BAR BULLETIN

Official Publication of the State Bar of New Mexico

August 17, 2016 • Volume 55, No. 33

Edit the Epilogue, by Melinda Silver (see page 3) www.melindasilverfineart.com

Inside This Issue

Notices 4

New Mexico Court of Appeals:
Notice of Retirements 4

Sixth Judicial District Court:
Announcement of Vacancy 4

Commemorate the Signing of the U.S.
Constitution with New Mexico's Youth 8

From the New Mexico Court of Appeals

2016-NMCA-051, No. 33,127:
Rodarte v.
Presbyterian Insurance Company 13

2016-NMCA-052, No. 34,167:
Garcia v. The Board of Regents
of the University of New Mexico 21

2016-NMCA-053, No. 34,096:
Shah v. Devasthali 25

NEW MEXICO Lawyer

Entertainment Law in New Mexico
Intellectual Property Law Section

CLE Planner

Sept. 16

27th Annual Appellate Practice Institute

6.4 G | 1.0 EP

Friday, Sept. 16, 2016 • 8:15 a.m.–5:15 p.m.
State Bar Center, Albuquerque: Live Seminar and Webcast

$99 Non-Members not seeking CLE credit
$259 Co-sponsoring section members, government and legal services attorneys, Paralegal Division members
$289 Standard Fee
$319 Webcast Fee
Co-sponsor: *Appellate Practice Section*

8 a.m. Registration and Continental Breakfast
8:15 a.m. **Welcome and Introduction**
Edward Ricco, Rodey, Dickason, Sloan, Akin & Robb, PA, Chair, Appellate Practice Section
8:20 a.m. **Recent Developments in Appellate Practice**
Edward Ricco, Rodey, Dickason, Sloan, Akin & Robb, PA and C. David Henderson, Appellate Defender, Office of the Public Defender
9 a.m. **Discretionary Review of Administrative Appeals**
Judge J. Miles Hanisee, New Mexico Court of Appeals; Judge David K. Thomson, First Judicial District Court; and Timothy Atler, Atler Law Firm PC
10 a.m. Break
10:15 a.m. **Preservation of Error**
Judge James J. Wechsler, New Mexico Court of Appeals; Judge C. Shannon Bacon, Second Judicial District Court; and Jocelyn Drennan, Rodey, Dickason, Sloan, Akin & Robb, PA
11:15 a.m. **A Conversation with Mark Reynolds, Chief Clerk of the New Mexico Court of Appeals**
Mark Reynolds, Chief Clerk, New Mexico Court of Appeals
11:45 a.m. Lunch (provided at the State Bar Center)
Annual Appellate Practice Section Meeting
12:45 p.m. **Taking Your Appellate Practice to the Next Level**
Howard J. Bashman, Law Offices of Howard J. Bashman; Creator of "How Appealing: The Web's First Blog Devoted to Appellate Litigation"
2:00 p.m. **Appellate Mediation**
David W. Aemmer, Chief Circuit Mediator, 10th Circuit Court of Appeals; and Robert Rambo, Appellate Mediator, New Mexico Court of Appeals
3:00 p.m. Break
3:15 p.m. **Immediate Rights of Appeal**
Chief Justice Charles W. Daniels, New Mexico Supreme Court; Judge Linda M. Vanzi, New Mexico Court of Appeals; and Alice Tomlinson Lorenz, Lorenz Law
4:15 p.m. **Appellate Ethics**
Jane Gagne, Assistant Disciplinary Board Counsel, Office of the Disciplinary Board
5:15 p.m. Adjournment

Sept. 23

2016 Tax Symposium

6.0 G | 1.0 EP | 8.5 recommended CPE credits

Friday, Sept. 23, 2016 • 8:30 a.m.-4:30 p.m.
State Bar Center, Albuquerque

$99: Non-members not seeking CLE credit
$235: Early bird Registration (Registration must be received by Aug. 23, 2016)
$245: Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
$275: Standard Fee
$309: Webcast Fee
Co-sponsor: *Taxation Section*

8:15 a.m. Registration
8:30 a.m. **Federal Tax Update**
Bruce McGovern, South Texas College of Law
9:50 a.m. **State Tax Update**
Frank Crosiata, New Mexico Taxation and Revenue Department
10:55 a.m. **Low-Income Taxpayer Issues**
Grace Allison and Mary Pareja, University of New Mexico School of Law
11:55 Lunch and Taxation Section Annual Meeting (lunch provided at the State Bar Center)
12:30 p.m. **Nonprofit Financing**
Robert Desiderio, Sanchez, Mowrer & Desiderio, PC; Mark Chaiken, New Mexico Finance Authority; and Jeanine Steffy, Steffy Law Firm, PC
1:20 p.m. Break
1:30 p.m. **Tax Fraud Investigations**
Rick Marion, Internal Revenue Service Criminal Investigation Division
2:35 p.m. **Partnership Tax Update**
Oscar Ornelas, Ornelas Firm PLLC; and Ed Hymson, Ed Hymson Attorney at Law
3:20 p.m. Break
3:30 p.m. **Ethical Practice Before the IRS**
Vanessa Kaczmarek, Modrall Sperling Roehl Harris Sisk, PA
4:30 p.m. Adjourn

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

Register online at **www.nmbar.org** or call 505-797-6020.

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

August 17, 2016, Vol. 55, No. 33

Table of Contents

Notices 4
Continuing Legal Education Calendar 5
Commemorate the Signing of the U.S. Constitution with New Mexico's Youth 8
Writs of Certiorari 9
Court of Appeal Opinions List 11
Recent Rule-Making Activity 12
Opinions

From the New Mexico Court of Appeals

2016-NMCA-051, No. 33,127: Rodarte v. Presbyterian Insurance Company 13
2016-NMCA-052, No. 34,167: Garcia v. The Board of Regents of the University of New Mexico 21
2016-NMCA-053, No. 34,096: Shah v. Devasthali 25
Advertising 29

Meetings

August

17
Real Property Division of Real Property Trust and Estate Section,
Noon, State Bar Center

18
Family Law Section BOD,
9 a.m., teleconference

20
Young Lawyers Division BOD,
9:45 a.m., Buffalo Thunder Resort, Santa Fe

23
Health Law Section BOD,
9 a.m., teleconference

23
Intellectual Property Law Section BOD,
Noon, Lewis Roca Rothgerber Christie, Albuquerque

25
Natural Resources, Energy and Environmental Law Section BOD,
Noon, teleconference

26
Immigration Law Section BOD,
Noon, State Bar Center

September

6
Bankruptcy Law Section BOD,
Noon, U.S. Bankruptcy Court

Workshops and Legal Clinics

August

17
Family Law Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

September

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6003

7
Civil Legal Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

7
Common Legal Issues for Senior Citizens Workshop
Workshop: 10–11:15 a.m.
POA AHCD Clinic: 12:30–1:30 p.m.,
Clayton Senior Citizens Center, Clayton,
1-800-876-6657

About the Cover Image: *Edit the Epilogue, acrylic on canvas, 36 by 36*
Melinda Silver is a passionate painter who works in acrylics, encaustics and mixed media, painting layers and then destroying those layers to capture the tension and mystery geological, social, political, religious and personal change. She worked many years as a commercial artist for print media. Always interested in making this world a better place, she attended and graduated from the UNM School of Law and practiced both locally and in Washington, D.C. Now she works in her newly remodeled studio in Santa Fe. She finds working with the abstract requires a leap of faith which is fascinating, terrifying and gratifying. For inquiries or to arrange a studio visit, contact Silver at melindasilver@gmail.com or at www.melindasilverfineart.com.

Notices

Court News

New Mexico Court of Appeals

Notice of Retirements

Court of Appeals Chief Judge Michael E. Vigil announces two retirements: Hon. Michael D. Bustamante on Oct. 31 and the Hon. Roderick T. Kennedy on Nov. 30. A Judicial Nominating Commission will be convened in Santa Fe on Dec. 1 to interview applicants for the vacancy of Judge Bustamante. A second Judicial Nominating Commission will be convened later in December to interview applicants for the Judge Kennedy vacancy. Further information on the application process can be found at http://lawschool.unm.edu/judsel/index.php. Look for updates regarding these vacancies in the fall.

Sixth Judicial District Court

Announcement of Vacancy

A vacancy on the Sixth Judicial District Court, Luna County, will exist as of Aug. 27 due to the retirement of Hon. Daniel Viramontes, effective Aug. 26. The assignment for this position is a general bench assignment, Division IV, and will be located in Deming. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Alfred Mathewson, chair of the Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may found at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Sept. 14. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The District Court Judicial Nominating Committee will meet at 8:30 a.m., Sept. 22, to interview applicants for the position at the Luna County Judicial Complex, 855 South Platinum Avenue, Deming. The Commission meeting is open to the public and anyone who has comments will have an opportunity to be heard.

State Bar News

Attorney Support Groups

- Sept. 12, 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#.
- Sept. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)
- Oct. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the first Monday of the month but will skip September due to Labor Day.)

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

Professionalism Tip

With respect to the public and to other persons involved in the legal system:
I will be mindful of my commitment to the public good.

Appellate Practice Section

Appellate Pro Bono Program

The Appellate Practice Section has launched an appellate pro bono program that will match volunteer attorneys with qualifying pro se litigants in appeals assigned to the Court of Appeals general calendar. The Volunteer Attorney Program of New Mexico Legal Aid will manage the process of assembling a panel of volunteer lawyers and matching lawyers with specific cases. Those interested in learning about and possibly accepting appellate pro bono opportunities should contact Section Chair Edward Ricco at ericco@rodey.com or 505-768-7314.

Brown Bag Lunch with Judge Jonathan B. Sutin

Join the Appellate Practice Section and Young Lawyers Division for a brown bag lunch at noon, Sept. 9, at the State Bar Center with guest Judge Jonathan B. Sutin of the New Mexico Court of Appeals. The brown bag lunch series is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Tim Atler, tja@atlerfirm.com. Space is limited.

Business Law Section

Nominations Open for 2016 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year award, to be presented on Nov. 18 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 3. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

Senior Lawyers Division

Judicial Service Awards

The Senior Lawyers Division presents an award to any judge from a New Mexico court who has completed an aggregate of 25 years of judicial service. Any judge who fits this qualification should contact Judge Bob Scott (ret., U.S. Magistrate Court) at 505-255-5138 or flyings421@gmail.com.

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

Albuquerque Bar Association

Presidents' Dinner

Join the Albuquerque Bar Association for the President's Dinner in recognition of friendship, support and service to the Association. The dinner will be Aug. 27 (hors d'oeuvres at 6 p.m., dinner and program at 7 p.m.) at the UNM Championship Course Pavillion, 3601 University Blvd. SE, Albuquerque. The dinner will include a four course wine pairing by Chef Christophe Descarpentries of Petit Louis Bistro. Other programming will include a past presidents interview

continued to page 7

Legal Education

August

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

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

September

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**
6.2 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, New Mexico Chapter
505-268-3999

21 **Ethics and Cloud Computing**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Fiduciary Standards in Business Transactions: Good Faith and Fair Dealing**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

27 **2015 Federal Practice Tips and Advice From U.S. Magistrate Judges**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **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

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

FAMILY LAW 101 CLE

The **Volunteer Attorney Program/Justice for Families Project** is hosting a CLE entitled **"Family Law 101"** on **September 9, 2016** from **8:45 am - noon** at **New Mexico Legal Aid**, 301 Gold Ave. SW, Albuquerque, NM 87102

The CLE (**3.0 G pending**) will be presented by **Gretchen Walther, Esq., Tiffany Oliver Leigh, Esq., Torri Jacobus, Esq.,** & **Kasey Daniel, Esq.**

FREE for attorneys who agree to give advice at the Second Judicial District Court Family Law Clinic for two clinics, or agree to accept a pro bono limited representation family law referral from VAP/JFP. For attorneys not wishing to volunteer, a $50 donation is suggested to attend.

To attend this CLE, please contact Kasey Daniel at (505) 545-8543 or kaseyd@nmlegalaid.org

Volunteer Attorney Program
A Program of New Mexico Legal Aid
Justice for Families Project

continued from page 4

montage, recognition for 2016 Liberty Award recipient Michelle Giger and a tribute to John Robb. Individual tickets are $100. Tables of 10 are $1,000. Sponsorships are available. R.S.V.P. by Aug. 18 at tbeckmann@abqbar.org or by calling 505-842-1151.

Federal Bar Association, New Mexico Chapter

Save the Date—Second Annual CLE at the Movies in October

The New Mexico Chapter of the Federal Bar Association is proud to offer a special showing of the movie *Citizen Four*, the real life thriller giving audiences a riveting insight into Edward Snowden's decision to reveal classified document about the National Security Agency. A CLE panel discussion (3.2 G) will follow the movie with Hon. Gregory Fouratt, Dana Gold, Nancy Hollander and Robert Gorence. The event will be at 1 p.m., Oct. 14, at the Regal Winrock Stadium 16 in Albuquerque. The cost is $50 for non-FBA members, $40 for FBA members, and $15 for students. A limited number of free tickets for law students are available. For more information or to register, send your name and bar number to nmfedbar@gmail.com.

Hispanic National Bar Association

Presidential Reception

Join community and business leaders to welcome Hispanic National Bar Association President Robert Maldonado to Albuquerque at an event at 5:30 p.m., Aug. 26, at Farm and Table in Los Ranchos de Albuquerque. Enjoy Southwest cuisine, Spanish guitar and a flamenco performance while meeting President Maldonado and celebrating the HNBA. R.S.V.P. by Aug. 23 to Susan Harris, 505-848-9755 or susanh@modrall.com

New Mexico Criminal Defense Lawyers Association

Digital Evidence CLE

Join the New Mexico Criminal Defense Lawyers Association for a CLE "I Always Feel Like Somebody's Watching Me, and I Have No Privacy: Digital Evidence and the Fourth Amendment" (6.7 G) on Aug. 26 in Las Cruces. Topics include: cell phone forensics, caselaw update on the fourth amendment and technology, child porn discovery and forensics and more. After the CLE, NMCDLA members and their friends and families are invited to the annual membership party and auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar.

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.

Constitution Day

~ September 17, 2016 ~

In the spirit of Constitution Day and to aid in the fulfillment of Public Law 108-447 Sec. 111 Division J - SEC. 111(b), the YLD organizes a public education program that provides participating New Mexico fifth-grade classes with U.S. Constitution booklets to keep and an educational lesson from a licensed New Mexico attorney.

Statewide attorney volunteers are needed for this program! Roughly hour-long educational lessons will take place during the week of Sept. 12–16 at elementary schools across New Mexico.

Please accept this offer to earn pro bono hours and connect with New Mexico's youth. Educator feedback reflects that this is a worthwhile program and an exciting and inspiring experience for students. More than 25,000 New Mexico students have been served during this program's lifetime.

For more information and to volunteer,
visit www.nmbar.org/ConstitutionDay

Deadline to participate is Aug. 22.

State Bar of New Mexico
Young Lawyers Division

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 August 5, 2016

Published Opinions

No. 33784	1st Jud Dist Santa Fe CV-09-4090, J CHRISTOPHERSON v ST VINCENT (affirm)	8/4/2016
No. 33940	12th Jud Dist Otero CR-13-451, STATE v K GRAY (reverse and remand)	8/4/2016
No. 34347	11th Jud Dist San Juan CV-14-1, S MILLIRON v SAN JUAN COUNTY (affirm)	8/4/2016

Unpublished Opinions

No. 35227	2nd Jud Dist Bernalillo CV-09-7967, J MAYER v S SMITH (dismiss)	8/1/2016
No. 35468	2nd Jud Dist Bernalillo CR-12-3829, STATE v R PALFOX (affirm)	8/1/2016
No. 34459	2nd Jud Dist Bernalillo CV-11-7863, BANK OF NY v S LOPES (affirm)	8/2/2016
No. 35295	5th Jud Dist Chaves CR-14-183, STATE v A PEREZ (affirm)	8/2/2016
No. 34328	5th Jud Dist Chaves CR-12-215, STATE v L HOUSEWRIGHT (reverse and remand)	8/4/2016
No. 35244	2nd Jud Dist Bernalillo CR-14-4007, STATE v J PERKINS (reverse)	8/4/2016
No. 35389	5th Jud Dist Chaves CR-12-6, STATE v J ORTEGA (dismiss)	8/4/2016
No. 35456	2nd Jud Dist Bernalillo LR-15-16, STATE v J SALAZAR (affirm)	8/4/2016

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

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 August 17, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

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, May 19, 2016, No. S-1-SC-35862

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-051

No. 33,127 (filed March 28, 2016)

ALBERT RODARTE,
Appellant-Respondent,
v.
PRESBYTERIAN INSURANCE COMPANY,
Appellee-Petitioner,
and
NEW MEXICO SUPERINTENDENT OF INSURANCE,
Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
RAYMOND Z. ORTIZ, District Judge

PAUL D. MANNICK
Santa Fe, New Mexico
for Appellant-Respondent

WALTER J. MELENDRES
SETH C. MCMILLAN
MONTGOMERY & ANDREWS, P.A.
Santa Fe, New Mexico
for Appellee-Petitioner

Opinion

J. Miles Hanisee, Judge

{1} This case requires us to determine whether certain medical treatment is covered by a plan participant's health benefits plan or required by applicable regulations governing such contracts. After Albert Rodarte's (Rodarte) daughter, Jessica, suffered a severely disabling anoxic brain injury, he sought pre-approval from her health insurance company for Jessica to receive hyperbaric oxygen therapy (HBOT). Presbyterian Insurance Company (Presbyterian) denied the request, concluding that the treatment was not a covered benefit. On review, the New Mexico Superintendent of Insurance (the Superintendent) upheld Presbyterian's denial of coverage, finding that HBOT was an excluded treatment under her Presbyterian plan, and that the use of HBOT to treat Jessica's condition was not "medically necessary" under the New Mexico Administrative Code (the Code).[1] In its appellate capacity, the district court disagreed and reversed the Superintendent in both respects.

{2} On petition by Presbyterian, this Court accepted certiorari in order to review the district court's ruling. We hold that Jessica's condition was excluded from those for which her Presbyterian health benefits plan provided HBOT coverage. We also hold that HBOT was not a medically necessary treatment for Jessica's condition under the Code. We therefore reverse the district court.

BACKGROUND

{3} Jessica's injury, identified as "global anoxic encephalopathy," resulted from an incident of cardiac arrest and stroke that deprived her brain of oxygen for approximately seventeen minutes. At the time, Jessica was a freshman at New Mexico State University. Her injury left her profoundly impaired both mentally and physically. After researching Jessica's condition on the internet and learning of HBOT, Rodarte contacted Dr. Kenneth Stoller, who owned and operated a facility offering the treatment. When treated by HBOT, a patient is "enclosed in a pressure vessel and exposed to 100% oxygen at increased atmospheric pressure." While acknowledging that HBOT is "off-label," Dr. Stoller nonetheless maintained it to be a "well-established FDA approved treatment used for a wide variety of conditions[.]" He requested prior authorization from Presbyterian to treat Jessica with a series of forty HBOT sessions.

{4} Presbyterian denied Dr. Stoller's request because Jessica did "not meet the requirements for the requested" HBOT under the terms of her insurance contract, and because her diagnosis was "a specifically excluded condition for [HBOT] per Presbyterian . . . criteria." When Rodarte requested "adverse determination review" through Presbyterian's internal process of appeal,[2] Presbyterian twice upheld its denial of coverage. It first explained that "HBOT is not a covered benefit . . . due to [Jessica's] cerebral vascular injury[,]" and later elaborated that its decision was additionally justified by the absence of "evidence in the literature that supports treatment with HBOT for Jessica's condition." Presbyterian added that "experimental or investigational services [or] treatments are not covered benefits."

{5} As permitted by the Code,[3] Rodarte then sought external review by the Superintendent. After first determining that Rodarte's grievance qualified for external review of an experimental or investigational treatment under 13.10.17.28 NMAC (5/15/2012), the Superintendent convened a hearing panel to issue a recommendation regarding the propriety of Presbyterian's denial of coverage. The panel, comprised

[1]Grievance Procedures within the Code were revised effective January 1, 2016. Many regulations, including some pertinent to this appeal, have been renumbered and in some instances modified. In this Opinion, we cite to and apply the regulations in place during the course of the underlying proceedings. We note differences to applicable regulations when necessary or helpful to an understanding of our analysis.

[2]*See* 13.10.17.17(A) NMAC (5/15/2012) (stating that "[e]very grievant who is dissatisfied with an adverse determination shall have the right to request internal review of the adverse determination by the health care insurer").

[3]*See* 13.10.17.23 NMAC (5/15/2012) (setting forth process by which external review by the Superintendent is initiated).

of two physicians and one attorney, held an informal hearing at which Presbyterian and Rodarte presented evidence in support of their respective positions. Utilizing the same regulation initially applied by the Superintendent, the panel considered: (a) whether HBOT "reasonably appears to be a covered benefit under the plan"; (b) whether HBOT "is not explicitly listed as an exclusion under the plan"; and (c) whether HBOT is a "medical necessity."

{6} In its ensuing written recommendation to the Superintendent, the panel noted that Rodarte sought HBOT treatment for anoxic encephalopathy, a condition for which the insurance contract did not specifically include or exclude HBOT coverage. The contract did, however, list certain conditions for which HBOT was available, and excluded "any clinical condition not listed above," specifically naming seven such excluded conditions. The panel advised, however, that "it is not practical for a [p]lan to list all of the diseases and illnesses in the world that are excluded [and] . . . if anoxic encephalopathy is not specifically listed as covered, then it is excluded." The panel recommended that the Superintendent uphold Presbyterian's denial of HBOT coverage under the terms of Jessica's contract and for the additional reason that under the evidence presented and considered, HBOT was not "medically necessary" as an experimental or investigational treatment under the standard given in 13.10.17.28(B) NMAC (5/15/2012).

{7} In a final order, the Superintendent adopted, approved, and accepted the findings and conclusions of the panel, adding that "even if a treatment might be considered a covered benefit, it must also be medically necessary before an adverse determination [of coverage] can be reversed." Thus, the Superintendent identified the issue to be "whether as a result of [Presbyterian's] adverse determination, [Jessica] was deprived of medically necessary covered services." Importantly, the Superintendent did not disturb the panel's conclusion that because "anoxic encephalopathy is not specifically listed as covered, then it is excluded" from coverage under Presbyterian's plan. The Superintendent then made a specific finding that "[t]he HBOT treatment denied by Presbyterian in this case does not meet the requirements necessary to establish medical necessity pursuant to 13.10.17(B) NMAC [(5/15/2012)]."[4] By the Superintendent's order, Presbyterian's adverse determination was upheld.

{8} Having failed to convince Presbyterian or the Superintendent that HBOT was a covered benefit for Jessica's condition under either her health plan contract or the Code, Rodarte appealed to the district court.[5] There he argued again that the insurance contract covered HBOT for Jessica's condition, contained no effective exclusion, and was "medically necessary" under 13.10.17.28(B) NMAC (5/15/2012). Presbyterian insisted that its plan covers "medically necessary" services as defined not by the Code, but by the insurance contract itself. Presbyterian also maintained that Rodarte failed to establish that the Superintendent's determination of non-medical necessity in this case was unsupported by substantial evidence.

{9} After initially affirming the Superintendent, the district court was persuaded by Rodarte's motion for reconsideration that its ruling was incorrect. In granting the motion to reconsider, the district court ruled that HBOT "reasonably appears to be a covered benefit" under Jessica's Presbyterian plan, and was not "explicitly listed as an excluded benefit." Applying 13.10.17.28 NMAC (5/15/2012) for the first time, the district court concluded as a matter of law that "Dr. Stoller's certification regarding HBOT as a recommended treatment for Jessica [satisfied] the requirements for medical necessity applicable to experimental and investigational medical procedures." The district court concluded that in its original order, it had "mistakenly applied" the "more general definition of medical necessity found at 13.10.17.7[(L)] NMAC [(5/15/2012)]." Ultimately, the district court reversed the Superintendent. This appeal followed.

DISCUSSION

Standard of Review

{10} Under NMSA 1978, Section 39-3-1.1(D) (1999), a district court may "set aside, reverse[,] or remand" the final decision of the Superintendent when: "(1) the [Superintendent] acted fraudulently, arbitrarily[,] or capriciously; (2) the final decision was not supported by substantial evidence; or (3) the [Superintendent] did not act in accordance with law." Our review is the same as that of "the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806.

{11} We discuss: (1) whether the HBOT treatments are a covered benefit under Presbyterian's plan; (2) whether such treatments are medically necessary under regulations adopted by the Superintendent requiring a plan to provide medically necessary services; and (3) whether the district court was correct to reverse the Superintendent.

I. Presbyterian's Insurance Contract Does Not Provide HBOT Coverage for Jessica's Medical Condition

{12} The Presbyterian insurance contract states that it "helps pay for healthcare expenses that are [m]edically [n]ecessary and [s]pecifically covered." It defines "[s]pecifically covered" to mean "only those healthcare expenses that are expressly listed and described" in the agreement. Presbyterian's medical policy specifically covers HBOT for certain diabetic wounds, gangrene, compromised skin grafts, and a number of other conditions; however, it does not list HBOT as a covered service for global anoxic encephalopathy. Furthermore, in the "exclusions" section of the HBOT portion of the policy, the policy states, "[a]ny clinical conditions not listed above [are] not covered, including but not limited to" a list of seven conditions, including stroke.

{13} Presbyterian argues that HBOT for Jessica's specific condition is not covered under the insurance contract as it is not an expressly covered treatment in the agreement. Rodarte contends that because Presbyterian reimburses oxygen and other therapeutic support care services,

[4]We note that "13.10.17(B) NMAC [(5/15/2012)]" is not a provision that existed or exists in the Code. It is therefore unclear which "requirements necessary to establish medical necessity" were applied by the Superintendent to determine that HBOT is not medically necessary to treat Jessica. As discussed in greater detail herein, the Code addresses medical necessity in both 13.10.17.7(L) NMAC (5/15/2012) (defining "medical necessity" in the general definitional section) and 13.10.17.28(B) NMAC (5/15/2012) (setting forth the certification requirements of medical necessity when requesting external review of an experimental or investigational treatment adverse determination).

[5]*See* NMSA 1978, § 59A-4-20(A) (2011) (stating that an appeal from "an order of the [S]uperintendent made after an informal . . . or . . . administrative hearing . . . shall be taken to the district court").

he "would reasonably expect that HBOT, which is a method of oxygen therapy, would be among the therapeutic and support services Presbyterian promised to provide." Additionally, Rodarte maintains that because HBOT falls under the plan's coverage for short term rehabilitation services, and "HBOT . . . is designed to repair and restore damaged brain tissue," its provision would be internally consistent. Rodarte claims that a contracted plan that reasonably appears to cover oxygen can likewise reasonably be expected to cover HBOT for global anoxic encephalopathy.

{14} In construing the language of Presbyterian's plan, we are mindful that, "absent a statute to the contrary, insurance contracts are construed by the same principles which govern the interpretation of all contracts." *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 18, 123 N.M. 752, 945 P.2d 970 (internal quotation marks and citation omitted). The process of contract interpretation "often turns upon whether . . . the contract is ambiguous." *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 12, 112 N.M. 504, 817 P.2d 238. "[W]hen the policy language is clear and unambiguous, [an appellate court] must give effect to the contract and enforce it as written." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960. "If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists." *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 845 P.2d 1232. Whether an agreement contains an ambiguity is a matter of law to be determined by the trial court, and is a question we review de novo on appeal. *Id*.

> In determining the existence of an ambiguity, the language at issue should be considered not from the viewpoint of a lawyer, or a person with training in the insurance field, but from the standpoint of a reasonably intelligent layman, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, prior to and contemporaneous with the making of the policy.

Rummel, 1997-NMSC-041, ¶ 19 (internal quotation marks and citation omitted).

{15} We conclude that the insurance contract unambiguously restricts coverage for HBOT to a series of named conditions and excludes coverage of HBOT for all other treatments. Jessica's injury does not fall within the exclusive list of covered conditions in the contract, and the contract expressly excludes all non-listed conditions from coverage. As well, the contract expressly excludes strokes, one source of Jessica's injuries, from the scope of HBOT coverage. We are not persuaded by Rodarte's argument that the contract's exclusion of HBOT for all non-covered treatment is ambiguous because the contract elsewhere covers oxygen for rehabilitation treatment. Even assuming the phrase "oxygen" in the contract can be read to include HBOT, "a specific provision [in a contract] relating to a particular subject will govern in respect to that subject, as against a general provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates." *Weldon v. Commercial Union Assurance Co.*, 1985-NMSC-118, ¶ 9, 103 N.M. 522, 710 P.2d 89 (internal quotation marks and citation omitted).

{16} As did Presbyterian and the Superintendent, we therefore conclude that the HBOT treatments in this case are not only not specifically covered treatments under the health plan into which Presbyterian and Jessica contracted, they are specifically excluded. We reverse the district court's conclusion to the contrary.

II. HBOT Is Not Medically Necessary to Treat Jessica's Medical Condition Under the Code

{17} Our Legislature empowered the Superintendent to establish "reasonable rules and regulations necessary for or as an aid to administration or effectuation of any provision of the Insurance Code administered by the [S]uperintendent[.]" NMSA 1978, § 59A-2-9(A) (1997). That authority was employed by the Superintendent to promulgate grievance procedures, which apply to "all health care insurers that provide, offer, or administer health benefit plans[.]" 13.10.17.2(A) NMAC (5/15/2012). One such regulation applicable to insurers such as Presbyterian, 13.10.13.8(C)(1) NMAC, requires, at a minimum, that evidence of health insurance coverage include "a complete statement that a covered person shall have the right . . . to available and accessible services when medically necessary[.]" Therefore, even if the language in a health plan specifically excludes coverage for a treatment or service, the Superintendent's regulations require that it be covered if it is medically necessary. We therefore consider whether the HBOT treatments must be covered under Presbyterian's plan because they are medically necessary under the Code.

{18} Regarding which treatments are medically necessary, 13.10.17.7 NMAC (5/15/2012) supplies various definitions "[a]s used in this rule[.]" The meaning of "medical necessity" or "medically necessary" is set forth in 13.10.17.7(L) NMAC (5/15/2012). Medically necessary treatments are those

> health care services determined by a provider, in consultation with the health care insurer, to be appropriate or necessary, according to any applicable generally accepted principles and practices of good medical care or practice guidelines developed by the federal government, national or professional medical societies, boards and associations, or any applicable clinical protocols or practice guidelines developed by the health care insurer consistent with such federal, national, and professional practice guidelines, for the diagnosis or direct care and treatment of a physical, behavioral, or mental health condition, illness, injury, or disease[.]

13.10.17.7(L) NMAC (5/15/2012).[6]

{19} That definition is either replaced, as argued by Rodarte, or remains substantively applicable to the Superintendent's grievance process, as argued by Presbyterian, when the medical treatment sought under a health plan is characterized as experimental or investigational. 13.10.17.28 NMAC (5/15/2012), the provision advanced by Rodarte as defining medical necessity, primarily referenced by the Superintendent, and relied on as the basis for the district court's final ruling reversing the Superintendent, provides:

> If the request is for external review of an experimental or investigational treatment adverse determination, insurance division staff shall also consider whether:

[6]The definition set forth in 13.10.17.7(L) NMAC (5/15/2012) was not modified under the 2016 revision to the Code. It has been renumbered as 13.10.17.7(N) NMAC.

> A. **coverage;** the recommended health care service:
> (1) reasonably appears to be a covered benefit under the grievant's health benefit plan except for the health care insurer's determination that the health care service is experimental or investigational for a particular medical condition; and
> (2) is not explicitly listed as an excluded benefit under the grievant's health benefit plan; and
> B. **medical necessity;** the grievant's treating provider has certified that:
> (1) standard health care services have not been effective in improving the grievant's condition; or
> (2) standard health care services are not medically appropriate for the grievant; or
> (3) there is no standard health care service covered by the health care insurer that is as beneficial or more beneficial than the health care service[.]

13.10.17.28 NMAC (5/15/2012).[7]

{20} Having reviewed the entire administrative record, the Superintendent specifically concluded that the "HBOT treatment denied by Presbyterian does not meet the requirements necessary to establish medical necessity[,]" then cited a non-existent provision of the Code: "13.10.17(B) [NMAC (5/15/2012)]." In reversing the Superintendent, the district court relied on 13.10.17.28(B) NMAC (5/15/2012). To determine whether the district court's reversal of the Superintendent was correct, we must determine the applicable definition in this circumstance.

{21} "[A] court's interpretation of an administrative regulation is a question of law that we review de novo." *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 24, 147 N.M. 583, 227 P.3d 73 (internal quotation marks and citation omitted). "In interpreting sections of the . . . Code, we apply the same rules as used in statutory interpretation." *Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus.*, 2007-NMCA-157, ¶ 18, 143 N.M. 133, 173 P.3d 55. "We look first to the plain language of the [regulation], giving the words their ordinary meaning," unless there is an indication that "a different [meaning] was intended." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. "When [a regulation's] language is clear and unambiguous, this Court must give effect to that language and refrain from further . . . interpretation." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (alteration, internal quotation marks, and citation omitted).

A. 13.10.17.28(B) NMAC (5/15/2012) Does Not Provide the Applicable Definition of Medical Necessity Under the Code

{22} The Code details the requirements, time frames, and considerations pertinent to the filing and review of an adverse determination grievance. *See* 13.10.17.1 to -.40 NMAC (05/03/2004, as amended through 05/15/2012). Its provisions are organized beginning with general requirements, then preliminary determinations, initial determinations, internal review, and finally external review. *Id.* For example, 13.10.17.6 NMAC (5/15/2012) establishes "procedures for filing and processing adverse determination grievances and administrative grievances regarding actions taken or inaction by a health care insurer." More specifically, 13.10.17.27 NMAC (5/15/2012) details the "[c]riteria for initial external review of adverse determination by insurance division staff[,]" setting out factors that staff must consider in deciding which grievances are available for review by the Superintendent. 13.10.17.28 NMAC (5/15/2012) denotes supplemental considerations in the context of external review of experimental or investigational treatments, as indicated by the phrase "shall also consider" in the first sentence of the provision. Regarding medical necessity, what "shall also" be considered is the required certification of medical necessity by a "licensed, board certified or board eligible physician qualified to practice in the area of medicine appropriate to treat the grievant's condition[.]" 13.10.17.28(B)(3)(b) NMAC (5/15/2012). The language "shall also" and the fact that the section regarding medical necessity does not supply an independent definition, but states the requirements for supplemental certification in the context of experimental or investigational treatment adverse determinations, is the first indication that 13.10.17.28(B) NMAC (5/15/2012) does not replace 13.10.17.7(L) NMAC (5/15/2012)'s definition of "medical necessity."

{23} 13.10.17.29(B) NMAC (5/15/2012) next details the procedure applicable "[i]f the request for external review does not meet the criteria prescribed by 13.10.17.27 [NMAC (5/15/2012)] and, if applicable, 13.10.17.28 NMAC [(5/15/2012)]." However, if the "request meets the criteria for external review," the Superintendent notifies the insurer and the grievant that an informal hearing "has been set to determine whether, as a result of the health care insurer's adverse determination, the grievant was deprived of medically necessary covered services." 13.10.17.29(C) NMAC (5/15/2012). The "additional criteria" under 13.10.17.28 NMAC is plainly denoted as something that "shall also" be considered upon a grievant's request for external review involving experimental or investigational treatment. *Id.*

{24} Our review of 13.10.17.27 through -.29 NMAC (5/15/2012) suggests that the criteria listed under the "medical necessity" provision of 13.10.17.28(B) NMAC (5/15/2012) merely states applicable "criteria for initial external review" of the medical necessity of experimental or investigational treatment, rather than supplying an independent and superseding definition of "medical necessity" for purposes of determining whether a treatment is covered by the plan or medically necessary under the Code. *See* 13.10.17.29 NMAC (5/15/2012); *see also State v. Ybarra*, 2010-NMCA-063, ¶ 7, 148 N.M. 373, 237 P.3d 117 ("There is no difference between our review of the Administrative Code and statutes, and we determine and effectuate the intention of the administrative agency using the plain language of the regulation as the primary indicator of its intent."). We see no indication that the "criteria for initial external review," utilized in order to

[7]The 2016 revision to the Code renumbered 13.10.17.28 NMAC (5/15/2012) as 13.10.17.29 NMAC. Substantive changes to the language of 13.10.17.28 include the substitution of "an IRO" for "insurance division staff," and identification of the health care treatment sought as both "recommended or requested." *See* 13.10.17.29 NMAC. As used in 13.10.17.29 NMAC, "IRO" refers to "[i]ndependent review organization," which are entities under the revised Code that can be assigned to conduct the independent review. *See* 13.10.17.23 NMAC. Also under the 2016 revision to the Code, external review of a decision by an IRO is binding upon both the grievant and the health care insurer unless a grievant has and exercises a right of appeal under the Patient Protection Act, NMSA 1978, § 59A-57-1 to -11 (1998, as amended through 2003). *See* 13.10.17.30(A) NMAC.

determine whether a grievant's request for external review is to occur as "prescribed by 13.10.17.27 [NMAC (5/15/2012)] and, if applicable, 13.10.17.28 [NMAC (5/15/2012)]" was also intended to substitute or replace the general definition of "medical necessity" for purposes of the Superintendent's hearing. *See* 13.10.17.29(B) NMAC (5/15/2012); *see also* 13.10.17.29(C) NMAC (5/15/2012) (explaining role of 13.10.17.28 NMAC (5/15/2012) in determining whether a request meets the criteria for external review prior to the setting of an informal hearing); *see also Alliance Health of Santa Teresa, Inc.*, 2007-NMCA-157, ¶ 24 (stating that we generally do not read language into the Code).

{25} In the dissenting portion of Chief Judge Vigil's separate opinion, he reasons that, in the "case of an experimental or investigational treatment, the definition of 'medical necessity' [under 13.10.17.28(B) NMAC (5/15/2012)] governs instead of the general definition" under 13.10.17.7(L) NMAC (5/15/2012). (Vigil, C.J., dissenting in part, and specially concurring, ¶ 40). But this perspective essentially revises the Code's regulatory language. That the criteria for medical necessity under 13.10.17.28(B) NMAC (5/15/2012) is meant to supplement, and not replace, 13.10.17.7(L) NMAC (5/15/2012) is made most plain by use of the prefatory directive "shall also consider." 13.10.17.28 NMAC (5/15/2012). Otherwise, the language would read "shall consider instead." But it does not. We likewise consider Chief Judge Vigil's statement that a patient can "never win when coverage is sought for an experimental or investigational treatment," (Vigil, C.J., dissenting in part, and specially concurring, ¶ 39), to be mistaken. Such a grievant must, however, establish medical necessity by the same standard required of any grievant under the Code, that being the general standard under 13.10.17.7(L) NMAC (5/15/2012). Additionally, in order to gain the opportunity for a hearing before the Superintendent, such a grievant must first attain a treating provider's separate and compliant certification of medical necessity with the added strictures associated with the experimental or investigational treatment sought. *See* 13.10.17.28(B) NMAC (5/15/2012).

{26} Indeed, it would make little sense that a treating provider's contention could alone establish medical necessity under the Code despite the existence of an otherwise comprehensively applicable definition that both applies objective criteria and directly incorporates a health care provider's independent assessment of those "health care services . . . appropriate or necessary, according to generally accepted principles and practices of good medical care[.]" 13.10.17.7(L) NMAC (5/15/2012). We view 13.10.17.7(L) NMAC (5/15/2012) and 13.10.17.28(B) NMAC (5/15/2012) to not be mutually exclusive. Accordingly, we conclude that the district court misinterpreted 13.10.17.28(B) NMAC (5/15/2012) and thereby misapplied the definition of "medical necessity" under the Code. While we recognize that the Superintendent likewise appeared to rely primarily upon 13.10.17.28(B) NMAC (5/15/2012) as the determinant of "medical necessity," and we generally defer to an agency's interpretation of its own regulation, "we are not bound by the agency's interpretation and we may substitute our own independent judgment for that of the agency if the agency's interpretation is unreasonable or unlawful." *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 51, 148 N.M. 21, 229 P.3d 494 (alteration, internal quotation marks, and citation omitted). To the extent the Superintendent's use of 13.10.17.28 NMAC (5/15/2012) was mistaken, we are not bound by it or the district court's ensuing error applying the same provision. *See Albuquerque Bernalillo Cty. Water Util. Auth.*, 2010-NMSC-013, ¶ 51.

B. 13.10.17.7(L) NMAC (5/15/2012) Provides the Applicable Definition of Medical Necessity Under the Code

{27} 13.10.17.7 NMAC (5/15/2012), the applicable definitional section, announces that "[a]s used in this rule[,]" the meaning of "medical necessity" or "medically necessary" is established by 13.10.17.7(L) NMAC (5/15/2012). Consistent with the Superintendent's authority, we view this generally applicable definition to be that which should have been applied by the Superintendent to review whether Presbyterian's adverse determination regarding coverage of HBOT deprived Jessica of "medically necessary covered services." *See* 13.10.17.29(C) NMAC (5/15/2012); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 22, 117 N.M. 346, 871 P.2d 1352 (stating that when "the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written"). The regulation promulgated by the Superintendent reveals the purpose of the external review hearing: "to determine whether, as a result of the health care insurer's adverse determination, the grievant was deprived of medically necessary covered services." 13.10.17.29(C) NMAC (5/15/2012). To this end, the Code pointedly defines "medical necessity" or "medically necessary" under 13.10.17.7(L) NMAC (5/15/2012). These rules and regulations govern insurers like Presbyterian. *See* 13.10.17.2(A) NMAC (5/15/2012). Thus, for the purposes of determining whether HBOT was "medically necessary" in Jessica's circumstances, the Superintendent is constrained by definitional rules it is statutorily empowered to promulgate, one being 13.10.17.7(L) NMAC (5/15/2012). It is this provision to which Presbyterian's contract and coverage must adhere, even in circumstances where the Code provides additionally applicable criteria, such as the requisite certification of medical necessity set forth by 13.10.17.28(B) NMAC (5/15/2012) in the context of "initial external review of experimental or investigational treatment adverse determinations[.]"

III. The District Court's Reversal of the Superintendent Was Erroneous

{28} While we have held that the district court improperly concluded that HBOT was a "covered benefit" pursuant to her insurance contract, and improperly applied 13.10.17.28(B) NMAC as the definition of "medical necessity," we must yet determine whether Presbyterian's denial of coverage withstands Rodarte's challenge under 13.10.17.7(L).[8] *See Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 18, 147 N.M. 678, 228 P.3d 462 (holding in the context of vehicle insurance that parties' freedom to contract does not excuse them from "the necessity of meeting [applicable]

[8]We recognize that Presbyterian seeks to prevail based solely upon the language of the contract into which it and Rodarte entered, but we observe no substantive difference, nor does Presbyterian argue one exists, between 13.10.17.7(L) NMAC (5/15/2012) and the insurance contract's own definition. As we have stated, the health plan contract must conform to applicable provisions of the Code. *See* 13.10.13.8(C)(1) NMAC (requiring "that a covered person shall have the right, at a minimum . . . to available and accessible services when medically necessary").

statutory and regulatory requirements"). If the denial of coverage to Jessica was proper under 13.10.17.7(L) NMAC (5/15/2012) as well as the contract, then the Superintendent will have reached the proper result and the district court will have erred in reversing the Superintendent. If, to the contrary, the denial of coverage to Jessica was improper under 13.10.17.7(L) (5/15/2012), the district court's reversal could be correct on grounds not relied on by it. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (stating that an appellate court may affirm a trial court's ruling on a ground that was not relied on below if reliance on the new ground would not be unfair to the appellant). We may not "set aside, reverse[,] or remand the final decision" of the Superintendent without a determination that it acted fraudulently, arbitrarily or capriciously, its final decision was not supported by substantial evidence, or was not in accordance with law. Section 39-3-1.1(D). Neither party contends, nor does our review of the record indicate, that the Superintendent acted fraudulently, arbitrarily, or capriciously.

{29} To ascertain whether substantial evidence supported the Superintendent's final decision upholding Presbyterian's coverage denial, we look to the record. We note that the Superintendent's internal review panel first determined that there was a lack of evidence that HBOT improved Jessica's condition. First, it observed that Jessica's pre-screening exam was conducted four months prior to the first application of HBOT and was therefore "not an appropriate objective scientific tool for measuring the effect of HBOT." As well, it concluded that the case studies presented to the panel by Dr. Stoller were not comparable to "high level research studies[,] such as those done in a prospective, randomized, controlled, double-blinded fashion." It also pointed to the absence of evidence establishing a causal linkage between Jessica's "alleged improvements" and HBOT treatment, and a study provided by Dr. Stoller that noted the inability to gauge the efficacy of HBOT when utilized within a year of a traumatic brain injury. We conclude this to be "relevant evidence that a reasonable mind would find adequate to support a conclusion[,]" required for a determination of the existence of substantial evidence. *Ponder*, 2000-NMSC-033, ¶ 7 (internal quotation marks and citation omitted). Under 13.10.17.7(L) NMAC (5/15/2012), substantial evidence supported the determination that Rodarte failed to establish the medical necessity of HBOT to treat Jessica's anoxic brain injury.

{30} Regarding whether the Superintendent acted in conformance with law, we recognize that the erroneous application of 13.10.17.28(B) NMAC (5/15/2012) to the substantive question of medical necessity in this instance can alone serve as the basis to reverse the administrative determination. Here we cannot tell with certainty which provision the Superintendent utilized because he cited a nonexistent provision within the Code. We can, however, nonetheless determine that the Superintendent's ultimate determination that the treatment was not medically necessary should have been affirmed by application of 13.10.17.7(L) NMAC (05/15/2012). *See Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208 P.3d 901 (stating that appellate courts may affirm a lower court if it is right for any reason, "so long as the circumstances do not make it unfair to the appellant to affirm"); *see also Martinez v. N.M. State Eng'r Office*, 2000-NMCA-074, ¶ 21, 129 N.M. 413, 9 P.3d 657 (upholding the decision of an administrative law judge on the basis of right for any reason). Because there is substantial evidence to support the Superintendent's determination, we may also conclude that it did not act fraudulently, arbitrarily, or capriciously. Lastly, because Presbyterian consistently sought enforcement of its contract by repeated reference to the correct governing standard for medical necessity, as set forth within 13.10.17.7(L) NMAC (5/15/2012), we find no unfairness in our conclusion agreeing, albeit on somewhat different grounds, with the result reached by the Superintendent.

CONCLUSION

{31} For the foregoing reasons, we reverse the judgment of the district court and reinstate the final order of the Superintendent upholding Presbyterian's denial of coverage.

{32} IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:
LINDA M. VANZI, Judge
VIGIL, Chief Judge
(dissenting in part,
and specially concurring).

VIGIL, Chief Judge
(dissenting in part,
and specially concurring).

{33} I dissent in part, and specially concur in the majority opinion for the reasons set forth below.

DISSENT

{34} The Code requires all health benefits plans in New Mexico to provide for medically necessary services. 13.10.17.29(C) NMAC (5/12/2012). However, HBOT treatments which Rodarte seeks to treat Jessica's condition are without question experimental or investigational. As such, they are not "medically necessary" under Presbyterian's plan[9] and they do not satisfy the Code's general definition of "medical necessity" set forth in 13.10.17.7(L) NMAC (5/12/2012).[10] That is to say, until a treatment has been vetted and adopted as the standard of care by the federal government or national or professional medical

[9]Presbyterian's insurance contract defines "medical necessity" to be: "appropriate or necessary services as determined by a Provider/Practitioner, in consultation with Presbyterian . . . which are provided to a Member for any *covered* condition requiring, according to generally accepted principles of good medical practice guidelines developed by the federal government, national or professional medical societies, boards, and associations, or any applicable clinical protocols or practice guidelines developed by [Presbyterian] consistent with such federal, national and professional practice guidelines for the diagnosis or direct care and treatment of an illness, injury, or medical condition, and are not services provided only as a convenience."

[10]Unless otherwise indicated , all future references shall be to the 2012 version, and for ease of reference shall be referred to as "Section .7(L)." Section .7(L) defines "medical necessity or medically necessary" as: "health care services determined by a provider, in consultation with the health care insurer, to be appropriate or necessary, according to any applicable generally accepted principles and practices of good medical care or practice guidelines developed by the federal government, national or professional medical societies, boards and associations, or any applicable clinical protocols or practice guidelines developed by the health care insurer consistent with such federal, national, and professional practice guidelines, for the diagnosis or direct care and treatment of a physical, behavioral, or mental health condition, illness, injury, or disease[.]"

NEW MEXICO
Lawyer
Aug. 2016 Volume 11, No. 3
www.nmbar.org

Entertainment Law in New Mexico:

Updates for 2016

Intellectual Property Law Section

In August 2009, the Intellectual Property Law Section produced an issue of the *New Mexico Lawyer*, "Art and Entertainment Law in New Mexico." Included in this issue are several updates and new developments since then. To view the 2009 issue, visit www.nmbar.org/NewMexicoLawyer.

Lindsay Lohan v. Grand Theft Auto: Potential Changes for Actors and Actresses in New Mexico

By Jeffrey H. Albright

When Lindsay Lohan first filed her lawsuit against Grand Theft Auto,[1] alleging that GTA had exploited her likeness and persona for its own profit, many people (including many in the legal profession) thought the lawsuit would be dismissed. But, not so fast. In March 2016, New York Supreme Court Judge Joan Kennedy ruled that the case would continue. This article analyzes the issues behind Ms. Lohan's lawsuit, the legal implications of the right of publicity that forms the basis for her lawsuit and the potential implications that Ms. Lohan's lawsuit could have on actors, actresses and film makers as right of publicity laws take form in New Mexico.

...allowing uncompensated third party use devalues the property and allows unjust enrichment in violation of the owner's property right.

In the August 2009 issue of the *New Mexico Lawyer*, the right of publicity was discussed in terms of two very separate but unique situations, one involving a picture of a family that had been posted by a mother on Facebook and then used by a Belgian restaurant overseas to advertise to tourists. The other event involved Woody Allen, who filed a federal lawsuit against a clothing manufacturer who used a picture of him from the 1977 movie "Annie Hall" on billboards without Allen's permission.[2] You may recall that in May 2009, Allen accepted a settlement of $5 million from American Apparel prior to the case going to a jury trial.

The two situations referred to above and Ms. Lohan's lawsuit derive from an area of law that is not codified in federal law, but rather in individual state statutes, with 19 states presently having right of publicity laws—each of which is unique. The issue of "right of publicity" pits the private rights of individuals against First Amendment free speech and free press rights, but it is not the same as defamation. Defamation, whether libel or slander, involves an individual's reputational interests. It is not transferable and the protection expires upon death.

The right of publicity, on the other hand, is a property right usually (but not exclusively) extended to celebrities. In some states it is both transferable and may survive death. Damages awarded are for the commercial value of identity. In other words, it is commercial appropriation—of a person's name, likeness or other indicia associated with someone's identity (or voice, or phrase, etc.).

To prevail on a right of publicity claim, the plaintiff must prove: (1) that there is commercial value to her identity; (2) that there exists an appropriation of her name, likeness or other indicia of the persona, as described above; (3) that it is being used in the advertising for goods or services; or (4) some aspect of the identity is being used to imply an endorsement with a product.

However, many distinctions involving right of publicity claims can be subtle. Products that predominantly "sell" a celebrity are deemed unprotectable merchandise. Products that predominantly sell *comment about* a celebrity are deemed protected "speech." Some courts have adopted this approach and have ruled that sales of merchandise by non-news organizations that infringe the right of publicity are not protected by the first amendment, even if the merchandise "commemorates" an event. Generally, three criteria are required for a right of publicity to prevail over a First Amendment claim: (1) The plaintiff must demonstrate that there is commercial value to her/his identity; (2) The "use" is in advertising goods or services; and (3) The publicity is being used to imply an endorsement of a product without permission. See e.g. *Titan Sports Inc. v. Comics World Corp.*, 870 F.2d 85 (2nd Cir. 1989).

The bottom line is that allowing uncompensated third party use devalues the property and allows unjust enrichment in violation of the owner's property right. The rationale is simple: the dominant purpose of merchandise is to make profit through exploitation of the celebrity.[3]

There are exceptions to claims of the right of publicity. Newsworthy events/public interest events are of social interest and are not protected. Parody, borrowed from copyright fair use doctrine, is a bar

against claims to the right of publicity. Public officials are generally afforded less protection because of newsworthiness. Celebrities who make a living exploiting media have little protection (think Kardashian.) The First Amendment protects newsworthy events.

With all of that as background, does Ms. Lohan have an arguable claim over the character of Lacey Jones from the game "Grand Theft Auto?"

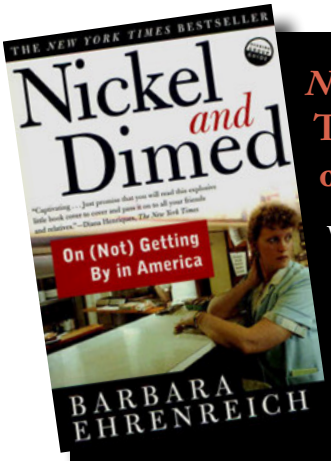
Ms. Lohan claims that Take Two Interactive Software Inc. and Rockstar North appropriated her image and incorporated her persona with her likeness, clothing, outfits, hairstyles, sunglasses, her clothing line and mannerisms in the "Grand Theft Auto V" video game. In October 2014, Ms. Lohan added 45 pages of pictures to her original complaint. She also claimed that the defendants used a "look alike model to evoke her persona and image" by imitating a photograph from 2007 (think Woody Allen). The game also depicted West Hollywood's famous Chateau Marmont Hotel where she once resided. In the game, the Lacey Jones character has a relatively minor role and is rescued from the paparazzi by the game players.

Rockstar Games' claim that Lohan filed the suit "for publicity purposes" and that the only similarity was that both Lohan and the model they used were "young and blonde women." However, in her initial decision denying dismissal of the lawsuit, Judge Joan Kennedy said that Ms. Lohan had provided sufficient evidence for the lawsuit to move forward. Judge Kennedy also determined that there was sufficient evidence presented by Ms. Lohan to overcome the one year statute of limitations in which to bring a claim, all because of a republication of some previous documents that contained the likeness.

Is Ms. Lohan likely to prevail on her claims? An important issue in this case is the fact that Ms. Lohan chose to file her claim in New York. New York has the oldest privacy statute in the U.S., and courts there have applied the statute for decades. Even the term "common law right of publicity" was first used in New York. At the same time, however, New York is the only state expressly to have rejected a posthumous publicity right.

What does this mean for New Mexico? While New Mexico does not yet have right of publicity laws, its ever-growing film industry and status as place of residence for many film and TV actresses and actors suggest that it is only a matter of time before right of publicity laws make their way to the Roundhouse. New Mexico will need to look to other states, such as California, New York and neighboring states to determine both the elements of law that will be needed to meet a right of publicity standard and subjective issues. These subjective issues will include such things as statute of limitations, who can file suit, exceptions, duration of the right of publicity, licensing of the right of publicity for commercial gain, consideration for heirs and assigns, whether to allow corporations or businesses to own the right or a license to the right, and many other issues. And in making those decisions, who knows? New Mexico may end up looking at the Lindsay Lohan case in New York for guidance! ■

Jeffrey Albright is a partner with the law firm of Lewis Roca Rothgerber Christie LLP. He is the chair of the Intellectual Property Law Section Board of Directors.



Nickled and Dimed: The Right of Publicity of the Unknown

While the right of publicity most frequently arises when dealing with celebrities, this is not always the case. In *Christianson v. Henry Colt and Company, LLC,* WL 2680822 (C.D. Ill. 2007), a claim under Illinois' right of publicity statute was not barred where a waitress whose picture appeared on the cover of Barbara Ehrenreich's New York Time's best seller *Nickled and Dimed* was not mentioned in the book. The book related a series of encounters the author had while traveling across America talking to average people doing common jobs: e.g. waitresses, librarians, janitors, bus drivers, etc. The waitress was not mentioned on the book jacket, in any of the stories, nowhere in the credits, or anywhere in Ms. Ehrenreich's description of her encounters. The court determined that the waitress' image was clearly designed to catch the eye of a prospective customer/purchaser and the Court ruled in favor of Ms. Christianson. Terms of an agreed to settlement were not made public.

Endnotes

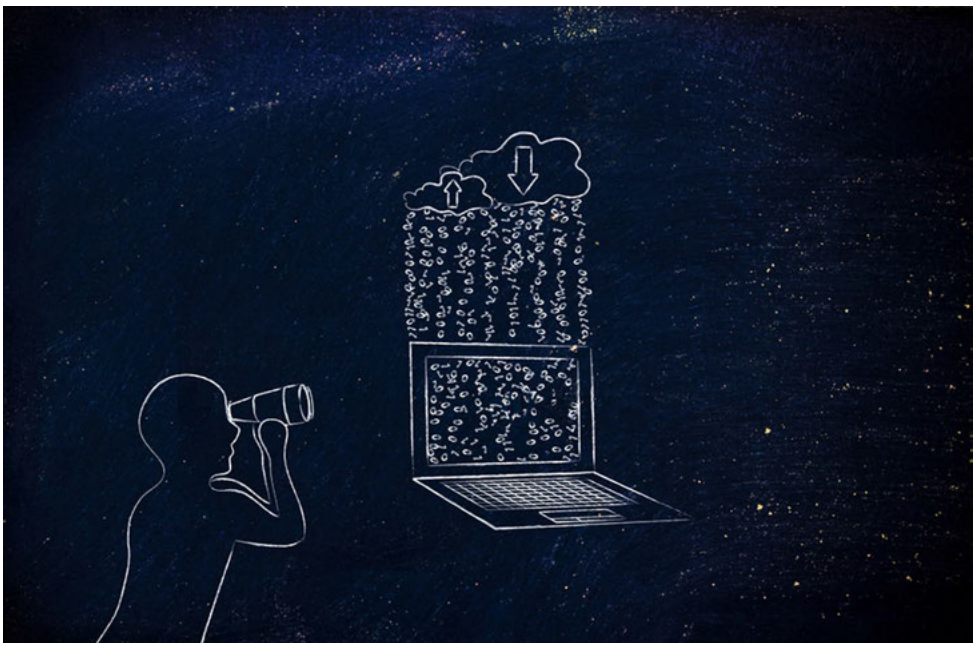
[1] *Lindsay Lohan v. Take Two Interactive Software, Inc,, Rockstar Games, Rockstar Games, Inc., and Rockstar North*, Index No. 156443 (N.Y.S. 2014)

[2] Jeffrey H. Albright, *You Can Take My Picture, But Not My Right of Publicity*, The New Mexico Lawyer, Vol. 4, No. 3 (August, 2009)

[3] *See, e.g. Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2nd Cir.1989).

New Law Creates a Civil Federal Cause of Action for TRADE SECRET THEFT

By Kevin Bieg



Trade secrets are becoming increasingly valuable, in part because of a perceived reduction in the value of patents. At the same time they are increasingly vulnerable to theft because of the ease of electronic information transfer, rise in cyber-attacks, increased employee mobility, and globalization. A recent survey found that trade secrets are the most common and important form of intellectual property for businesses in the U.S. with research and development activity.[1] Although difficult to quantify, the cost of trade secret theft to American companies has been estimated to be as high as 1–3 percent of GDP.[2] As a result, Congress passed the Defend Trade Secrets Act[3] with near-unanimous support and President Obama signed it into law on May 11. The DTSA creates, for the first time, a federal civil cause of action for trade secret misappropriation. The primary benefits of the DTSA include the creation of a uniform nationwide regime for trade secret protection and the availability of a federal forum for misappropriation litigation.

To state a claim in federal court for misappropriation, the trade secret must be related to a product or service used, or intended to be used, in interstate or foreign commerce. The DTSA provides private parties with access to federal courts under federal question original jurisdiction, as has long been the case for other forms of intellectual property, such as patents, copyrights and trademarks. However, in contrast to federal patent and copyright law, the DTSA does not preempt or otherwise override state trade secret laws, including the New Mexico Uniform Trade Secrets Act.[4] Therefore, plaintiffs can file DTSA claims in federal court in tandem with state claims that may provide additional relief, over which the federal court will have supplemental jurisdiction. Conversely, if a plaintiff wants to keep the case in state court, the plaintiff may assert only claims under state trade secret law, file in state court, and remain there notwithstanding the DTSA unless diversity jurisdiction exists in which case, of course, state law would continue to govern.

A recent survey found that trade secrets are the most common and important form of intellectual property for businesses in the U.S. with research and development activity.

The DTSA broadly defines a trade secret as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing if (1) the owner of the information has taken reasonable measures to keep such information secret; and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the another person who can obtain economic value from the disclosure or use of the information." Misappropriation includes the acquisition of another's trade secret by improper means, or use of a trade secret without consent of the trade secret owner. Improper means include theft, bribery, misrepresentation, breach of a duty to maintain secrecy or inducement of such a breach or espionage through electronic or other means. Misappropriation does not include reverse engineering, independent derivation or any other lawful means of acquisition.

The DTSA is not retroactive and has a three-year statute of limitations. Therefore, a complaint for misappropriation must be filed within three years from the date on which the misappropriation was discovered or should have been discovered by reasonable diligence.[5] Further, a continuing misappropriation constitutes a single claim of misappropriation under the DTSA, which may be interpreted to mean that discovery of a misappropriation

triggers the limitations period for all subsequent related acts.

The DTSA typically provides remedies similar to most state trade secret law. These include injunctive relief to protect against actual or threatened misappropriation; a reasonable royalty for continued use of the trade secret if injunctive relief is "inequitable;" damages for actual losses, unjust enrichment, or a reasonable royalty for past misappropriation; and punitive damages of up to twice the amount of actual damages awarded, as well as reasonable attorneys' fees, for willful and malicious misappropriation.

The DTSA does limit one form of injunctive relief available in some states based upon the "inevitable disclosure doctrine." Under this doctrine, employers could prevent departing employees from going to work for a competitor based upon the theory that the employee would inevitably disclose the former employer's trade secrets to the competitor. The DTSA expressly rejects this doctrine and affirmatively requires that any such restriction on a person's employment must be "based on evidence of threatened misappropriation and not merely on the information the person knows." Additionally, any injunction limiting a person's new employment must not conflict with applicable state laws protecting the mobility of individual employees, such as state laws prohibiting non-compete agreements.

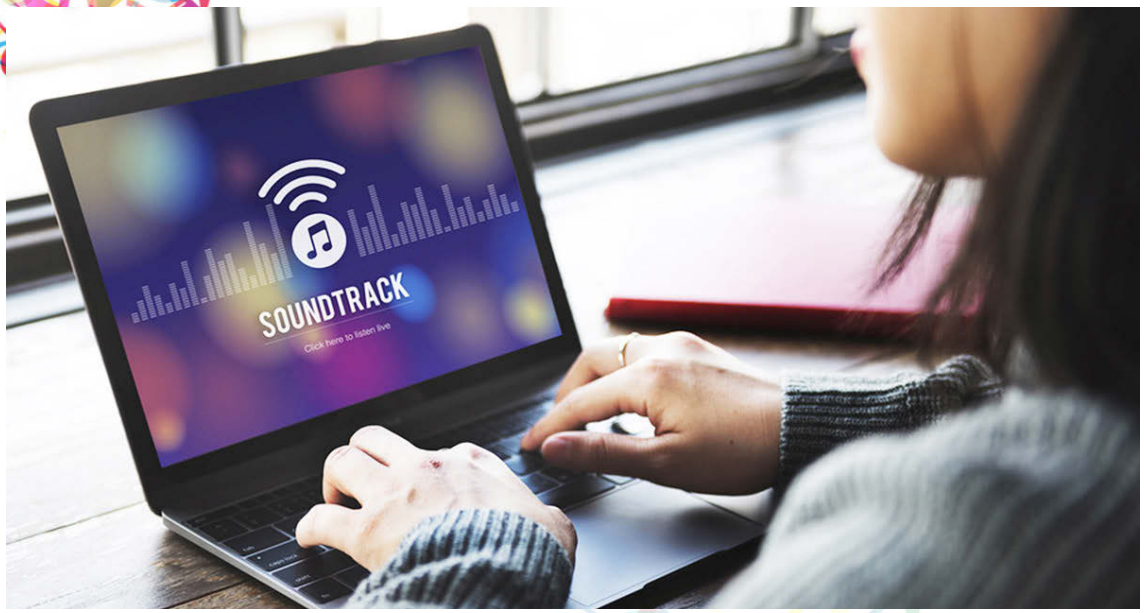
A new provision under the DTSA is availability of *ex parte* seizure in extraordinary circumstances. This exceptional remedy allows federal law enforcement officers to seize a defendant's property to preemptively prevent the wrongful dissemination of a trade secret without notice to the defendant beforehand. However, the burden to show extraordinary circumstances is high, and a seizure order can only be obtained if a number of specific factual prerequisites are satisfied, including, among others, a likely showing that the information is indeed a "trade secret," that the defendant misappropriated it by improper means, and that immediate and irreparable injury will occur without the seizure. If granted by the court, the seizure order must authorize the narrowest seizure necessary to prevent further dissemination of the trade secret and that is minimally disruptive to legitimate business operations, restrict access by the plaintiff, set a timely date for a seizure hearing, and require the plaintiff to provide security to cover damages for a wrongful or excessive seizure or attempted seizure. Nonetheless, *ex parte* seizure may enable plaintiffs to prevent further misappropriation and limit the disclosure of trade secrets while a case is pending.

Finally, the DTSA provides for limited whistleblower protection with regard to both civil and criminal liability for employees, independent contractors or consultants who disclose a company's trade secrets in confidence to a government official or an attorney for the purpose of investigating or reporting a suspected violation of the law, or in a complaint or document filed in a lawsuit or other proceeding, if the filing is made under seal and not disclosed to the a third party except under court order. The protection provides immunity against such actions under both state and federal law. Further, in order for a company to take advantage of the full range of federal remedies available under the DTSA, the company must include an express, written notice of immunity for whistleblower disclosures in all agreements entered into after enactment of the DTSA that govern the

continued on page 14

Music Licenses *for* Filmmakers

By Gina T. Constant



Say your client is producing a movie and she wants to use the song "Hotel California" by the Eagles in her film. How do you go about securing the rights to use that music for her? The answer is that you need to get the permission of the copyright owner(s). As explained below, this can be trickier than it sounds.

Pursuant to the Copyright Act,[1] the creator of an original work that is fixed in a tangible medium owns the copyright to that work. A "copyright" literally means the exclusive right to make copies of the work. When a piece of music is used in a movie, a copy of that music is being made and therefore, the right to copy that music needs to be secured. In a music recording, two works are actually being copied: (1) the composition of the song, that is, the lyrics, vocal arrangement, the instrumental accompaniment, etc.; and (2) the artist's recorded performance of the song.

First, the copyright in the composition is initially owned by the songwriter(s).[2] The rights to use the composition of the song are called the synchronization or "sync rights." For popular music, the sync rights are generally owned by a publishing company because the songwriters have assigned their copyrights in their songs to the publishing company in consideration of getting their song published and being paid royalties. Publishers for American music can usually be found on the websites of performance rights organizations (like ASCAP or BMI). In our case, a search on ASCAP's website for "Hotel California" reveals that the publisher is Fingers Music. We could go to www.fingersmusic.com and find out how to contact the publisher to request a license. If you want a sync license for a less popular, more obscure tune, you may have to track down the actual composers and negotiate a license directly with them.

> ...even if a composition of an older song is in the public domain, a more recent recording or arrangement may still be copyright protected.

Second, the copyright in the recorded performance of the song will generally be owned by the artist's record label. The rights to use the master recording are called the "master rights." Here, the artist has negotiated a contract with a record label and has assigned the copyrights to the record label in consideration of being signed by the record company, getting the artist's recordings radio play, and royalties on sales of the artist's records. Of course, brand new artists will have a lot less control over their music and how their music can be licensed to others than very popular artists. For instance, a few years ago Taylor Swift famously pulled her music from the music streaming service Spotify,[3] which means that she and her record label refused to grant Spotify a master license to her album "1989." Because of her popularity, she had a greater say in licensing decisions than an unknown singer would have.

To find out whom to contact for a master license, one good website to search is Discogs, www.discogs.com. In our case, the record company that produced "Hotel California" for the Eagles is Asylum Records and the contact information for them is listed at Discogs.

In order to avoid the expense of a master license for "Hotel California," your client may want to simply acquire the sync rights from the publisher and then hire a local band or studio musicians to record the song. This is why when you watch TV programs or movies, you often hear popular music performed by unknown musicians. The production still has to secure the rights to use the recording from these musicians but that will be far less expensive than getting the Eagles' version of the song.

It can be a challenge to find the companies you need to contact for licensing, especially for older songs because record and

publishing companies get bought and sold just like any other companies. But websites like ASCAP and Discogs can give a lot of information that will help in finding who has authority to negotiate a sync or master license. Also, it should be noted that a license is not required for songs that are in the public domain because the copyrights have expired. But know that even if a composition of an older song is in the public domain, a more recent recording or arrangement may still be copyright protected.

Once you have secured for your filmmaker client the master and sync licenses to "Hotel California" as recorded by the Eagles, she can use it in her movie. However, the license that she signed will have terms that will limit her distribution of the movie. For instance, does the license only cover distribution in the U.S. or the universe (yes, the "universe" is used in entertainment law contracts because we don't want any infringement happening on a space station!). You may have been able to secure perpetual rights for your client but, more likely, there will be a term for a certain number of years, after which the licenses will automatically expire. These dates should be calendared so renewals can be secured, if necessary, prior to termination.

> ...yes, the "universe" is used in entertainment law contracts because we don't want any infringement happening on a space station!

The repercussions of not obtaining copyright licenses from all copyright owners of music used in a movie can be harsh. If the copyright owner has registered the work with the U.S. Copyright Office, then the Copyright Act allows for injunctive relief, double damages, statutory damages and attorneys' fees.[4]

Finally, there are plenty of firms who specialize in licensing and most will do this work for a flat fee per license or per project. ■

Gina Constant practices with Romero & Constant PC in Albuquerque and serves on the Board of Directors of the Intellectual Property Law Section.

Endnotes

[1] 17 U.S.C.S. §§ 101 to 1332 (2010)

[2] Unless the song is a "Work for Hire" pursuant to 17 U.S.C.S. § 101.

[3] http://time.com/3554468/why-taylor-swift-spotify/

[4] 17 U.S.C.S. §§ 501 to 513 (2008)

The DMCA Dilemma

By Talia Kosh

Since it became law in 1998, the Digital Millennium Copyright Act has become the avenue for content management for copyright holders, but it is also an easily-deployed weapon for anyone who wants to censor content on the Internet.

The DMCA protects online service providers (OSPs) from copyright infringement lawsuits if they comply with various parts of the DMCA, including swiftly removing potentially infringing content after receiving a takedown notice from the alleged rights holder. It also provides a mechanism for challenging improper takedowns. The DMCA notice and takedown procedures theoretically provide a content provider with protection from a wrongful claim of copyright infringement. However, the DMCA has been criticized as of late for failing to sufficiently protect copyright holders.

It can also be a system that is incredibly confusing and frustrating to rights holders. This article reviews a few of this last year's DMCA conflicts to highlight the areas of concern.

Orwell's *1984*

The first cautionary tale began in October 2015 when George Orwell's Estate issued copyright takedown notices to merchandise seller, CafePress, for a vaguely-worded reference to copyrighted materials owned by the Orwell estate that were displayed on merchandise sold by internet radio host, Josh Hadley, which stated, "1984: It's already here." The Estate ended up taking a lot of heat for its "Big Brother" approach to sending takedown notices to merchants. However, according to the Estate, it was being blamed for a unilateral decision by CafePress to takedown every single item of merchandise that might reference any intellectual property owned by the Estate, including anything marked with *1984*, the title of Orwell's novel *1984*, out of fear of being sued if they did not.

Bill Hamilton, executor of Orwell's Estate, stated, "I asked CafePress to take down material that was in breach of Orwell copyright, and without checking with me which items I was referring to, [they] unilaterally took down everything with any Orwell reference, including T-shirts."[1] Hadley actually never sold a single shirt, but got caught in CafePress' decision to take down all of his merchandise referencing *1984*. Instead of filing a counter-notice, Hadley spoke out on social media. In this case, a great cost was incurred by the brand and reputation of the Estate by sending out a single takedown notice, risking the service provider unilaterally taking

down everything that might infringe on a holder's intellectual property. The Estate discovered the hard way that there is a social cost in the Orwell Estate appearing to have lost touch with the import of Orwell's works.

The Estate's takedown notice was insufficient, because it did not specifically reference the infringing materials, as required by DMCA. CafePress should have only removed materials referenced in the takedown notice.[2] Further, the focus of the DMCA is to guard against copyright infringement, which does not protect titles and slogans. However, OSPs are not required to review the validity of an infringement claim—they are charged only with taking down the material once a notice is issued and then restoring that content should a counter-notice issue and a lawsuit not be filed within 10 days. Also, since Hadley was commenting on the original material itself and making a critique or criticism that "it [1984] is already here" this could be considered fair use. Even so, Hadley could have easily responded with a counter-notice, in which case CafePress would have restored Hadley's content, if no lawsuit was initiated by the Estate. Basically, no one knew what he or she was doing and it was bad for everyone involved.

Even if the copyright claim is on a tiny portion of the video, or if the video used material in fair use, the entire video can be affected and flagged.

The Content ID Monster

YouTube's copyright framework adds yet another layer of confusion and frustration with its internal automated Content ID system which applies copyright flags to YouTube accounts. The Content ID automatically allows Content ID managers to redirect monetization (e.g., ad monies) to the alleged rights holder. But qualifying as a content manager is no small feat; the applicant must own rights to a "substantial" body of original material frequently uploaded on YouTube. Most applications for content management are rejected without explanation. It's basically a secret club where only media conglomerates get a key. If content managers improperly claim copyright, livelihoods of smaller content creators can easily be affected. Even if the copyright claim is on a tiny portion of the video, or if the video used material in fair use, the entire video can be affected and flagged. Content ID makes frequent mistakes and there are also many questionable claims.

If Content ID flags a video and the flag is not legitimate, a dispute may be filed. If the dispute fails, then the disputant may appeal. The content manager then must submit a proper DMCA takedown notice to deny the appeal. If the appeal is denied, the appellant will get a strike against him or her on his or her YouTube account, the entire video will be removed, the account will no longer be in good standing and the appellant can lose monetization privileges. A strike can be removed by submitting a counter-notice under the DMCA. If the content manger does not file a lawsuit in federal court, then YouTube must restore video.[3] However, this doesn't always happen. As the Electronic Frontier Foundation notes, "in many instances, even if you successfully submit a DMCA counter-notice, the video will not be reinstated."[4] In addition, once the content is removed for a video with a lot of views, even after reinstatement, the view numbers will not necessarily be reinstated.

Dancing Baby Case

So with this in mind, we come to the "Dancing Baby Case[5]." In *Lenz v. Universal Music Corp., et al.*, Lenz uploaded to YouTube a 29-second home video of her children dancing to Prince's "Let's Go Crazy." This video was flagged by Universal's content management system and a takedown notice was generated automatically. Universal did not consider whether this was an incidental and fair use prior to sending a takedown notice. Lenz sued for declaratory relief, claiming incidental and fair use of the song. The Ninth Circuit ruled that copyright holders like Universal must consider fair use before attempting to remove content from the Internet. Now these media conglomerates will have to actually review questionable videos and determine whether fair use of the content exists before generating a takedown notice.

YouTube recently changed its tune and Google has announced that it will promise to pay the legal fees (up to $1 million) of certain YouTube users where takedowns have been issued in cases where YouTube agrees that fair use applies.[6] However, a far more effective (and simpler) change would be for YouTube to remove the immediate monetary reward for a false claim, so that instead of the ad money being diverted to the claimant and never recovered by the creator, the ad monies could be held in escrow until the matter is resolved.

Notices have been abused by companies for purposes unrelated to copyright protection, such as censorship around the globe, which has led civil liberties groups and others to call for reform of the law to clarify its scope. Some companies have realized they can use the DMCA to remove unfavorable newsworthy content.[7] Others simply use sloppy algorithms which generate DMCA notices for content not covered by the DMCA, targeting Amazon, IMBD and other critical reviews.[8] When lawmakers are rapidly moving towards expanding the reach and strength of the DMCA, the real threats of censorship must also be considered. Often the fear of litigation that follows DMCA takedowns are more of a guiding force for controlling behavior than are facts or the law around creators' rights.

Many members of the music industry—from Taylor Swift to Trent Reznor—have spoken out against YouTube and the DMCA. Swift and others have signed an open letter to Congress, asking for a reformation of the DMCA, stating that the DMCA "…forces creators to police

the entire Internet for instances of theft, placing an undue burden on these artists and unfairly favoring technology companies and rogue pirate sites." They believe the DMCA is an outdated law, the take-down process is too burdensome and the content can immediately be put back online if a lawsuit is not filed. However, the solution is not so clear, as changing the safe harbors of the DMCA would have a major negative impact on all OSPs. If the DMCA moved to a takedown, stay-down system, this could be much more damaging to small businesses and creatives, with no recourse for censorship outside of filing a lawsuit.[9] ■

Talia Kosh practices with the Bennett Law Group in Santa Fe and is the chair-elect of the Intellectual Property Law Section.

...the DMCA has been criticized as of late for failing to sufficiently protect copyright holders.

Endnotes

[1] Flood, Alison, "George Orwell's estate denies 'Big Brother values' after challenge to 1984 merchandise." www.theguardian.com. The Guardian. October, 2015.

[2] See Van der Sar, Ernesto, "Orwell Estate Sends Copyright Takedown Over the Number 1984."www.torrentfrek.com. Torrent Freak. October 2015.

[3] 17 U.S.C. Section 512(g)(2)(C). Stephen McArthur, "How to Beat a YoTube ContentID Copyright Claim-What Every Gamer and MCN Should Know" www.gamasutra.com. Gama Sutra. June 24, 2014

[4] *See*"A Guide to YouTube Removals." www.eff.org. Electronic Frontier Foundation.

[5] Lenz v. Universal Music Corp. et al., Case Nos. 13-16106, -16107 (9th Cir.., Sept 14, 2015.

[6] Hern, Alex. "YouTube plans to defend filmmakers against copyright claims." www.theguardian.com. The Guardian. November 23, 2015.

[7] Masnick, Mike. ""Brazilian Media Giant Realizes It Can use the DMCA to Cansor Criticism of Its Coverage," Tech Dirt (April 27, 2016). The Electronic Frontier Foundation has noted that, "[T]he DMCA has become a global tool for censorship, precisely because it was designed to facilitate the removal of online media," citing dozens of cases of state censorship, including, Department of Homeland Security issuing takedowns over conspiracy theory videos on YouTube based on copyright ownership, and governments around the globe filing takedowns for media containing criticisms of government and government officials. *See* Sutton, Maira, "Copyright Law As a Tool for State Censorship of the Internet," Electronic Frontier Foundation (December 3, 2014).

[8] Cushing, Tim. "Another Entity Thinks A Random Bundle of URLs Is a Legitimate DMCA Takedown Request." Teck Dirt (June 8, 2016).

[9] "Takedown, Staydown Would Be A Disaster, Internet Archive Warns." TorrentFreak (June 7, 2016).

Should I Register My Trademark?

Yes, Even If the Trademark is "*Disparaging*," "*Immoral*" or "*Scandalous*"

By Justin Muehlmeyer

Businesses in the entertainment industry are particularly fond of using not-so-politically correct trademarks. The first to come to mind might be the Washington "Redskins," whose ongoing legal battle over registration of their mark caused what is perhaps the biggest debate about trademark law amongst lay people in history, at least since 19th century apothecary Lydia E. Pinkham became the first woman, other than Queen Victoria, to use a portrait of herself on products (Cara Giaimo, *The First Woman To Put Her Face on Packaging Got Trolled Like Crazy*, Atlas Obscura (Apr. 29, 2016), available at http://www.atlasobscura.com/articles/the-first-woman-to-put-her-face-on-packaging-got-trolled-like-crazy.)

For those who are offended by trademarks like the Washington "Redskins," Congress heard your concerns more than a century ago and enshrined your values into what is now Section 2(a) of the Lanham Act authorizing the U.S. Patent and Trademark Office (USPTO) to reject registration of "disparaging," "immoral" or "scandalous" trademarks. 15 U.S.C. 1052(a). New Mexico's Trademark Act also prohibits the registration of such trademarks. NMSA 1978, § 57-3B-4(A)(1) & (2). Such provisions were intended as a bastion of decency in commerce.

Recently, however, a band called "The Slants," whose members are all Asian Americans, has altered more than a century of precedent. The court tasked with appeals from the USPTO, the U.S. Court of Appeals for the Federal Circuit, held last year that the disparagement provision of Section 2(a) is unconstitutional on its face because trademarks are a form of expressive speech protected by the First Amendment. Consequently, the band's trademark cannot be refused registration on those grounds. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

In order to obtain a registration of a trademark, one must actually be using it.

Thus, for those with clients using "disparaging," "immoral" or "scandalous" trademarks, now may be the time to consider applying for registration, or at least keeping an eye out for resolution of the USPTO's petition for certiorari in *In re Tam* to the U.S. Supreme Court. Following *In re Tam*, the USPTO issued an informal notice to trademark examiners that any application for a mark that is potentially violative of Section 2(a) should be "suspended" rather than refused on that basis until the USPTO's petition for a writ of certiorari is resolved (Examination Guide 01-16, Examination For Compliance With Section 2(A)'S Scandalousness And Disparagement Provisions While Constitutionality Remains In Question, United States Patent And Trademark Office (Mar. 10, 2016)). Even if you don't have such clients, let this article be a reminder of the value of registering your mark.

Trademark Rights Arise From Use of a Mark With Goods and Services, Not Merely From Registration

Be sure you understand how trademark use relates to registration. In order to obtain a registration of a trademark, one must actually be using it. While it is possible to apply for federal registration of a mark before its owner actually uses it by filing an "intent-to-use" application, the applicant must later prove actual use of the mark to obtain registration and avoid abandonment of the application. 15 U.S.C. § 1051(b). The New Mexico Trademark Act does not provide for such an "intent-to-use" application, but requires actual use before filing. NMSA 1978, § 57-3B-5.

Accordingly, use is always required for registration, but registration is not required for use.

Until *In re Tam*, courts addressing First Amendment challenges to the constitutionality of Section 2(a)'s ban of "disparaging," "immoral," or "scandalous" trademarks upheld the provision because the refusal to register an applicant's mark does not affect the applicant's right to use it. *See, e.g., In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981). Trademark rights arise not from federal law, but from the use of a mark in commerce in connection with particular goods and services. 1 Anne Gilson LaLonde, *Gilson on Trademarks*, § 3.02[2][a] (2015). Consequently, prior to *In re Tam*, First Amendment rights were held not abridged by a refusal to register a trademark because a trademark can still be used without a registration.

Register That Mark, Even if it May be "Disparaging," "Immoral" or "Scandalous"—Because Use Without Registration May be Useless

In *In re Tam*, the U.S. Court of Appeals for the Federal Circuit reversed the established precedent that the refusal of registration does not abridge First Amendment rights. According to the Court, federal registration is so important that its denial "on the basis of the government's disapproval of the message . . . violates the guarantees of the First Amendment." *In re Tam*, 808 F.3d at 1345. Federal trademark registration "bestows *truly* significant and financially valuable benefits upon markholders," *id.* at 1340, and "the loss of these rights, standing alone, is enough for us to conclude that [Section] 2(a) has a chilling effect on speech." *Id.* at 1345.

Benefits of Federal Registration:

- Prima facie evidence of the owner's exclusive right to use the mark nationwide in connection with certain goods or services in commerce;
- Constructive notice of the registrant's claim of ownership of the mark;
- "Incontestable" status after five years of registration, limiting challenges to the validity of the mark;
- Federal court jurisdiction;
- Treble damages for willful infringement; and
- The services of U.S. Customs and Border Protection in restricting importation of infringing or counterfeit goods.

In re Tam is an opportunity for practitioners to contemplate the role and importance of registration. The holder of a registered trademark has a right of priority nationwide, if a federal registration, or statewide, if a state registration, regardless of where the registrant actually uses the mark. As the chart summarizes, the benefits of federal registration are numerous, and include both substantive and procedural rights. State registration provides "protection substantially consistent with the federal system of trademark" (NMSA 1978, § 57-3B-2).

While a trademark can be used without a registration, think twice about doing so. The common law cause of action for trademark infringement may not even exist in New Mexico following the 1997 enactment of the New Mexico Trademark Act, which could be interpreted to extinguish the action. *See Guidance Endodontics, LLC v. Dentsply Intern., Inc.*, 708 F.Supp.2d 1209, 1249-53 (2010). The cause of action and remedies granted under the Act are provided only for marks registered with the state (NMSA 1978, § 57-3B-14; § 57-3B-16). Even if the common law cause of action does exist, a plaintiff asserting infringement of an unregistered mark has the burden of proving the validity and ownership of the un-registered mark, and the plaintiff's right of priority will be limited to the particular geographical market of the plaintiff's actual use, which could be as small as the "geographical area immediately surrounding [the plaintiff's] stores" (*S&S Investments, Inc. v. Hooper Enterprises, Ltd.*, 116 N.M. 393, 395-96 (1993)).

Now that Section 2(a) is stricken, trademarks that were previously prohibited from registration as disparaging, immoral or scandalous may come to enjoy the benefits of registration. Organizations like the Washington "Redskins," the San Francisco women's motorcycle contingent "Dykes on Bikes" and the band "The Slants" have fought long and hard for the right to obtain federal registrations for their trademarks that until now have been prohibited from registration, because they know how valuable registration is. Keep their enthusiasm for registration in mind when you are asked that common business question: should I register my trademark? ■

Justin Muehlmeyer is a registered patent attorney practicing at Peacock Myers, PC. He is the Young Lawyer Division liaison to the Intellectual Property Law Section.

New Law Creates a Civil Federal Cause of Action for Trade Secret Theft

continued from page 6

use of the company's trade secrets or other confidential information. Alternatively, or additionally, the company can cross-reference in such employee agreements to a company reporting policy document for suspected violations of law that includes the whistleblower immunity notification, such as in an employee handbook. Failure to include such immunity notification in these agreements will preclude an employer's ability to obtain punitive damages or attorneys' fees in a subsequent litigation against an employee who otherwise misappropriates trade secret information.

Overall, the DTSA provides greater access to the federal courts for misappropriation claims and will help companies protect their trade secrets. Companies should take the opportunity to review their procedures to reasonably protect the secrecy of their trade secrets and ensure their policies and employee agreements include the required notice of whistleblower immunity. Finally, as with any new law, it is too early to determine how the DTSA will be applied in practice, especially the *ex parte* seizure provisions. ■

Kevin Bieg is with Sandia National Laboratories and serves as secretary on the Intellectual Property Law Section Board of Directors.

Endnotes

[1] National Science Foundation, *New Pilot Survey Reveals Importance of Intellectual Property* (February 22, 2012).

[2] Center for Responsible Enterprise And Trade (CREATe.org) & PricewaterhouseCoopers LLP, *Economic Impact of Trade Secret Theft: A framework for companies to safeguard trade secrets and mitigate potential threats*, p. 3 (February 2014).

[3] Defend Trade Secrets Act, 18 U.S.C. § 1836 (2016), codified in amendments to the Economic Espionage Act of 1996.

[4] NMSA 1978, § 57-3A-1 *et seq*.

[5] 18 U.S.C. § 1836(d).

LawPay®

THE WAY ATTORNEYS GET PAID

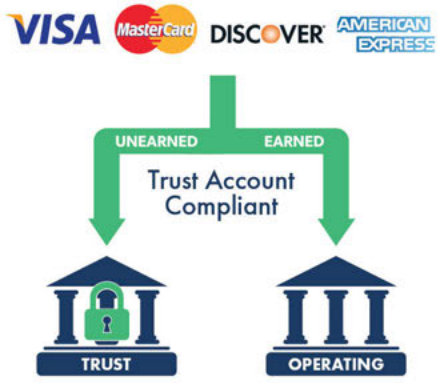
STATE BAR of NEW MEXICO

Proud Member Benefit Provider

1.95% & 20¢ per transaction | No swipe required | No equipment needed | $5–$20 monthly

The proven payment solution for lawyers.

Managing payments and growing revenue for over 30,000 law firms in the US, LawPay is the only solution recognized by the ABA. Designed specifically for the legal industry, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind your credit card transactions are handled the right way.



LawPay.com/NMBar | 866.376.0950

practice guidelines, the treatment is not "medically necessary" under Presbyterian's plan and the Code's general provision.

{35} However, the Code also recognizes that in particular cases an experimental or investigational treatment may be medically necessary for a particular patient such as Jessica. For these cases, the Code expands the classes of treatments that may be required and sets forth the parameters in which an experiment or investigational treatment may be medically necessary. This is 13.10.17.28 NMAC (5/12/2012).[11] The majority concludes that Section .28 serves only a gatekeeper function by "merely" setting forth criteria to consider in determining whether to grant administrative review when a provider has denied coverage for an experimental or investigational treatment. Majority Op. ¶ 24. The majority then determines that an experimental or investigational treatment must fulfill an impossibility, which is to satisfy the Code's general definition of "medical necessity" in Section .7(L), Majority Op. ¶ 25, and after weighing the evidence itself, concludes that the HBOT treatments are not "medically necessary" under Section .7(L). Majority Op. ¶ 27. I dissent from these conclusions.

{36} Presbyterian denied coverage on the grounds there is no coverage for Jessica's condition and because the treatment was for "experimental or investigational services [or] treatments." Rodarte sought administrative review of the denial, and the Superintendent granted review under Section .28. The hearing panel appointed by the Superintendent, took evidence and made a recommended decision. It considered whether Jessica's proposed treatment satisfied the criteria of Section .28, and concluded that it does not. The hearing panel therefore recommended upholding Presbyterian's denial of HBOT treatments under Section .28.

{37} The Superintendent upheld the hearing panel's recommended decision to deny coverage. The Superintendent first stated that the issue presented in the administrative hearing under 13.10.17.29(C) NMAC (5/12/2012) was whether Jessica was deprived of "medically necessary covered services." Thus, ruled the Superintendent, the services must be "medically necessary" before Presbyterian's adverse determination could be reversed. Pertinent to the issue before us, the Superintendent specifically ruled, "Although not expressly stated in the regulations, it is reasonable to infer that, when a treatment is denied because it is deemed to be experimental or investigational, the standard for medical necessity set forth in [Section .28(B)], and relied on by the [p]anel, should be applied to the evidence in the record." The Superintendent then specifically ruled that the HBOT treatment denied by Presbyterian "does not meet the requirements necessary to establish medical necessity[.]" The Superintendent also added, "pursuant to 13.10.17.B NMAC" which, as the majority opinion points out, does not exist. In my view this error is inconsequential, as the Superintendent and hearing panel are both clear that they were applying the standard of medical necessity under Section .28(B) in upholding Presbyterian's denial. (I infer a typographical error in typing "13.10.**17.B**" instead of "13.10.17.**28(B)**").

{38} Rodarte then appealed to the district court, specifically arguing that the HBOT treatment was "medically necessary" under Section .28(B). As the majority points out, the district court ultimately considered whether the treatment satisfied the requirement of "medical necessity" in Section .28. Majority Op. ¶ 9. In its ruling, the district court ruled that "the proper standard for the ultimate agency review of the medical necessity of an experimental or investigational medical procedure is . . . [Section .28(B)]," and that the specific standard in Section .28(B) applies, rather than the more general definition of "medical necessity" found at Section .7(L). It is from this order that Presbyterian appeals.

{39} Presbyterian, the hearing panel appointed by the Superintendent, the Superintendent, and the district court all concluded that the standard of "medical necessity" under Section .28(B) applies. Disagreeing, the majority holds that it is nothing more than something which must be considered in determining whether to grant administrative review. Majority Op. ¶ 24. Where the majority's reasoning fails, however, is that it results in granting an administrative hearing which a patient can never win when coverage is sought for an experimental or investigational treatment, because such a treatment will never satisfy Section .7(L). As Rodarte points out, "[w]hat would be the point of permitting appeals that could never, by definition, succeed?" The answer is that the Code does not provide for a meaningless hearing. Instead, as the Superintendent ruled, when a treatment is denied because it is deemed to be experimental or investigational, the standard of medical necessity in Section .28(B) governs.

---

[11]Unless otherwise indicated, all future references shall be to the 2012 version, and for ease of reference shall be referred to as "Section .28." In its entirety Section .28 provides:

A. **coverage**; the recommended or requested health care service:

(1) reasonably appears to be a covered benefit under the grievant's health benefit plan except for the health care insurer's determination that the health care service is experimental or investigational for a particular medical condition; and

(2) is not explicitly listed as an excluded benefit under the grievant's health benefit plan; and

B. **medical necessity**; the grievant's treating provider has certified that:

(1) standard health care services have not been effective in improving the grievant's condition; or

(2) standard health care services are not medically appropriate for the grievant; or

(3) there is no standard health care service covered by the health care insurer that is as beneficial or more beneficial than the health care service:

(a) recommended by the grievant's treating provider that the treating provider certifies in writing is likely to be more beneficial to the grievant, in the treating provider's opinion, than standard health care services; or

(b) requested by the grievant regarding which the grievant's treating provider, who is a licensed, board certified or board eligible physician qualified to practice in the area of medicine appropriate to treat the grievant's condition, has certified in writing that scientifically valid studies using accepted protocols demonstrate that the health care service requested by the grievant is likely to be more beneficial to the grievant than available standard health care services.

{40} Administrative regulations are to be interpreted under the same basic principles that guide interpretation of statutes. *See PC Carter Co. v. Miller*, 2011-NMCA-052, ¶ 11, 149 N.M. 660, 253 P.3d 950. As such, "each section or part should be construed in connection with every other part or section, giving effect to each, and each provision is to be reconciled in a manner that is consistent and sensible so as to produce a harmonious whole." *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 23, 147, N.M. 523, 226 P.3d 622 (internal quotation marks and citation omitted). Moreover, "The general/specific rule provides that when two statutes deal with the same subject matter, the statute dealing with a specific subject will be considered an exception to, and given effect over, the more general statute." *Lu v. Educ. Trust Bd. of N.M.*, 2013-NMCA-010, ¶ 13, 293 P.3d 186 (alteration, internal quotation marks, and citation omitted). Finally, a regulation should be interpreted with common sense, and an interpretation that leads to absurdity or contradiction should be avoided. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 36, 309 P.3d 1047. Application of these settled principles requires that, in the case of an experimental or investigational treatment, the definition of "medical necessity" in Section .28 governs instead of the general definition of "medical necessity" in Section .7(L). Since the majority disagrees, I dissent. I therefore agree with the hearing panel, the Superintendent, and the district court that Section .28 governs administrative review when treatment has been denied on the basis that it is experimental or investigational.

SPECIAL CONCURRENCE

{41} The foregoing dissent notwithstanding, I agree with the majority that the order of the district court must be reversed. However, I arrive at this conclusion under Section .28.

{42} Under subsection (A) of Section.28, it must be considered: (1) whether HBOT reasonably appears to be a covered benefit under Presbyterian's plan, except for Presbyterian's determination that HBOT is experimental or investigational; and (2) HBOT is not explicitly listed as an exclusion under Presbyterian's plan. Part I of the majority opinion in ¶¶ 12-16 demonstrates that Presbyterian's insurance contract does not provide coverage for Jessica's medical condition. I fully concur in this portion of the majority opinion. Moreover, this part of the majority opinion also demonstrates that the HBOT treatments are not only not specifically covered under Presbyterian's health plan, they are specifically excluded. I therefore conclude that Rodarte failed to prove that subsection (A) of Section .28 was satisfied.

{43} I next consider whether subsection (B) of Section .28 was satisfied. The issue presented to the hearing panel was whether the HBOT treatments were "medically necessary" under Section .28(B)(3)(b).

{44} In seeking to prove such "medical necessity" Jessica's treating physician, Dr. Ken Stoller certified that there is no standard health care service covered by Presbyterian that is as beneficial or more beneficial than the proposed HBOT treatments. The hearing panel noted, however, that "the issue is a lack of high level research studies such as those done in a prospective, randomized, controlled, double-blinded fashion. Dr. Stoller presented several case studies in his materials, but case studies are not a substitute [for] the types of studies just described in the medical field." After noting Jessica's treatments by Dr. Stoller, and Jessica's response to those treatments, the hearing panel concluded, "Due to the lack of evidence that HBOT caused Ms. Rodarte's alleged improvements and the fact that she was provided HBOT treatment within the first year following her diagnosis of anoxic encephalopathy when spontaneous improvement can occur, it is not clear that HBOT caused Ms. Rodarte's improvements." Based on its review of the evidence, the hearing panel concluded that the evidence failed to demonstrate that the HBOT treatments were medically necessary under Section .28(B). The Superintendent in turn adopted, approved, and accepted the hearing panel's recommendation.

{45} I conclude that substantial evidence supports the Superintendent's conclusion that the HBOT treatments were not medically necessary under Section .28(B). I therefore agree with the majority that the district court erred. However, I disagree with the majority that independently examining the evidence to determine whether it satisfies section .7(L) is necessary or appropriate. *See* Majority Op. ¶¶ 26-28.

{46} I therefore specially concur in the result reached.

MICHAEL E. VIGIL, Chief Judge

Certiorari Denied, May 19, 2016, No. S-1-SC-35865

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-052

No. 34,167 (filed March 29, 2016)

VINCENT R. GARCIA, ROBERTO BORBON, MARK MORAN, and KENNETH A. ZIEGLER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,
v.
THE BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, SANDIA FOUNDATION, and ENTERPRISE BUILDERS, INC.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
NAN G. NASH, District Judge

SHANE C. YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
Albuquerque, New Mexico
for Appellants

GEORGE R. MCFALL
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Albuquerque, New Mexico
for Appellee Sandia Foundation

THOMAS L. STAHL
EDWARD RICCO
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico
for Appellee Board of Regents of the University of New Mexico

WAYNE E. BINGHAM
BINGHAM, HURST & APODACA, P.C.
Albuquerque, New Mexico
for Appellee Enterprise Builders Corporation

Opinion

Linda M. Vanzi, Judge

{1} Plaintiffs are a class of workers who provided various electrical services on a construction project in which the Board of Regents of the University of New Mexico, Sandia Foundation, and Enterprise Builders (collectively, Defendants) were involved. They sued Defendants for statutory minimum wage violations, including violation of the Public Works Minimum Wage Act (PWMWA), NMSA 1978, §§ 13-4-10 to -17 (1937, as amended through 2011). They also asserted their rights as alleged third-party beneficiaries to a settlement agreement (the Agreement) between Defendants and the Department of Workforce Solutions (the Department). The Department has since (sua sponte, we are told) reversed the determination that led to the Agreement in the first place, and Plaintiffs' appeal of that decision was dismissed as untimely by the relevant agency, ultimately resulting in the dismissal of all statutory claims. *See Garcia v. Bd. of Regents of Univ. of N.M.*, 2014-NMCA-083, ¶¶ 6, 16, 331 P.3d 1003.

{2} In the present case, we are asked to consider a narrow issue: whether the district court properly granted summary judgment on the only remaining claim, which alleged breach of the Agreement. The sole ground for granting summary judgment was that the underlying Agreement was "void" for violation of federal tax law. We reverse. We hold that the Agreement indeed contains an unenforceable term, but the term can be properly severed. Accordingly, we reverse the district court's grant of summary judgment.

BACKGROUND

{3} The PWMWA serves "to ensure that employees of contractors working on state . . . projects are protected from substandard earnings." *Universal Commc'ns Sys., Inc. v. Smith*, 1986-NMSC-076, ¶ 4, 104 N.M. 754, 726 P.2d 1384. "Under the PWMWA, every contract for construction or alteration of public buildings or public works in excess of sixty thousand dollars that involves mechanics or laborers or both must comply with minimum wage standards set by the Director of the Labor Relations Division" of the Department of Workforce Solutions (the Director). *Garcia*, 2014-NMCA-083, ¶ 2.

{4} In April 2009, the Director certified that a joint project undertaken by Defendants constituted a public works project, subject to the PWMWA. Defendants appealed that determination but then settled with the Department, which withdrew its certification and agreed to take no further action against them. In exchange, Defendants agreed to (1) pay a designated amount of back wages and fringe benefits due each worker under the PWMWA, totaling $779,357.12; and (2) make separate "delay payments" to each worker, totaling $158,150.27.

{5} The Agreement distinguished between the two types of payments, presumably for tax purposes. The delay payments purported to represent "payment to settle a disputed claim for liquidated damages under the PWMWA and not wages." They were to be issued separately from the payments for back wages and fringe benefits. The Agreement contained no instructions to withhold any payroll taxes from the delay payments.

{6} In contrast, the payments for back wages and fringe benefits were divided into two groups. Enterprise agreed to issue wage/benefit checks to its own employees "subject to payroll withholding in the normal course." All other workers worked for various subcontractors who were not parties to the settlement negotiations. Wage/benefit checks made out to those workers, "i.e., those workers not employed by any [Defendant]," were to be issued "without such withholding." The present appeal centers entirely on this no-withholding clause—a single provision that applies only to one type of payment made to one group of workers.

{7} Defendants agreed to make all checks to all workers payable to each worker individually. They would issue the checks to the Department by deadlines specified in the Agreement, and the Department would then "distribute said checks to each worker" who signed a document releasing Defendants from liability for future wage-related claims arising out of the project. Characterized broadly, the terms

of the Agreement indicate that Defendants hoped to pay a total of $937,507.39 (the sum of wages and benefits owed plus delay compensation owed) over to the Department in exchange for a complete release of liability to the Department and to all workers identified to have worked on the project.

{8} But Defendants never made any of the agreed payments, which would have been due in full by the end of 2010. When they had not issued a single check by May 2011, Plaintiffs filed suit for breach of the Agreement and for other claims that have since been dismissed.

{9} Defendants moved for summary judgment, arguing, in relevant part, that the no-withholding provision called for a performance that violated the Internal Revenue Code, making the entire Agreement void as against public policy. Plaintiffs responded that there remained issues of disputed facts—mostly related to Defendants' efforts to comply with the Agreement, that there were alternatives to "straight payroll withholding" that would make the Agreement entirely consistent with the law, and that, in any event, the clause could be severed or reformed as a nonessential part of an otherwise valid wage claim settlement. The district court ultimately concluded that the term could not be enforced and that it was "central to the Agreement," meaning that it could not be severed. The court also concluded that reformation was inappropriate. Summary judgment was granted to Defendants. Plaintiffs appealed, and we now reverse the district court.

DISCUSSION

Standard of Review

{10} All issues raised in this appeal are subject to a de novo standard of review. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. . . . We review these legal questions de novo." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. This case involves a settlement agreement, which "is a species of contract." *Branch v. Chamisa Dev. Corp.*, 2009-NMCA-131, ¶ 33, 147 N.M. 397, 223 P.3d 942 (internal quotation marks and citation omitted). "New Mexico adheres to the contextual approach to contract interpretation, in recognition of the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding." *Id.* (internal quotation marks and citation omitted). "Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case." *K.R. Swerdfeger Constr. Inc. v. Bd. of Regents of Univ. of N.M.*, 2006-NMCA-117, ¶ 23, 140 N.M. 374, 142 P.3d 962 (internal quotation marks and citation omitted). Our analysis also requires us to construe several statutes. We do so to give effect to the intent of the Legislature, and our review is de novo. *Romero Excavation & Trucking, Inc. v. Bradley Constr. Inc.*, 1996-NMSC-010, ¶¶ 5-6, 121 N.M. 471, 913 P.2d 659.

The No-Withholding Provision Is Not Enforceable

{11} Plaintiffs, who are not parties to the Agreement, have alleged that they are third-party beneficiaries entitled to enforce it. *See Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81 ("A third party may be a beneficiary of [a] contract, and as a beneficiary may have an enforceable right against a party to a contract."). While that may be true, our courts cannot enforce a provision—for anyone's benefit—that requires performance in violation of federal law. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("[I]llegal promises will not be enforced in cases controlled by the federal law.").

{12} There is no dispute that back pay paid to employees in a settlement agreement is subject to social security and income taxes. The Internal Revenue Code defines "wages" for income tax purposes to mean "all remuneration . . . for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash[.]" I.R.C. § 3401(a) (2012). There are a few exceptions to this definition, but they are not applicable here. *See id.* The definition of "wages" under I.R.C. § 3121(a) (2012) for social security and medicare (FICA) purposes contains similar language.[1] The United States Supreme Court and the federal circuit courts of appeals have consistently concluded that back pay awarded pursuant to various employment, labor, and civil rights legislation constitutes "remuneration" —and therefore "wages" subject to income tax and FICA withholding. *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364-65 (1946) (applying the National Labor Relations Act); *Noel v. N.Y. State Office of Mental Health Cent. N.Y. Psychiatric Ctr.*, 697 F.3d 209, 213-14 (2d Cir. 2012) (applying Title VII); *Gerbec v. United States*, 164 F.3d 1015, 1026 (6th Cir. 1999) (discussing the Employee Retirement Income Security Act); *see Blim v. W. Elec. Co.*, 731 F.2d 1473, 1480 n.2 (10th Cir. 1984) ("Back pay is taxable . . . and subject to income tax and social security withholding."), *superceded by statute on other grounds as stated in E.E.O.C. v. Beverage Distrib. Co.*, 780 F.3d 1018, 1024 (10th Cir. 2015). The point has been admitted by the parties in their briefing here.

{13} Nor is there any question that it is the employer who is obligated to deduct and withhold the required taxes and to file the corresponding reports and returns. I.R.C. § 3402(a)(1) (2012) ("[E]very employer making payment of wages shall deduct and withhold upon such wages a tax[.]"); *Otte v. United States*, 419 U.S. 43, 52 (1974) (stating that reporting obligations follow the obligation to withhold); *see also* Treas. Reg. § 1.6041-2(a)(1) ("Wages . . . paid to an employee are required to be reported on Form W-2."); Treas. Reg. § 1.6045-5 (providing that the reporting requirement of Section 1.6041 is not vitiated by paying lump sum settlement to a plaintiff's attorney). An employer that willfully fails to meet these obligations is liable to pay a penalty apart from the tax. I.R.C. § 6672(a) (2012); *see Burden v. United States*, 486 F.2d 302, 304 (10th Cir. 1973).

{14} Plaintiffs make no serious allegation that they were independent contractors. The complaint flatly alleged that the underlying claims involved "employees who are or were employed by Defendants," and the taxing authority looks only to the nature of the underlying claim when determining tax ramifications of a settlement payment. *Getty v. Comm'r of Internal Revenue*, 913 F.2d 1486, 1490 (9th Cir. 1990) ("In characterizing the settlement payment for tax purposes," the question is, "[i]n lieu of what were the damages awarded?"(internal quotation marks and citation omitted)); *see also* Treas. Reg. § 31.3121(a)-1(c) ("The name by which the remuneration for employment is designated is immaterial."); Treas. Reg. § 31.3401(a)-1(a)(2) ("The name by which the remuneration for services is designated is immaterial.").

{15} As we view it, the difficult question is whether—for purposes of the deduction

[1]Relevant provisions of state law are not meaningfully different. *See* NMSA 1978, § 7-3-2(C), (J) (2010) (defining "employer" and "wages"); *see also* NMSA 1978, § 7-3-3(A) (1996) (requiring employer to withhold income taxes).

and withholding requirements—any Defendant is actually the "employer" of the employees who worked for the various nonparty subcontractors to whom Defendants agreed to issue checks "without such withholding." The Internal Revenue Code defines "employer" as

> the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—
> (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' . . . means the person having control of the payment of such wages[.]

I.R.C. § 3401(d). The exception in paragraph (1) applies in unusual cases where the person with legal control over the payment of wages is not the common law employer of the recipient. In those cases, the purpose of the exception is to ensure "that the person actually paying the wages . . . is obligated to withhold the taxes." *Educ. Fund of Elec. Indus. v. United States*, 426 F.2d 1053, 1057 (2d Cir. 1970).[2] As the Ninth Circuit Court of Appeals has stated,

> It matters little who hired the wage earner or what his duties were or how responsible he may have been to his common law employer. Neither is it important who fixed the rate of compensation. When it finally comes to the point of deducting from the wages earned that part which belongs to the United States and matching it with the employer's share . . . , the only person who can do that is the person who is in 'control of the payment of such wages.'

Evans v. Internal Revenue Serv., 607 F.2d 1237, 1240 (9th Cir. 1979).

{16} Defendants agreed to issue checks from their own accounts to the workers covered by the Agreement; the Department would serve only to "distribute said checks to each worker." This indicates that Defendants, rather than the Department or any subcontractor, were in sole control of the payment of wages for all workers covered by the Agreement, including those not employed (in the traditional sense) by Enterprise. As the statutory employer of the workers, Defendants were obligated to withhold and pay over to the United States the taxes associated with all wage payments. *See* I.R.C. § 3402(a)(1).

{17} It is therefore difficult to envision any scenario in which the no-withholding clause could be enforced by Plaintiffs. *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 8, 145 N.M. 372, 198 P.3d 871 ("[E]mployees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability." (internal quotation marks and citation omitted)). Acts of Congress directly prohibit any suit to enjoin "the assessment or collection of any tax . . . in any court by any person," I.R.C. § 7421(a) (2012), and expressly immunize every employer from liability for withholding federal taxes from wages, I.R.C. § 3403 (2012), even in cases involving breach of an agreement not to withhold, *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 770 (9th Cir. 1986), and even when an employee asserts a claim for money damages in a state court in New Mexico, *Landess*, 2008-NMCA-159, ¶¶ 8-9. These protections are "strictly enforced." *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984).

{18} "In ascertaining public policy we look to the language of the statute, its subject matter and the purpose to be accomplished." *City of Artesia v. Carter*, 1980-NMCA-006, ¶ 12, 94 N.M. 311, 610 P.2d 198. It is evident that Congress intends to compel employers to withhold payroll taxes without judicial intervention, with the legal right to disputed sums determined only in a suit for refund. *Enochs v. Williams Packaging & Navigation Co.*, 370 U.S. 1, 7 (1962). State tax law is to the same effect. NMSA 1978, § 7-3-4 (1996) ("No employee shall have a right of action against the employer for any amount deducted and withheld from the employee's wages."). Consistent with the state and federal interest in ensuring the undisturbed collection of lawful revenue, we conclude that the no-withholding provision is contrary to law and unenforceable.

{19} But this is not a suit for declaratory judgment; and Defendants are not asserting tax law as a defense to the no-withholding clause, which nobody really intends to enforce, and which Plaintiffs argue should be severed or reformed. In essence, Defendants argue that, since they negotiated for the illegal clause, they would lose the benefit of their bargain if they had to make the settlement payments in compliance with the law. They argue that enforcement of the Agreement without the illegal clause would require them to pay the employer share of FICA and other taxes and would subject them to various administrative burdens associated with meeting their statutory obligations. According to Defendants, the illegality of the no-withholding clause brings the entire Agreement down with it. Plaintiffs counter that the clause is "a technicality [that] does not strike at the heart of the . . . Agreement" and that Defendants should not be entitled to disown a document they drafted because they inserted a collateral clause that misconstrues tax law. We consider the parties' arguments through the lens of severability.

The Unenforceable Clause Can Be Severed

{20} "The paramount public policy is that freedom to contract is not to be interfered with lightly. It is the court's duty to sustain the legality of a contract in whole or in part whenever it can do so." *Tharp v. Allis-Chalmers Mfg. Co.*, 1938-NMSC-044, ¶ 13, 42 N.M. 443, 81 P.2d 703 (internal quotation marks and citation omitted). Where the purpose and subject matter of a contract are legal, but the contract contains an illegal provision, the general rule is that a court may enforce the valid portions of the contract in favor of a party who has not engaged in serious misconduct if the illegal term is not an essential part of the agreed exchange. Restatement (Second) of Contracts § 184(1) (1981). The requirement that the term to be severed is not essential exists to prevent courts from selectively enforcing parts of a contract in a manner that nullifies the contract's essential purpose. *See id.* cmt. a. Along these lines, our own courts have enforced contracts that are partially illegal when "the illegal part can be eliminated without destroying the symmetry of the contract as a whole[.]" *Capo v. Century Life Ins. Co.*, 1980-NMSC-058, ¶¶ 23-24, 94 N.M. 373, 610 P.2d 1202; *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, ¶ 16, 81 N.M. 161, 464 P.2d 891; *Ritchey v. Gerard*, 1944-NMSC-053, ¶ 14, 48 N.M. 452, 152 P.2d 394.

{21} This was a contract to settle a wage claim. Its manifest purpose, which was to "avoid[] the nuisance, costs, and inherent risks of litigation" in exchange for payments

[2]While I.R.C. § 3401(d)(1) strictly applies only to income tax withholding, its meaning has been extended to FICA as well. *See Otte*, 419 U.S. at 51.

to affected workers, was entirely legal—and in fact desirable. *See Esquibel v. Brown Constr. Co.*, 1973-NMCA-111, ¶ 17, 85 N.M. 487, 513 P.2d 1269 ("It is the policy of the law to favor compromise and settlement."). The no-withholding provision was nothing more than an ancillary attempt to designate tax ramifications of some of the payments to some of the workers. Such a term is not essential. As mentioned above, the labels that parties to settlement agreements put on their payments are of no real import; they are, in fact, "immaterial" to the taxing authority, which looks instead to the nature of the underlying claim. Treas. Reg. §§ 31.3121(a)-1(c), 31.3401(a)-1(a)(2); *Getty*, 913 F.2d at 1490. The interests of the United States are adequately protected by statutory penalties, I.R.C. § 6672(a), and by the immunity granted to all employers that withhold payroll taxes in accordance with the law notwithstanding a contract purporting to require otherwise, *Bright*, 780 F.2d at 770. There is no benefit to the public to be gained by imposing an additional penalty (the avoidance of an otherwise valid settlement agreement) on litigants who mistakenly settle on a tax arrangement that is inconsistent with Section 3402(a)(1).

{22} While the no-withholding provision may be inconsequential to the taxing authority and the public, Defendants—via statements of counsel—have maintained that it is important to them. They argue that severing the no-withholding clause would alter the cost of the Agreement. One cannot normally set aside a settlement agreement on the basis that he was ignorant of the law when the claim was settled, *see Esquibel*, 1973-NMCA-111, ¶ 19; or on the ground that the agreement turned out to be unwise, *see Harkins v. Harkins*, 1984-NMSC-057, ¶ 3, 101 N.M. 296, 681 P.2d 722. For our purposes, the relevant standard is not whether performance in compliance with the law might be more expensive than Defendants expected, but whether the illegal term was "an essential part of the agreed exchange." Restatement (Second) of Contracts § 184(1). The district court granted summary judgment without hearing any evidence that it was.

{23} There is no evidence in the record, for instance, that the agreed rates for non-Enterprise employees were any different than those for Enterprise employees, which were "subject to payroll withholding in the normal course." The contract says that payments to all "known workers who performed construction work on the site" were based "upon amounts of back pay and fringe benefits [the workers] would have been due under the PWMWA (less wages and benefits already paid)." Without any evidence to the contrary, this language is clear enough. The price of the bargain was not determined by the no-withholding provision; it was tied directly to the prevailing wage and benefit rates set by the Director of the Department for classes of laborers and mechanics employed on a public works project. *See* § 13-4-11(B).

{24} The terms of the Agreement indicate only that Defendants sought to comply with the law. They mistakenly believed, according to the contract, that the non-Enterprise workers were "not employed by any [Defendants]." They made, as the attorney for Sandia Foundation later admitted, "a very fundamental" and "somewhat embarrassing" mistake. In other words, the only way to effectuate their intent is to bring the Agreement into compliance with state and federal law by severing the illegal term. Under the circumstances, we think it best not to permit sophisticated parties to evade the spirit of their agreement by leaning on their own inexplicable misreading of tax provisions that are directed at them. *Cf. Forrest Currell Lumber Co.*, 1970-NMSC-018, ¶ 16; *S. States Life Ins. Co. v. McCauley*, 1970-NMSC-010, ¶ 7, 81 N.M. 114, 464 P.2d 404 ("The party at fault under the statute cannot gain an advantage by his own act."); *Elephant Butte Alfalfa Ass'n v. Rouault*, 1926-NMSC-009, ¶ 17, 33 N.M. 136, 262 P. 185 ("Public policy safeguards society from oppression; it is not an instrument of oppression."). While partial enforcement of the Agreement may make performance more expensive than Defendants intended, they (and not Plaintiffs, who took no part in negotiations for the illegal term) should bear the cost of their mistake.

{25} We conclude that the appropriate remedy is to strike the single occurrence of the words "without such withholding" from Paragraph 2 of the Agreement. The Agreement then requires Defendants to make their wage/benefit payments to all workers in the manner already contemplated for the Enterprise employees. Therefore, consistent with state and federal law, all payments are naturally "subject to payroll withholding in the normal course."

CONCLUSION

{26} We reverse the district court's grant of summary judgment.

{27} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
RODERICK T. KENNEDY, Judge

Certiorari Denied, May 19, 2016, No. S-1-SC-35869

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-053

No. 34,096 (filed March 30, 2016)

BIREN SHAH, M.D.,
Plaintiff-Appellant,
v.
RAMAKRISHNA DEVASTHALI, M.D., PUNEET GHEI, M.D.,
LAS CRUCES IMAGING, LLC, LAS CRUCES RADIOLOGY ASSOCIATES, INC.,
and DAGS ENTERPRISES, LLC,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
MANUEL I. ARRIETA, District Judge

DONALD F. KOCHERSBERGER III
ALICIA M. LAPADO
BUSINESS LAW SOUTHWEST LLC
Albuquerque, New Mexico
for Appellant

CARALYN BANKS
KEN SLAVIN
KEMP SMITH LLP
Las Cruces, New Mexico
for Appellees

Opinion

Michael D. Bustamante, Judge

{1} After an arbitrator awarded Appellant Dr. Biren Shah $1,465,876, Defendants moved for—and were granted—a modification of the award. The district court reduced the award to $150,000. Discerning no basis for the reduction, we reverse the district court's modification and remand for confirmation of the arbitration award.

BACKGROUND

{2} Appellant Dr. Biren Shah (Shah) and Defendants Dr. Ramakrishna Devasthali and Dr. Puneet Ghei are radiologists. In or around 2004, Shah joined the other doctors[1] as an employee, director, and stockholder of Las Cruces Radiology Associates, Inc. (LCRA). LCRA was governed by its bylaws (the Bylaws). Together, Shah, Devasthali, Ghei, and Alvi also formed two limited liability companies, Las Cruces Imaging, LLC (LC Imaging) and DAGS, LLC (DAGS). LC Imaging leased the radiology equipment used by the radiologists and DAGS owned the property in which they operated. LC Imaging and DAGS were governed by separate operating agreements (the Operating Agreements).

{3} In 2010 Shah's employment with LCRA was "terminated for cause," which resulted in termination of his stockholder status with LCRA and expulsion as a member from LC Imaging and DAGS. In early 2011 Shah filed a complaint in district court against Defendants for breach of contract, wrongful termination, breach of the duty of good faith and fair dealing, equitable estoppel, and unjust enrichment. He also requested an accounting, dissolution, and declaratory judgment. Defendants filed a motion to dismiss and to compel arbitration pursuant to an arbitration provision included in the Operating Agreements. After a hearing, the district court entered sixty-seven findings of fact and granted the motion to compel arbitration. The findings of fact are discussed in more detail as part of our analysis of the parties' arguments. We refer to this order as the Arbitration Order.

{4} A five-day arbitration took place before an arbitrator appointed by the American Arbitration Association. Without articulating the basis for his decision, the arbitrator ordered Defendants to pay Shah $1,465,876. After Shah moved to confirm the arbitration award, Defendants filed a motion to modify or correct the arbitration award. The district court granted Defendants' motion to modify the arbitration award on the ground that the arbitrator had exceeded his authority because the award was inconsistent with the parties' agreements. We call this order the Modification Order. In the Modification Order, the district court reduced the amount of the award from $1,465,876 to $150,000. Shah appeals the Modification Order.

DISCUSSION

{5} The question on appeal is whether the district court was correct in its conclusion that "[t]he [a]rbitrator exceeded the scope of his authority when he awarded an amount beyond what was required under the contracts." We conclude that the district court erred in its interpretation of the Bylaws, in its factual findings, and by reconsidering its original findings after arbitration was complete.

{6} We begin by setting out the standard of review of the district court's modification of an arbitration award. Next, we discuss the relevant provisions of the agreements between the parties. Finally, we assess the district court's Modification Order.

Standard of Review

{7} Arbitration provisions permit parties to "submit their disputes to an impartial private tribunal for a final and binding decision based upon the parties' presentation of arguments and evidence. This process allows for the informal, speedy, and inexpensive final disposition of disputes, and also aids in relieving the judiciary's heavily burdened caseload[.]" *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 8, 115 N.M. 622, 857 P.2d 22 (citations omitted). The modification of arbitration awards by district courts is governed by Section 44-7A-25 of the Uniform Arbitration Act. NMSA 1978, §§ 44-7A-1 to -32 (2001). Section 44-7A-25 provides that

> the court shall modify or correct the award if: (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award; (2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or (3) the award is imperfect in a matter of form not affecting the merits

[1]A fourth radiologist, Dr. Naveed Alvi, was also a stockholder. Dr. Alvi is not a party to this appeal.

of the decision on the claims submitted.

{8} This provision sharply limits the district court's discretion to modify an arbitration award. Our Supreme Court has observed that "[t]he [Uniform] Arbitration Act neither empowers the district court to review an arbitration award on the merits of the controversy, nor grants the district court the authority to review an award for errors of law or fact." *In re Arbitration Between Town of Silver City & Silver City Police Officers Ass'n* (*Silver City*), 1993-NMSC-037, ¶ 7, 115 N.M. 628, 857 P.2d 28; *see Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) ("Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited[.]" (citation omitted)).

{9} In addition, the purposes of the Uniform Arbitration Act depend on finality in arbitration awards. Consequently, "[o]nce an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award." *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.*, 1989-NMSC-007, ¶ 4, 108 N.M. 192, 769 P.2d 726. In the interest of finality, district courts should "exercis[e] great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process of arbitration, freely chosen by the parties." *Id.* Consistent with these principles, "[i]t is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators, but rather to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award." *Melton v. Lyon*, 1989-NMSC-027, ¶ 7, 108 N.M. 420, 773 P.2d 732; *cf. Silver City*, 1993-NMSC-037, ¶ 7 ("De novo review of the merits of arbitration awards by the district court would only serve to frustrate the purpose of arbitration, which seeks to further judicial economy by providing a quick, informal, and less costly alternative to judicial resolution of disputes.").

{10} In the context of appeals from orders modifying arbitration awards, our primary task is to determine de novo whether the district court adhered to the structure described above. In addition, on appeal, this Court "determine[s] whether substantial evidence in the record supports the district court's findings of fact, and whether the court correctly applied the law to the facts when making its conclusions of law[.]" *Silver City*, 1993-NMSC-037, ¶ 8 (citation omitted). To the extent the latter question depends on interpretation of a contract, we review the contract terms de novo. *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 8, 123 N.M. 526, 943 P.2d 560 ("Since resolution of the issue on appeal depends upon interpretation of documentary evidence, we are in as good a position as the district court to interpret the operating agreement."). "The contract will be considered and construed as a whole, with meaning and significance given to each part in its proper context, so as to ascertain the parties' intentions." *Segura v. Kaiser Steel Corp.*, 1984-NMCA-046, ¶ 12, 102 N.M. 535, 697 P.2d 954.

{11} In this case, the parties did not provide any testimony or other evidence concerning their individual understanding of the agreements or the course of negotiation, if any, leading to the operative versions of the agreements. Nor do the parties argue that the agreements are ambiguous. Given that the parties have not provided any evidence outside the documents themselves, our task is limited to construing the documents on their face. *Cf. C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 15, 112 N.M. 504, 817 P.2d 238 (holding that the court may consider collateral evidence of the circumstances surrounding the execution of agreements in determining whether the language of the agreement is unclear).

The Bylaws and Operating Agreements

{12} We turn next to the operative provisions of the corporate Bylaws and the LLC Operating Agreements. The Bylaws provide that "[a]ll stockholders of [LCRA] must be employees of [LCRA]" and that "[i]n the event a [s]tockholder's employment with [LCRA] terminates for any reason, [LCRA] shall purchase the [s]tockholder's share in [LCRA] as set forth herein." Article VI of the Bylaws governs when shares will be transferred and how they will be valued. Consistent with the requirement that all stockholders must be employees, one of these sections addresses purchase of the terminated employee's shares by the other stockholders. In addition to termination of employment, other events—death, divorce, disability, bankruptcy, and "expulsion" of a stockholder—will also act as triggers requiring the transfer of the stockholder's shares.

{13} Two of the triggering provisions are of particular interest here because our analysis depends in large part on which of these two provisions the arbitrator should have or did rely on in making the award. The first is titled "Bankruptcy, Expulsion, [a]nd Unspecified Events [o]f Expulsion[,]" and addresses share transfer when a stockholder is "expelled from [LCRA]." We call this provision "the Expulsion Provision."

{14} The Expulsion Provision states that

> [a]ny [s]tockholder that has been expelled from [LCRA] or who is the holder of an [i]nterest in [LCRA] which has resulted in an unspecified event of expulsion shall convey that [s]tockholder's common stock in [LCRA] to the other [s]tockholders of [LCRA] for the value calculated under Section 10[.]C and Section 11 of this Article.

The corresponding valuation provision, Section 10.C, is titled "Bankruptcy and Undefined Events of Expulsion." It provides that the "[s]tockholder's common stock in [LCRA] shall be purchased by the remaining [s]tockholders for the *lesser of* the following: (1) $50,000[, or] (2) The value of the [s]tockholder's common stock in [LCRA] as determined pursuant to the formula set forth in [the Bylaws.]" (emphasis added). **[RP 148-149, ¶10.]**

{15} The second key provision is titled "Resignation, Retirement, or Termination of Employment" and applies when a stockholder resigns, retires, or is involuntarily terminated from employment. We call this provision "the Termination Provision." The Termination Provision states that "[i]n the event a [s]tockholder resigns, or retires from employment with [LCRA] or the [s]tockholder's employment with [LCRA] is terminated, that [s]tockholder's common stock in [LCRA] shall be purchased by the remaining [s]tockholders . . . in accordance with Section 10 and Section 11 of this Article." Although Section 10.D is not specifically referenced in the Termination Provision, its title, "Resignation, Retirement, or Termination of Employment[,]" mirrors that of the Termination Provision. Section 10.D provides that "[i]n the event a [s]tockholder voluntarily resigns or retires from employment with [LCRA] or the [s]tockholder's employment with [LCRA] is terminated, the value of the [s]tockholder's common stock in [LCRA] shall be determined [according to a formula up to 100% of the value of the stock]."

{16} We note that, in spite of the significant difference in the valuation of the stock

when a stockholder is expelled versus when a stockholder's employment is terminated, the terms "expulsion" and "termination" are not defined in the Bylaws. Nevertheless, there is no indication in the Bylaws that termination of employment and expulsion are indistinct and overlapping acts. In fact, expulsion and termination are addressed in different sections of the Bylaws. We conclude that the concept of termination of employment with LCRA is distinct from that of expulsion. The district court erred to the extent it conflated the two concepts in its reading of the Bylaws.

{17} Reading the Bylaws as a whole, we conclude that when a stockholder is expelled through "expulsion" or an "undefined event of expulsion," the other stockholders may purchase the expelled stockholder's stock for the lesser of $50,000 or the value of the common stock, but when a stockholder's employment is terminated, the purchase price is not capped at $50,000 and may be up to 100% of the value of the stock.

{18} Shah does not challenge the district court's findings of fact that he was expelled from LC Imaging and DAGS as a result of the termination of his employment with LCRA, and that an expelled member's interest in LC Imaging and DAGS is limited to the lesser of $50,000 or the value of the member's capital account. Rather, his argument focuses on the provisions in the Bylaws governing the purchase price for his stock in LCRA as set out above. We include the following description of the provisions in the Operating Agreements merely to provide context for our discussion of the provisions in the Bylaws.

{19} Like the Bylaws, the Operating Agreements have two sets of provisions, the first setting out what happens to the stock when an "event[] of dissolution" occurs, and the second setting out how the stock shall be valued in each of those instances. "Events of dissolution" include

> a [m]ember's i) death; ii) divorce; iii) disability . . . ; iv) bankruptcy; v) retirement; vi) resignation; vii) withdrawal; viii) termination of a [m]ember's [i]nterest [in] Las Cruces Radiological Associates, LLC [sic] . . . ; ix) gift of interest during lifetime; x) *expulsion of a [m]ember*; xi) any other event which would cause the dissolution of [LC Imaging or DAGS] under applicable law.

(Emphasis added.). In the event of expulsion from the limited liability companies, the "[m]ember's interest in the [c]ompany shall be purchased by the remaining [m]embers for the lesser of the following: (1) $50,000[,] (2) The value of the [m]ember's capital account as determined pursuant to the formula set forth in [the Operating Agreement.]"

Modification of the Arbitration Award

{20} As a preliminary matter, we briefly address Defendants' argument that the arbitrator exceeded the scope of his authority because "the only issues presented at [a]rbitration were: (1) whether [Shah] could establish his substantive claims against [Defendants]; and (2) if, *and only if*, he established the substantive claim against [Defendants], the amount of damages to be awarded to [Shah]." Defendants maintain that because the arbitrator found no liability on Shah's substantive claims, a damages award was inappropriate. This argument is unavailing for three reasons. First, the issue of the value of Shah's LCRA stock was squarely before the arbitrator regardless of his determination of liability on Shah's tort and breach of contract claims. The district court's Arbitration Order included the following finding.

> Given the structure of the business relationship and the events that trigger expulsion, *unless the value of [Shah's] stock in LCRA . . .* is also considered in arbitration, the intent of the [p]arties to have the rights of a [m]ember in the [two limited liability companies] cease and total value of a [m]ember's assets determined, provisions of the Operating Agreements, including the arbitration provisions, would be rendered meaningless and unreasonable.

(Emphasis added.) This finding of fact was requested by Defendants. In addition, and although it was not adopted by the district court, we note that Defendants also requested a finding of fact stating their request "that arbitration be compelled and that the arbitrator make a determination regarding [Shah's] wrongful termination and related claims and *perform an accounting and a determination of the value of [Shah's] assets in LC Imaging, DAGS, and LCRA, Inc*." (Emphasis added.). In addition to Shah's substantive claim, the arbitrator was clearly tasked with determining the value of Shah's interest in LCRA.

{21} Second, nothing in the district court's Arbitration Order (or in Defendants' requested findings of fact) supports Defendants' position. The word "damages" does not appear in the Arbitration Order and nothing in the Arbitration Order implies that the arbitrator's determination of the value of Shah's stock depended on the arbitrator's liability findings. Third, there is no indication in the arbitrator's award that the award was based on damages for Shah's tort or breach of contract claims. Defendants' argument is merely speculative as to the arbitrator's basis for the award. Because we determine below that the arbitrator's award was consistent with the Bylaws, we will not guess at other possible bases for the award that have no support in the record.

{22} We now address the district court's modification of the arbitration award. The district court concluded that the arbitrator exceeded his authority because the award was inconsistent with the Bylaws. This conclusion is based on its implicit finding, in the Modification Order, that Shah had been *expelled* from LCRA. Based on this finding, the district court also found that the governing transfer provision was the Expulsion Provision. The associated valuation provision (Section 10.C) provides that the stock purchase price was the lesser of $50,000 or the stock value. The district court concluded that Shah was entitled to only $50,000 for his stock in LCRA, in addition to $50,000 each for his interest in DAGS and LC Imaging.

{23} But in the Arbitration Order, which governed the arbitration, the district court found that Shah's employment had been *terminated*. Indeed, the Arbitration Order includes three statements to the effect that Shah's employment with LCRA was terminated, one of which also states that "termination of [Shah's] employment with LCRA, Inc. triggered the termination of his status as a stockholder with LCRA, Inc. and his status as a [m]ember in LC Imaging and DAGS." Several of these findings closely resemble, or are identical to, findings requested by Defendants and are supported by an affidavit by Devasthali stating that Shah's employment with LCRA was terminated. Tellingly, the district court specifically cited to the Termination Provision in its finding that "[o]nce [Shah's] employment with LCRA . . . was terminated and his stock ownership in LCRA . . . ceased, he was contractually bound to have his stock purchased by the remaining stockholders." As noted above, the Termination Provision specifies that the purchase price must be determined pursuant to Section 10, but does not specify

which subsection. Section 10.D, which shares the same title as the Termination Provision, does not include the "lesser of" language found in Section 10.C.

{24} Under these circumstances, we discern no basis on which the district court could properly modify the arbitrator's award. First, the Arbitration Order specified that Shah's employment was terminated. Given this finding, the arbitrator could—and apparently did—apply the term of the Bylaws related to employment termination: the Termination Provision. In addition, the arbitrator could reasonably have concluded that Section 10.D, not Section 10.C, governed the valuation of Shah's LCRA stock based on the way the transfer provisions and associated valuation provisions are organized and the similarities in the titles of Section 10.D and the Termination Provision. *Cf. United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (stating that "[i]t is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his"). Hence, the arbitrator's award for Shah's LCRA stock pursuant to Section 10.D is consistent with the district court's findings of fact and the terms of the Bylaws specified in the Arbitration Order. We conclude that the district court erred in finding otherwise. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (stating that "if an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." (internal quotation marks and citation omitted)).

{25} In addition, the district court's finding in the Modification Order that Shah was expelled from LCRA, instead of terminated from his employment as set forth in the Arbitration Order, is not supported by the evidence. *Cf. State ex rel. Goodmans Office Furnishings, Inc. v. Page & Wirtz Constr. Co.*, 1984-NMSC-103, ¶ 7, 102 N.M. 22, 690 P.2d 1016 ("Findings of fact which are supported by substantial evidence will not be disturbed on appeal."). Devasthali's affidavit states that "Shah's employment with [LCRA] was terminated." There is no similar evidence in the record supporting the district court's finding that the removal of Shah from LCRA was an "expulsion" instead of a termination of employment within the terms of the Bylaws. To the extent Defendants rely on a joint pre-hearing statement submitted to the arbitrator stating that Shah was expelled "as a [s]tockholder/[m]ember," we are not convinced by this statement because it post-dates and contradicts the district court's original factual findings in the Arbitration Order.

{26} Finally, the district court erred in revisiting the findings in the Arbitration Order. In essence, Defendants argued in the district court that Shah's employment was terminated and requested findings to that effect. The district court adopted those findings and ordered arbitration consistent with those findings. Once the arbitrator entered his award in favor of Shah based on those findings, Defendants argued that the district court's original findings—the ones Defendants originally requested and to which they never objected—were incorrect and requested different findings. Defendants' efforts to circumvent the arbitration award are untenable. One of the purposes of arbitration "is to reduce caseloads in the courts." *United Tech. & Res., Inc. v. Dar Al Islam*, 1993-NMSC-005, ¶ 11, 115 N.M. 1, 846 P.2d 307. As this case demonstrates, permitting Defendants to argue for a different factual finding post-arbitration improperly gave them an opportunity to relitigate the arbitrator's original task. *See id.* ¶ 23 ("Having bitten once at the arbitration apple, [a party] cannot [then] take a second bite from the judicial one."). Moreover, even if the district court, in hindsight, felt that either its original findings or the arbitrator's award were in error, it did not have the authority to modify them under the circumstances here because "[district courts] do[] not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties' dispute." *Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, ¶ 7, 126 N.M. 772, 975 P.2d 385 (internal quotation marks and citation omitted).

CONCLUSION

{27} An arbitration award may be modified by the district court only in limited circumstances. Since we conclude that those circumstances do not exist here, we reverse the district court's modification of the award and remand for confirmation of the arbitrator's award.

{28} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
J. MILES HANISEE, Judge

Classified

Positions

Prosecutor Positions Available
The Twelfth Judicial District Attorney's Office in Otero/Lincoln County has job openings available for all Attorney levels. Job requirements, qualifications, skills, and other information pertaining to this position can be viewed at the New Mexico District Attorney's website at www.da.state.nm.us under personnel inquiries. Salary offered will be based on qualifications and experience and is consistent with the New Mexico District Attorney's Association Pay and Compensation Plan. Interested individuals should send a letter of interest and a resume to District Attorney, David Ceballes, 1000 New York Avenue, Room 101, Alamogordo, New Mexico 88310 or email at 12thda@da.state.nm.us.

13th Judicial District Attorney Assistant Trial Attorney, Senior Trial Attorney
Assistant Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry to mid-level attorney to fill the positions of Assistant Trial Attorney. These positions require misdemeanor and felony caseload experience. Senior Trial Attorney – We are also accepting applications for attorneys with a high level of experience prosecuting serious violent offenses. A proven track record in these major cases and experience in management/supervisory/ personnel areas is also a plus. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: RAragon@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

Compliance Specialist
Sandia Laboratory Federal Credit Union has an opening for a Compliance Specialist. This position requires a candidate who can communicate effectively and is diligent, detail-oriented, and discrete, with experience interpreting and applying regulations. If you enjoy research and synthesizing information to make decisions, this might be a good position for you. SLFCU offers competitive compensation, a great work environment and a generous benefit package. You may learn more about this position and about our organization, and/or submit an employment application at www.slfcu.org (Career Opportunities). EOE

Assistant General Counsel - Lawyer Advanced (NMDOT)

The New Mexico Department of Transportation is recruiting to fill a Lawyer Advanced position. The position provides representation of the Department in eminent domain and right-of-way related litigation matters in state court, in administrative hearings, and in other practice areas as assigned by the General Counsel. The person filling this position will also provide comprehensive legal advice and counsel to the Department's upper management on right-of-way issues involving utilities, railroads, tribal entities, access control and environmental law. Experience in real estate law, governmental entity defense litigation or representation in complex civil litigation matters is highly desirable. Experience in environmental law and Indian law would be useful. The requirements for the position are a Juris Doctor Law degree from an accredited law school, a current license as a New Mexico attorney in good standing and a minimum of five (5) years of experience practicing law, of which three (3) years must be in litigation. The position is a Pay Band 80, annual salary range from $44,782 to $77,917 depending on qualifications and experience. All state benefits will apply. Overnight travel throughout the state, good standing with the New Mexico State Bar and a valid New Mexico driver's license are required. We offer the selected applicant a pleasant environment, supportive colleagues and dedicated support staff. Working conditions: Primarily in an office or courtroom setting with occasional high pressure situations. Interested persons must submit an on-line application through the State Personnel Office website at http://www.spo.state.nm.us/, no later than the applicable closing date posted by State Personnel. Additionally, please submit a copy of your resume, transcripts and bar card to Shannell Montoya, Human Resources Division, New Mexico Department of Transportation, located at 1120 Cerrillos Road, Room 135, P.O. Box 1149, Santa Fe, New Mexico 87504. The New Mexico Department of Transportation is an equal opportunity employer.

Attorney

Allen, Shepherd, Lewis & Syra, P.A. is seeking an attorney with 0-5 years of litigation experience. Experience in worker's compensation, construction defects, professional malpractice or personal injury preferred. Must be licensed in New Mexico or obtain New Mexico license. Candidates considered for a position must have excellent oral and written communication skills. Available position is considered regular and full time. Please send resume with cover letter, unofficial transcript, writing sample and salary requirements to Allen, Shepherd, Lewis & Syra, P.A. Attn: Human Resources, PO Box 94750, Albuquerque, NM 87199-4750. All replies will be kept confidential. Our firm values an inclusive workplace to serve our diverse client needs. EOE Please send resume to hr@allenlawnm.com

Litigator

The Albuquerque office of Brownstein Hyatt Farber Schreck, LLP is seeking a talented and ambitious litigator with 1-6 years of experience. Candidates should have a proven track record in legal research and drafting of pleadings, memos and briefs. Excellent academic performance, strong writing and analytical skills, interpersonal skills and the ability to work in a team environment required. No search firms please. Please submit resume, transcripts, writing sample and professional references to Jamie Olberding, Director of Attorney Recruiting and Integration, at jolberding@bhfs.com.

General Counsel

The Albuquerque Bernalillo County Water Utility Authority is the largest water and sewer utility in New Mexico, serving some 600,000 people in the metro area. We are currently recruiting for General Counsel to perform complex executive and professional level work as legal advisor to the Water Authority Board, the Executive Director and upper management on all issues related to Water Authority operations. Applicants must have a Juris Doctorate Degree from an accredited law school and ten (10) years of increasingly responsible professional experience practicing law, including trial experience and managerial or supervisory experience. Experience in the public sector with emphasis on federal, state and municipal law as it applies to the operation of a publicly owned utility is preferred. Membership in the New Mexico State Bar and ability to maintain membership is a condition of continued employment. Applicants must be able to obtain and maintain a valid New Mexico driver's license and an Authority Operator Permit. In addition to the satisfaction you'll get from exciting work in a great organization, Water Authority employees enjoy a competitive salary and benefits package. Health, dental and vision insurance are provided with the Water Authority paying 80% of the premium cost. In addition, new employees may elect to participate in one of two retirement plans. The state retirement plan (PERA) is a defined benefit plan that provides retirement income up to 90% of the average of your five highest years' salary. Retirement under PERA also guarantees you access to the retiree health care plan. Some new employees may be eligible to opt out of the PERA pension program and participate in a 401 Defined Contribution Plan, similar to 401(k) plans available in the private sector. Other benefits include generous paid sick and vacation leave, group term life insurance paid by the employer, deferred compensation programs, flex benefit plans, domestic partner benefits, employee assistance programs, wellness programs, gym discounts, career counseling, educational leave and tuition assistance, and training credit achievement. Salary $90,709 - $132,142 annually. The position closes September 6, 2016 and applicants must apply on-line. For complete requirements and to apply online, visit www.abcwua.org/employment. EOE employer

Staff Attorney

Disability Rights New Mexico, a statewide non-profit agency that promotes and protects the rights of persons with disabilities, seeks full time Staff Attorney to represent agency clients in informal, administrative and legal proceedings; comment on proposed regulations and legislation; provide technical assistance; and participate in policy advocacy. Must have excellent research and writing skills, demonstrate competence in a range of legal practice including litigation, and any combination of advanced education, legal practice, professional work experience or volunteer activities relevant to disability issues. Must be licensed in NM or eligible for legal services or reciprocity license. Persons with disabilities & minorities strongly encouraged to apply. Competitive salary and benefits. Send letter of interest addressing above qualifications, resume, and three references to DRNM, 1720 Louisiana Blvd. NE, #204, Albuquerque, NM 87110, or by email to mwolfe@drnm.org by September 2, 2016. No calls please. AA/EEO

Position Vacancy Announcement

Position/Division: Assistant Trial Attorney (Position Classification Dependent upon experience) (Hiring Salary depends on experience and budget availability); Location: Dona Ana County Building, 845 N. Motel Blvd., Suite D, Las Cruces, NM 88007; Salary Range: $48,980-$61,225/ Annually (Hiring salary depends on experience and budget availability); Requirements: J.D. degree and current license to practice law in New Mexico. Preferred Qualifications: Legal experience totaling up to at least one (1) year. Job Duties: Incumbent handles a variety of misdemeanors and lower level felony cases, such as DWI's and bad check cases; does legal research for felony cases for higher level Attorney's; assists in trial teams; performs non-prosecution duties as assigned and performs other related job duties. Felony work is performed under supervision. Working Conditions: Work is performed in office and courtroom environments. Physical effort and travel may be required. Incumbent may be required to work under stressful situations and/or conditions. Application Deadline: Friday, August 19, 2016 by 5:00 p.m. Submit Application to: 3rd Judicial District Attorney's Office, C/O Whitney Safranek, Human Resources Administrator, 845 N. Motel Blvd., Suite D, Las Cruces, NM 88007; wsafranek@da.state.nm.us. *This position may be offered at the lowest level.*

Associate

Busy Family Law practice in Santa Fe looking for associate. Must be committed to assisting clients and building practice. Some Family Law experience required. Send letter and resume to lori@leeslawfirm.com.

Assistant Trial Attorney

Assistant Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will based primarily in Socorro County (Socorro). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Trial Secretary II

Staff counsel for Farmers Insurance Exchange and Affiliates is seeking a Trial Secretary II with at least two (2) years of experience in personal injury law. Must be detail oriented, work independently, handle high volume and assist the attorneys with trial preparation. Must be proficient in ProLaw, Microsoft Word and Microsoft Windows. Excellent benefits, competitive salary and an enjoyable working environment. Spanish speaking desired, but not required. Please e-mail or fax your resume to: Kathy.lopez@farmers.com Fax No.: (505) 246-2924

Experienced Paralegal/ Legal Assistant

Aldridge, Hammar, Wexler & Bradley, P.A., an uptown law firm seeks full-time, experienced Paralegal/Legal Assistant. The candidate must have at least three years' experience, excellent drafting and editing skills, and be a team player. This full-time position is eligible for health insurance, dental, paid time off, retirement plan, and other rewarding benefits. Salary DOE. E-mail resume, cover letter, and references to Manager@ABQLawNM.com. All replies will be maintained as confidential.

Experienced Real Estate Paralegal

Experienced part-time real estate paralegal wanted for a sole attorney real estate practice. E-Mail cover letter and resume in confidence to linda@leybalawfirm.com.

Services

Experienced Paralegal

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

Nurse Paralegal

Specialist in medical chronologies, related case analysis/research. Accurate, knowledgeable work product. For resume, work samples, references: maryj.daniels@yahoo.com.

Office Space

Journal Center Office Suite Available

WOULD CONSIDER BUILDING NAMING RIGHTS FOR YOUR FIRM! 9128 sf available, 5131 Masthead, Journal Center, next to NM State Bar. Abundant parking, common area, gym, locker room, track & lunchroom onsite. Beautiful building and surroundings, many amenities. Contact Jim Moore, Property Manager, 505-681-0873

3500 Comanche NE

Fully furnished office space available. Rent includes utilities, wifi, parking, shared conference room, kitchen, referrals and collaboration with other attorneys. $550- 900/ month depending upon your need. Contact jmarshall@rainesdivorcelaw.com.

Professional Office Space

$829.17 PER MONTH PER 1000 sq. ft. of PROFESSIONAL OFFICE SPACE FULL SERVICE. Completely renovated, beautifully landscaped, 10 ft. ceilings, copious amount of parking. There are 5 Suites from 1,080 sq. ft. to a total of 8,585 sq. ft. available. Open floor plans. Ready for occupancy by September 1. Day Properties 505-328-3726. Close to major thoroughfares and I-40.

Office Furniture

Office Furniture

Atkinson & Kelsey, P.A. remodeling sale: All existing furniture identified for sale has been professionally appraised. Six (6) Danner Antique Oak Lawyer's Stacking Bookcases. Each 80" x 37" x 15". $3600 for the set; Two (2) Global Wernicke Co. 5 shelf stacking bookcases, Pattern 113, 86" x 34" x 13" for $500 each; One (1) Macey two shelf, glass/oak Lawyer's Bookcase, 40" x 34" x 12" for $200; One (1) Global Wernicke Co. 4 shelf glass/oak Lawyer's bookcase, Pattern 113, 64" x 34" x 13.5" for $1000; One (1) Antique three shelf oak Lawyer's stacking bookcase (missing base section) 42" x 34" x 9.5" for $600; One (1) antique Lawyer's stacking bookcase 81" x 34" x 12" for $500; One (1) antique Lawyer's stacking bookcase 65" x 34" x 12" for $1200; Three (3) Global Wernicke antique, oak Lawyer's Stacking Bookcases, 82" x 37" x 14.5" for $3600 for set; Two (2) Global Wernicke two shelf Lawyer stacking bookcases 39" x 34" x 12" for $1000 for the pair; One (1) wood Alma desk; 2 pedestal with center drawer for $750; Three (3) antique red mahogany Boling Captain's chairs for $125 each; Four (4) maple captain's chairs for $40 each; One (1) conference table with glass protection cover with thirteen padded office chairs with arms; One (1) LexMark copier xS734 de; Miscellaneous desks, chairs, credenzas. Please contact Virginia R. Dugan at 883-3070 to view furniture.

For Sale

Practice For Sale

Small real estate, foreclosure defense and consumer credit practice for sale. Excellent reputation, good will and referrals. Attorney semi-retiring out of state, will be available to provide assistance. Great opportunity for young attorney who wants to be self-employed. Must be willing to learn specialized area of law. Please respond with something about yourself, your qualifications and the reason you are interested in purchasing my practice." Submit to POB 92860, ABQ, NM 87199-2860, attn; Box A

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

be well nm for SMALL BUSINESS

Affordable health insurance options. ***Made easy!***

Find out about affordable health insurance for small business at beWellnm.com.

You already know that healthy employees make a company stronger and more productive. But did you know beWellnm for Small Business can help make it happen with a choice of affordable health insurance options? Our broker/agents will help you compare plans and benefits and give you expert, personalized advice. And they'll show you how easy it is to enroll. For more information, visit us online at **beWellnm.com/SBChecklist**, or speak to a small business expert at **800.204.4700**. Help your business **be healthier, be happier, be insured at beWellnm.**

nmhix | NEW MEXICO'S HEALTH INSURANCE EXCHANGE | beWellnm.com/SBChecklist | 1.800.204.4700

The project described was supported by Funding Opportunity Number IE-HBE-12-001 from the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services. The contents provided are solely the responsibility of the authors and do not necessarily represent the official views of HHS or any of its agencies.