citizens Workshop:
10–11:15 a.m., workshop
Noon–1 p.m., POA AHCD clinic,
Villiage of Ruidoso Community Center, Ruidoso, 1-800-876-6657

August

3
Divorce Options Workshop:
6–8 p.m., State Bar Center, Albuquerque,
505-797-6003

About the Cover Image: *Where Hatch Chilies Come From, oil, 20 by 24*
Richard Prather creates atmospheric landscapes. The challenge to capture the subtle nuances of shadow and light drives his pursuit in painting the canyons and mountains of the Southwest. In addition to more than 30 years of studying and painting on his own, he credits the many workshops from some of the very best plein air artists working today with having the largest impact on the quality of his work. Prather is a signature member of the Oil Painters of America, The Plein Air Painters of New Mexico and the Outdoor Painters Society. After a career as a life scientist the Environmental Protection Agency, Prather and his wife Sharla moved to Placitas where they currently reside with their two dogs Belle and Louie. To view more of his work, visit www.richardprather.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. 27) 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:
I will be punctual for court hearings, conferences and depositions.

State Bar News

Attorney Support Groups

- 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#.
- Aug. 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

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

Board of Bar Commissioners

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.

Intellectual Property Law Section

Pro Bono Filmmakers' Clinic

New Mexico Lawyers for the Arts and City of Albuquerque Film Office seek volunteer attorneys for the NM Lawyers for the Arts Pro Bono Filmmakers' Clinic from 10 a.m.–2 p.m. (or any portion thereof), Aug. 13. at Hotel Andaluz in Albuquerque. Continental Breakfast will be provided. Volunteer attorneys are needed for assistance in the following areas: entertainment, contracts, business law, employment matters, tax law, estate planning, IP law. For more information and to participate, contact Jose J. Garcia at josejgarcia_esq@lawyer.com. The Young Lawyers Division and Intellectual Property Law Section are co-sponsors of this clinic.

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

ABA Women Rainmakers

Essential Tips for Success in ADR

Join the ABA Women Rainmakers on Aug. 10 for an event as part of the Wednesday Rainmaking Webinar Series: Ten Essential Tips for Success in ADR to Build Your Practice. Attracting and keeping clients today requires that litigators and business lawyers have the expertise for effectively resolving their clients' disputes through litigation alternatives. Learn essential tips from three experienced arbitrators and mediators for drafting effective ADR clauses and positioning clients to be successful in arbitration, mediation, and hybrid forms of ADR. These tips are designed to give you an added advantage in building your book of business. To register, visit https://attendee.gotowebinar.com/register/8848355383759099906.

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.

Oliver Seth American Inn of Court

Meetings Begin in September

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September until May. Meetings address a pertinent topic and conclude with dinner. Those who reside and/or practice in Northern New Mexico and want to enhance skills and meet some good lawyers should send a letter of interest to the Honorable Paul J. Kelly Jr., U.S Court of Appeals—Tenth Circuit, PO Box 10113, Santa Fe, NM 87504-6113.

Other News

Workers' Compensation Administration

Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the adoption of new WCA Rules at 1:30 p.m., Aug. 11, at the WCA, 2410 Centre Avenue SE, Albuquerque. Proposed changes can be found at www.workerscomp.state.nm.us/. Comments should be sent to Rachel.bayless@state.nm.us. Those with disabilities should call 505-841-6083 for assistance attending or participating in the meeting.

Featured
Member Benefit

Fee Arbitration Program

This program helps to resolve fee disputes between attorneys and their clients or between attorneys. Call 505-797-6054 or 1-800-876-6227.

Notice of Correction

The July 20 *Bar Bulletin* (Vol. 55, No. 29) contained an error in the "PAW Court Addresses Animal Abuse" article. The article stated the Pre-Adjudication Animal Welfare court receives felony animal abuse cases. In actuality, the PAW Court only receives misdemeanor cases. The *Bar Bulletin* apologizes for the error

YLD Wills for Heroes

The YLD and its volunteer paralegals and law students continue to serve New Mexico's first responders.
On June 25 a Wills for Heroes event was held for APD Officers at the Albuquerque Police Department Academy.

"The June WFH event was an invaluable opportunity to give back to APD officers who serve our community and their families. The 25 volunteers completed 37 wills, without them none of this would be possible." –*Sonia Russo, YLD Director-at-Large*

Thank you volunteers!

Karen Atkinson
Christina Babcock
Allison Block-Chavez
Nettie Condit
Uma Devi
Laura Escarcida
Veronica C. Gonzales-Zamora
James Houghton
Christine James
Billy Jimenez
Tina Kelbe
Amanda Lucero
Jennifer McCabe
Lucia Misa-O'Connor
Johnn Osborn
James J. Owens
Cheryl Passalaqua
Dorielle Paull
Lynette Rocheleau
Sonia Russo
Evonne Sanchez
Dawn Seals
Cindy Silva
Sharon Wirth

State Bar of New Mexico
Young Lawyers Division

Wills for Heroes New Mexico

A Message from State Bar President
J. Brent Moore

Dear Members of the State Bar of New Mexico:

In January I wrote to you as your incoming President, and I would like to take a moment to update you on my first six months in the position. During the first half of 2016, there has been a flurry of activity at the State Bar, and I have been talking to and meeting with lawyers statewide and nationally. It has been both educational and enjoyable. My priorities for 2016 are focused on several items of note, particularly the Annual Meeting—Bench & Bar Conference, the New Mexico State Bar Foundation and Entrepreneurs in Community Lawyering. The following provides an update on these important programs.

2016 Annual Meeting—Bench & Bar Conference

As many of you already know, we are lucky to have U.S. Supreme Court Justice Ruth Bader Ginsburg as our keynote speaker for this year's annual meeting. The dates for the full meeting are Aug. 18-20 at Buffalo Thunder Resort & Casino in Santa Fe. If you have not already registered, I encourage you to attend. At the meeting you will be able to enjoy the remarks of Justice Ginsburg, a plenary session with three of our New Mexico Supreme Court Justices, a presentation by former Solicitor General Ted Olson and a presentation on the law and journalism by former ABC White House correspondent Sam Donaldson. There also will be breakout sessions covering a wide range of legal topics, social events, and terrific networking opportunities with fellow colleagues from across the state.

New Mexico State Bar Foundation

The New Mexico State Bar Foundation has begun positioning itself as the New Mexico entity working with the private bar and other interested parties to assist in providing legal services to low income New Mexicans. This campaign is called "And Justice for All." To this end, I am working with our staff on some exciting new initiatives, including a fellows program for New Mexico lawyers, a coordinated annual campaign, a Pathway to Justice brick walkway, and a better than ever silent auction at the annual meeting. Through direct financial support and in-kind administrative support, the State Bar has long supported services to both members and the public and will continue supporting development efforts of the Bar Foundation.

Entrepreneurs in Community Lawyering

I hope by now you have heard about the Bar Foundation's work to create a legal incubator program. The program is called Entrepreneurs in Community Lawyering (ECL). We began this endeavor with the "if you build it, they will come" philosophy. After almost a year of planning and development, this program is on track to launch in October. ECL will assist new attorneys in starting their own successful solo practices by providing them with the help and guidance that they need to be excellent lawyers and serve the legal needs of underrepresented populations. It is hoped that ECL attorneys will help provide legal services to those who exceed the legal services guidelines, but still cannot afford legal services.

In the next six months, I will be working closely with the other officers and staff to ensure that the Bar Foundation and ECL are on solid ground for the future. Please know that I am humbled to serve as your president for 2016 and I count myself lucky to work with the dedicated men and women of the State Bar. They work tirelessly behind the scenes to serve our members. Please do not hesitate to contact the State Bar staff or me if you have any questions or if there is anything we can do to assist you.

Sincerely,

J. Brent Moore

J. Brent Moore
President

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

For Our Community

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

For Our Members

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

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

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

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

STATE BAR of NEW MEXICO FOUNDATION

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

Legal Education

July

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

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

26 **I Always Feel Like Somebody's Watching Me, And I Have No Privacy: Digital Evidence and the 4th Amendment**
6.7 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.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

15 **Workers' Compensation Law and Practice Seminar**
5.6 G, 1.0 EP
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

16 **27th Annual Appellate Practice Institute**
6.4 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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

September

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

October

3 **Mastering Microsoft Word in the Law Office**
7.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Indemnification Provisions in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Managing Employee Leave**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10–14 **Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry**
24.5 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

10–14 **Basic Practical Regulatory Training for the Electric Industry**
26.2 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

13 **Joint Ventures Between For-Profits and Non-Profits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13–14 **34th Annual Advanced Oil, Gas & Energy Resources Law**
10.3 G, 1.7 EP
Video Replay, Santa Fe
State Bar of Texas
www.texasbarcle.com

14 **Citizenfour—The Edward Snowden Story**
3.2 G
Live Seminar
Federal Bar Association, NM Chapter
505-268-3999

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 15, 2016

Published Opinions

No. 33775	2nd Jud Dist Bernalillo CV-12-11299, J DAMON v VISTA DEL NORTE (affirm)	7/12/2016
No. 34653	1st Jud Dist Santa Fe, LR-14-11, STATE v D ARAGON (affirm)	7/12/2016
No. 34083	1st Jud Dist Rio Arriba, CV-11-389, M ARMIJO v CITY OF ESPANOLA (reverse)	7/13/2016
No. 34033	9th Jud Dist Curry CR-12-86, STATE v D HOWL (affirm in part and remand)	7/14/2016

Unpublished Opinions

No. 35221	5th Jud Dist Lea CR-15-98, STATE v R FLOREZ (dismiss)	7/11/2016
No. 34443	2nd Jud Dist Bernalillo CR-12-1263, STATE v D MORGAN (affirm)	7/14/2016

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 6, 2016

Clerk's Certificate of Address and/or Telephone Changes

Mark Chad Abramson
Semro Henry Spinazze & Barga Ltd.
6542 Fourth Street NW
Albuquerque, NM 87107
419-517-7377
419-517-7378 (fax)
abramson@shslawltd.com

Daniel A. Alderete
Riley, Shane & Keller, PA
3880 Osuna Road NE
Albuquerque, NM 87109
505-883-5030
calderete@rsk-law.com

Megan D. Antus
Long-Weaver, Manning, Antus & Antus LLP
310 W. Wall Street, Suite 705
Midland, TX 79701
432-242-0470
844-287-8884 (fax)
mantus@wmafirm.com

Peter S. Auh
New Mexico Association of Counties
111 Lomas Blvd. NW, Suite 424
Albuquerque, NM 87102
505-820-8116
505-338-1173
pauh@nmcounties.org

Greg Dixon
Dixon Law, PLLC
108 N. Second Street
Purcell, OK 73080
405-549-9181
405-527-6666 (fax)
dixondurango3@gmail.com

Krystal A. Dominguez
Office of the Eleventh Judicial District Attorney
201 W. Hill Street, Suite 100
Gallup, NM 87301
505-722-2281 Ext. 115
kdominguez@da.state.nm.us

Derek V. Garcia
Law Office of Derek Garcia, LLC
PO Box 53603
Albuquerque, NM 87153
505-333-8030
505-212-0092 (fax)
derekgarcialaw@gmail.com

Jonathan David Gardner
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102
505-222-1011
505-241-1011 (fax)
jgardner@da2nd.state.nm.us

Jocelyn Amelia Garrison
Law Offices of the Public Defender
800 Pile Street, Suite A
Clovis, NM 88101
575-219-6323
575-763-9808 (fax)
jocelyn.garrison@lopdnm.us

Veronica L. Hill
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102
505-222-1144
vhill@da2nd.state.nm.us

Wade L. Jackson
Sutin, Thayer & Browne, PC
PO Box 1945
6565 Americas Parkway NE, Suite 1000 (87110)
Albuquerque, NM 87103
505-883-3431
wlj@sutinfirm.com

Gilberto Juarez
3722 Alameda Avenue
El Paso, TX 79905
915-532-3606
915-532-3603 (fax)
giljuarez77@yahoo.com

Patrick Lopez
2500 Parkway Avenue NE
Rio Rancho, NM 87144
505-309-0780
patrick.lopez.esq@gmail.com

Peter Arthur Mommer
31533 160th Street
Dike, IA 50624
515-257-3342
petermommer@hotmail.com

Nels Orell
Ron Bell Injury Lawyers
610 Seventh Street NW
Albuquerque, NM 87102
505-242-7979
505-243-7192 (fax)
norell@898-bell.com

Hugh William Parry II
2 Sandia Lane
Santa Fe, NM 87508
505-466-4238
rustyparry@comcast.net

Joshua Kevin James Rubin
Office of the Second Judicial District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102
505-222-1125
505-241-1125 (fax)
jrubin@da2nd.state.nm.us

William H. Snowden
Law Offices of the Public Defender
301 N. Guadalupe Street, Suite 101
Santa Fe, NM 87501
505-395-2888
505-204-7063 (fax)
william.snowden@lopdnm.us

Joseph M. Spindle
United States Attorney's Office, District of New Mexico
PO Box 607
201 Third Street NW
Suite 900 (87102)
Albuquerque, NM 87103
505-346-7274
505-346-7296 (fax)
joseph.spindle@usdoj.gov

Delilah Tenorio
Stetson Law Offices
1305 Rio Grande Blvd. NW
Albuquerque, NM 87104
505-256-4911
505-256-5177 (fax)
dmt@stetsonlaw.com

Arslanbek Sanjarovich Umarov
Butt, Thornton & Baehr, PC
PO Box 3170
4101 Indian School Road NE, Suite 300S (87110)
Albuquerque, NM 87190
505-884-0777
505-235-7525 (fax)
asumarov@btblaw.com

Jamye Boone Ward
N.M. Children, Youth and Families Department
2200 Indian Wells Road
Alamogordo, NM 88310
575-434-5950
575-437-3084 (fax)
jamye.ward@state.nm.us

John Ward Wheeler II
PO Box 1176
Santa Fe, NM 87504
505-412-2231
jwwsf2014@gmail.com

Evan P. Woodward
Caruso Law Offices PC
4302 Carlisle Blvd. NE
Albuquerque, NM 87107
505-883-5000
505-883-5012 (fax)
evan@carusolaw.com

Stephen Abanise
U.S. Social Security Administration
Office of Disability and Adjudication Review
5107 Leesburg Pike
Falls Church, VA 22041
951-217-7726
sabanise@gmail.com

Kay R. Bonza
2850 N. Lakewood Avenue, Unit K
Chicago, IL 60657
kay.bonza@gmail.com

Darryl A. Bouchard
Darryl Bouchard Law
PO Box 2157
Ranchos de Taos, NM 87557
575-737-8383
darryl.bouchard.law@gmail.com

Kevin M. Brown
Brown Law Firm
3777 The American Road NW, Suite 100
Albuquerque, NM 87114
505-292-9677
505-292-9680 (fax)
kevin@brownlawnm.com

Victoria Ferrara
1210 Luisa Street, Suite 6
Santa Fe, NM 87505
505-988-5568
505-988-5857 (fax)
victoria@oneplanetlaw.com

Neal D. Gidvani
3993 Howard Hughes Parkway, Suite 400
Las Vegas, NV 89169
702-979-4597
neal.gidvani@gmlaw.com

Mary Kate LaMothe
828 Truman Street NE
Albuquerque, NM 87110
505-469-7779
mklamothe@outlook.com

Ted Lautenschlager
703 La Jolla Lane
Roswell, NM 88201
deb5661@yahoo.com

Clare E. Mancini
State of Washington Health Care Authority
PO Box 45502
Olympia, WA 98501
clare.mancini@hca.wa.gov

Guillermina (Mina) Ortega
PO Box 36773
Albuquerque, NM 87176
915-691-1694
ortegalawoff@gmail.com

Sharice Ogas Pacheco
Law Office of
Jill V. Johnson Vigil
1475 N. Main Street, Suite E
Las Cruces, NM 88005
575-527-5405
575-527-1899 (fax)
sharice@jvjvlaw.com

Jessica Sweeney
8035 Eastern Avenue #T1
Silver Spring, MD 20910
sweeney0115@gmail.com

Rebecca A. Torres
Torres Law Firm, LLC
661 Quantum Road NE
Rio Rancho, NM 87124
505-221-6709
bt@torreslawnm.com

Jennifer K. Trujillo
U.S. Department of Justice
145 N Street NE
Washington, DC 20530
jennifer.k.trujillo@usdoj.gov

Jill Valerie Johnson Vigil
Law Office of
Jill V. Johnson Vigil
1475 N. Main Street, Suite E
Las Cruces, NM 88005
575-527-5405
575-527-1899 (fax)
jill@jvjvlaw.com

Carolyn Ann Wilber
743 Brave Court
Hesperus, CO 81326
carolyn@durangofamilylaw.com

Katrina H. Crandall
Margolis Healy
128 Lakeside Avenue, Suite 302
Burlington, VT 05401
802-861-1428
802-861-1404 (fax)
kcrandall@margolishealy.com

Daniel P. Custodio
Western Digital Technologies, Inc.
951 SanDisk Drive
Milpitas, CA 95035
408-801-7122
dan.custodio@sandisk.com

David L. Dotson
Law Office of David L. Dotson
PO Box 115
Socorro, NM 87801
575-838-3978
575-838-2058 (fax)
dotsonlawoffices@gmail.com

Kerry Cait Marinelli
Cortez Treneer & Associates
11900 N. 26th Street, Suite 200
Edinburg, TX 78539
505-633-4097
956-393-2699 (fax)
kerry.marinelli@fredloya.com

Dated July 14, 2016

Clerk's Certificate of Address and/or Telephone Changes

Jorge A. Alvarado
Enlace Comunitario
PO Box 8919
Albuquerque, NM 87198
505-246-8972 Ext. 33
505-246-8973 (fax)
jalvarado@enlacenm.org

Arthur Brent Bailey
Will Ferguson & Associates
10090 Coors Blvd., NW, Suite 100
Albuquerque, NM 87114
505-243-5566
505-897-2279 (fax)
brent@fergusonlaw.com

Ross R. Bettis
The Sawyers Law Group, LLC
1327 E. Bender Blvd.
Hobbs, NM 88240
575-393-1300
575-393-1869 (fax)
rbettis@klipsawlaw.com

John M. Butrick
7000 Montaño Road, NW
Albuquerque, NM 87120
202-320-2342
jmbutrick@yahoo.com

Clara Nevarez Cobos
United States Attorney's Office
555 S. Telshor Blvd., Suite 300
Las Cruces, NM 88011
575-522-2304
clara.cobos@usdoj.gov

Lalita Devarakonda
Hurley, Toevs, Styles, Hamblin & Panter, PA
PO Box 31670
4155 Montgomery Blvd., NE (87109)
Albuquerque, NM 87190
505-888-1188
lalita@hurleyfirm.com

David William Hall
1499 Blake Street, Unit 4M
Denver, CO 80202
970-946-5260
dhall@dhall-law.com

Richard E. Hatch
Brigham Young University-Office of General Counsel
303 HCEB
Provo, UT 84602
801-422-0289
richard.hatch@byu.edu

Thomas Joseph Hoffman
PO Box 40283
Albuquerque, NM 87196
505-265-7298
thoffman505@gmail.com

Kevin P. Holmes
Office of the Attorney General
111 Lomas Blvd., NW, Suite 300
Albuquerque, NM 87102
505-222-9069
505-222-9007 (fax)
kholmes@nmag.gov

Rebecca Barbara Jackson
Sandia National Laboratories
PO Box 5800, MS 0141
Albuquerque, NM 87185
505-845-3184
rbjacks@sandia.gov

Clare E. Mancini
Washington State Health Care Authority
PO Box 42700
Olympia, WA 98501
360-725-1060
360-753-3077 (fax)
clare.mancini@hca.wa.gov

Caroline Manierre
Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP
PO Box 8180
1215 Paseo de Peralta (87501)
Santa Fe, NM 87504
505-988-8004
505-982-0307 (fax)
cmanierre@rothsteinlaw.com

Donald F. Moore Jr.
Office of the Fifth Judicial District Attorney
301 N. Dalmont Street
Hobbs, NM 88240
575-397-2471
575-397-6484 (fax)
dmoore2@da.state.nm.us

Bonnie J. Paisley
Paisley Business Law, PC
2612 Rincon del Rio Court, NW
Albuquerque, NM 87107
505-228-5806
bonnie@paisleybusinesslaw.com

Marshall J. Ray
Law Offices of
Marshall J. Ray, LLC
201 Twelfth Street, NW
Albuquerque, NM 87102
505-312-7598
505-214-5977 (fax)
mray@mraylaw.com

Susanne Darling Roubidoux
N.M. Educational Retirement Board
PO Box 26129
701 Camino de los Marquez (87505)
Santa Fe, NM 87502
505-476-6149
505-827-1855 (fax)
susanne.roubidoux@state.nm.us

David R. Silva
David Silva, Attorney at Law PC
PO Box 1657
2313 Hot Springs Blvd.
Las Vegas, NM 87701
505-425-2867
844-273-8756 (fax)
lawyur@yahoo.com

Kyle Marie Stock
Community Catalyst
One Federal Street
Boston, MA 02110
617-275-2838
kmstock@communitycatalyst.org

Randall L. Thompson
Randall L. Thompson, PC
201 Twelfth Street, NW
Albuquerque, NM 87102
505-884-2400
rlt@rltlawpc.com

Robert I. Waldman
9624 St. Andrews Court, NE
Albuquerque, NM 87111
505-822-9052
rwaldmanlaw@gmail.com

Trisha A. Walker
Office of the City Attorney
PO Box 1293
1 Civic Plaza, NW (87102)
Albuquerque, NM 87103
505-768-3835
505-768-2310 (fax)
twalker@cabq.gov

Amara L. Aaron
PO Box 934
Spring Hill, TN 37174
alma@aaronlawoffice.com

Scott Aaron
PO Box 934
Spring Hill, TN 37174
aaronlawoffice@gmail.com

Angela L. Adams
2361 Camino Pintores
Santa Fe, NM 87505
505-670-3487
aadams@jbsinternational.com

Brian M. Close
Close Law Firm, PC
8200 S. Quebec Street #A3132
Centennial, CO 80112
505-796-4878
505-214-5366 (fax)
info@closelawfirm.com

Margaret Alison Duggan
PO Box 13071
Albuquerque, NM 87192
peggy_duggan@yahoo.com

Samantha Jane Fenrow
N.M. Public Regulation Commission
PO Box 1269
1120 Paseo de Peralta (87501)
Santa Fe, NM 87504
samantha.fenrow@state.nm.us

Michael H. Gritzbaugh
900 N. Stuart Street, Apt. 913
Arlington, VA 22203
mgritzbaugh@yahoo.com

Eric L. Hiser
Jorden Hiser & Joy, PLC
5080 N. 40th Street, Suite 245
Phoenix, AZ 85018
480-505-3900
ehiser@jhjlawyers.com

Julita Ann Leavell
3167 San Mateo Blvd., NE, Suite 290
Albuquerque, NM 87110
505-620-3927
jleavelllawoffices@gmail.com

Jason Neal
PO Box 260073
1815 University Avenue, Unit 201
Madison, WI 53726
jasonneal7@yahoo.com

Stevie Dion Nichols
900 N. Stuart Street, Apt. 913
Arlington, VA 22203
stevie.nichols@gmail.com

D'Ontae D. Sylvertooth
Naval Litigation Office
720 Kennon Street, SE, Bldg. 36, Room 233
Washington Navy Yard, DC 20374
202-685-7740
202-685-7036 (fax)
dontae.sylvertooth@navy.mil

Rebekah B. Wolf
1000 Marquez Place
Santa Fe, NM 87505
rebekah.b.wolf@gmail.com

Justin A. Young
1229 Lobo Place, NE
Albuquerque, NM 87106
jyoungabq@gmail.com

Richard De Stefano
De Stefano Law Firm, PC
509 Camino de la Placita
Taos, NM 87571
575-751-7100
575-288-2669 (fax)
rick@destefanolaw.com

Catherine F. Davis
(cathy@huntdavislaw.com)
Kenneth Albert Hunt
(ken@huntdavislaw.com)
Chris Pierce
(chris@huntdavislaw.com)
Julie J. Vargas
(julie@huntdavislaw.com)
Hunt & Davis, PC
2632 Mesilla Street, NE, Suite 2
Albuquerque, NM 87110
505-881-3191

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 27, 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.

Certiorari Denied, March 23, 2016, No. S-1-SC-35772

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-040

No. 34,108 (filed February 2, 2016)

RAY CASTILLO,
Plaintiff-Appellant,
v.
JOSE LUIS ARRIETA, MANUEL ARRIETA, THE ARRIETA LAW FIRM, P.C.,
and JOSE LUIS ARRIETA, P.C.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
LISA B. RILEY, District Judge

DAMON B. ELY
LAW OFFICES OF DAMON B. ELY
Albuquerque, New Mexico

MIGUEL J. CHAPA
CHAPA LAW GROUP, P.C.
San Antonio, Texas
for Appellant

CODY R. ROGERS
MILLER STRATVERT P.A.
Las Cruces, New Mexico
for Appellees Manuel Arrieta and
the Arrieta Law Firm, P.C.

JOSE LUIS ARRIETA
Las Cruces, New Mexico
Pro se Appellee

Opinion

Linda M. Vanzi, Judge

{1} In 2006 Plaintiff Ray Castillo signed a document with a provision requiring him to arbitrate "any dispute" arising between him and his attorneys, who are now defendants in this case. The present lawsuit—alleging legal malpractice and related claims—can only proceed to a jury trial if, as a matter of contract, the arbitration clause does not apply, or if it is otherwise unenforceable.

{2} An arbitration clause in a fee agreement between attorney and client implicates unique legal and ethical concerns that are presently being debated, with other jurisdictions taking varied approaches to enforceability. *See generally* Terese M. Schireson, Comment, *The Ethical Lawyer-Client Arbitration Clause*, 87 Temp. L. Rev. 547, 557-64 (2015). For the reasons discussed in this Opinion, we hold that the plain text of this unusually broad arbitration provision reasonably applies to Plaintiff's malpractice claim, but that it is unenforceable if it was signed without Plaintiff's informed consent. We reverse the district court's decision compelling arbitration and remand for proceedings to determine the circumstances surrounding negotiation of the fee agreement.

I. BACKGROUND

{3} On August 7, 2006, Plaintiff signed a contingency fee agreement with Jose Luis Arrieta and the Arrieta Law Firm, P.C., which Plaintiff alleges was then also the firm of Jose's brother and co-counsel, Manuel Arrieta. The representation was related to injuries Plaintiff allegedly suffered less than a month earlier in a work site accident—the severity of which is now disputed by the parties. This dispute, along with most other factual disputes raised in the briefs, is not relevant to our analysis.

{4} The fee agreement at issue contains fourteen numbered paragraphs. The final numbered paragraph succinctly provides:

> **ARBITRATION CLAUSE:** Should any dispute arise, Client and Attorney agree to submit their dispute to arbitration.

Plaintiff signed the fee agreement, affirming that he "read the foregoing terms and agree[d] to them without reservation." There is no other language in the agreement that discusses the scope or meaning of the arbitration clause or provides any explanation of arbitration generally. There is no indication in the agreement that Plaintiff was waiving his right to a jury trial should he sue his attorney for malpractice. Nor is there any suggestion that Plaintiff seek advice of independent counsel before agreeing to such a waiver.

{5} In 2013 Plaintiff brought this lawsuit against Jose, Manuel, and their law firms (collectively, Defendants), alleging that Defendants breached their obligations in the fee agreement, breached an implied covenant of good faith and fair dealing, and committed legal malpractice resulting in Plaintiff's inability to present his personal injury case. When Defendants moved to compel arbitration, Plaintiff opposed the motion on grounds that the arbitration clause was ambiguous, did not clearly apply to a legal malpractice claim, and was otherwise unconscionable and unenforceable as a matter of public policy. With respect to enforceability, Plaintiff argued, in part, that an attorney has fiduciary obligations to his client, which includes an obligation to explain the meaning and scope of an agreement to arbitrate, including the relative advantages and disadvantages of prospectively giving up the right to a jury trial for any future malpractice claim.

{6} Plaintiff and Defendants submitted conflicting affidavits related to the circumstances surrounding negotiation of the fee agreement. According to Defendants, each paragraph was reviewed with and explained to Plaintiff before the agreement was signed. Specifically, the defense affidavit states that Plaintiff was told that any dispute arising from the representation "would be subject to arbitration through a neutral arbitrator selected by both parties." In contrast, Plaintiff's affidavit states that Defendants never discussed anything about arbitration with him and that he was never told that he would be waiving his right to a jury trial if he sued Defendants for malpractice.

{7} Plaintiff sought leave to depose Defendants in order to investigate the factual dispute evinced by the affidavits. Without any evidentiary hearing, the district court—either believing the factual dispute to be irrelevant, or else resolving

the dispute on the face of the conflicting affidavits—denied Plaintiff's request to conduct discovery and granted Defendants' motion to compel arbitration.

II. DISCUSSION

{8} Plaintiff makes several related arguments on appeal, which we summarize as: (1) the arbitration provision, which was included in an agreement dealing primarily with attorney fees, does not clearly apply to the malpractice claim; and (2) enforcement of the provision violates public policy unless Plaintiff was sufficiently informed "of the details of the arbitration process and the pros and cons of arbitration," and given the opportunity to seek advice of independent counsel. "We review de novo the grant of the motion to compel arbitration in the same manner we would review a grant of a summary judgment motion." *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 4, 134 N.M. 630, 81 P.3d 573. As such, the question cannot be resolved as a matter of law if there remain disputed issues of material fact. *See Campbell v. Millennium Ventures, LLC*, 2002-NMCA-101, ¶¶ 13-14, 132 N.M. 733, 55 P.3d 429.

A. The Legal Malpractice Claim Is Within the Scope of the Arbitration Clause

{9} As an initial matter, we are asked to determine whether the arbitration provision relied upon is even intended to apply to Plaintiff's legal malpractice claim. *See Clay v. N.M. Title Loans, Inc.*, 2012-NMCA-102, ¶ 14, 288 P.3d 888 ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (internal quotation marks and citation omitted)). "Under contract law, the scope of an arbitration provision—whether the parties intended to submit to arbitration—is determined by applying the plain meaning of the contract language." *Id.* (alteration, internal quotation marks, and citation omitted). The clause in this case is included in an agreement that deals primarily with attorney fees, and is broadly worded to apply to "any dispute" that may arise between the parties. Plaintiff considers this language to be ambiguous, and asks us to construe any ambiguity strictly against Defendants.

{10} "We construe ambiguities in a contract against the drafter to protect the rights of the party who did not draft it." *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 14, 134 N.M. 558, 80 P.3d 495. But "[a]rbitration clauses such as the one before us are drafted with broad strokes and, as a result, require broad interpretation." *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 55, 131 N.M. 772, 42 P.3d 1221. "When parties voluntarily contract to arbitrate their grievances, an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Horne v. Los Alamos Nat'l Sec., L.L.C.*, 2013-NMSC-004, ¶ 46, 296 P.3d 478 (alteration, internal quotation marks, and citation omitted); *see Heimann v. Kinder-Morgan CO2 Co., L.P.*, 2006-NMCA-127, ¶ 7, 140 N.M. 552, 144 P.3d 111 ("[A]mbiguity in arbitration clauses should be resolved to favor arbitration."). We will certainly not construe a broad but unambiguous arbitration clause in a manner counter to its plain text. *See Clay*, 2012-NMCA-102, ¶ 27.

{11} However, our prior cases dealing with broadly worded arbitration clauses have still required *some* relationship between the dispute at issue and the general substance of the underlying agreement. *See id.* ¶ 14 ("In order to fall within the scope of the arbitration clause, the claims at issue must bear a 'reasonable relationship' to the contract in which the arbitration clause is found."); *Santa Fe Techs.*, 2002-NMCA-030, ¶ 52. Although the arbitration provision we examined in *Clay*—by its terms—applied only to matters that arose from or were related to the underlying agreement, we were nonetheless persuaded that "even the most broadly[] worded arbitration agreements still have limits founded in general principles of contract law," and that courts should "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." 2012-NMCA-102, ¶¶ 18, 22-23 (internal quotation marks and citation omitted).

{12} Thus, a party to even the most general arbitration agreement "may be assumed to have intended to arbitrate issues that are closely related to those governed by the agreement itself, but not those that are unrelated to the agreement, out of the context of the agreement, or outrageous and unforeseeable." *Id.* ¶ 20; *see Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995) ("[I]f two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, [it is] elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract.").

{13} The underlying agreement at issue in this case is styled as an "Attorney-Client Contingency Fee Agreement." It deals primarily with attorney fees—provisions regulating minimum deposits for litigation and costs, legal fees and billing practices, attorney's charging lien, and other such matters. But it also describes the scope of representation, discusses discharge and withdrawal, and disclaims liability for various issues. Importantly, Paragraph 2 contains the attorney's obligations to the client to "provide those legal services reasonably required to represent Client, and . . . take reasonable steps to inform Client of progress and to respond to Client's inquiries." In short, the agreement, like any retainer agreement, broadly governs the attorney-client relationship and sets out various obligations between the parties.

{14} Plaintiff's complaint for legal malpractice is based on Defendants' "failing to pursue the proper entities, failing to preserve evidence, failing to diligently pursue the case, failing to properly communicate with the clients and otherwise acting in an unreasonable and negligent manner." In other words, and without requiring much abstraction, the gist of the complaint is that Defendants "failed to provide those legal services required to represent" Plaintiff, and failed to keep Plaintiff informed and respond to his inquiries—which are the same obligations described in Paragraph 2 of the fee agreement. Therefore, because the present dispute fairly implicates the rights and obligations described in the fee agreement, particularly the duties set out in Paragraph 2, we conclude that it would ordinarily be subject to the arbitration clause included in that same agreement. *See Clay*, 2012-NMCA-102, ¶ 20 ("A party may be assumed to have intended to arbitrate issues that are closely related to those governed by the agreement itself[.]"). Whether the arbitration provision may be enforced under the present circumstances is a separate question to which we now turn.

B. The Arbitration Clause Is Unenforceable Absent Plaintiff's Informed Consent

{15} "[A]rbitration agreements are contracts enforceable by the rules of contract law." *Horne*, 2013-NMSC-004, ¶ 16; *see* NMSA 1978, § 44-7A-7(a) (2001) ("An agreement contained in a record to submit

to arbitration any existing or subsequent controversy arising between the parties . . . is valid, enforceable[,] and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."). Contract provisions that are "grossly unreasonable and against our public policy under the circumstances" are not enforceable. *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 31, 146 N.M. 256, 208 P.3d 901. "Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case[,]" considering both statutory and judicial expressions of public policy. *K.R. Swerdfeger Constr., Inc. v. Bd. of Regents, Univ. of N.M.*, 2006-NMCA-117, ¶ 23, 140 N.M. 374, 142 P.3d 962 (internal quotation marks and citation omitted).

{16} Defendants argue that Plaintiff's failure to read and understand the document he signed is no defense to its enforcement. *See Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶ 13, 98 N.M. 541, 650 P.2d 825 ("Each party to a contract has a duty to read and familiarize himself with its contents . . . , and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby."). But the agreement at issue is not an ordinary contract, and typical arm's-length principles that are completely appropriate in ordinary transactions may be less so in dealings between attorney and client.[1] While attorney and client have substantial latitude in defining their relationship, *see Citizens Bank v. C & H Constr. & Paving Co.*, 1979-NMCA-106, ¶ 30, 93 N.M. 422, 600 P.2d 1212, there are necessary limits to the terms that they can agree upon—even at the outset of representation.

{17} "The relation of attorney and client is one of the highest trust and confidence, requiring the attorney to observe the utmost good faith towards his client, and not to allow his private interests to conflict with those of his client." *Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶ 47, 149 N.M. 74, 244 P.3d 342 (alteration, internal quotation marks, and citation omitted). Thus, some courts "give particular scrutiny to fee arrangements . . . casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients." *Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73, 80 (E.D.N.Y. 1994) (omission in original) (internal quotation marks and citations omitted). In New Mexico, while a contingency fee agreement will usually be enforced as written, our courts still follow the rule that the agreement must be reasonable and that it must have "been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee." *Citizens Bank*, 1979-NMCA-106, ¶¶ 40-43 (internal quotation marks and citation omitted). And when an attorney engages in a business transaction with an existing client, our courts "closely scrutinize[]" the agreement and require "a showing that the attorney made a full and frank disclosure of all relevant information that he had and that the client had independent advice before completing the transaction." *Van Orman v. Nelson*, 1967-NMSC-069, ¶¶ 55-58, 78 N.M. 11, 427 P.2d 896. This level of judicial scrutiny—foreign to ordinary transactions—is only justified because the relationship between attorney and client "has always been considered and treated as one of trust and confidence." *Id.* ¶ 57.

{18} Whether the special nature of the attorney-client relationship in any way limits an attorney's ability to include a provision in a fee agreement requiring a client to arbitrate any future malpractice claim is an issue of first impression in New Mexico. The question has been carefully examined by the American Bar Association (ABA) and by state bar ethics committees, with the majority concluding that such a clause is at least ethically permitted, provided certain requirements typically involving the client's informed consent, are met. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425, at 7 (2002) (requiring the client's informed consent after full disclosure of advantages and disadvantages of agreeing to arbitrate); Ariz. Ethics Op. 94-05, at 5 (Mar. 1, 1994) (same); Tex. Ethics Op. 586, 72 Tex. B.J. 128, 129 (Prof'l Ethics Comm. 2009) (same); Va. Legal Ethics Op. 1707, at 3 (Jan. 12, 1998) (same); Cal. Ethics Op. 1989-116 (St. Bar. Comm. on Prof'l Responsibility & Conduct 1989), 1989 WL 253264, at *5 (same, but distinguishing between existing and prospective clients); Conn. Ethics Op. 99-20 (Bar Ass'n Comm. on Prof'l Ethics Jun. 22, 1999), 1999 WL 958027, at *2 ("With respect to arbitration clauses[,] a lawyer will satisfy his ethical duty to [a] client by using plain and intelligible wording in the clause, by directing the client's attention to the clause, and by fairly answering any questions the client asks concerning the clause."); NYCLA Ethics Op. 723 (Cty. Lawyers' Ass'n Comm. Prof'l Ethics July 17, 1997), 1997 WL 419331, at *4 (stating that the attorney must "fully disclose[] the consequences" of the provision, and allow the client an opportunity to seek independent counsel); Okla. Adv. Op. 312 (Bar Ass'n Legal Ethics Comm. Aug. 18, 2000), 2000 WL 33389634, at *6 (same); Vt. Adv. Ethics Op. 2003-7, at 1 (Comm. Prof'l Responsibility 2003) (same). At least one committee has determined (over dissent) that such agreements are permitted only if the client is actually represented by independent counsel. D.C. Ethics Op. 211 (May 15, 1990), *available at* https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion211.cfm. Only two committees have taken categorical approaches to the issue: the clauses are permitted in Maine and strictly prohibited in Ohio until an actual dispute arises. *See* Me. Ethics Op. 170 (Prof'l Ethics Comm'n Dec. 23, 1999), *available at* http://mebaroverseers.org/attorney_services/opinion.html?id=89504; Ohio Adv. Op. 96-9 (Bd. Of Commr's on Grievances & Discipline Dec. 6, 1996), 1996 WL 734408, at *5.

{19} In 2002 the ABA's Standing Committee on Ethics and Professional Responsibility addressed the issue in detail. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 02-425. The ABA persuasively concluded that a mandatory predispute arbitration clause is not a prospective limitation on malpractice liability in violation of the Model Rules of Professional Conduct "unless the retainer agreement insulates the lawyer from liability or limits the liability to which she otherwise would be exposed under common or statutory law." *Id.* at 3-4. However, an attorney's duties under the Rules to explain matters to a client and to avoid conflicts of interest are implicated when a retainer agreement includes a provision requiring arbitration of malpractice claims. *Id.* at 4-7. Since arbitration typically results in a client's waiver of significant rights, including the right to a jury trial, the right to broad discovery, and the right to an appeal on the merits, the ABA decided that an attorney should fairly explain those consequences, as well as the benefits of agreeing to arbitrate in order to comply with the Model Rules. *Id.* at 4-5 (citing Model Rules of Professional Conduct r 1.4(b) (Am. Bar Ass'n 2014), which requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

[1]On appeal, there is no apparent dispute that the parties were in an attorney-client relationship when the fee agreement was signed.

{20} Based in part on the ethical concerns expressed in the ABA and state bar opinions, some courts have held that predispute attorney-client arbitration clauses are unenforceable as a matter of substantive law, unless the meaning and scope of the clauses were sufficiently disclosed to the client. *See, e.g.*, *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6, 10 (Ct. App. 1989); *Haynes v. Kuder*, 591 A.2d 1286, 1291-92 (D.C. 1991) (but concluding that the text of the clause itself, which referred to "the unavailability of court action" sufficiently conveyed all the information necessary); *Hodges v. Reasonover*, 103 So. 3d 1069, 1077-78 (La. 2012); *see also Kamaratos v. Palias*, 821 A.2d 531, 538-39 (N.J. Super. Ct. App. Div. 2003) (discussing consultation with an independent attorney as applied to fee disputes); *Thornton v. Haggins*, 2003 WL 23010100, at ¶ 10 (Ohio Ct. App. 2003) (mem.) (requiring consultation with an independent attorney as a prerequisite to enforcement), *but see Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 504-05 (Tex. 2015) ("[P]rospective clients who sign attorney-client employment contracts containing arbitration provisions are deemed to know and understand the contracts' content and are bound by their terms on the same basis as are other contracting parties."); *Watts v. Polaczyk*, 619 N.W.2d 714, 718-19 (Mich. Ct. App. 2000) (same).

{21} We find the Louisiana Supreme Court's opinion in *Hodges* particularly instructive. Louisiana shares with New Mexico both a strong public policy favoring arbitration, *compare McMillan v. Allstate Indemnity Co.*, 2004-NMSC-002, ¶ 9, 135 N.M. 17, 84 P.3d 65, *with Hodges*, 103 So. 3d at 1072, and a general understanding that an attorney, consistent with the oath of his profession, owes a higher degree of fidelity to and communication with his client than transacting parties ordinarily owe one another, *see Hodges*, 103 So. 3d at 1073, 1077. In light of the attorney's fiduciary duties of "candor and loyalty in all dealings with a client[,]" and because arbitration clauses in fee agreements affect a client's material rights to a jury trial and appeal, the Court, citing ABA Formal Opinion 02-425, ultimately concluded that arbitration clauses in attorney-client agreements are only enforceable if the attorney makes a "full and complete disclosure of the potential effects of [the] arbitration clause, including the waiver of a jury trial, the waiver of the right to appeal, the waiver of broad discovery rights, and the possible high upfront costs of arbitration." *Hodges*, 103 So. 3d at 1078.

{22} The Louisiana approach is consistent with the policies expressed in our own Rules of Professional Conduct. For instance, Rule 16-104(B) NMRA, which is identical to Model Rule 1.4(b)—relied upon by the ABA in Formal Opinion 02-425—requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 16-104(B). Rule 16-107(B) NMRA governs conflict of interest situations. The commentary to the Rule states: "[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." *Id.* cmt. 10. As the ABA noted, "claims against lawyers for malpractice obviously implicate such concerns." ABA Formal Op. 02-425, at 7. Both of these general considerations are specifically evident in our rule addressing prospective limitations on malpractice liability: The Rules do not "prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable *and the client is fully informed of the scope and effect of the agreement*." Rule 16-108(H) comm. cmt. 14 NMRA (emphasis added).

{23} We recognize that the Rules of Professional Conduct do not have the force of substantive law. *See generally Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶¶ 18-21, 106 N.M. 757, 750 P.2d 118 (holding that a violation of the Rules does not, by itself, give rise to a private cause of action). However, the Rules in this instance are also an expression of an attorney's fiduciary obligations of candor and loyalty to his client—an expression of public policy that can preclude enforcement of other transactions between attorney and client when those duties are violated. *C.f. Van Orman*, 1967-NMSC-069, ¶¶ 55-58. We conclude that if an attorney is going to require his client, within the context of their relationship of trust, to waive the right to a jury trial for a future malpractice dispute, such a waiver should be made knowingly with the client's informed consent. "[F]or the purpose of obtaining informed consent, adequate communication will ordinarily include disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." *Spencer v. Barber*, 2013-NMSC-010, ¶ 34, 299 P.3d 388 (internal quotation marks and citation omitted). At a minimum, the attorney should inform his client that arbitration will constitute a waiver of important rights, including, the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits.

{24} Here, the text of the clause itself is no help. It declares in a single sentence only that client and attorney agree to submit "any dispute" to arbitration. We have already held that this is technically sufficient to apply to malpractice claims. However, it is not sufficient to inform the client "of the material advantages and disadvantages of the proposed course of conduct." *See id.* If Plaintiff truly was never warned that he "was waiving [his] right to a trial by jury" if he sued his attorneys for malpractice, as he stated in his affidavit, then inclusion of such a broadly worded and unexplained material term was an overreach by his attorneys that will not be enforced in this Court.

{25} Despite Plaintiff's affidavit claiming otherwise, the district court found that "factual circumstances surrounding the formation of the [fee agreement] indicate that . . . Plaintiff was free to accept or decline the terms" and "Plaintiff knowingly accepted the terms." The only apparent source of this latter conclusion is the court's finding that Plaintiff "continued with the representation" after signing the fee agreement and, prior to this malpractice dispute, "elected to proceed with further and subsequent representation with [Defendants] and other attorneys using the same or similar arbitration provisions[.]" In that vein, Defendants argue at length that Plaintiff never disputed that he later signed four similarly worded agreements and that Plaintiff was always given an opportunity to ask questions and given a copy of the agreement for his files.

{26} That Plaintiff continued with the representation proves nothing. That he later signed similar agreements under similar circumstances demonstrates only that Defendants routinely included the same clause in their agreements with Plaintiff, potentially without ever explaining the meaning and scope of that clause. There are competing affidavits from the parties. One says that Defendants explained each provision of the fee agreement, and

that Plaintiff indicated he understood the meaning of the arbitration clause. The other says that Defendants never "discuss[ed] with [Plaintiff] anything about arbitration[.]" With contradictory affidavits and without any evidentiary hearing, the district court could not have resolved the only relevant factual dispute: Before seeking Plaintiff's signature on this agreement, did Defendants, consistent with their fiduciary obligations, sufficiently disclose the meaning and scope of the arbitration provision? When Plaintiff sought to conduct depositions to test the affidavits, his request for discovery was denied.

{27} On this record we cannot determine whether the motion to compel arbitration was properly granted. We will treat the issue as analogous to the grant of a summary judgment motion. *DeArmond*, 2003-NMCA-148, ¶ 4. Since disputed factual circumstances surrounding the adequacy of the disclosures made to Plaintiff are at the "heart of this case," we conclude that remand is appropriate. *See Spencer*, 2013-NMSC-010, ¶ 39.

C. Defendants' Arguments

{28} We briefly address Defendants' two remaining arguments. First, Defendants argue that Plaintiff "is not free to pick and choose which portions of the contract he wishes to enforce, and absent any applicable affirmative defense, remains bound by the contract as a whole." Second, Defendants argue that Plaintiff's claim of a breach of fiduciary duty is an effort to place the merits of the case before the appellate courts.

{29} The first argument is not persuasive. Plaintiff is challenging the arbitration clause as an unexplained and unenforceable material term within an otherwise enforceable contract. He is doing so while simultaneously alleging, in part, that Defendants breached that contract. This is no different than the challenges to arbitration asserted in many of our leading cases. *See, e.g.*, *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶¶ 7-8, 150 N.M. 398, 259 P.3d 803 (alleging breach of contract while disputing the enforceability of the arbitration clause in that contract). In the only authority cited by Defendants, we applied the rule that a nonsignatory "is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing" the clause. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, ¶¶ 11, 14, 338 P.3d 123 (internal quotation marks and citation omitted). "In the arbitration context, [this] doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the . . . clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). Of course, Plaintiff makes no allegation that the clause should not be enforced against him on the ground that he is a non-signatory to the fee agreement, making the equitable principle applied in *Damon* wholly inapposite.

{30} With respect to Defendants' second argument, we clarify that we are not deciding any aspect of Plaintiff's substantive malpractice claim. We are only defining the parameters by which a claim of malpractice in the attorney-client relationship is arbitrable. The underlying malpractice claim is to be resolved in arbitration or in the district court, depending on the district court's resolution of the relevant factual dispute. *See Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶ 17, 149 N.M. 681, 254 P.3d 124 ("The general rule is that the arbitrability of a particular dispute is a threshold issue to be decided by the district court unless there is clear and unmistakable evidence that the parties decided otherwise under the terms of their arbitration agreement.").

III. CONCLUSION

{31} We remand for the district court to determine whether Defendants sufficiently disclosed the meaning and scope of the arbitration agreement to Plaintiff. On remand, the court should hold an evidentiary hearing on the issue. If Defendants did not inform Plaintiff that the agreement constituted a waiver of important rights, including the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits, then Defendants' motion to compel arbitration should be denied.

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

LINDA M. VANZI, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
J. MILES HANISEE, Judge

Certiorari Denied, April 7, 2016, No. S-1-SC-35805

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-041

No. 34,185 (filed February 15, 2016)

ERIC TRUJILLO,
Worker-Appellant,
v.
LOS ALAMOS NATIONAL LABORATORY,
Employer/Self-Insured-Appellee.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
LEONARD J. PADILLA, Workers' Compensation Judge

ANNIE-LAURIE COOGAN
ANNIE-LAURIE COOGAN LLC
Santa Fe, New Mexico
for Appellant

MINERVA CAMP
CAMP LAW, LLC
Albuquerque, New Mexico
for Appellee

Opinion

James J. Wechsler, Judge

{1} Worker Eric Trujillo seeks review of a Workers' Compensation Administration ruling that denied reinstatement of temporary total disability (TTD) and medical benefits. The Workers' Compensation Judge (WCJ) dismissed Worker's claims after ruling that Worker failed to prove causation to a reasonable degree of medical probability. Because substantial evidence does not support the WCJ's ruling, we reverse.

BACKGROUND

{2} Worker was employed by Los Alamos National Laboratory (LANL) (Employer)[1] as a laborer and labor foreman beginning in July 1994. Worker's duties included trenching, snow removal, tree cutting, moving furniture, construction, and demolition work. Over the years, Worker suffered various work and non-work related injuries. Several of these injuries affected Worker's back and neck. Worker did not miss significant time at work due to any of these injuries, although he did file a workers' compensation claim for an ergonomic injury in 2006 that was denied.

{3} On November 30, 2012, Worker was participating in the installation of electrical equipment when he fell approximately six feet to the ground from a scaffolding. Worker testified that he was carrying a chipping hammer down from the scaffolding platform, stepped on an oily or slick spot on the scaffolding, and landed flat on his back. Worker also testified that the chipping hammer weighed approximately twenty-five pounds and that his hard hat cracked when he hit the ground. Worker's testimony as to the circumstances of the accident are not in dispute.

{4} Several hours later, Worker arrived at Occupational Medicine (Occ Med), which is Employer's in-house medical facility. Occ Med is the initial medical provider for on-the-job injuries and also provides interim care for on-the-job injuries and clearance for employees to return to work from injuries or extended absences. Worker was diagnosed with (1) multiple contusions to the back, neck, and upper-extremities; (2) tenderness in the mid-back and C-spine; and (3) tingling in both elbows. Worker's examination was described as "unremarkable," and he was given anti-inflammatory medication and allowed to return to work without restrictions.

{5} Worker finished his shift without further incident. After returning home, Worker became very stiff and was making nonsensical statements, at which point his wife drove him to Los Alamos Medical Center. Worker was diagnosed with similar conditions noted at Occ Med, as well as a head injury.

{6} Worker returned to Occ Med for follow-up care on December 3, 2012, and he was seen by Dr. Sara Pasqualoni. Dr. Pasqualoni diagnosed Worker with (1) a concussion; (2) cervical, thoracic, and lumbar strains; (3) chronic pain syndrome; and (4) elevated blood pressure. At the conclusion of the appointment, Worker stood to exit and fell directly onto his face. Worker was transported back to Los Alamos Medical Center and was re-admitted. During a follow-up to Worker's December 3, 2012 appointment, Dr. Pasqualoni also referred Worker to his primary care physician, Dr. Kidman, for continued management of Worker's chronic pain.

{7} Worker returned to Occ Med on December 10, 2012 for follow-up care. Worker was ordered to continue physical therapy and to return to Occ Med for additional evaluation.

{8} Worker again reported to Occ Med on December 20, 2012, and he was evaluated by Dr. Sandra Scher. During this visit, Dr. Scher conducted a physical evaluation and reviewed CT scans of Worker's cervical spine, thoracic spine, and lumbar spine; a CT scan of Worker's head; an MRI of Worker's cervical spine; and X-rays of Worker's thoracic spine and lumbar spine. The resulting assessment was "chronic pain, unknown at this time whether it continues to be due to fall or underlying chronic pain syndrome."

{9} At this point, Worker was referred to Dr. Theresa Elliott for additional pain management. Dr. Elliott specializes in occupational medicine, chronic pain management, and interventional spine medicine. Occ Med periodically refers "complex pain patients [for whom] we can't find something identifiable" to Dr. Elliott.

{10} Dr. Elliott evaluated Worker on January 9, 2013. Following review of Worker's medical records and radiologic studies, Dr. Elliott took an oral history and conducted a physical examination. Dr. Elliott diagnosed Worker with injuries, including (1) cervical strain, (2) thoracic strain, (3) lumbar strain, (4) bilateral elbow strains, and (5) preexisting cervical and lumbar

[1]Prior to a transition to in-house management of labor services at LANL in 2008, Worker was employed by Johnson Controls and KSL. Previous on-the-job injuries/accidents referred to in this opinion may have occurred during employment with these entities. Because there is no legal significance as to which entity employed Worker prior to 2008, we refer simply to Employer or LANL throughout.

pain that was "possibly aggravated" by the accident. Dr. Elliott also conducted a drug test that was positive for benzodiazepines, opioids, oxycodone, and THC. Dr. Elliott referred Worker for additional imaging studies and physical therapy.

{11} Worker returned to Occ Med on January 11, 2013, and he was evaluated by Dr. Pasqualoni. Dr. Pasqualoni reviewed Worker's radiologic imaging and conducted a physical exam but was unable to determine the cause of Worker's pain. Dr. Pasqualoni did not make any additional recommendations, electing to see if Dr. Elliott's examination resulted in objective findings directly associated with Worker's accident.

{12} Worker's final visit to Occ Med occurred on February 6, 2013. After a physical examination with Dr. Pasqualoni, Worker was ordered to continue physical therapy and continue pain management with Dr. Elliott. Worker was also cleared to return to work with restrictions, including no driving, climbing, or lifting items over ten pounds. Dr. Pasqualoni did not place Worker at maximum medical improvement (MMI) given her interest in the results of Worker's treatment with Dr. Elliott. Following his appointment at Occ Med, Worker was improperly ordered to undergo a drug test.[2] Worker failed to complete the drug test and was subsequently terminated. Worker's TTD and medical benefits were also terminated at that time.

{13} Nearly one year later, on March 4, 2014, Dr. Belyn Schwartz evaluated Worker in connection with lingering injuries associated with Worker's November 30, 2012 accident. Following a physical examination, Dr. Schwartz made various conclusions as to the causal relationship between Worker's fall and his injuries. Dr. Schwartz prescribed a course of physical therapy and anti-inflammatory medication.

{14} After a series of hearings, the WCJ issued a compensation order denying Worker's claims based upon a finding that Worker failed to prove causation between the November 30, 2012 accident and injuries to a reasonable degree of medical probability.

STANDARD OF REVIEW

{15} We apply whole record review to appeals of workers' compensation determinations in order to determine whether substantial evidence supports the WCJ's ruling. *Henington v. Tech. Vocational Inst.*, 2002-NMCA-025, ¶ 19, 131 N.M. 655, 41 P.3d 923. In doing so, we "view[] the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." *Grine v. Peabody Nat. Res.*, 2006-NMSC-031, ¶ 28, 140 N.M. 30, 139 P.3d 190 (internal quotation marks and citation omitted). After reviewing all the evidence, both favorable and unfavorable, we "disregard that which has little or no worth" and then "decide if there is substantial evidence in the whole record to support the agency's finding or decision." *Tallman v. ABF (Arkansas Best Freight)*, 1988-NMCA-091, ¶¶ 9-10, 108 N.M. 124, 767 P.2d 363.

CAUSATION UNDER THE WORKERS' COMPENSATION ACT

{16} The Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2015), provides that injuries caused by on-the-job accidents are compensable if the worker proves a disability that is a "natural and direct result of the accident." Section 52-1-28(A)(3). To prove causation, the worker must present expert medical testimony by a qualified health care provider. Section 52-1-28(B).

{17} The testimony of a qualified health care provider must establish, to a reasonable medical probability, that a causal relationship exists between the accident and disability. *Archuleta v. Safeway Stores, Inc.*, 1986-NMCA-092, ¶ 6, 104 N.M. 769, 727 P.2d 77. The language required to convey a reasonable medical probability "need not [be offered] in positive, dogmatic language or in the exact language of the statute[,]" but it must permit "a reasonable inference that the disability is the natural and direct result, as a medical probability, of the accident." *Gammon v. Ebasco Corp.*, 1965-NMSC-015, ¶¶ 22-23, 74 N.M. 789, 399 P.2d 279.

THE WORKERS' COMPENSATION ADMINISTRATION'S ORDER DENYING BENEFITS

{18} Three health care providers offered opinion testimony: Dr. Sara Pasqualoni, Dr. Theresa Elliott, and Dr. Belyn Schwartz. Our administrative rules require that medical doctors testify by deposition during workers' compensation proceedings. 11.4.4.12(G)(4) NMAC (12/31/12). Based upon these three depositions, the WCJ made the following findings related to causation.

Dr. Pasqualoni

{19} (1) Dr. Pasqualoni diagnosed Worker with cervical, thoracic, and lumbar strains, and a concussion; (2) Dr. Pasqualoni deferred narcotic treatment of chronic pain in Worker's upper back, neck, and shoulders to Worker's primary care physician; and (3) Dr. Pasqualoni intended to release Worker to work on February 6, 2013.

Dr. Elliott

{20} (1) Dr. Elliott completed a Form Letter to Health Care Provider on March 18, 2014, indicating that Worker's cervical, thoracic, and lumbar strains are related to an on-the-job injury; (2) Dr. Elliott testified that Worker's pre-existing cervical and lumbar pain were "possibly aggravated" by the accident; (3) Dr. Elliott testified that Worker's problems are pre-existing; and (4) Dr. Elliott testified that Worker's accident "could have" aggravated his pre-existing condition.

Dr. Schwartz

{21} (1) Dr. Schwartz testified that Worker's accident "likely" aggravated some underlying, degenerative process; (2) Dr. Schwartz testified that "it is very difficult to say" whether the accident caused Worker's complaints; (3) Dr. Schwartz testified "I could opine" when asked about causation; and (4) Dr. Schwartz testified that Worker's accident aggravated his pre-existing condition.

{22} The above findings led the WCJ to conclude that "[w]orker fail[ed] to prove by a preponderance of competent medical evidence, as required by [Section] 52-1-28, that the accident of November 30, 2012, caused Worker's condition, or aggravated a pre-existing condition."

REOPENING OF EVIDENCE

{23} As a threshold matter, we must consider Employer's argument that the WCJ improperly reopened the evidence following the close of Worker's case. This matter was initially set for trial on February 5, 2014. Worker presented his case in chief and rested. During Employer's case, the WCJ elected to recess in order to allow for depositions to be taken of certain witnesses called by Employer. Worker moved to reopen his case at that time. Employer objected.

[2]The Workers' Compensation Administration's order found, as a matter of law, that "Employer violated its own policies and federal regulations by ordering Worker to undergo a reasonable suspicion drug test when Employer did not have reasonable suspicion." This portion of the Workers' Compensation Administration's order has not been appealed at this time.

{24} During the recess, various motions and responses were filed, including Worker's response to Employer's motion for summary judgment, to dismiss, and for judgment as a matter of law. A medical record related to Worker's physical examination by Dr. Belyn Schwartz on March 4, 2014 was attached to this response. In a hearing on March 24, 2014, Employer opposed the admission of documents that did not exist at the time of the initial trial, arguing that admission would amount to a new trial.

{25} The WCJ, relying on 11.4.4.12(L)(5) NMAC (12/31/2012), ordered that discovery be reopened "in the interests of justice" and in accordance with the New Mexico Administrative Code and New Mexico Rules of Civil Procedure. "[A] court may re-open the evidence in a case at its discretion." *DiMatteo v. Doña Ana Cty.*, 1985-NMCA-099, ¶ 27, 104 N.M. 599, 725 P.2d 575. However, it is also "well settled that a motion to reopen must cross a threshold of showing a good reason for the requesting party not presenting its case at the first hearing." *State v. McClaugherty*, 2007-NMCA-041, ¶ 57, 141 N.M. 468, 157 P.3d 33 (Kennedy, J., concurring in part and dissenting in part). In this case, our review of the hearing transcript reveals that the "interests of justice" are triggered by allegations of discovery abuses or violations by Worker. *See* 11.4.4.12(L)(5) NMAC (12/31/2012) ("Under exceptional circumstances and in the interest of justice, within ten (10) days of the close of the adjudication hearing, the judge has discretion to direct or allow supplementation of evidence.").

{26} Given established precedent granting broad discretion to trial courts in similar circumstances, the WCJ's determination to reopen this case for the purpose of admitting additional evidence did not constitute an abuse of discretion in this case. *See Foreman v. Myers*, 1968-NMSC-138, ¶ 17, 79 N.M. 404, 444 P.2d 589 (holding that a trial court's determination to reopen a case is "within the sound discretion of the trial court and will not be lightly overturned.").

BALANCING OF ADMISSIBLE DEPOSITION TESTIMONY

{27} Our standard of review requires that the expert witness testimony be balanced to determine "if there is substantial evidence in the whole record to support the agency's finding or decision." *Tallman*, 1988-NMCA-091, ¶ 10. The *Tallman* Court discussed *McMillian v. Schweiker*, 697 F.2d 215 (8th Cir. 1983), as an example of when an administrative determination is not supported by substantial evidence. *Tallman*, 1988-NMCA-091, ¶ 10.

{28} In *McMillian*, the appellant suffered a stroke and was diagnosed with a brain tumor. 697 F.2d at 217. Following his surgery, the appellant applied for social security disability based on symptoms including difficulty walking, difficulty using his left hand, fatigue after physical exertion, difficulty concentrating, and recurring headaches. *Id.* at 218. At his disability determination hearing, the appellant presented expert testimony from five health care providers. This testimony included: (1) opinions from two doctors that the appellant was "totally and permanently disabled;" (2) an opinion from a third doctor that the appellant was "prevented from engaging in full time employment;" and (3) opinions from two additional doctors that discussed medical findings but failed to offer opinions as to the appellant's ability to return to the workforce in any capacity. *Id.* at 218-19. Additional testimony was offered by the appellant's witnesses, including his wife, friends, and former co-workers, as well as additional expert testimony by a vocational expert. *Id.* at 219. The administrative law judge (ALJ), relying "principally" on the testimony of the vocational expert, found that the appellant's physical limitations "would not preclude the performance of sedentary job activity[.]" *Id.* at 219-20 (internal quotation marks and citation omitted). This determination was upheld by the district court but was reversed by the Eighth Circuit. *Id.* at 217. In reversing, the court noted that "nothing in the medical reports specifically contradicts [the appellant's] complaints of difficulty in concentration and fatigue[,]" and that the ALJ's finding "discredited" the appellant's physical complaints and departed from the medical evidence. *Id.* at 221. ("[T]he medical reports reveal that three examining physicians . . . concluded that [the appellant] could not engage in substantial gainful employment due to his stroke and brain surgery, while the two other examining physicians refrained from expressing an opinion on the matter.").

{29} The present case is largely analogous to *McMillian*. Both cases examine agency decisions that are predicated largely on expert testimony by health care providers. Both cases examine whether the agency determination was supported by substantial evidence. In *McMillian*, the court held that the ALJ's ruling was not supported by the vocational or medical evidence. By implication, the court determined that medical testimony that fails to offer an opinion as to an ultimate issue is merely balanced against less equivocal testimony. *Id.* ("[T]he cursory observation made by two examining physicians that [the appellant's] mental and verbal functions 'were not visibly abnormal' does not detract from [the appellant's] complaint of difficulty in concentration.").

{30} In the present case, Worker was involved in an on-the-job accident on November 30, 2012 and, at least as recently as March 4, 2014, had pain in his lower back, left shoulder, and extremities that he attributes to the accident. Expert testimony was offered by Drs. Elliott, Pasqualoni, and Schwartz for the purpose of establishing whether a causal relationship existed between Worker's accident and injuries. *See* § 52-1-28(A). We review the testimony of each doctor to determine whether substantial evidence supports the WCJ's determination.

The Deposition Testimony of Dr. Elliott

{31} Dr. Elliott examined Worker on January 9, 2013, and her deposition testimony was taken on two separate occasions: January 30, 2014, and May 27, 2014. On January 30, 2014, she testified:

> Q: What were your diagnoses?
> A: There were five, well, basically four: cervical strain; No. 2, thoracic strain; No. 3, lumbar strain; No. 4, bilateral elbow strains with questionable ulnar neuritis. And then the fifth impression was preexisting cervical and lumbar pain, possibly aggravated.
> Q: With regard to all five of those, were you able to come to an opinion as to the cause of those diagnoses or whether they were preexisting?
> A: Well, as I said, the only thing that I mentioned was preexisting was the cervical and lumbar pain, and I felt that it was possibly aggravated.

Dr. Elliott repeated these diagnoses in her second deposition, in which she testified:

> Q: [In] your deposition, you gave some diagnoses to a reasonable degree of medical probability . . . .
> A: Yes. I stated that there were four to five diagnoses, one was his cervical strain, number two was a thoracic strain, number three

was a lumbar strain, number four was bilateral elbow strain with questionable ulnar neuritis, and the fifth impression was preexisting cervical and lumbar pain, possibly aggravated.

. . . .

Q: And the only condition you felt might be preexisting was the cervical and lumbar pain possibly aggravated?

A: That is correct.

Dr. Elliott went on to testify,

Q: Do you feel confident based on what you saw on January 9 [, 2013] to render the opinions that you rendered in your deposition?

. . . .

A: If you're asking me if I still uphold all of my opinions that I stated in my original deposition, yes, I do.

Q: And it's your opinion that [Worker] did suffer a work-related injury and various medical conditions resulting from that fall?

A: Correct.

Additionally, on March 18, 2014, Dr. Elliott answered "yes" and signed the form letter referenced, though incompletely, in the WCJ's compensation order, which stated:

> In your opinion, are the conditions or complaints for which you have treated the Worker causally related to an on-the-job injury . . . based upon a reasonable medical probability?

{32} The WCJ's order downplayed both the unequivocal nature of the March 18, 2014 form letter and the substance of the above quoted testimony. Instead, the WCJ's order focused on more equivocal portions of Dr. Elliott's testimony that relate exclusively to Worker's pre-existing cervical and lumbar pain. For example, Dr. Elliott testified that Worker's pre-existing cervical and lumbar pain was "possibly aggravated" by the accident. Dr. Elliott also testified that a fall from a scaffolding "could have" aggravated pre-existing back pain. These comments do not, however, indicate that the newly diagnosed injuries, including cervical strain, thoracic strain, lumbar strain, and bilateral elbow strain were pre-existing or merely aggravated by Worker's accident. In the workers' compensation context, a health care provider must be allowed to equivocate with respect to certain injuries about which he or she is unsure as to causation while still offering positive statements as to others. A contrary holding would set up an all-or-nothing requirement for health care providers making causation determinations. To elaborate, by way of example, a health care provider can testify that a causal relationship exists between a workplace accident and a worker's concussion but that he or she is unsure as to whether a causal relationship exists with respect to the same accident and the worker's sprained ankle. The lack of certainty as to the second injury does not negate the certainty as to the first.

{33} This is the scenario that played out here. Worker was referred to Dr. Elliott following initial treatment at Occ Med. Dr. Elliott reviewed Worker's medical history and conducted a physical exam. She noted that he had pre-existing cervical and lumbar pain. This pre-existing pain did not prevent Worker from completing daily tasks. Because Worker claimed that he could no longer perform daily tasks after the November 30, 2012 accident, Dr. Elliott presumably attributed the injuries Worker complained of and his inability to complete daily tasks to that accident.

{34} Dr. Elliott's inability to determine to a reasonable medical probability whether Worker's fall aggravated pre-existing injuries is largely immaterial to this analysis. Dr. Elliott diagnosed Worker with four "new" injuries after the November 30, 2012 accident. She did so to a reasonable medical probability. Whether Worker's fall "possibly" or "could have" aggravated pre-existing injuries *in addition* to causing Worker's cervical, thoracic, lumbar, and bilateral elbow strains does not logically lead to the WCJ's conclusion that all of "Worker's problems are pre-existing."

{35} During her deposition, Dr. Elliott was asked whether it was possible that diagnoses one through four were entirely pre-existing, to which she answered, "It's possible, yes." Employer seizes upon this point as an example of equivocation by Dr. Elliott on the matter of causation. We disagree. The statement does not represent acceptance of the premise; it merely reflects acknowledgment of the possibility that the injuries are pre-existing. The statement is not sufficient to negate the clear assertions of causation previously discussed. *See White v. Land Valley Co.*, 1957-NMSC-100, ¶ 14, 64 N.M. 9, 322 P.2d 707 ("[T]he verdict must rest upon probabilities and not upon mere speculation, conjecture, surmise, or bare possibilities[.]"), *overruled in part by Mascarenas v. Kennedy*, 1964-NMSC-179, 74 N.M. 665, 397 P.2d 312.

{36} In summary, Dr. Elliott's testimony provides clear evidence of causation to a reasonable degree of medical probability between Worker's November 30, 2012 accident and diagnosed injuries including (1) cervical strain; (2) thoracic strain; (3) lumbar strain; and (4) bilateral elbow strain. Dr. Elliott's testimony does not provide evidence of causation to a reasonable degree of medical probability as to (1) any aggravation of pre-existing cervical or lumbar pain, or (2) any injuries caused by Worker's secondary fall at Occ Med on December 3, 2012.

The Deposition Testimony of Dr. Pasqualoni

{37} Dr. Pasqualoni's testimony is difficult to reconcile, in part, because neither party actually posed to her a question about causation to a reasonable medical probability. While Occ Med providers diagnosed Worker with numerous injuries and treated Worker for them, nowhere in Dr. Pasqualoni's 107-page deposition does she positively affirm or deny that Worker's injuries were causally related to the November 30, 2012 accident to a reasonable medical probability.

{38} During Worker's December 3, 2012 appointment at Occ Med, Dr. Pasqualoni diagnosed Worker with a concussion; cervical, thoracic, and lumbar strains; chronic pain syndrome; and elevated blood pressure. Dr. Pasqualoni further testified that Worker's chronic pain was centralized in his neck, shoulders, and upper back. Additionally, Dr. Pasqualoni adopted the diagnoses of Los Alamos Medical Center staff that included muscular back pain and spasms and chronic myofascial neck pain and shoulder pain. These diagnoses, when viewed in the aggregate, indicate a combination of new injuries and chronic pain. In an attempt to resolve these dual diagnoses, Dr. Pasqualoni and Occ Med staff debated whether Worker's specific complaints were causally related to the November 30, 2012 accident or were the result of pre-existing chronic pain. Relevant excerpts from Dr. Pasqualoni's deposition highlighting this debate include the following:

> Q: Can you tell us what Dr. Scher found in her notes in terms of [Worker's] condition? . . .
>
> A: So she, doing his exam and reviewing all of his radiologic studies, basically puts in her Assessment "chronic pain, unknown

at this time whether it continues to be due to fall or underlying chronic pain syndrome[.]"

. . . .

Q: Based on your treatment of [Worker], your clinical training as an occupational provider, and the last time you saw him, same question, would an I[ndependent] M[edical] E[xam] be helpful[?] . . .

A: I believe that a chronic pain specialist would be the best person to do the IME, because it's very complex differentiating between [Worker's] underlying chronic pain syndrome, which is the fibromyalgia, and whatever injury [Worker] incurred when he fell off the scaffold.

Similarly, when asked to explain how Worker's symptoms and radiologic studies conform with her medical expectations, Dr. Pasqualoni stated the following:

Q: Could those findings account for some of the numbness and paresthesias he felt in his arms? . . .

A: So, in general, the thecal sac effacement should not cause any symptoms or paresthesia, so it should not cause any neurologic deficits. . . . So on the thoracic spine, there was no canal or foraminal stenosis. And if you're talking about arm numbness and tingling, usually it's going to be lower cervical, upper thoracic spine that would account for those symptoms. . . . The cervical spine, there was no canal or foraminal stenosis.

Q: Okay. But there is disc protrusions in the thoracic spine that efface the thecal sac. . . . And you're saying that that does not ever cause numbness in the arms.

A: It should not. . . .

Q: So you're saying that under no circumstances mild effacement of thecal sacs does not affect the pressure on the nerve.

A: No, not unless it's concurrent with canal stenosis, as well.

Q: All right. So let's look at the cervical, . . .

A: So he had a mild annular bulge at C3-4, smaller bulges at C4-5 and C5-6, and he had facet arthropathy at C5-6, no resulting spinal stenosis or neural foraminal narrowing.

Q: Would any of those conditions, mild annular bulges or regular bulges or facet arthropathy, cause numbness or paresthesia in his hands and arms?

A: Not without stenosis.

Q: So those findings in no way explained why he has some numbness in his arms and shoulders?

A: No.

We are in no position to question Dr. Pasqualoni's conclusions about Worker's radiological image studies. At the same time, we are compelled to note that none of her testimony states that Worker's accident was not causally related to the numbness in Worker's arms and shoulders, or other complained of symptoms. Dr. Pasqualoni's testimony also fails to indicate, or establish to a reasonable medical probability, that Worker's symptoms are somehow related to a chronic or pre-existing injury.

{39} As the Eighth Circuit did in *McMillian*, this Court declines to give substantial weight to expert opinion testimony that fails to speak to the ultimate issue in the case. *See Tallman*, 1988-NMCA-091, ¶ 9 (holding that a whole record review empowers appellate courts to "analyze and examine all the evidence and disregard that which has little or no worth"). As such, Dr. Pasqualoni's testimony failed to provide a medical opinion as to causation that is sufficient to (1) contradict the opinion of Dr. Elliott, or (2) independently support the WCJ's determination.

{40} We further note that Dr. Pasqualoni's testimony did not factor significantly in the WCJ's order in this case. The WCJ made only four findings based on Dr. Pasqualoni's testimony, and two of those related to Worker's previous prescription drug regimen. The other two findings outline Dr. Pasqualoni's (1) initial diagnoses and (2) clearance for Worker to resume employment. Given the breadth of Dr. Pasqualoni's testimony, we presume that the absence of findings based upon Dr. Pasqualoni's testimony in the WCJ's order is correlated with the absence of positive statements as to causation in her deposition.

The Deposition Testimony of Dr. Schwartz

{41} Dr. Schwartz examined Worker on two occasions beginning in March of 2014 and was deposed on May 20, 2014. Relevant excerpts of Dr. Schwartz's deposition testimony include the following:

Q: If you could just give me your opinion on which diagnoses you believe are causally related to the [November 30, 2012] alleged industrial accident.

A: So in my general take on what I think happened, I think he has increased or additional low back pain following this fall injury on November 30, 2012. It is my sense that he likely aggravated some underlying degenerative process that was already at play and/or injured some soft tissues in his low back, sometimes referred to as a strain injury; but the concept of additional low back pain, I believe, is a result of this fall. He also had chronic neck pain that I did not attribute to this, and his overweight status I do not attribute to this.

Q: So the one diagnosis you causally relate to the 2012 accident is a strain to the low back?

A: Strain and likely aggravation of degenerative disc disease of the lumbar spine.

. . . .

Q: [T]o a reasonable degree of medical probability based on your review of the medical records and your examination of [Worker], do you believe he aggravated any preexisting condition as a result of this fall off a scaffold on November 30, 2012?

A: It's very difficult to say that to a reasonable degree of medical probability given information alluded to in the context of this deposition with preexisting issues that I have not [been] able to review whatsover. By his reporting, he was functional and able to work consistently, and since his accident, due to back pain, he is not able to. So from his reporting and the scant records that I did have, I would say that I could opine that, but more questions have been raised[.]

. . . .

Q: Would you have any reason to disagree with [the] assessment done by Dr. Elliott on January 9, 2013? . . . .

A: No, I have no reason to disagree with Dr. Elliott's assessment at that time.

As discussed above, Dr. Elliott's testimony states, to a reasonable degree of medical probability, that a causal relationship exists

between Worker's diagnosed conditions, including (1) cervical strain, (2) thoracic strain, (3) lumbar strain, and (4) bilateral elbow strain with questionable ulnar neuritis. Dr. Schwartz's testimony appears consistent with respect to these injuries. Additionally, Dr. Elliott noted pre-existing cervical and lumbar pain, which was possibly aggravated by Worker's accident. We have already concluded that Dr. Elliott's testimony does not establish, to a reasonable degree of medical probability, that Worker's accident was causally related to the aggravation of pre-existing back injuries. Therefore, we must determine whether Dr. Schwartz's testimony does establish a causal relationship in this regard.

{42} The testimony of a medical provider must establish, to a reasonable medical probability, that a workplace accident and injuries claimed are causally related. *Gammon*, 1965-NMSC-015, ¶ 22. Dr. Schwartz's testimony presents a somewhat unique twist on conventional analysis in this area given that her testimony appeared to shift during the course of the deposition.

{43} Dr. Schwartz's testimony begins with a relatively certain pronouncement that Worker's accident resulted in "[s]train[s] and likely aggravation of degenerative disc disease of the lumbar spine." However, over the course of her testimony, Dr. Schwartz was confronted by Employer's counsel with information related to numerous prior injuries to Worker's neck and back about which Dr. Schwartz was apparently unaware.[3] After being confronted with this information, Dr. Schwartz was again asked whether Worker's accident and the aggravation of pre-existing injuries were causally related. At this time, Dr. Schwartz conceded that "[i]t's very difficult to say that to a reasonable degree of medical probability" that Worker's accident and injuries are causally related.

{44} Review of our workers' compensation jurisprudence related to this issue indicates that Dr. Schwartz's equivocation during the deposition supports the WCJ's determination that her testimony does not indicate a causal relationship between accident and injury to a reasonable medical probability. *See, e.g., Montano v. Saavedra*, 1962-NMSC-095, ¶ 9, 70 N.M. 332, 373 P.2d 824 (affirming a denial of compensation when the expert witness "admitted it would be difficult to say with any degree of probability" that claimant's condition at the time of trial was probably caused by the accident); *Renfro v. San Juan Hosp., Inc.*, 1965-NMSC-067, ¶ 9, 75 N.M. 235, 403 P.2d 681 (affirming a denial of compensation when the expert witness testimony "only establishes that the fall could, rather than that it did, as a medical probability, cause the disability"). Absent unequivocal and uncontradicted testimony establishing causation, a workers' compensation judge is charged with weighing expert witness opinion. *Montano*, 1962-NMSC-095, ¶ 13. Because Dr. Schwartz's testimony does not establish causation to a reasonable medical probability, we find no error in the WCJ's determination as to the persuasiveness of Dr. Schwartz's testimony.

LACK OF SUFFICIENT EVIDENCE SUPPORTING WORKERS' COMPENSATION ADMINISTRATION'S ORDER

{45} When undertaking whole record review, this Court is not empowered to choose "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*," and we have not done so here. *Tallman*, 1988-NMCA-091, ¶ 14 (internal quotation marks and citation omitted). We are well-aware of the difficult position in which our systemic legal requirements place medical practitioners. *See, e.g.*, *Renfro*, 1965-NMSC-067, ¶ 13 ("An examination of the medical testimony in its entirety, *even recognizing the natural reluctance of a medical expert to make positive statements*, fails to reveal testimony which requires . . . that as a medical probability the disability of the appellant was the natural and direct result of the fall." (Emphasis added)). However, Dr. Pasqualoni's testimony simply cannot be read to offer an opinion, to a reasonable degree of medical probability, as to the nature of the relationship, if any, between Worker's accident and injuries. *See Tallman*, 1988-NMCA-091, ¶ 16 ("While the administrative agency's findings are entitled to respect, they must nonetheless be set aside when the record before the reviewing court clearly precludes the agency's decision from being justified by a fair estimate of the worth of the testimony of witnesses[.]" (internal quotation marks and citation omitted)).

CONCLUSION

{46} Dr. Elliott's testimony indicates the existence of a causal relationship between Worker's accidental fall of November 30, 2012 and his cervical, thoracic, lumbar, and bilateral elbow strains. Dr. Pasqualoni's testimony neither confirms nor denies a causal relationship. As a result, the WCJ's ruling is not supported by substantial evidence.[4]

{47} We therefore remand this case to the Workers' Compensation Administration for additional evaluation of Worker's entitlement to TTD and medical benefits in light of this opinion.

{48} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
J. MILES HANISEE, Judge

[3]Various lines of questioning by Employer's counsel during Dr. Schwartz's deposition clearly contemplate a *Neiderstadt* challenge to Dr. Schwartz's expert opinions. *See Niederstadt v. Ancho Rico Consol. Mines*, 1975-NMCA-059, ¶ 11, 88 N.M. 48, 536 P.2d 1104. Because this argument was not specifically made on appeal, we decline to apply the analysis sua sponte. *See Kreischer v. Armijo*, 1994-NMCA-118, ¶ 10, 118 N.M. 671, 884 P.2d 827 (declining to review issues not raised in appellate briefing).

[4] The WCJ's conclusions of law applied only to causation. It is unclear to us whether Workers' injuries resulted in a disability as required to trigger compensation under our workers' compensation statute. *See Tom Growney Equip. Co. v. Jouett*, 2005-NMSC-015, ¶ 22, 137 N.M. 497, 113 P.3d 320 ("Compensation is paid only when a work-related accidental injury becomes disabling." (alteration, internal quotation marks, and citation omitted)). The parties have not briefed this matter, and we decline to surmise.

Certiorari Denied, April 5, 2016, No. S-1-SC-35793

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-042

No. 33,564 (filed February 16, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
REQUILDO CARDENAS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
SARAH C. BACKUS, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
M. VICTORIA WILSON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

KATHRYN J. HARDY
ALAN H. MAESTAS
ALAN MAESTAS LAW OFFICE, P.C.
Taos, New Mexico
for Appellant

Opinion

Roderick T. Kennedy, Judge

{1} A formal opinion in this matter was filed on February 2, 2016. We hereby withdraw that opinion and substitute it with this Opinion to correct an oversight. The victim was referred to as "Matthew Lucero" in the preceding opinion, and the correct name of victim is "Matthew Lujan."

{2} Defendant shot and killed an unknown intruder, who he later discovered was his friend, by firing a single fatal shot through his front door in the early hours of the morning. Defendant appeals the district court's refusal to give a defense of habitation instruction as well as an involuntary manslaughter instruction. We conclude that adequate evidence was presented to warrant the giving of both. We therefore reverse.

I. BACKGROUND

{3} Matthew Lujan and Defendant, Requildo Cardenas, were close friends. At approximately 1:30 a.m., on July 5, 2012, Lujan was involved in a fight at a party. Enraged by the fight, Lujan left the party and drove immediately to Defendant's home. Lujan arrived at Defendant's home, opened the screen door, and began knocking and pounding on the door within. Lujan's actions were loud enough to rouse Defendant from sleep. Defendant armed himself and demanded that the visitor identify himself. Defendant received no answer in response to his demand, and the intruder continued pounding on the door. Defendant fired a single shot through the front door, which killed Lujan. When Defendant fired the fatal shot, Lujan's identity was unknown to him.

{4} Defendant was tried for voluntary manslaughter.[1] He requested jury instructions on defense of habitation and involuntary manslaughter. The district court denied the instructions. Defendant was found guilty of voluntary manslaughter. Defendant now appeals his conviction, asserting that the district court erred in denying his requested instructions on defense of habitation and involuntary manslaughter.

II. DISCUSSION

{5} Whether a jury instruction was properly denied is a mixed question of law and fact that we review de novo. *State v. Guerra*, 2012-NMSC-014, ¶ 13, 278 P.3d 1031. " 'When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction[s].' " *State v. Skippings*, 2011-NMSC-021, ¶ 10, 150 N.M. 216, 258 P.3d 1008 (quoting *State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184, 185 P.3d 355). While "[a] defendant is entitled to an instruction on his or her theory of the case if evidence has been presented that is sufficient to allow reasonable minds to differ as to all elements of the offense[,]" the failure to instruct the jury on a defendant's theory of the case is reversible error only if there is evidence to support giving the instruction. *Boyett*, 2008-NMSC-030, ¶ 12 (internal quotation marks and citation omitted). A defendant charged with involuntary homicide may present a theory of self-defense. *State v. Gallegos*, 2001-NMCA-021, ¶ 18, 130 N.M. 221, 22 P.3d 689.

A. Defense of Habitation

{6} Defense of habitation contains both a subjective and an objective element; the parties acknowledge this. *Cf. State v. Coffin*, 1999-NMSC-038, ¶ 15, 128 N.M. 192, 991 P.2d 477 (indicating self-defense is made up of both a subjective standard that focuses on the perception of the defendant at the time of the incident and an objective standard that focuses on how a reasonable person in the same situation would have acted). The subjective element allows for the use of deadly force where "[i]t appeared to the defendant that the commission of [a violent felony] was immediately at hand and that it was necessary to kill the intruder to prevent the commission of [the violent felony]." UJI 14-5170 NMRA; *Boyett*, 2008-NMSC-030, ¶ 21 (requiring felony, in defense of habitation context, to be a *violent* felony). In evaluating this element, it is necessary to look to the subjective belief of the defendant. The objective element requires that "[a] reasonable person in the same circumstances as the defendant would have acted as the defendant did." UJI 14-5170.

{7} Our Supreme Court's opinion in *Boyett* sought to clarify the law governing defense of habitation. 2008-NMSC-030, ¶¶ 9, 11. The *Boyett* court acknowledged that, although defense of habitation applies to the prevention of a felony in the home, felonies no longer solely encompass "forcible and atrocious" crimes. *Id.* ¶ 20 (internal quotation marks and citation

[1]During a previous trial, a jury acquitted Defendant of second degree murder, but it could not reach a verdict on the voluntary manslaughter charge. The district court declared a mistrial, and the case went to trial again based solely on the voluntary manslaughter charge.

omitted). As a result, the Court endeavored to clarify what qualifies as a "felony" in the defense of habitation context. *Id.* The Court concluded, based on applicable precedent, that a " 'felony' in the defense of habitation context is properly limited to those felonies involving violence." *Id.* ¶ 21 (stating that a felony must result "in violence against the occupants were it not prevented"). The Court reasoned that, using this clarification, an instruction on defense of habitation would be warranted "if some evidence reasonably tended to show that [the defendant] killed [the v]ictim to prevent her from forcing entry into his home and committing a violent felony once inside." *Id.* ¶ 22. The Court looked to the evidence presented in the case and concluded that an instruction on defense of habitation was not warranted because there was no evidence that the victim was endeavoring to enter the home by violence or intended to do violence on those inside. *Id.* ¶ 23. The Court acknowledged that, assuming the defendant held a reasonable belief that the victim intended to commit a felony in his home, defense of habitation would justify the defendant's actions "only if he could show that [the v]ictim was attempting to force entry to his home." *Id.* Thus, if there is evidence that the victim is trying to break through the defendant's front door at the time he kills the victim, defense of habitation applies. *Id.*

{8} The district court in this case seems to have interpreted *Boyett* to require an analysis of the intruder's intent for the subjective element of defense of habitation, rather than solely on Defendant's perception of the intruder's actions and intentions. The State asserts that the defense of habitation instruction was not warranted because there was no evidence that "the commission of [a violent felony] was immediately at hand." UJI 14-5170. The State also asserts that, without evidence that Defendant intended to kill Lujan, no evidence existed to support the assertion that Defendant believed "it was necessary to kill [Lujan] to prevent the commission of [the violent felony.]" *Id.* We address each argument in turn.

1. Evidence of a Violent Felony

{9} Perhaps following the district court's ruling, the State suggests that in order to satisfy the subjective prong of defense of habitation, which requires Defendant to believe that the commission of a violent felony was immediately at hand, there must have been evidence that Lujan intended to commit a violent felony within Defendant's home. In support of this suggestion, the State cites to *Boyett* and suggests that by requiring a certain type of felony—namely, a violent one—the Court super-imposed a requirement that evidence of Lujan's intent to commit a violent felony be presented to warrant a defense of habitation instruction.

{10} Self-defense and defense of habitation are virtually identical, *State v. Bailey*, 1921-NMSC-009, ¶ 30, 27 N.M. 145, 198 P. 529, and it is well-established that self-defense focuses on the subjective intent of the *defendant*. *See Coffin*, 1999-NMSC-038, ¶ 15 (indicating that the subjective element of self-defense focuses on the perception of the defendant at the time of the incident). Defense of habitation employs the same focus with regard to the subjective prong; the relevant inquiry lies in the defendant's own subjective perception of the intruder's intentions, rather than interpreting the intruder's intent itself. By asserting that evidence of the victim's intent is required, the State misstates the law governing defense of habitation. UJI 14-5170 contains no reference to the intruder's intent; instead, the instruction mentions only the defendant's perception of what is happening. The State's shifted emphasis is not supported by the language of the UJI.

{11} Our case law is also clear that the defendant's interpretation of the victim's actions is the relevant criterion in a defense of habitation inquiry. In *State v. Couch*, 1946-NMSC-047, ¶ 44, 52 N.M. 127, 193 P.2d 405, our Supreme Court decided that the defendant was entitled to a defense of habitation instruction because he could have believed that the person attacking his home intended to enter and commit violence against the occupants. In *Couch*, the defendant, whose home had been subjected to other attacks and invasions, awoke late one night while his home was the target of vandals throwing rocks. *Id.* ¶ 2. The defendant shot at the intruders and killed one of them. *Id.* The Court concluded that the defendant was entitled to a defense of habitation instruction: "When one's home is attacked in the middle of a dark night . . . the householder, being unable to determine what weapons the [unknown] assailants have . . . may pursue his adversaries till he finds himself out of danger." *Id.* ¶¶ 44, 49.

{12} We interpret *Boyett* to stand not for the proposition that there must be evidence of the intruder's intent or that the victim intended to commit a violent felony, but solely whether evidence exists that could give rise to a defendant's belief that commission of a felony of a violent nature was imminent. The instruction must be given when the evidence presented at trial, viewed in the light most favorable to giving the instruction, supports Defendant's alleged belief that he or his home was subject to the threat of a violent felony.

{13} According to the evidence, Lujan arrived at Defendant's door at approximately 1:30 a.m. and was pounding on the door loudly enough to rouse Defendant from sleep and threateningly enough to cause Defendant to arm himself. Despite yelling a request that the intruder identify himself, Defendant received no response before firing the fatal shot.

{14} Evidence at trial indicated that Lujan was in the process of opening the door when he was shot. Expert testimony suggested, based on spatter patterns of Lujan's blood on the hinges and frame of the door, that the door could have been anywhere between one and four inches open when Defendant fired the fatal shot. Because there is no evidence that Defendant opened the door, it is reasonable to infer from the facts that Lujan did. One of the investigating officers testified that he believed Lujan was "trying to gain entry" into Defendant's home.[2] Defendant's father testified that when he visited the residence the day after the shooting, he observed that the lock on the door had been damaged. This evidence, considered in the light most favorable to giving the instruction, *Skippings*, 2011-NMSC-021, ¶ 10, satisfies *Boyett*'s requirement that some evidence show that the intruder was attempting to force entry into Defendant's home. 2008-NMSC-030, ¶ 23. It was therefore adequate to support an assertion by Defendant that he reasonably believed that a violent felony was about to occur in his home. Confronted with a violent and unauthorized attempt of an unknown actor to enter his home, and in the absence of the intruder's response to Defendant's request to identify himself, Defendant's actions could be found to be objectively reasonable, as discussed more completely

[2]This came to light as impeachment evidence; defense counsel impeached the officer using prior statements made regarding Lujan's actions that evening.

below. We therefore conclude that the district court erred in refusing Defendant's requested defense of habitat instruction.

2. Intent to Kill

{15} The State incorrectly asserts that Defendant is required to prove he had an intent to kill Lujan in order to receive a defense of habitation instruction. The district court did not deny Defendant's requested defense of habitation instruction based on Defendant's lack of intent to kill. In fact, it appears that the State did not raise this argument below. The State suggests, however, that we affirm the district court's decision using the right for any reason doctrine. While we may affirm the district court on grounds not relied on by it, we may not do so if it would result in unfairness to the appellant. *State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828. Because we conclude that adding an "intent to kill" element to defense of habitation would be inappropriate, we decline the State's invitation to affirm on that ground.

{16} According to UJI 14-5170, it must appear to the defendant that it is "necessary to kill the intruder to prevent the commission of [a violent felony]." In *Bailey*, our Supreme Court noted, in dicta, that the right to kill in self-defense or defense of habitation was not at issue in the case and that the defendant was not entitled to have that issue presented to the jury because the defendant absolutely denied killing the victim. 1921-NMSC-009, ¶¶ 18, 31 (noting that the defendant "never intended to kill [the intruder], did not attempt to kill him, and did not kill him").

{17} *Bailey* is inapposite to the case before us, and the State's reliance on it is misplaced. Defense counsel argued at trial that Defendant may have intended the shot to be a warning shot, and that both the single shot fired and the location of the shot indicated that Defendant did not intend to kill the intruder. He does not contend that he did not shoot the victim or that he did not intentionally pull the trigger. The State now uses these arguments to assert that Defendant is not entitled to a defense of habitation instruction because he had no intent to kill the intruder, contrary to the UJI which requires that the defendant believe it is "necessary to kill the intruder." *See* UJI 14-5170.

{18} The State's reading of *Boyett*, UJI 14-5170, and *Bailey* misinterprets the language therein by suggesting that a belief that it is necessary to use deadly force to prevent commission of a violent felony equates to an intent to kill an intruder. The two are not equivalent; an intent to kill pertains to a desired result while a belief that it is necessary to use deadly force relates to the means by which that result may be reached. The focal point of the jury instruction's "necessary to kill" language lies on the defendant's intent to prevent the commission of the violent felony using whatever force—including deadly force—is necessary. The explicit language of UJI 14-5170 therefore requires that the defendant believe deadly or lethal force is necessary to prevent the commission of a violent felony. "The inquiry in a self-defense claim focuses on the reasonableness of [a] defendant's belief as to the apparent necessity for the force used to repel an attack." *State v. Reneau*, 1990-NMCA-119, ¶ 6, 111 N.M. 217, 804 P.2d 408.

{19} Under UJI 14-5170, once a defendant reasonably holds the belief that it is necessary to use lethal force to prevent the felony and defend his habitation, he has satisfied the second half of the subjective element of defense of habitation. This belief can be inferred from circumstantial evidence. *Cf. State v. Duarte*, 1996-NMCA-038, ¶ 7, 121 N.M. 553, 915 P.2d 309 (acknowledging that the defendant's fear in self-defense context can be inferred from circumstantial evidence); *State v. Wood*, 1994-NMCA-060, ¶ 13, 117 N.M. 682, 875 P.2d 1113 (pointing out that subjective elements are "rarely established by direct evidence and generally must be proven by circumstantial or factual inferences"). In this case, a jury could reasonably conclude that Defendant exhibited a belief that it was necessary to use deadly force by picking up his gun and firing it. Regardless of whether he intended for that particular shot to be lethal, the firing of the shot under the circumstances exhibited a willingness to use deadly force. *See Black's Law Dictionary* 760 (10th ed. 2014) (defining "deadly force" as a "[v]iolent action known to create a substantial risk of causing death or serious bodily harm"). If the first subjective element is met, and the choice to use deadly force is reasonable, the elements of the defense are met, and the killing is legally justified. The existence of any evidence to support the giving of a defense of habitation instruction, however slight, provides an adequate basis for giving the instruction. *State v. Heisler*, 1954-NMSC-032, ¶ 23, 58 N.M. 446, 272 P.2d 660 ("[W]here self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on the issue that are warranted by the evidence[.]"). Because the evidence was sufficient to entitle Defendant to a defense of habitation instruction and that instruction was not given, we reverse. *See State v. Salazar*, 1997-NMSC-044, ¶ 50, 123 N.M. 778, 945 P.2d 996 ("Failure to give an instruction which is warranted by the evidence is not harmless error.").

B. Involuntary Manslaughter Instruction

{20} There are three circumstances in which an involuntary manslaughter instruction is warranted: (1) "the commission of an unlawful act not amounting to a felony"; (2) "the commission of a lawful act that might produce death, in an unlawful manner"; or (3) "the commission of a lawful act that might produce death without due caution and circumspection." *State v. Henley*, 2010-NMSC-039, ¶ 14, 148 N.M. 359, 237 P.3d 103 (internal quotation marks and citation omitted). "An involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a mens rea of criminal negligence[.]" *Id.* ¶ 22. Criminal negligence has been described in many different ways. It exists where there is a conscious disregard of a substantial and unjustifiable risk that harm will result from certain conduct. *Id.* ¶ 16. It exists where a person acts with willful disregard of the rights or safety of others and in a manner that endangers any person or property. *Id.* It also exists where a person's actions are so reckless, wanton, and willful that they show an utter disregard for the safety of others. *Id.* Defendant requested an instruction pursuant to the third category of involuntary manslaughter instruction. Because we have held that a defense of habitation instruction was available to Defendant, the jury could have found that his shooting Lujan was in the commission of a lawful act, but was done without due caution or circumspection. *See State v. Romero*, 2005-NMCA-060, ¶ 17, 137 N.M. 456, 112 P.3d 1113.

{21} Looking at the evidence in the light most favorable to giving the instruction, we conclude that the trial testimony would establish that Defendant knew that an intruder was on the other side of the door and that, because he was pounding on the door, the intruder was within an arm's length of the door. Despite having at least this much knowledge, Defendant fired a

shot through the door. The jury could have determined that Defendant was criminally negligent because firing a gun at the door while someone was on the other side of it was "willful disregard of the rights or safety of others" and endangered that unknown intruder. *Henley*, 2010-NMSC-039, ¶ 16 (quoting UJI 14-133 NMRA) (internal quotation marks omitted). The jury also could have inferred that Defendant unintentionally killed the intruder based on Defendant's theory that he fired a warning shot, *Duarte*, 1996-NMCA-038, ¶ 7 (stating that intent can be inferred), and evidence that Defendant only shot once, shot high into the door, and requested identification before he fired the shot. Because the jury could have found that Defendant committed a lawful act, and unintentionally killed the victim while acting criminally negligently, we conclude that an involuntary manslaughter instruction should have been given.

III. CONCLUSION

{22} Having decided that, when considering the evidence in the light most favorable to giving the instructions, there was sufficient evidence to support the instructions, we conclude that the district court erred in refusing Defendant's request for a defense of habitation instruction and involuntary manslaughter instruction. We therefore reverse.

{23} IT IS SO ORDERED.
RODERICK T. KENNEDY, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
LINDA M. VANZI, Judge

Certiorari Denied, May 3, 2016, No. S-1-SC-35712

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-043

No. 34,320 (filed January 6, 2016)

STATE OF NEW MEXICO, ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioner-Appellee,
v.
NATHAN H.,
Respondent-Appellant,
KATEESHA L.,

and

IN THE MATTER OF NYREE H., ADRIAN H., and DESHAUN H., Children.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
SANDRA A. PRICE, District Judge

CHARLES E. NEELLEY
Chief Children's Court Attorney
REBECCA J. LIGGETT
Children's Court Attorney
KELLY P. O'NEILL
Children's Court Attorney
NEW MEXICO CHILDREN, YOUTH & FAMILIES DEPARTMENT
Santa Fe, New Mexico
for Appellee

NANCY L. SIMMONS
LAW OFFICES OF NANCY L. SIMMONS, PC
Albuquerque, New Mexico
for Appellant

THERESE E. YANAN
NATIVE AMERICAN DISABILITY LAW CENTER, INC.
Farmington, New Mexico
Guardian ad Litem

Opinion

Michael E. Vigil, Chief Judge

{**1**} Father appeals from the district court's judgment terminating his parental rights due to neglect. NMSA 1978, § 32A-4-28(B)(2) (2005). On appeal, Father argues that: (1) the Indian Child Welfare Act (ICWA), 25 U. S. C. §§ 1901 to 1963 (2013) applies and therefore its substantive and procedure standards apply; (2) efforts of the Children, Youth, & Families Department (CYFD) to determine whether the ICWA applies were inadequate; and (3) CYFD did not satisfy its burden of proof to terminate Father's parental rights. Based on our review of the record, we conclude that Father's arguments are unpersuasive and affirm the district court's judgment.

I. BACKGROUND

{**2**} Mother and Father have three children who were born September 6, 2006, January 8, 2008, and March 9, 2009. On April 2, 2012, Father was incarcerated due to a probation violation resulting from a child abuse charge and failure to fulfill other conditions. Children remained with Mother. At one point, she asked neighbors to watch Children when she went to work. When Mother did not return for Children, Child Protective Services and law enforcement were called and Children were taken into protective custody. One of the neighbors reported that Children were filthy and often complained about not being fed.

{**3**} CYFD filed a petition alleging that Children were abused and that the ICWA applied because Children were eligible for enrollment or enrolled in an Indian tribe. CYFD filed an ICWA Notice and sent it to the ICWA unit of the Navajo Children and Family Services. The district court filed an ex parte custody order granting CYFD legal and physical custody until otherwise ordered by the court.

{**4**} At the custody hearing on April 16, 2012, the district court ordered legal custody over Children continue with CYFD. Parents were ordered to undergo psychological and psychiatric evaluations, and drug and alcohol screening, including possible random urine analysis. Father was released from incarceration in July 2012.

{**5**} On June 4, 2012, Father pled no contest that he neglected Children, under NMSA 1978, Section 32A-4-2(E)(4) (2009), in that he was unable to discharge his parental responsibilities due to his incarceration. The district court found that the children were subject to the ICWA and made requisite findings pursuant to 25 U. S. C. Section 1912 (d), (e) (2012). The district court also adopted a treatment plan for Father.

{**6**} An initial review occurred on August 13, 2012. The district court found that Father had made reasonable efforts to follow the treatment plan. Specifically, the district court found that Father had regular contact with CYFD, completed a mental health evaluation and hair follicle test, visited Children weekly and engaged in frequent telephone conversations with Children. Father had contacted Children's therapist and saved money to obtain housing. The district court ordered that the permanency plan be reunification. Prior to the first permanency hearing, Father was incarcerated from October 2012 to February 2013.

{**7**} At the first permanency hearing on March 25, 2013, the district court found that Father consistently visited Children prior to his incarceration and maintained scheduled phone calls with Children during incarceration. After Father was released, Father did not maintain the same consistency with calling Children, and failed to attend a visit with Children without any communication to CYFD. Father was preparing a trailer as a home for Children prior to his incarceration, but maintained slow progress in repairs after his release. Cottonwood Services assessed Father for his substance abuse in which it recommended that Father engage in outpatient substance abuse counseling at least once a week for twenty-four weeks for his dependence on cannabis and alcohol and individual therapy twice a month with two random urine analysis per month. Prior to incarceration, Father attended two parenting classes and three group and individual sessions, but he was not able to maintain counseling during his incarceration. Father consistently maintained contact with

CYFD and remained on probation subject to random urine analysis. The district court ordered that the permanency plan remain reunification.

{8} Father was again incarcerated shortly after the first permanency hearing and was still in custody when the second permanency hearing was held on July 22, 2013. At the hearing, the district court changed the permanency plan from reunification to adoption. The district court found that Father's repeated incarcerations partially prevented his progress in the treatment plan. Father had not completed a parenting program or produced a viable home for Children, and was unable to demonstrate that he had the financial ability to keep Children at home. Father had, however, maintained visits with Children and participated in a treatment team meeting. The district court ordered Children to remain in the legal custody of CYFD.

{9} On July 29, 2013, CYFD filed a motion to terminate Father's parental rights, and the termination of parental rights trial (TPR) was held on March 17, 2014, concurrent with an additional permanency hearing. The district court found Father had not obtained secure housing, completed the aftercare treatment program, or participated in random drug or alcohol testing during his non-incarceration. Father had also missed several visits with Children when he was not incarcerated and had completed only a minimum number of therapy sessions. Father had, however, completed a thirty-day rehabilitation program at Four Winds, maintained contact with CYFD, and engaged in regular visits with Children during his incarceration. The district court ordered that the permanency plan remain adoption. The district court, however, could not determine whether Children were subject to the ICWA.

{10} The TPR hearing took place on March 17, 2014, and May 5, 2014. Also on May 5, 2014, the district court examined evidence to determine whether the ICWA applied. After hearing testimony on this issue, the district court concluded that the ICWA did not apply because Children are neither enrolled nor eligible to be enrolled in an Indian tribe. The district court further concluded that, based on clear and convincing evidence, termination of Father's parental rights was in the best interest of Children. Father appeals.

II. DISCUSSION

{11} We first address whether the ICWA applies. Secondly, we determine whether CYFD complied with its statutory duty under NMSA 1978, Section 32A-4-22(I) (2009), to investigate whether the ICWA applies. Finally, we address whether there was clear and convincing evidence to terminate Father's parental rights, pursuant to Section 32A-4-28(B)(2).

A. Applicability of The ICWA

{12} We review the applicability of the ICWA de novo. *Cherino v. Cherino*, 2008-NMCA-024, ¶ 7, 143 N.M. 452, 176 P.3d 1184 (stating that "the applicability of ICWA requires us to interpret statutory language, which is also subject to de novo review"); *see State ex rel. Children, Youth & Families Dep't v. Marsalee P.*, 2013-NMCA-062, ¶ 12, 302 P.3d 761 (stating that "interpretation of ICWA and its relationship to the Abuse and Neglect Act present questions of law that we review de novo" (alterations, internal quotation marks, and citation omitted)).

{13} We begin with the understanding that when we construe the ICWA, "we must resolve all ambiguities liberally in favor of the Indian parent and the tribe in order to effectuate the purpose of the Act, which is to prevent the unnecessary removal of Indian children." *In re Esther V.*, 2011-NMSC-005, ¶ 19, 149 N.M. 315, 248 P.3d 863. Under its statutory scheme, the "ICWA applies to Indian children regardless of whether they are registered with a tribe." *In re Guardianship of Ashley Elizabeth R.*, 1993-NMCA-129, ¶ 18, 116 N.M. 416, 863 P.2d 451; *see* 25 U.S.C. § 1911 (describing the jurisdiction of Indian tribes over state custody proceedings with Indian children).

{14} An Indian child is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4). Father relies on the second prong because Children are not members of any Indian tribe. The only relevant tribes are the Navajo Nation and the Ute tribe. We will begin with the examination of whether Children are eligible for membership in the Navajo Nation because neither party disputes that Father is a member of the Navajo Nation. Mother is not an enrolled member in any tribe.

{15} To be eligible for membership in the Navajo Nation, Children must possess one-fourth degree Navajo blood. Navajo Nation Code tit. 1, § 701(C) (2010) ("Children born to any enrolled member of the Navajo Nation shall automatically become members of the Navajo Nation and shall be enrolled, *provided they are at least one-fourth degree Navajo blood*." (emphasis added)). The parties do not dispute that Father has one-fourth degree Navajo blood. Mother's blood contribution to Children is therefore significant in determining whether Children are eligible for membership in the Navajo Nation.

{16} Susan Fryback, the permanency planning worker for Children, testified about her investigation of Mother's blood. Fryback had various conversations with Mother in which Fryback attempted to obtain information on the maternal grandmother's name, birth date, enrollment status, and the hospital where she was delivered. Mother opposed enrollment for Children. Fryback, however, received the grandmother's name but obtained an incorrect phone number from Mother. Mother did not provide her birth certificate to CYFD, even though she was asked to do so on at least five different occasions. Fryback communicated with Mother's adopted great grandmother and received another phone number for the biological maternal grandmother. Fryback did not receive any response when she called the number. Mother's adopted great grandmother did not have any information concerning the biological maternal great-grandmother.

{17} Deborah Yost, a CYFD adoption consultant who collaborates with the ICWA unit of the Navajo Children and Family Services, testified that the maternal grandmother must be enrolled in order for Mother to be eligible, to then make Children eligible for membership in the Navajo Nation. The Navajo Nation does not have any record of the maternal grandmother. Yost attempted to call the maternal grandmother, who purportedly lived in Oregon, but no one answered. The great grandmother, who raised Mother, was deceased.

{18} Yost received a letter from the ICWA unit of the Navajo Children and Family Services on April 30, 2014, stating that Children are not eligible based on its research. Yost testified that this correspondence was in response to a letter on March 12, 2014, coinciding with Yost's phone calls to the Navajo Nation of Vital Records.

{19} Based on the difficulties CYFD experienced in receiving evidence on Mother's lineage and the Navajo Nation's determination that Children are ineligible, we hold that Children are not eligible for enrollment with the Navajo Nation. Nevertheless,

Father asserts that the status of Children does not need to be certain to implement the ICWA and the district court must only examine whether the ICWA possibly applies, relying on *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000). We conclude that *Desiree F.* does not assist Father. In *Desiree F.*, Picayune Rancheria of the Chukchanski Indians filed a notice of tribal intervention pursuant to 25 U.S.C. § 1911(c) prior to a scheduled permanent plan meeting, but after an order terminating parental rights. *Desiree F.*, 99 Cal. Rptr. 2d at 693. The tribe's moving papers contended that the child was eligible for enrollment; that the tribe was not notified of the dependency proceedings; that the state agency had not complied with the ICWA with respect to the mother and the tribe's rights; and that the tribe sought intervention and placement of the child with her grandmother. *Id.* The tribe enrolled the child as a member once it became aware of her existence and obtained notice of the proceedings, and the court concluded that the tribe's decision on membership and eligibility was determinative and the lack of formal enrollment of the child was the agency's fault, due to its failure to give notice. *Id.* at 695-96. In this case, on the other hand, the Navajo Nation has determined that Children are not eligible for enrollment. *See Montana v. United States*, 450 U.S. 544, 564 (1981) ("[T]he Indian tribes retain their inherent power to determine tribal membership[.]").

{20} Father further asserts that the Navajo Nation has a second method of enrollment, applications to the Enrollment Screening Committee, which is based on criteria other than vital statistics. According to Yost, Children could be enrolled through this process, even if the biological parent is not an enrolled member. However, this committee also follows the one-fourth blood quantum requirement. For all the cases where:

> the records of the Navajo Agency do not show that the applicant is of at least one-fourth degree Navajo blood or the applicant does not establish such fact by documentary evidence independent of his own statement, consisting of the affidavits of disinterested persons, certified copies of public or church records, or the like, the Screening Committee shall reject the application.

Navajo Nation Code tit. 1, § 752(B) (2010). Again the evidence fails to satisfy this requirement.

{21} Finally, Father contends that the Children are eligible for membership in the Ute tribe through Mother. It is undisputed that Mother is not an enrolled member of the Ute tribe. Based on the language of 25 U.S.C. § 1903(4), an Indian child must be a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member. *See Marsalee P.*, 2013-NMCA-062, ¶ 21 (construing Indian child as defined in 25 U.S.C. § 1903(4) as "when the child is a member of an Indian tribe or the child is eligible to be a member and is the biological child of a member"). Father does not make any arguments that Mother satisfies the requirements for being a member of the Ute tribe.

{22} Moreover, the evidence on Mother's lineage to the Ute tribe is lacking. According to Yost, CYFD does not have any information on how the Mother has any lineage to the Ute tribe or the name of a family member enrolled in the Ute tribe. Fryback further contacted the Southern Ute tribe with the information she possessed and the tribe stated in its response to this information that the children are not eligible. Father only relies on his testimony that Mother possesses Ute blood and Yost's belief that Mother might be one-eighth Ute. There is no evidence, notwithstanding Father and Yost's belief, to establish Children's lineage to the Ute tribe.

{23} Based on the foregoing reasons, we conclude that the ICWA does not apply to Children, because they are not eligible for membership into either the Navajo Nation or the Ute tribe and therefore do not satisfy the definition of an Indian child as set forth in 25 U.S.C. Section 1903(4).

B. Compliance by CYFD with Section 32A-4-22(I)

{24} Father argues that CYFD's purported efforts did not satisfy the requirements in *Marsalee P.* regarding Section 32A-4-22(I), much less determine the applicability of the ICWA. We therefore must examine whether CYFD's actions met the statutory mandate in Section 32A-4-22(I). In doing so, we review "[t]he interpretation of the ICWA and its relationship to our state statute on abuse and neglect" de novo. *In re Esther V.*, 2011-NMSC-005, ¶ 14.

{25} Section 32A-4-22(I) states "[w]hen a child is placed in the custody of [CYFD], [CYFD] shall investigate whether the child is eligible for enrollment as a member of an Indian tribe and, if so, [CYFD] shall pursue the enrollment on the child's behalf." Father contends CYFD failed to comply with this statutory mandate.

{26} In *Marsalee P.*, we examined whether CYFD complied with Section 32A-4-22(I). *Marsalee P.*, 2013-NMCA-062, ¶ 25. Neither party disputed that the children were eligible for enrollment in the Navajo Nation. *Id.* ¶ 18. The record contained no evidence that CYFD made any attempts to enroll the children before the trial, and at the time of the trial, CYFD knew the children were eligible. *Id.* ¶ 25. We were unable to determine the extent of CYFD's compliance with Section 32A-4-22(I) prior to the trial. *Marsalee P.*, 2013-NMCA-062, ¶ 25. We therefore held that the district court erred when it terminated the mother's parental rights without requiring CYFD to comply with the statute.

{27} Unlike *Marsalee P.*, the record in this case demonstrates that CYFD conducted an investigation in compliance with Section 32A-4-22(I). CYFD focused on retrieving evidence on Mother's genealogy. CYFD had many conversations with Mother to receive information on her lineage in which Mother was not cooperative. Specifically, Fryback requested Mother's birth certificate on at least five different occasions, but Mother did not produce the document. Yost testified that she attempted to retrieve Mother's birth certificate from the income support division. Yost contacted the Navajo Nation of Vital Records where it assisted in the investigation on CYFD's behalf. CYFD was informed that the Navajo Nation does not have any record of the maternal grandmother. Yost also made phone calls prior to the ICWA unit of the Navajo Children and Family Services, to determine if Children were eligible. CYFD attempted to reach the grandmother over the phone where it received no response. According to Fryback, she interviewed the Mother's adopted great grandmother in her home to obtain information on the biological great grandmother, but she did not possess any information.

{28} CYFD conducted further steps in its investigation. Fryback attempted to retrieve Father's birth certificate and certificate of Indian blood from Father and the paternal grandmother, but Fryback did not receive these documents. Fryback contacted the Southern Ute tribe and described all of the information CYFD had and the tribe responded that based on this information Children are ineligible.

{29} We hold that under these circumstances, CYFD complied with Section 32A-4-22(I) to investigate whether Children were eligible for enrollment. Father asserts that CYFD should have deposed Mother, subpoenaed the birth records, or conducted other avenues for its investigation; however, the statute does not require CYFD to implement all possible methods in its investigation. Rather, the language of Section 32A-4-22(I) requires an investigation by CYFD. *Marsalee P.*, 2013-NMCA-062, ¶ 25. Each case must be determined on its own facts. Here, CYFD conducted an adequate investigation based on the evidence which it had.

C. The Evidence was Clear and Convincing

{30} Finally, we next address whether the district court erred when it concluded that there was clear and convincing evidence to terminate Father's parental rights, pursuant to Section 32A-4-28(B)(2). We review the district court's decision for substantial evidence. *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 22, 132 N.M. 299, 47 P.3d 859 ("Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion." (internal quotation marks, and citation omitted)).

{31} In TPRs, the standard of proof is clear and convincing evidence. *State ex rel. Children, Youth & Families Dep't v. Lance K.*, 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778. Clear and convincing evidence means "evidence that instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Lance K.*, 2009-NMCA-054, ¶ 16 (alteration, internal quotation marks, and citation omitted). We examine the evidence in the light most favorable to whether the district court, as the trier of fact, could appropriately conclude that the clear and convincing evidence standard was satisfied. *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 3, 120 N.M. 463, 902 P.2d 1066.

{32} Under Section 32A-4-28(B)(2), the district court was required to find that:

> the child has been a neglected or abused child as defined in the Abuse and Neglect Act and . . . that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by [CYFD] or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child.

The district court therefore had to make three separate findings: (1) Children were neglected or abused; (2) the conditions and causes of neglect and abuse were unlikely to change in the foreseeable future; and (3) CYFD made reasonable efforts to assist Father in adjusting the conditions that rendered Father unable to properly care for Children. *See Eventyr J.*, 1995-NMCA-087, ¶ 12. On appeal, Father only challenges the district court's conclusion that the conditions and causes were unlikely to change in the foreseeable future.

{33} The district court's treatment plan ordered Father to engage in certain requirements, including treatment for his substance abuse. The treatment plan required Father to participate in parenting classes, retain stable housing, follow the recommendations from his substance abuse and mental health assessments, and participate in scheduled visits with Children. Father did not comply with these requirements due to his repeated incarcerations.

{34} Father was incarcerated from April 2012 to July 2012 when this case began. Father was again incarcerated from October 2012 to February 2013, because he pleaded guilty to battery upon a police officer. Father also received an unsatisfactory discharge from probation involving his child abandonment conviction prior to this case. Father was again incarcerated from May 11, 2013, to April 22, 2014. Father received new criminal charges in May and he pleaded guilty to auto burglary and receiving stolen property in September 2013. Father's probation involving battery upon a police officer was also revoked in September 2013. At the time of the TPR hearing, Father still had nine months of probation remaining.

{35} The evidence demonstrated that Father's repeated incarcerations affected his treatment plan. Kim DuTremaine, a licensed independent social worker, substance abuse counselor, and an expert witness in substance abuse assessments, psycho-social assessments, recommendations and diagnosis, performed a psycho-social assessment on Father. Because Father had problems with substance dependency and self-medicating behavior, DuTremaine recommended that Father participate in outpatient co-occurring therapy—a substance abuse group session, once a week for six months, and individual sessions twice a month to focus on his anxiety disorder in conjunction with his substance abuse issues. Father only attended three group sessions out of the twenty-four recommended sessions. Father did not meet the recommendations for the group sessions in September 2012 and Father was again incarcerated by October 2012.

{36} In October 2013, Father's addiction severity was re-assessed through DuTremaine's agency as Father had been incarcerated and had failed the treatment plan at a lower level of care. However, DuTremaine's agency determined Father was appropriate for residential treatment. The agency recommended the residential treatment program, followed by intensive outpatient program, and then additional aftercare program. According to DuTremaine, this recommendation would encompass a ten-month period where the intensive outpatient program included individual, family, and group therapy, as well as urine analysis and contingency management. The intensive outpatient program involved at least nine hours per week for a minimum of twelve weeks, and the aftercare program included one day per week for a total of six months. Freybeck testified that Father was released from incarceration to participate in the treatment program at Four Winds on October 8, 2013, and that Father was to return to the detention center after completion. Father completed his inpatient program, but did not complete the intensive outpatient program.

{37} In regard to Father's attempts to obtain and maintain secure housing, Dianne Grieser testified that Father had lived in her house and that she had offered Father a trailer, which needed significant repair, for Children to live in. According to Grieser, the trailer needed new plumbing, wiring, flooring, and a new furnace. Fryback testified that the trailer was not appropriate for Children when she last saw it. Father's most current residence did not have the space to allow Children to stay the night.

{38} Father also did not maintain telephone calls and scheduled visits with Children. Ione Randleman, who was a foster parent for Children from November 2012 to June 2013, testified that when Father was released from incarceration in approximately March 2013, Father, at first, regularly called Children. Father then began to reduce his telephone calls with Children until he stopped calling entirely. Randleman did not know if the decline in

phone calls started when Father was once again incarcerated. Randleman also stated that Father missed scheduled visits with Children during his release from incarceration and when Father missed visits, Children would exhibit severe behavior.

{39} Fryback also testified that Father did not complete any parenting classes and his repeated incarcerations impeded their completion. Because Father has not accomplished certain requirements—completed parenting classes, maintained a stable home, followed the substance abuse treatment plan, and participated in the scheduled visits with Children—and was repeatedly incarcerated, we hold that there is clear and convincing evidence that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future.

{40} Father nevertheless contends that his situation is similar to *State ex rel. Children, Youth and Families Department v. Hector C.*, 2008-NMCA-079, 144 N.M. 222, 185 P.3d 1072, asserting that past conduct was stale evidence and, therefore, was insufficient to terminate Father's parental rights. In *Hector C.*, the father was incarcerated at the inception of the case in which a motion for termination of parental rights was filed prior to his release. *Id.* ¶¶ 3-9. After the father was released, he attended classes on parenting and substance abuse, worked in a local supermarket, attended more than the required number of counseling sessions, and never tested positive for drug use. *Id.* ¶ 17. The father also did not have noncompliance issues with his parole. *Id.* The father's incarceration for receiving stolen property and tampering with evidence had "played an overwhelming and singular role in the termination proceedings," bypassing the father's current situation. *Id.* ¶ 21. We found *Hector C.* to be analogous with *State ex rel. Department of Human Services v. Natural Mother*, 1981-NMCA-103, 96 N.M. 677, 634 P.2d 699 where we held that the amount of time and considerable changes in the mother's circumstances caused the evidence to be stale concerning whether the conditions would persist in the future. *Hector C.*, 2008-NMCA-079, ¶ 15 (citing *Natural Mother*, 1981-NMCA-103, ¶ 9). We concluded that the trial court did not have clear and convincing evidence for its finding that the causes and conditions of neglect were unlikely to change in the foreseeable future. *Hector C.*, 2008-NMCA-079, ¶ 23.

{41} However, in this case Father's past conduct is still relevant to his current parental abilities, and to foreseeable events. Unlike *Hector C.* and *Natural Mother*, Father has not changed his situation in any meaningful way. Father has not retained a stable and secure home for Children, completed any parenting classes, or followed the recommendations for treatment on his substance dependency and anxiety disorder. Although Father's repeated incarceration hindered the treatment plan, incarceration does not release Father from following treatment that affects his parental duties to Children. *See Hector C.*, 2008-NMCA-079, ¶ 23 ("Father fails to recognize his continuing duty to care for the children, regardless of his incarceration."). While we recognize that incarceration is not a dispositive legal ground to terminate Father's parental rights, Father's significant substance abuse and criminal issues—for which he was repeatedly incarcerated, provided sufficient evidence that he was unable to care for his children now, and in the foreseeable future. *State ex rel. Children, Youth & Families Dep't v. Joe R.*, 1997-NMSC-038, ¶ 11, 123 N.M. 711, 945 P.2d 76. "Parents do not have an unlimited time to rehabilitate and reunite with their children." *State ex rel. Children, Youth & Families Dep't v. Browind C.*, 2007-NMCA-023, ¶ 40, 141 N.M. 166, 152 P.3d 153. (internal quotation marks and citation omitted).

III. CONCLUSION

{42} For the foregoing reasons, the judgment of the district court is affirmed.

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

Classified

Positions

Law Clerk
United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to Judge Browning, $59,256 to $71,025 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

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.

Associate Attorney
The Santa Fe law firm of Katz Ahern Herdman & MacGillivray PC is seeking a full-time associate with three to five years of experience to assist in all areas of our practice, including real estate, zoning, business, employment, construction and related litigation. Please send resumes to fth@santafelawgroup.com. Please state "Associate Attorney Position" in email subject line.

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.

Full-Time Staff Attorney
New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney. Required: Law degree and license; three years of experience practicing law; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; detail-orientation. Preferred: familiarity with poverty and civil rights law and advocacy; strong Spanish language skills. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by sending resume and letter specifying how you meet each of the position reqs to hiringcommittee@nmpovertylaw.org Please put your name in the subject line. EEOE

EOE

City Attorney

Date Open: July 6, 2016; Date Close: Until Filled; Schedule: Monday -Friday, 8:00 am – 5:00 pm.; Salary: $96,086 $118,174 – Annually; Job # 16-047; Full Time; Administration. SUMMARY: Directly reports to the city manager. Responsible for management and professional legal work. Involves highly complex legal principles and practices in providing advice to the city administration as well as representing the city in litigation and legal matters. Work originates through the ongoing need of city government to enter into contracts, comply with state and federal laws and defend the city in litigation. Work involves considerable contact with city elected officials, department heads, employees, the court system, and general public. Education, Training and Experience Guidelines:
Graduation from an ABA accredited law school with a J.D. degree and six year's professional legal experience, including two years' experience with local government law preferred. LICENSE AND CERTIFICATION REQUIREMENTS: Admitted to practice law in before the courts of the State of New Mexico and in good standing with New Mexico State Bar Association. APPLY: Application and detailed job description is available on our city's website at www.roswell-nm.gov. The City of Roswell offers a competitive benefit package which includes medical, life, vision, dental, and retirement. Currently you may submit your application vie fax (575-624-6926), mail (P.O. Drawer 1838, Roswell, NM 88202-1838) or bring by Human Resources Office at 425 N. Richardson, Roswell, NM 88201. MUST SUBMIT A "PRE-EMPLOYMENT RELEASE AND WAIVER FORM" WITH APPLICATION

County Attorney

The Los Alamos County is looking for County Attorney with 10 years' of experience in the practice of law across all years of experience which must include two years of providing legal representation to public sector executive policymakers. Three years' management and supervisory experience, across all years of job related experience. Licensed to practice law in the State of New Mexico or attain the license within 12 years months of employment. Excellent Benefits included. A Los Alamos County job application is required. Applications and full position information can be found at www.losalamosnm.us or by calling 505-662-8040. Completed applications should be mailed or delivered to: Los Alamos County Human Resources 1000 Central Avenue, Suite 230 Los Alamos, NM 87544. Applications may also be faxed to 505-662-8000 or emailed to jobs@lacnm.us

Attorney

Egolf + Ferlic + Harwood, LLC is looking for a hardworking lawyer to join our fast-paced and growing practice. The ideal candidate will have clerkship and private sector litigation experience. She or he will be eager to work hard on cases that will advance the law in New Mexico and produce meaningful results for our clients and our communities. We look forward to welcoming a lawyer who possesses impeccable writing and research skills and who can manage important cases from start to finish. Please be in touch if you think you will be a good candidate for this position, want to enjoy a collegial workplace, seek unparalleled opportunities for professional advancement, and understand the importance of the Oxford comma. You may send your letter of interest, resume and writing sample to our firm administrator, Manya Snyder, at Manya@EgolfLaw.com. We look forward to you joining our team!

Associate Attorney

General Liability Practice Group- Our Albuquerque office is seeking high energy associates with minimum two years experience to join the General Liability Practice Group. Applicants should have exceptional writing skills with experience in analyzing files, researching and briefing, and taking and defending depositions. Minimum requirements for this position: two years of litigation defense experience, credentials from ABA approved law school and currently licensed by NM State Bar. This is a great opportunity in a collegial local office of a national firm. We offer a competitive salary and benefit package. Please submit a cover letter, resume with salary history and two writing samples and identify the position applying for. Email to angela.roberts@lewisbrisbois.com.

Request for Proposals to Provide Housing Development Legal Services

The New Mexico Mortgage Finance Authority (MFA) has EXTENDED THE DEADLINE for submission of proposals in response to MFA's Request for Proposals (RFP) for Housing Development Legal Services, and INVITES ALL QUALIFIED LAW FIRMS to submit a proposal to provide legal services for MFA's housing development programs. JOINT PROPOSALS – FROM TWO OR MORE FIRMS - ARE WELCOME! The Request for Proposals (RFP) can be accessed on MFA's website, at http://www.housingnm.org/rfp. Once on the MFA website's RFP page, select "Housing Development Legal Services RFP" from the "Current RFP's" list. Responses must be received by 4:00 pm Mountain Time, Thursday, August 11, 2016.

Assistant Attorney General III, Santa Fe (Full time)
Job Reference # H10109984

The New Mexico Office of the Attorney General, Treaty of Guadalupe Hidalgo Division an Equal Employment Opportunity (EEO) employer is seeking applicants for an "At Will" (not classified) Assistant Attorney General III position. An "At Will" position means any state office job or position of employment which is exempt from the service and the Personnel Act," Section 10- 9-4 NNMSA 1978, the employee serves at the pleasure of the New Mexico Attorney General. The Assistant Attorney General III will be responsible for reviewing, overseeing and addressing concerns relating to the provisions of the Treaty of Guadalupe Hidalgo. The position will also provide legal advice to the Land Grant Council, the Acequias Commission, and other relevant stakeholders on a wide range of legal matters. Applicants should hold a Juris Doctorate and have a minimum of 7 years of legal experience in property, tax, water, history or other relevant experience. Applicants must be licensed to practice law in New Mexico. Fluency in Spanish is preferred. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Attorney General. This job advertisement will remain open until filled. Applicants selected for an interview must notify the Attorney General's Office of the need for a reasonable accommodation due to a Disability. Please send resumes to: The Office of the Attorney General, Attn: Tania Maestas. E-mail: tmaestas@nmag.gov – (505) 827-6000. P.O. Drawer 1508, Santa Fe, NM 87504-1508.

Associate Attorney

Established Rio Rancho law firm has an immediate opening for an associate attorney interested in the practice of real estate, corporate, estate, and probate matters. Real Estate transactional experience preferred. Please submit a resume and writing sample to P. O. Box 15698, Rio Rancho, NM 87174 or via email to ms@lsplegal.com. All replies kept confidential.

Associate Attorney

Busy Civil, Family, and Criminal firm in search of associate attorney. The ideal candidate will be a self-starter who is detail oriented, but also creative in their approach to cases and issues. This position will be both a writing and litigating position, as both will be a daily occurrence. Must be an optimist, and eager to learn, litigate, and help people. Salary and benefits are DOE. Please send a cover letter and resume in strict confidence to jcordova@carpenterlawnm.com

Associate Counsel – New Mexico State Land Office

The New Mexico State Land Office is seeking applications from attorneys for an exempt Associate Counsel position with the agency. Salary: $60,000 - $80,000 annually, plus benefits, depending on experience and qualifications. This is a fulltime exempt position that advises and represents the Commissioner of Public Lands and State Land Office staff regarding a variety of matters which may include oil & gas, water, environmental or other areas of natural resources and land use law. The chosen applicant may also assist in rulemaking and administrative matters, including professional service contracts and public records, human resources legal matters and representing the Commissioner in a variety of complex litigation in state and federal court. The position requires a juris doctor or equivalent degree from an accredited law school and a current license, in good standing, to practice law in New Mexico. Some travel is required. Strong writing and analytical skills, interpersonal skills and the ability to work in a team environment are necessary. Copies of your resume, New Mexico bar card, references, letter of interest and a legal writing sample must be submitted no later than 5:00 p.m. on August 12, 2016 to John L. Sullivan, Acting General Counsel, New Mexico State Land Office, P.O. Box 1148, Santa Fe, NM 87504-1148. The State of New Mexico is an EOE.

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.

Secretary/Legal Assistant

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

Mgr. Employer Outreach

The School of Law seeks a motivated individual for a full-time Manager, Employer Outreach position. Duties: Manages the promotion and execution of employer outreach services in the legal community and other employment markets, including employer liaison, on/off-campus recruitment, career fairs, and other initiatives; advises students and graduates regarding employment options. Requires: ability to create/deliver presentations on legal career/employer development topics; knowledge of legal career outreach methods, programs, services, resources. Must be able to interact professionally with diverse constituencies. Occasional evening/weekend work required. Applicants possessing J.D. degree from ABA accredited law school strongly preferred. To apply: http://unmjobs.unm.edu

Admissions Administrator

The New Mexico Board of Bar Examiners seeks an Admissions Administrator to work under the immediate supervision of the Executive Director and at the direction of the Board in administering bar admissions for New Mexico. The qualified candidate will have strong written and verbal communication skills, attention to detail, and ability to work well with diverse individuals. The duties of the Admissions Administrator include dissemination of information to applicants seeking licensure as New Mexico attorneys, receiving and assisting in evaluating applications for admission, maintaining applicant files, participating in bar exam organization and administration, and other duties as required by the Board and its Executive Director. For the complete job description, visit http://nmexam.org/about-2/hiring-admissions-administrator/.

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

Experienced full-time paralegal needed for a busy family law and civil law practice. Must have working knowledge of E-filing and a basic understanding of State Civil and Criminal Rules. Will be assisting with discovery, trial preparation, docket management and pleadings drafting, as well as significant client contact. Must be a team-player, organized and detail oriented. Spanish Speaker is a plus. Salary and benefits are DOE. Please send a cover letter and resume in strict confidence to jcordova@carpenterlawnm.com

Services

Vocal Presentation Coach

Open and close with a BANG. Seasoned writer/WB recording artist/Licensed Speech Pathologist. Refs. bigvoice4u@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

Experienced Paralegal

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

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.

Office Space

814 Marquette, NW, Albuquerque, New Mexico

Three large offices for rent with two secretarial areas in recently renovated downtown house with adjacent parking and refrigerated air. Call 243-4541 for appointment.

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.

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

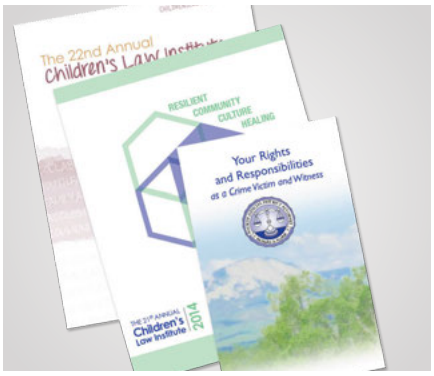
VEHICLE FORFEITURE CONFERENCE
FOR NEW MEXICO COMMUNITIES

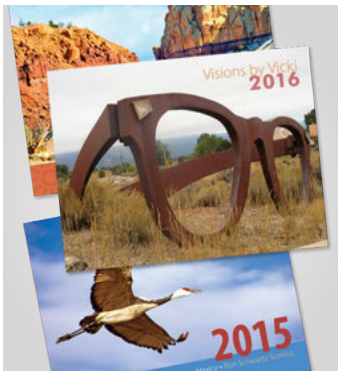
SEPTEMBER 14, 2016
SANTA FE COMMUNITY CONVENTION CENTE

Susana Martinez
Governor, State of New Mexico

DPC
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