

# BAR BULLETIN

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*Kissing the Universe*, by Margaret Letzkus (see page 3)

[www.margaret-letzkus.com](http://www.margaret-letzkus.com)

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### Meetings

#### September

- 7**  
**Employment and Labor Law Section BOD**,  
 Noon, State Bar Center
- 8**  
**Business Law Section BOD**,  
 4 p.m., teleconference
- 8**  
**Elder Law Section BOD**,  
 Noon, State Bar Center
- 8**  
**Public Law Section BOD**,  
 Noon, teleconference
- 9**  
**Prosecutors Section BOD**,  
 Noon, State Bar Center
- 14**  
**Taxation Section BOD**,  
 11 a.m., teleconference
- 14**  
**Animal Law Section BOD**,  
 Noon, State Bar Center
- 14**  
**Children's Law Section BOD**,  
 Noon, Juvenile Justice Center

### Workshops and Legal Clinics

#### 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
- 7**  
**Sandoval County Free Legal Clinic**  
 10 a.m.–2 p.m., 13th Judicial District Court,  
 Bernalillo, 505-867-2376
- 8**  
**Common Legal Issues for  
 Senior Citizens Workshop**  
 Workshop: 10–11:15 a.m.  
 POA AHCD Clinic: noon–1 p.m.,  
 Raton Senior Center, Raton,  
 1-800-876-6657

#### About the Cover Image: *Kissing the Universe*, Mixed Media

Margaret Letzkus was born and raised in Texas with summers reserved for the southwest destinations of New Mexico, Colorado and Arizona. She has lived on both coasts and currently resides in New Mexico. The rich mix of cultures within Texas and New Mexico had a profound impact on her artwork. The colors of the land, sunsets, textiles and fiestas excited her at an early age and have become her passion as a painter. Her whimsical pieces contain a sense of humor and a great deal of serendipity. After obtaining her degree in fine arts from the University of Texas at Austin she quickly gained recognition as a colorist. Her canvases achieve dramatic and energetic impact. Her pieces are in collections all over the world. To view more of her work, visit [www.margaret-letzkus.com](http://www.margaret-letzkus.com).

# Notices

## COURT NEWS

### New Mexico Supreme Court Commission on Access to Justice

The next meeting of the Commission on Access to Justice is noon–4 p.m., Sept. 16 at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at [www.nmcourts.gov/access-to-justice-commission.aspx](http://www.nmcourts.gov/access-to-justice-commission.aspx).

### 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.

### Second Judicial District Court Exhibit Destruction

Pursuant to 1.21.2.6.17 Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic Matters/Relations and Domestic Violence cases for the years of 1999–2002 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Oct. 1. Individuals who have cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday–Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the Court.

### 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

## Professionalism Tip

**With respect to the public and to other persons involved in the legal system:**  
I will strive to set a high standard of professional conduct for others to follow.

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](http://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.

### U.S. District Court, District of New Mexico Magistrate Judge Appointment

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Las Cruces. The current annual salary of the position is \$186,852. The term of office is eight years. The full public notice and application forms for the magistrate judge position are posted in the U.S. District Court Clerk's Office of all federal courthouses in New Mexico, and on the Court's website at [www.nmd.uscourts.gov](http://www.nmd.uscourts.gov). Application forms may also be obtained by calling 575-528-1439. Applications must be received by Sept. 30. All applications will be kept confidential unless the applicant consents to disclosure.

### Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments apply to D.N.M.LR-Cr. 32, Sentencing and Judgment. A "redlined"

version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at [www.nmd.uscourts.gov](http://www.nmd.uscourts.gov). Members of the bar may submit comments by email to [localrules@nmdcourt.fed.us](mailto:localrules@nmdcourt.fed.us) or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules. Comments must be submitted by Sept. 30.

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

### Animal Law Section September Animal Talk, Blood Ivory: Wildlife Trafficking in the U.S.

The Animal Law Section and ABQ BioPark Zoo bring members a look into the world of wildlife trafficking and its impact on elephant species. Attorneys Ruth Musgrave and Susan George plus BioPark elephant staff will talk about what is being done in New Mexico to help save the species from extinction. The Animal Talk will be from 12:45-1:30 p.m., Sept. 10, at the ABQ BioPark Zoo Colores Education Building. Activities are included with regular admission. For more information, contact Animal Law Section Past Chair, Judy Durzo at [jdurzo@mac.com](mailto:jdurzo@mac.com).

## 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](mailto: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](mailto: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](http://www.nmbar.org/BusinessLaw). The deadline for nominations is Oct. 3. Send nominations to Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org). Recent recipients include Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

## Immigration Law Section Citizenship/Naturalization Clinic

Immigration attorneys are needed to review citizenship application packets from 11 a.m.-5 p.m., Sept. 10 at a Citizenship/Naturalization Clinic hosted by the Immigration Law Section, New Mexico Immigrant Law

Center, Ole, and El Centro de Igualdad and Derechos at ACE Leadership High School in Albuquerque. Law students, paralegals and non-immigration attorneys are needed to assist applicants in filling out N-400 forms and fee waivers, if applicable. Contact Eva Eitzen at [eeitzen@nmilc.org](mailto:eeitzen@nmilc.org) or 505-331-5093 for more information and to volunteer.

## Natural Resources, Energy and Environmental Law Section Nominations Open for 2016 Lawyer of the Year Award

The Natural Resources, Energy and Environmental Law Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 16. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at [www.nmbar.org/NREEL](http://www.nmbar.org/NREEL). Nominations should be submitted by Oct. 28 to Breanna Henley, [bhenley@nmbar.org](mailto:bhenley@nmbar.org).

## Paralegal Division Criminal Law/Civil Liabilities CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Criminal Law/Civil Liabilities CLE program (3.0 G) from 9 a.m.-12:15 p.m., Sept. 24, at the State Bar Center. Topics include the unauthorized practice of law and increasing liabilities for paralegals, financial discovery, figuring out what you do and don't have and an update on case management deadline changes. Remote connections for audio or video will not be available. Registration is \$35 for Division members, \$50 for non-member paralegals, \$55 for attorneys. For more information and registration instructions, visit [www.nmbar.org](http://www.nmbar.org) > About us > Divisions > Paralegal Division > CLE Programs (click on "See Flyer" at the bottom of the page) or contact Carolyn Winton, 505-858-4433 or Linda Murphy, 505-884-0777.

## 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 [flying421@gmail.com](mailto:flying421@gmail.com).

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## Solo and Small Firm Section Fall Luncheon Presentation Schedule Begins with Former Sheriff Darren White

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with former Department of Public Safety Secretary and Bernalillo County Sheriff Darren White. White will present "The Journey from Drug War Warrior to Legalized Marijuana" on Sept. 20. Albuquerque attorney Matt Coyte will discuss various penal issues on Oct. 18 with "New Mexico's Prisons and Jails—Are

We Making Things Worse?" On Nov. 15 Fred Nathan, executive director of Think New Mexico, a results-oriented think tank serving New Mexicans, will discuss the work of Think New Mexico and various policy issues facing the 2017 legislative session. On Jan. 17, 2017, Ron Taylor will share his lawyerly insights as a juror in a long murder trial. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

### Young Lawyers Division State Bar Open House for Students and Lawyers

The Young Lawyers Division and UNM School of Law Student Bar Association invite all members of the State Bar and students to meet, mingle, and exchange information about opportunities within the State Bar at the annual State Bar Open House from 5:30-7:30 p.m., Sept. 13, at the State Bar Center. Food and beverages will be served. R.S.V.P. with Breanna Henley at bhenley@nmbar.org by Sept. 9.

### Recruitment for YLD/ UNM Mentorship Program

The Young Lawyers Division is now recruiting mentors for the YLD/UNM School of Law Mentorship Program's new year. The YLD will host a kickoff BBQ and two mentorship events, one in the fall and one in the spring. These events are a great opportunity to not only meet and talk with the law students, but also to network and catch up with old classmates and friends. To sign up, contact Sean FitzPatrick at sfitzpatrickesq@gmail.com by Sept. 9. Prospective mentors should provide a primary area of practice, preferred email address and any additional information that will help the YLD Board pair them with a law student.

### Veterans Legal Clinic Changes Schedule, Needs Volunteers

The Young Lawyers Division and New Mexico VA Health Care System seeks attorney volunteers to provide advice to veterans on Sept. 13 at the New Mexico Veteran's Memorial located at 1100 Louisiana Blvd SE, Albuquerque. Volunteers should arrive at 8 a.m. for orientation and breakfast. Paralegals, law students, and other non-attorney volunteers are needed to conduct intake and provide other assistance at the clinic. For more information and to volunteer contact

Keith Mier at kcm@sutinfirm.com. Please be advised that Sept. 13 will be the last Veterans Legal Clinic of 2016. The clinic will resume on a quarterly basis in 2017: Jan. 10, March 14, June 13 and Sept. 12 from 8:30-11 a.m.

### Volunteers Needed for Roswell Wills for Heroes Event

The Young Lawyers Division and UNM School of Law Alumni Association seek volunteer attorneys for its Wills for Heroes event from 8:30 a.m.-noon, on Sept. 17, at Fire Station 1, 200 S. Richardson, Roswell. Attorneys will provide free simple wills, powers of attorney, and advanced medical directives for first responders and their spouses. Breakfast, coffee and lunch will be served. Even though volunteers need no prior experience with wills, those uncomfortable providing advice in this area can still volunteer to conduct intake or serve as witnesses or notaries. Contact Anna Rains at acrains@sbw-law.com or 575-622-5440 to volunteer.

### UNM Law Library Hours Through Dec. 18

#### Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

#### Reference

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

#### Holiday Closures

Nov. 24–25 (Thanksgiving)

### 2016 John Field Simms Sr. Memorial Lectureship in Law CLE: The Legal Labyrinth of Brexit

The 2016 John Field Simms Sr. Memorial Lectureship in Law presents "The Legal Labyrinth of Brexit" (1.0 G) at 4:30 p.m., Sept. 7, at the UNM School of Law. The course will shed light on the political, legal and economic consequences about a matter that affects everyone—Britain's vote to leave the European Union. For the first time, a member state may leave the EU, creating a turning point in history. Brexit is a labyrinth of new and complex legal procedures that may completely transform the constitutional history of the Western world. Professor Bruno Aguilera-Barchet of the King Juan Carlos University of Madrid will discuss these issues. The

program is free and open to the public. Parking is free in the Law School parking lot, "L" starting at 4 p.m. Register online at <http://lawschool.unm.edu/alumni/events/simms.php> or R.S.V.P. by calling 505-277-8184.

### OTHER BARS Albuquerque Lawyers' Club Season Starts with Luncheon Guest Judge M. Monica Zamora

Albuquerque Lawyers' Club announces the start of its 2016-2017 session. Membership dues for the year are \$250 and will include nine lunches and two hours of ethics/professionalism CLE credits. Lunch meetings are held at noon, the first Wednesday of September through May, at Seasons Rotisserie and Grill. Non-members are welcome to attend (\$30 in advance, \$35 at the door).

The first meeting will be held Sept. 7 and the speaker is Judge M. Monica Zamora of the New Mexico Court of Appeals. Judge Zamora will be introduced by Judge Miles Hanisee, also of the Court of Appeals. For more information, visit the Club's brand new website at [www.AlbuquerqueLawyersClub.com](http://www.AlbuquerqueLawyersClub.com)

### H. Vearle Payne American Inn of Court Accepting New Membership Requests

The H. Vearle Payne American Inn of Court in Albuquerque is currently accepting new membership requests from attorneys and judges (active or retired) for its 2017 season which begins Sept. 13 and runs through May 9, 2017. The Inn meets on the second Tuesday of each month, excluding December, for dinner and discussions about pertinent topics. Judges and practitioners in the Albuquerque and surrounding areas interested in enhancing skills and networking should send a letter of interest to Administrator, H. Vearle Payne American Inn of Court, PO Box 40577, Albuquerque, NM 87196-0577 or [hvpinnofcourt@outlook.com](mailto:hvpinnofcourt@outlook.com). Dues are \$370 for master benchers (10 or more years in practice or a judge), \$310 for barristers (5–10 years in practice) and \$245 for associates (up to 4 years of practice). Dues cover national membership fee, all dinners and CLE credits.



# Legal Education

## September

- |  |  |   |
|--|--|---|
| <p>7 <b>The Legal Labyrinth of Brexit</b><br/>1.0 G<br/>Live Seminar, Albuquerque<br/>UNM School of Law,<br/>2016 John Field Simms Sr.<br/>Memorial Lecturship in Law<br/><a href="http://lawschool.unm.edu/alumni/events/simms.php">lawschool.unm.edu/alumni/events/simms.php</a></p> | <p>16 <b>27th Annual Appellate Practice Institute</b><br/>6.4 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                       | <p>22 <b>The New Lawyer – Rethinking Legal Services in the 21st Century (2015)</b><br/>4.5 G, 1.5 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p>9 <b>2015 Fiduciary Litigation Update</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p>19 <b>Santa Fe Land Institute</b><br/>6.0 G, 1.0 EP<br/>Live Program<br/>American Association of Professional Landmen<br/>817-231-4556</p>  | <p>22 <b>Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   |
| <p>9 <b>Wildlife and Endangered Species on Public and Private Lands</b><br/>6.0 G<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p>20 <b>2015 Mock Meeting of the Ethics Advisory Committee</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                             | <p>22 <b>Guardianship in NM: the Kinship Guardianship Act (2016)</b><br/>5.5 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p>9 <b>Family Law 101</b><br/>3.0 G<br/>Live Seminar, Albuquerque<br/>New Mexico Legal Aid<br/>505-545-8543</p>   | <p>20 <b>Legal Writing—From Fiction to Fact (Morning Session 2015)</b><br/>2.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>               | <p>23 <b>2016 Tax Symposium</b><br/>6.0 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p>13 <b>Legal Issues of Adoption Subsidy</b><br/>1.0 G<br/>Live Program<br/>New Mexico Adoption and Foster Care Alliance<br/><a href="http://www.adoptfostercarealliancenm.org">www.adoptfostercarealliancenm.org</a></p>   | <p>20 <b>Legal Writing—From Fiction to Fact (Afternoon Session 2015)</b><br/>2.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>             | <p>23 <b>Ethics and Keeping Secrets or Telling Tales in Joint Representations</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   |
| <p>14 <b>Vehicle Forfeiture Conference for New Mexico Communities</b><br/>5.0 G, 1.0 EP<br/>Live Seminar, Santa Fe<br/>City of Santa Fe<br/>505-955-6967</p>   | <p>20 <b>Spring Elder Law Institute (2016)</b><br/>6.2 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p>25 <b>The 22nd Annual Conference of the National Association for Civilian Oversight of Law Enforcement</b><br/>18.0 G<br/>Live Program, Albuquerque<br/>National Association for Civilian Oversight of Law Enforcement<br/><a href="http://www.nacole.org/">http://www.nacole.org/</a></p> |
| <p>15 <b>Liquidated Damages in Contracts</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  | <p>20 <b>Estate Planning for Firearms</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p>26–29 <b>Bankruptcy From a Government Perspective</b><br/>19.8 G, 1.5 EP<br/>Live Seminar, Santa Fe<br/>National Association of Attorneys General<br/><a href="http://www.naag.org">www.naag.org</a></p>   |
| <p>15 <b>Workers' Compensation Law and Practice Seminar</b><br/>5.6 G, 1.0 EP<br/>Live Seminar, Santa Fe<br/>Sterling Education Services<br/><a href="http://www.sterlingeducation.com">www.sterlingeducation.com</a></p>  | <p>22 <b>EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)</b><br/>3.2 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |   |

*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](mailto:notices@nmbar.org). Include course title, credits, location, course provider and registration instructions.*

## September

- |   |   |  |
|---|---|--|
| <p><b>29 Estate Planning for Liquidity</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>29 The US District Court: The Next Step in Appealing Disability Denials (2015)</b><br/>3.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>29 Invasion of the Drones: IP-Privacy, Policies, Profits, (2015 Annual Meeting)</b><br/>1.5 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>29 Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)</b><br/>1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |   |  |

## October

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|---|--|---|
| <p><b>1 New Mexico American College of Trial Lawyers Chapter Seminar</b><br/>2.0 G, 1.0 EP<br/>Live Program<br/>American College of Trial Lawyers<br/>949-752-1801</p>    | <p><b>5 Managing Employee Leave</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>13 Joint Ventures Between For-Profits and Non-Profits</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                   |
| <p><b>3 Mastering Microsoft Word in the Law Office</b><br/>6.2 G<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>      | <p><b>7 Employment and Labor Law Institute</b><br/>6.3 G<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>13-14 34th Annual Advanced Oil, Gas &amp; Energy Resources Law</b><br/>10.3 G, 1.7 EP<br/>Video Replay, Santa Fe<br/>State Bar of Texas<br/>www.texasbarcle.com</p> |
| <p><b>4 Indemnification Provisions in Contracts</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                               | <p><b>6 2016 New Mexico Health Law Symposium</b><br/>5.9 G, 1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>14 Citizenfour—The Edward Snowden Story</b><br/>3.2 G<br/>Live Seminar<br/>Federal Bar Association, New Mexico Chapter<br/>505-268-3999</p>                         |
| <p><b>5 Attorneys Information Exchange Group 2016 Fall Conference</b><br/>14.0 G<br/>Live Seminar, Santa Fe<br/>Attorneys Information Exchange Group<br/>www.aieg.com</p> | <p><b>10-14 Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry</b><br/>24.5 G<br/>Live Seminar, Albuquerque<br/>Center for Public Utilities New Mexico State University<br/>business.nmsu.edu</p> | <p><b>21 2016 Administrative Law Institute</b><br/>4.0 G, 2.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>      |
| <p><b>5 New Mexico Film Industry and Film Tax Credit</b><br/>1.0 G<br/>Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            | <p><b>10-14 Basic Practical Regulatory Training for the Electric Industry</b><br/>26.2 G<br/>Live Seminar, Albuquerque<br/>Center for Public Utilities New Mexico State University<br/>business.nmsu.edu</p>                       | <p><b>21 Ethics and Cloud Computing</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |
|   |  | <p><b>21 Annual Criminal Law Seminar</b><br/>10.0 G, 2.0 EP<br/>Live Seminar<br/>El Paso Criminal Law Group Inc.<br/>915-534-6005</p>                                     |



## New Mexico Lawyers and Judges Assistance Program

## Tip of the Month



## Resilience: A Stepping Stone to Success and Satisfaction

Resilience is the ability to rebound, adapt, and ultimately thrive when faced with a challenge or adversity. Although resilience seems to come naturally to some individuals, it is a skill that can be developed and improved.

Psychologists have identified several characteristics common to resilient individuals:

- perseverance: action-oriented, trusting of the process
- optimism: able to see the positive in most situations and be flexible in thinking
- emotional awareness: able to identify what feelings and why; and understand the feelings of others
- internal locus of control: feeling in control of one's own life and find solutions to problems
- support system: high-quality connections that encourage and ground me as needed

- sense of humor: ability to find humor in difficult situations
- perspective: view failure as a form of helpful feedback
- positive outlets for stress reduction: exercise, meditation, hobbies, etc.

As you consider these characteristics, ask yourself, "Which traits do I possess? From which of these would I benefit from strengthening?" Identify and prioritize the characteristics you want to enhance and develop an action plan that includes outside resources, when appropriate, and periodic feedback from a trusted individual. Not only will sharing your efforts with another person provide you with an additional viewpoint and incentive, it will also enrich the quality of your support network.

Helpful resources abound on the internet (search for terms like resilience, optimism and emotional IQ) and these topics are explored in relation to the legal profession in books such as *The Happy Lawyer* (Levit &

Linder) and *A Lawyer's Guide to Wellbeing and Managing Stress* (Lyon). In addition, short-term, cognitive behavioral therapy can be particularly useful in dealing with negative thinking and perfectionism.

Most importantly, understand that the process of changing one's behavior and thinking is not linear. More often than not, it is a gradual process—think two steps forward, one step back.

The Lawyer and Judges Assistance Program is a free service for all members of the New Mexico bench and bar and law students. NMJLAP offers confidential professional and peer assistance to help individuals identify and address problems with alcohol and other drugs, depression, and other mental health/emotional disorders, as well as with issues related to cognitive impairment. For more information, visit [www.nmbar.org](http://www.nmbar.org) > for Members > Lawyers and Judges Assistance.

## Hearsay

*continued from page 12*

## Rodey, Dickason, Sloan, Akin &amp; Robb, PA

*Best Lawyers in America:* Mark Adams, Leslie McCarthy Apodaca, Sandra Beerle, Rick Beitler, Perry Bendicksen III, Henry Bohnhoff, Brian Brack, Michael Brescia, David Buchholtz, David Bunting, John (Jack) Burton, Jeffrey Croasdell, Jocelyn Drennan, Nelson Franse, Catherine Goldberg, Scott Gordon, Alan Hall, Bruce Hall, Justin Horwitz, Paul Koller, Jeffrey Lowry, Dick Minzner, Donald Monnheimer, Michael Morgan, W. Mark Mowery, Sunny Nixon, Lisa Ortega, Theresa Parrish, John Patterson, Charles (Kip) Purcell, Edward Ricco, John P. Salazar, Andrew Schultz, Charles Seibert, Ellen Skrak, Seth Sparks, Tracy Sprouls, Robert St. John, Thomas Stahl and Charles Vigil.

## Sutin, Thayer &amp; Browne

*Best Lawyers in America:* Anne P. Browne (real estate law), Suzanne Wood Bruckner (tax law), Michael J. Golden (family law), Susan M. Hapka (employment law – management), Robert G. Heyman (banking and finance law, corporate law, financial services regulation law, public finance law), Christopher A. Holland (education law), Jay D. Rosenblum (Corporate Law, Mergers & Acquisitions Law) and Benjamin E. Thomas (banking and finance law).  
*Best Lawyers in America "Lawyer of the Year":* Eduardo A. Duffy (Albuquerque, corporate law, securities / capital markets law).

# New Probate Laws

## You Should Know About

By Jack Burton<sup>1</sup> and Fletcher Catron<sup>2</sup>

Amendments to the New Mexico Uniform Probate Code became effective July 1. In accordance with Section 45-1-110 NMSA 1978, the changes apply to all pending and future probate cases, although time periods that expired prior to July 1 are not extended by these amendments. The overriding purpose of the amendments is to make the UPC more uniform. This article highlights a few of the most significant points. The annual Probate Institute, which will be held at the State Bar Center in Albuquerque on Nov. 17, will provide more information regarding this topic.

If notice of a hearing is required to be published to reach persons who are unknown or persons whose address cannot be discovered, the number of weekly publications is increased from two to three. Section 45-1-401 NMSA 1978. This also applies to notices of a hearing on a petition for appointment of a personal representative to open a probate.

This three-publication rule conforms to Rule 1-004 NMRA and the uniform version of the UPC (UUPC). 8 Part I Uniform Laws Annotated, Uniform Probate Code § 401(a)(3); [www.uniformlaws.org/Act.aspx?title=ProbateCode](http://www.uniformlaws.org/Act.aspx?title=ProbateCode). It was also the rule in New Mexico before the adoption of the UPC. The reason for shortening it to two publications when the UPC was enacted is now lost.

Section 45-3-801 NMSA 1978 has been modified to provide that giving notice to creditors is now optional. This change was made primarily to conform to the UUPC. It also conforms to existing New Mexico



practice; because the debts survive the probate, there has been little reason to notify the creditor when the debt of the decedent is a secured debt or when the debt is a community debt and there is sufficient community property to pay that debt. In addition, personal representatives do not give notice when the estate is a small estate being administered by summary administration, when the probate was opened only to sell the decedent's residence and for no other purpose, or when the personal representative simply forgets to do so.

If notice to creditors is published, the number of weekly publications is increased to three from two, and the time allowed to present the creditor's claim is increased to four months from three. These increases follow the UUPC. The advantage of giving notice remains the same: the claim period for unsecured claims will expire much

sooner if notice is given. Section 45-3-803 NMSA 1978.

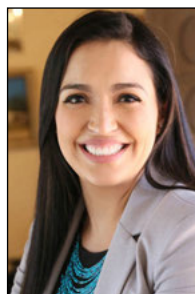
To allow time for the increased publication times permitted by Section 45-3-801, the legislature also extended the earliest time in which an estate could be closed by the sworn statement of the personal representative from three months after appointment to six months. Section 45-3-1003 NMSA 1987.

<sup>1</sup> Jack Burton coauthored this article on behalf of all of New Mexico's Uniform Law Commissioners (in alphabetical order): Raúl E. Burciaga, Jack Burton, Matthew Chandler, Zachary J. Cook, Robert J. Desiderio, Philip P. Larragoite, Antonio Maestas, Cisco McSorley, William H. Payne, Patrick J. Rogers, Raymond G. Sanchez and Paula Tackett.

<sup>2</sup> Fletcher Catron coauthored this article on behalf of the State Bar Real Property, Trust and Estate Section.



**Andrea M. Antillon** has joined Montgomery & Andrews, PA as of counsel. Antillon has more than 10 years of experience, both in private practice and as in-house counsel. Prior to beginning her career in law, she received a LL.M. in Taxation. She has represented private companies, public companies and private equity funds, both on national and international matters. She is licensed to practice in New Mexico, Colorado, Wyoming and Montana.



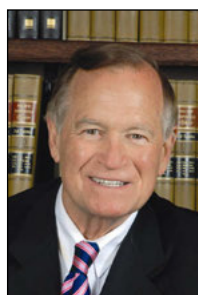
**Veronica C. Gonzales-Zamora** has been chosen to attend the 2016 Latina Leadership Academy. Academy participants are selected based on career goals and service to the Hispanic community. Gonzales-Zamora practices Family Law at David Walther Law, where she is involved in complex domestic relations cases and appeals.



**Stuart Butzier**, a shareholder with Modrall Sperling, has been named secretary of the Rocky Mountain Mineral Law Foundation by the trustees of the Foundation. As a long-time active member and former trustee and board member, Butzier has participated on numerous committees and presented legal papers at domestic and international programs of the Foundation.

**William D. Slease**, chief disciplinary counsel of the Disciplinary Board of the New Mexico Supreme Court, has been elected 2016-2017 president of the National Organization of Bar Counsel. NOBC is a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada and Australia. Slease previously served as the president-elect, treasurer and secretary.

## In Memoriam



**Turner W. Branch** was born on Aug. 22, 1938, in Houston, Texas, to James and Juanita Branch. After a lengthy illness, he died in Phoenix on Aug. 4 at the age of 77. In addition to Margaret Moses Branch, Turner's wife, friend and law partner, he is survived by Brian Branch and his wife Dawn Chavez Branch, children Nicholas and Samuel; Rebecca Branch and her husband Clyde DeMersseman, children Victoria and Branch DeMersseman; brother

James Branch and wife Joni; sister Virginia Branch-Perret. He was predeceased by his parents and sister Nancy Huitt. In 1956, Branch graduated from the Marist School in Atlanta. In 1960 he graduated with a B.A. in Political Science from the University of New Mexico where he was student body president and a member of Phi Sigma Alpha, the political science honors society. He was also a member and remained active throughout his life in the Pi Kappa Alpha Fraternity. Branch was commissioned as a second lieutenant in the U.S. Marine Corps on active duty at Quantico, Va. He was assigned to Camp Pendleton, Calif. and joined the Second Battalion of Fifth Marines, First Marine Division where he served for three and a half years. After an honorable discharge in 1963, he graduated in 1965 from Baylor Law School, where he was a section editor of the *Law School Review*. He received the T.R. McDonald Award as the outstanding student at the Law School. He served as chairman of the Student Grievance Committee, was selected to Omicron Delta Kappa and to the International Legal Fraternity of Phi Delta Phi. He returned to Albuquerque to practice law in 1965. He was a member of the State Bar of New Mexico, Colorado Bar Association, State Bar of Texas and the Bar Association of the District of Columbia. He also served the state he loved as a state legislator. Turner was

the founder of the Branch Law Firm, one of the oldest personal injury firms in New Mexico, and has been known for taking on challenging, complex and controversial cases involving personal injury, wrongful death, products liability, as well as catastrophic class actions and mass torts against pharmaceutical companies on a national and international basis. He was a board recognized Specialist as a civil trial advocate by the National Board of Trial Advocacy and the State of New Mexico. He has been certified as a Civil Trial Specialist since 1984; a Fellow in the International Academy of Trial Lawyers, a Diplomate in the American Board of Trial Advocates; and has served on their Board of Directors. He authored and contributed to numerous articles, books and speeches in the field of personal injury and spoken to trial attorney associations nationally. Named Baylor Law School Lawyer of the Year, Branch was also instrumental in shaping New Mexico law. In 1976 he was lead counsel in the landmark decision of *Hicks v. The State of New Mexico* which for the first time allowed injured individuals to recover damages for the wrongful conduct of the State. Branch also represented the State of New Mexico in litigation against the big tobacco companies. Recently, the Branch Law Firm argued successfully that the discovery rule should apply to the statute of limitations governing product liability and medical malpractice cases. One of Branch's favorite roles was that of grandpa, or Poppi as his grandchildren called him. He took time from his busy schedule to go to his grandchildren's plays, football games, lacrosse games, soccer games, basketball games, concerts, science fairs and many other events, too numerous to mention. Whenever one of his grandchildren came into the room, Turner's face would light up with love and pride. He loved them with all his heart. Other than his family, his dogs and the law, Branch's greatest love was the UNM Lobos. He was also part owner of KQTM (101.7 FM) the City's ESPN Radio affiliate. In 2012, the Branches donated \$1.5 million to the University of New Mexico

athletic department. The field is named in their honor. Branch defined success as giving it your very best at all times and letting others judge the results without paying attention to what the judges say one way or the other; but at all times keeping your eye on the objectives for and on behalf of the client. Unfortunately success is measured by the accumulation of wealth. If you're doing well financially you're successful. I don't think this is a judge of success or not. I think success is being able to know you've given it your very best and looking in a rearview mirror of life and saying I did my best, that's success." Using that definition Branch was a success in every aspect of his life. To Branch, family meant a lot

more than a relative by blood or marriage. It means the people who accept you no matter who you are, where there's no hatred or judgment. The love of a family should be unconditional, and everyone should try their best to provide all they can for the people in their family, emotionally and financially. Family are the people that everyone deserves to feel secure, and comfortable with, even if they aren't lucky enough to have that. From his immediate family, to his friends, colleagues and even strangers on the street corner, everyone was Turner Branch's friend! His family numbered in the hundreds if not thousands.

## Hearsay

### Atkinson & Kelsey, PA

*Best Lawyers in America:* **Virginia R. Dugan** and **Jon A. Feder**.

### Brownstein Hyatt Farber Schreck

*Best Lawyers in America:* **Eric Burris** (product liability litigation-defendants).

### Giddens, Gatton & Jacobus PC

*Best Lawyers in America:* **George "Dave" Giddens** (bankruptcy and creditor/debtor rights, insolvency and reorganization law, commercial litigation).

### Holland & Hart LLP

*Best Lawyers in America:* **Bradford C. Berge** (litigation - environmental, natural resources law, personal injury litigation - defendants, product liability litigation - defendants), **Mark F. Sheridan** (litigation - antitrust) and **Michael H. Feldewert** (natural resources law, oil and gas law).

*Best Lawyers in America "Lawyer of the Year":* **Bradford C. Berge** (natural resources law, Santa Fe) and **Michael H. Feldewert** (oil and gas law, Santa Fe).

### Jackson Lewis PC

*Best Lawyers in America:* **Danny W. Jarrett** (employment law - management and labor law - management) and **Victor P. Montoya** (employment law - management).

### Lewis Roca Rotherger Christie LLP

*Best Lawyers in America:* **Jeffrey H. Albright** (administrative/regulatory law, communications law, environmental law and litigation-environmental), **Dennis Jontz** (commercial litigation, corporate law, litigation-real estate and real estate law) and **Ross L. Crown** (construction law and government contracts).

*Best Lawyers in America "Lawyers of the Year":* **Jeffrey H. Albright** (environmental law, Albuquerque) and **Dennis Jontz** (litigation-real estate, Albuquerque).

### Miller Stratvert Law Firm

*Best Lawyers in America:* **Richard L. Alvidrez** (environmental law, litigation-environmental), **Seth V. Bingham** (personal injury litigation-defendants), **Timothy R. Briggs** (workers' compensation-employers), **Gordon S. Little** (banking and finance law, business organizations), **Thomas R. Mack** (medical malpractice law-defendants), **Paula G. Maynes** (employment law-management), **Ranne B. Miller** (personal injury litigation-d) and **James J. Widland** (banking and finance law, corporate law, litigation-banking and finance).

*Best Lawyers in America "Lawyers of the Year":* **Richard L. Alvidrez** (litigation-environmental, Albuquerque), **Seth V. Bingham** (personal injury litigation-defendants, Albuquerque), **Gordon S. Little** (banking and finance, Albuquerque) and **James J. Widland** (litigation-banking and finance, Albuquerque).

### Modrall, Sperling, Roehl, Harris & Sisk, PA

*Best Lawyers in America:* **Jennifer G. Anderson**, **Larry P. Ausherman**, **Martha G. Brown**, **Stuart R. Butzier**, **John R. Cooney**, **Earl E. DeBrine**, **Joan E. Drake**, **Timothy L. Fields**, **Paul M. Fish**, **Peter L. Franklin**, **Timothy C. Holm**, **James P. Houghton**, **Karen L. Kahn**, **George R. McFall**, **Margaret Lewis Meister**, **Arthur D. Melendres**, **Christopher P. Muirhead**, **Megan T. Muirhead**, **Brian K. Nichols**, **Jennifer A. Noya**, **Maria O'Brien**, **James M. Parker**, **Roberta Cooper Ramo**, **Marjorie A. Rogers**, **Ruth M. Schifani**, **Lynn H. Slade**, **Walter E. Stern III**, **R. E. Thompson** and **Douglas R. Vadnais**.  
*Best Lawyers in America "Lawyer of the Year":* **Arthur D. Melendres** (municipal law, Albuquerque), **Douglas R. Vadnais** (litigation-bankruptcy, Albuquerque), **George R. McFall** (education law, Albuquerque), **Karen L. Kahn** (employee benefits-ERISA law), **Roberta Cooper Ramo** (arbitration, Albuquerque) and **Timothy L. Fields** (railroad law, Albuquerque).

### Pregenzner, Baysinger, Wideman & Sale, PC

*Best Lawyers in America:* **Nell Graham Sale** (elder law and trusts and estates).

*Best Lawyers in America "Lawyers of the Year":* **Nell Graham Sale** (elder law, Albuquerque).

*continued on page 9*



# 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:			No.	Case Name	Case No.	Date
		Date Petition Filed				
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16	No. 35,682	Peterson v. LeMaster	12-501 01/05/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16	No. 35,677	Sanchez v. Mares	12-501 01/05/16
No. 35,898	Rodriguez v. State	12-501	05/18/16	No. 35,669	Martin v. State	12-501 12/30/15
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16	No. 35,665	Kading v. Lopez	12-501 12/29/15
No. 35,896	Johnston v. Martinez	12-501	05/16/16	No. 35,664	Martinez v. Franco	12-501 12/29/15
No. 35,894	Griego v. Smith	12-501	05/13/16	No. 35,657	Ira Janecka	12-501 12/28/15
No. 35,893	State v. Crutcher	COA 34,207	05/12/16	No. 35,671	Riley v. Wrigley	12-501 12/21/15
No. 35,891	State v. Flores	COA 35,070	05/11/16	No. 35,649	Miera v. Hatch	12-501 12/18/15
No. 35,895	Caouette v. Martinez	12-501	05/06/16	No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310 12/16/15
No. 35,889	Ford v. Lytle	12-501	05/06/16	No. 35,661	Benjamin v. State	12-501 12/16/15
No. 35,886	State v. Otero	COA 34,893	05/06/16	No. 35,654	Dimas v. Wrigley	12-501 12/11/15
No. 35,885	Smith v. Johnson	12-501	05/06/16	No. 35,635	Robles v. State	12-501 12/10/15
No. 35,884	State v. Torres	COA 34,894	05/06/16	No. 35,674	Bledsoe v. Martinez	12-501 12/09/15
No. 35,882	State v. Head	COA 34,902	05/05/16	No. 35,653	Pallares v. Martinez	12-501 12/09/15
No. 35,880	Fierro v. Smith	12-501	05/04/16	No. 35,637	Lopez v. Frawner	12-501 12/07/15
No. 35,873	State v. Justin D.	COA 34,858	05/02/16	No. 35,268	Saiz v. State	12-501 12/01/15
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16	No. 35,522	Denham v. State	12-501 09/21/15
No. 35,870	State v. Maestas	COA 33,191	04/29/16	No. 35,495	Stengel v. Roark	12-501 08/21/15
No. 35,864	State v. Radosevich	COA 33,282	04/28/16	No. 35,479	Johnson v. Hatch	12-501 08/17/15
No. 35,866	State v. Hoffman	COA 34,414	04/27/16	No. 35,474	State v. Ross	COA 33,966 08/17/15
No. 35,861	Morrisette v. State	12-501	04/27/16	No. 35,466	Garcia v. Wrigley	12-501 08/06/15
No. 35,863	Maestas v. State	12-501	04/22/16	No. 35,422	State v. Johnson	12-501 07/17/15
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16	No. 35,372	Martinez v. State	12-501 06/22/15
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16	No. 35,370	Chavez v. Hatch	12-501 06/15/15
No. 35,853	State v. Sena	COA 33,889	04/15/16	No. 35,353	Collins v. Garrett	COA 34,368 06/12/15
No. 35,849	Blackwell v. Horton	12-501	04/08/16	No. 35,335	Chavez v. Hatch	12-501 06/03/15
No. 35,835	Pittman v. Smith	12-501	04/01/16	No. 35,371	Pierce v. Nance	12-501 05/22/15
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16	No. 35,266	Guy v. N.M. Dept. of Corrections	12-501 04/30/15
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16	No. 35,261	Trujillo v. Hickson	12-501 04/23/15
No. 35,822	Chavez v. Wrigley	12-501	03/24/16	No. 35,097	Marrah v. Swisstack	12-501 01/26/15
No. 35,821	Pense v. Heredia	12-501	03/23/16	No. 35,099	Keller v. Horton	12-501 12/11/14
No. 35,814	Campos v. Garcia	12-501	03/16/16	No. 34,937	Pittman v. N.M. Corrections Dept.	12-501 10/20/14
No. 35,804	Jackson v. Wetzel	12-501	03/14/16	No. 34,932	Gonzales v. Sanchez	12-501 10/16/14
No. 35,803	Dunn v. Hatch	12-501	03/14/16	No. 34,907	Cantone v. Franco	12-501 09/11/14
No. 35,802	Santillanes v. Smith	12-501	03/14/16	No. 34,680	Wing v. Janecka	12-501 07/14/14
No. 35,771	State v. Garcia	COA 33,425	02/24/16	No. 34,775	State v. Merhege	COA 32,461 06/19/14
No. 35,749	State v. Vargas	COA 33,247	02/11/16	No. 34,706	Camacho v. Sanchez	12-501 05/13/14
No. 35,748	State v. Vargas	COA 33,247	02/11/16	No. 34,563	Benavidez v. State	12-501 02/25/14
No. 35,747	Sicre v. Perez	12-501	02/04/16	No. 34,303	Gutierrez v. State	12-501 07/30/13
No. 35,746	Bradford v. Hatch	12-501	02/01/16	No. 34,067	Gutierrez v. Williams	12-501 03/14/13
No. 35,722	James v. Smith	12-501	01/25/16	No. 33,868	Burdex v. Bravo	12-501 11/28/12
No. 35,711	Foster v. Lea County	12-501	01/25/16	No. 33,819	Chavez v. State	12-501 10/29/12
No. 35,718	Garcia v. Franwer	12-501	01/19/16	No. 33,867	Roche v. Janecka	12-501 09/28/12
No. 35,717	Castillo v. Franco	12-501	01/19/16	No. 33,539	Contreras v. State	12-501 07/12/12
No. 35,702	Steiner v. State	12-501	01/12/16	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

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**Effective August 26, 2016**

## **Published Opinions**

No. 33637	6th Jud Dist Luna CR-13-149, STATE v V GRANILLO (reverse and remand)	8/22/2016
No. 34588	12th Jud Dist Otero CV-09-172, D CHRISTOPHER v K OWENS (reverse and remand)	8/22/2016

## **Unpublished Opinions**

No. 35483	6th Jud Dist Grant LR-15-8, STATE v R FULLER (affirm)	8/22/2016
No. 34294	11th Jud Dist McKinley LR-14-16, STATE v T BLAIR (reverse and remand)	8/23/2016
No. 34352	3rd Jud Dist Dona Ana DM-07-1056, J HINZO v L HINZO (reverse and remand)	8/25/2016
No. 35445	9th Jud Dist Curry CR-13-768, STATE v N LOPEZ (affirm)	8/25/2016
No. 35485	2nd Jud Dist Bernalillo CR-14-3696, STATE v D ABEYTA (affirm)	8/25/2016
No. 35591	2nd Jud Dist Bernalillo CR-12-5863, STATE v M TONEY (dismiss)	8/25/2016

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

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

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# 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 September 7, 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
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### 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
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## RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

Rule 7-506	Time of commencement of trial	05/24/16
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## RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

Rule 8-506	Time of commencement of trial	05/24/16
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### CRIMINAL FORMS

Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
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## 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
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

**Opinion Number: 2016-NMSC-023**

No. S-1-SC-34920 (filed June 16, 2016)

IN THE MATTER OF JASON S. MONTCLARE, ESQUIRE  
An Attorney Licensed to Practice Before  
the Courts of the State of New Mexico

**PUBLIC CENSURE**

Jane Gagne  
Albuquerque, New Mexico  
for Disciplinary Board

Jason S. Montclare  
Alamogordo, New Mexico  
Respondent

## Opinion and Public Censure

**Charles W. Daniels,**  
Chief Justice

{1} Attorney Jason S. Montclare accepted a flat fee from a client in the form of real property and transferred a half interest in that property to his legal assistant before he had fully earned it, making him unable to return the unearned portion when he was later discharged before completion of the case. Montclare's actions violated Rule 16-105 NMRA, Rule 16-108 NMRA, and Rule 16-115 NMRA of our Rules of Professional Conduct. We write to issue a public censure and to clarify the rules pertaining to nonmonetary flat fees.

### I. BACKGROUND

{2} Montclare agreed to represent Wolfgang Bohm, the complainant, in a child support enforcement action brought by the State of New Mexico Human Services Department (State) in which Bohm had been incarcerated for failure to appear. On April 12, 2013, Bohm retained Montclare's services to obtain his release from jail and resolve the underlying child support action in exchange for a flat fee consisting of real property located at 101 Round Mountain, Bent, New Mexico. Bohm had transferred the property to Montclare on the preceding day by special warranty deed, which Montclare immediately recorded with the office of the county clerk.

{3} Montclare commenced work on Bohm's case and filed a motion for his immediate release from custody. On May 8, 2013, the State stipulated to Bohm's release without communicating with Montclare.

Bohm was released from jail the next day and asked Montclare to return the property. Montclare refused, maintaining that he had earned it, and instead deeded half of the property to his office manager Tracy Perry as payment for her services.

{4} The Office of Disciplinary Counsel of the New Mexico Supreme Court Disciplinary Board brought an action against Montclare on November 26, 2013. Before any hearing, Montclare and Perry agreed to transfer the property back to Bohm, but they were unable to reach an agreement as to how Montclare would compensate Perry for her interest. The Hearing Committee of the Disciplinary Board held a hearing on the merits on April 15, 2014. On June 3, 2014, the Hearing Committee issued its proposed conclusion that Montclare had violated Rule 16-105(A) by charging an unreasonable fee, Rule 16-108(A) by acquiring ownership of client property without complying with the requirements pertaining to conflicts of interest, and Rule 16-115(A) and (E) by failing to hold client property separate from his own. The Hearing Committee recommended that Montclare be suspended from the practice of law for six months followed by one year of supervised probation. Additionally, the Hearing Committee recommended that Montclare be ordered to make restitution to Bohm by deeding the entire property back to him or by paying him its appraised value.

{5} On June 24, 2014, counsel for the Disciplinary Board notified Montclare that the transfer of the property from Bohm to Montclare was not valid because the property was still in the name of Bohm's

deceased mother at the time, and consequently the deed from Montclare to Perry might be void because Montclare did not have a valid property interest to transfer. Nevertheless, the Disciplinary Board asked that Montclare and Perry execute special warranty deeds and quitclaim deeds transferring any interest they might have in the property back to Bohm to resolve any possible cloud on the title that may have resulted from the invalid transfers. On September 10, 2014, disciplinary counsel filed a specification of charges against Montclare, alleging that by deeding a half interest in the property to Perry he had violated Rule 16-504 NMRA by improperly splitting fees with a nonlawyer.

{6} On September 16, 2014, a Panel of the Disciplinary Board approved the Hearing Committee's proposed findings of fact and conclusions of law on the earlier charges after briefing but without hearing oral argument. The Panel adopted the Hearing Committee's recommendation of a six-month suspension followed by one year of supervised probation and also recommended that Montclare be required to take any necessary steps to restore clear title to the property to Bohm or, if clear title could not be restored, to pay Bohm the fair market value of the property.

{7} Montclare requested review of the Panel's decision by this Court on October 2, 2014, arguing that disciplinary counsel had not proved he had the mental state that merited suspension and asking that the case be remanded to the Hearing Committee for reconsideration in light of the invalidity of the transfer that was discovered after the hearing. On October 17, 2014, Montclare also moved the Panel for a new hearing on the same basis. Disciplinary counsel responded that the Panel no longer had jurisdiction over the proceedings because Montclare had already requested review by this Court. The Panel did not rule on the motion for a new hearing.

{8} We heard argument in this case on February 4, 2015, but ordered the matter held in abeyance subject to Montclare commencing fee arbitration with Bohm and making arrangements to clear title to the property. Disciplinary counsel suggested to Montclare that the additional allegations concerning fee-splitting could be resolved by consenting to discipline.

{9} On February 9, 2015, Montclare entered into a conditional agreement in



October-  
November  
**2016**

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## October and November



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6.2 G



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1.0 G



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### 2016 Health Law Symposium

Thursday, Oct. 6, 2016

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5.9 G

1.0 EP



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6.5 G



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Friday, Oct. 14–Saturday, Oct. 15, 2016

**Co-sponsor:** Family Law Section



The two-day Family Law Institute will once again be held in 2016 at the State Bar Center and will be offered by Live Webcast. Sessions for the institute include treatment of social security benefits in family law matters, criminal acts committed during marriage and after divorce and bankruptcy; property rights in bankruptcy for the non-bankrupt spouse. More information regarding CLE credits and speakers coming soon. Save the date for this popular two-day event!



### New Mexico Administrative Law Institute

Friday, Oct. 21, 2016

**Co-sponsor:** Public Law Section

Save the date for the full-day 2016 New Mexico Administrative Law Institute offered both live at the State Bar Center and via webcast! More information on this program coming soon.

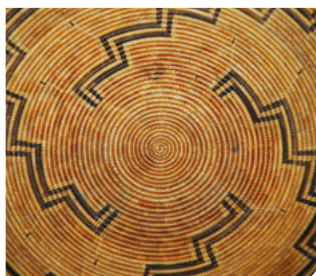


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Friday, Oct. 28, 2016

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Save the date for this new program through the Center for Legal Education at the Supreme Court Building in Santa Fe. Lunch will be provided at the Inn at Loretto in Santa Fe. Contact Marian Chavez (mchavez@nmbar.org) for more information about the program.



### Indian Law in 2016: What Indian Law Practitioners Need to Know

Thursday, Nov. 3, 2016

**Co-sponsor:** Indian Law Section

This program will provide an overview of recent federal, state, and tribal cases for Indian law practitioners. It will also include legislative and policy updates, New Mexico Rules of Professional Responsibility, practitioners can successfully follow to represent their clients in Indian Nation courts and the role of the attorney's ethical obligations in prosecuting and defending Native American defendants in federal court.

1.0 G 2.0 EP



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1.5 EP **Journalism, Law and Ethics (2016 Annual Meeting)**

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which he admitted to violating Rule 16-504(A) by sharing legal fees with a nonlawyer and consented to a formal reprimand. The Panel approved the consent agreement on March 19, 2015. Montclare then sought to withdraw from the consent agreement, and on April 3, 2015, he petitioned this Court for a hearing in the matter. This Court denied the petition.

{10} During this period, Bohm was attempting to sell the property but was unable to close the sale because he did not yet have clear title. Montclare subsequently quitclaimed his interest in the property to Bohm and attempted to reach an agreement with Perry to purchase her half interest in the property so that he could deed it back to Bohm, but he did not have the funds to pay the price Perry requested. Despite repeated extensions of time and admonitions from disciplinary counsel to make arrangements to purchase Perry's interest, Montclare still failed to do so.

{11} On September 25, 2015, disciplinary counsel moved this Court for an order to show cause as to why Montclare should not be held in contempt for violating the February 4, 2015, order by failing to take action to clear title to the property. The pending sale of the property was terminated due to the cloud on the title, and Bohm refused to participate in fee arbitration.

{12} After oral argument, we declined to hold Montclare in contempt but adopted the findings and conclusions of the Disciplinary Board Panel regarding the underlying violations of our Rules of Professional Conduct. We ordered that Montclare receive a public censure and be suspended from the practice of law for a period of six months, which suspension would be deferred on the condition that he purchase Perry's interest in the property on or before February 8, 2016, so as to return clear title to Bohm. The order specified that upon Montclare's delivery of full payment to Perry, disciplinary counsel would make arrangements to obtain and deliver a quitclaim deed from Perry renouncing her interest in the property. Montclare was also ordered to attend an ethics CLE and pay the costs of the disciplinary proceedings. This opinion serves as his public censure and shall be published in the State Bar of New Mexico *Bar Bulletin*.

## II. DISCUSSION

{13} In reviewing disciplinary proceedings, we defer to the Hearing Committee on factual matters but review legal conclusions and recommendations for discipline de novo. *In re Yalkut*, 2008-NMSC-009, ¶ 16, 143 N.M. 387, 176 P.3d 1119.

{14} "A lawyer shall not make an agreement for, charge or collect an unreasonable fee." Rule 16-105(A). "[N]on-refundable unearned fees are unreasonable." *Yalkut*, 2008-NMSC-009, ¶ 26. A flat fee for future legal services is not prohibited, but it cannot be considered as earned when paid and must be held in trust until earned. *See id.* Additionally, "lawyers must inform their new clients of the basis upon which they will compute the amount of fee earned . . . and maintain records that will enable them to determine the ongoing status of the fee, even when the fee arrangement is for a flat fee." *Id.* (omission in original) (internal quotation marks and citation omitted). An attorney who is discharged is only entitled to recover the reasonable value of services rendered prior to the discharge, even if the agreement was for a flat fee and the discharge is without cause. *Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶¶ 49, 51, 149 N.M. 74, 244 P.3d 342. Upon termination, an attorney must refund to the client "any advance payment of fee or expense that has not been earned or incurred." Rule 16-116(D) NMRA.

{15} Montclare did present billing records to the Hearing Committee showing the time he spent on the case and calculating the fee he maintained he had earned. The Committee found that these calculations were not credible and consequently that Montclare had not earned the full value of the property. We defer to these findings and conclude that, because Montclare did not earn the full value of the property before transferring an interest to Perry and thereby making it nonrefundable, the property was an unreasonable fee in violation of Rule 16-105(A).

{16} We clarify that the acceptance of a flat fee in the form of real property is not in itself contrary to our Rules of Professional Conduct. An attorney may accept a non-monetary fee, but regardless of the form it takes any fee must be reasonable and must be refundable until it is fully earned.

{17} Additionally, an attorney must minimize any potential conflict of interest with a client by ensuring that

(1) the [terms of a nonmonetary fee agreement] are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable

opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 16-108(A).

{18} Montclare argued that it was Bohm's idea to use the property to pay for legal services and that he was doing Bohm a favor by accepting the offered real estate because other attorneys had declined the case and Bohm would otherwise have been without representation. Regardless of the truth or accuracy of Montclare's assertions, they do not relieve him of his responsibilities to properly advise his client and to ensure that the terms of any transaction are fair and fully disclosed. Attorneys often contract with clients in difficult situations because it is precisely those circumstances that give rise to the need for an attorney. But our Rules of Professional Conduct prevent attorneys from taking advantage of any such desperation to the detriment of the client. Rule 16-108 "was promulgated to ensure that transactions between clients and attorneys remain fair and reasonable and to ensure that attorneys do not exercise an unfair advantage over their clients." *Guest v. Allstate Ins. Co.*, 2009-NMCA-037, ¶ 23, 145 N.M. 797, 205 P.3d 844, *reversed on other grounds by Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶ 72. By agreeing to accept Bohm's property without advising him to seek independent counsel, without obtaining his informed consent, or without ensuring that the terms of the transaction were fair and reasonable to Bohm, Montclare violated Rule 16-108(A).

{19} Finally, after agreeing to accept the property as a fee, Montclare failed to properly safeguard it until he had earned its full value. Any retainer or flat fee not yet earned must be safely kept and held in trust for the client, separately from the lawyer's own property. Rule 16-115. Money that belongs to a client must be deposited in a separate trust account and withdrawn only as fees are earned or expenses are incurred. Rule 16-115(A), (C). Our rules are not so specific regarding nonmonetary property, but it must be identified as belonging to the client, safeguarded, and promptly returned when the client is so entitled. Rule 16-115(A), (D). One way to accomplish this when a fee takes the form of real property



would be to have the deed held in escrow by a neutral, third party until the attorney has earned the full value of the property. But it would not necessarily be an ethical violation to transfer the title into the attorney's name and record the transfer, even though the attorney is not yet entitled to ownership of the property, because in the absence of a third-party escrow these steps might be necessary to properly safeguard both attorney and client interests in the title. There would have been no violation if Montclare had transferred and recorded the deed but had safely kept it and had promptly transferred it back

to Bohm when asked. When Montclare instead refused to return the property and transferred a half interest to Perry, making him unable to return it to Bohm without securing Perry's cooperation, Montclare violated Rule 16-115(A), (D).

### **III. CONCLUSION**

{20} We issue this public censure as a consequence of Montclare's actions in accepting a flat fee and transferring a portion of that fee to a third party before he had earned it so that he was unable to refund the unearned portion when requested as is required by our Rules of Professional Conduct. Because Montclare has since

made the required payments and filed the necessary documents to transfer all interest in the property back to his former client, we do not impose the previously deferred six-month suspension.

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

**CHARLES W. DANIELS, Chief Justice**

### **WE CONCUR:**

**PETRA JIMENEZ MAES, Justice**

**EDWARD L. CHÁVEZ, Justice**

**BARBARA J. VIGIL, Justice**

**JUDITH K. NAKAMURA, Justice**

From the New Mexico Court of Appeals

**Opinion Number: 2016-NMCA-057**

No. 33,850 (filed March 28, 2016)

ELDORADO COMMUNITY IMPROVEMENT ASSOCIATION, INC.,  
Plaintiff-Appellee,

v.

SUSAN BILLINGS, DAVID BORTON, DEVRA BORTON, and ERIC WILSON,  
Defendants-Appellants,

and

GREG COLELLO, ROSE WINSTON, and GERSHON N. SIEGEL,  
Defendants.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

MARK A. MACARON, District Judge

JOHN P. HAYS  
CASSUTT, HAYS & FRIEDMAN, P.A.  
Santa Fe, New Mexico  
for Appellee

RONALD J. VANAMBERG  
VANAMBERG, ROGERS, YEPA,  
ABEITA, GOMEZ & WORKS, LLP  
Santa Fe, New Mexico  
for Appellants

**Opinion**

**Jonathan B. Sutin, Judge**

{1} This case pits a subdivision association against several subdivision residents who keep hens as pets. The dispute is over a subdivision covenant that disallows “animals, birds, or poultry” on residents’ lots unless kept as “recognized household pets.” The subdivision association sued the defendant hen owners to rid their properties of hens. The defendants (the owners) claimed that their hens met the recognized household pet exception. On motions for summary judgment, the district court agreed with the subdivision association and required the owners to remove their hens from their lots. In this Opinion, we at times refer to “chickens” and to “hens” but we also use “poultry,” because “poultry” appears in Section 11 of the subdivision covenants and because the parties concentrate on using “poultry” in their briefs. We hold that the restrictive covenant does not disallow the owners from keeping hens that are recognized as household pets and that the district court erred in requiring the owners to remove the hens.

**BACKGROUND**

{2} Eldorado at Santa Fe Subdivision is a residential development located in Santa Fe County, New Mexico, and was established in 1972 with protective covenants. The 1972 covenants stated that their purpose “is to perpetuate . . . the rich qualities peculiar to the pastoral environment for the benefit of all who acquire property within the Eldorado Ranch.” The original 1972 covenants were replaced in 1996 by amended and restated protective covenants (hereinafter, the covenants) following a covenant election in 1995. The covenants state that their purpose, among other purposes, is to provide “an attractive rural setting for residential neighborhoods and home sites” and to encourage “individual expression consistent with the historical traditions of the region.” The plaintiff here, Eldorado Community Improvement Association, Inc. (the association), has many subdivision-related administrative tasks, not the least of which is to enforce violations of the covenants.

{3} At issue in this case is Section 11 of the covenants, which reads:

Household pets. No animals, birds[,] or poultry shall be kept

or maintained on any lot, except recognized household pets which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose. It is forbidden to permit dogs to run at large in Eldorado. At all times, dogs must be kept, restrained[,] and controlled by their owners in the manner described in the Santa Fe County Animal Control Ordinance. A maximum of two horses may be kept on any lot which has an area in excess of three acres and which has been properly designated, pursuant to these covenants, as a horse area on any recorded subdivision map or by majority vote of the Board of Directors. A stable for such horses may be erected upon such lot.<sup>1</sup>

No other section in the covenants has any direct bearing on keeping animals, birds, or poultry on residential lots.

{4} Section 11 forbids residential lot owners from keeping poultry on residential lots in the subdivision. At the same time, Section 11 provides an exception that permits poultry as well as animals or birds to be kept on residential lots under certain conditions, namely, as long as the poultry are “recognized household pets . . . for the pleasure and use of the occupants[,]” kept on the lot in reasonable numbers, and “not [kept] for any commercial use or purpose.” There exists no issue here as to number of hens or as to commercial use or purpose. Nothing in Section 11 gives free reign to expansive poultry operations and no issue exists as to any such use here.

{5} Both sides filed motions for summary judgment. Neither side argued that genuine issues of material fact existed that would preclude summary judgment. The district court determined that “[t]he terms ‘recognized household pets’ are not defined in the covenants and are not clear on their face[,]” in part because “[a] substantial number of homeowners and persons associated with the Eldorado Subdivision have disagreed for years about the meaning of the covenant language in issue.” As to interpreting the critical, ambiguous words,

<sup>1</sup> The pertinent 1972 covenant provision regarding pets reads: “No animals, birds[,] or poultry shall be kept or maintained on any lot, except recognized household pets which may be kept thereon in reasonable numbers as pets for pleasure and use of the occupants but not for any commercial use or purpose. Notwithstanding the foregoing, a maximum of two horses may be kept on any lot which has an area in excess of three acres and which may be designated by [Eldorado at Santa Fe, Inc.] as a horse area, and a stable for such horses may be erected upon such lot.”

the district court determined that chickens were not recognized household pets and could not be kept or maintained on any lot in the subdivision. The court granted the association's motion and ordered the owners to remove their chickens from their properties. The owners appeal. More facts will appear in the discussion that follows.

## DISCUSSION

### Standard of Review

{6} Because there exists no genuine issue of material fact, by agreement of the parties and determination by the district court, we are relieved of a burden of concern about the existence of such an issue. "Interpretation of language in a restrictive covenant is a question of law that we review de novo." *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vazquez*, 2013-NMCA-051, ¶ 11, 300 P.3d 736; *Heltman v. Catanach*, 2010-NMCA-016, ¶ 5, 148 N.M. 67, 229 P.3d 1239.

### Definitions

{7} Because the issues in this case focus on the meaning of certain covenant terms, we begin with definitions. A "bird" is "any of a class . . . of warm-blooded vertebrates distinguished by having the body more or less completely covered with feathers and the forelimbs modified as wings." *Merriam-Webster's Collegiate Dictionary* 125 (11th ed. 2005). A "chicken" is a "common domestic fowl[.]" *Id.* at 213; *Oxford Dictionaries*, [www.oxforddictionaries.com/us/definition/american\\_english/chicken](http://www.oxforddictionaries.com/us/definition/american_english/chicken) ("A domestic fowl kept for its eggs or meat[.]"). A "hen" is "a female chicken[.]" *Merriam-Webster's Collegiate Dictionary* 580; *Oxford Dictionaries*, [www.oxforddictionaries.com/us/definition/american\\_english/hen](http://www.oxforddictionaries.com/us/definition/american_english/hen) ("A female bird, especially of a domestic fowl"). A "fowl" is a "bird of any kind[.]" *Merriam-Webster's Collegiate Dictionary* 495; *Oxford Dictionaries*, [www.oxforddictionaries.com/us/definition/american\\_english/fowl](http://www.oxforddictionaries.com/us/definition/american_english/fowl) ("A gallinaceous bird kept chiefly for its eggs and flesh[.]"). Chickens are poultry. *See Merriam-Webster's Collegiate Dictionary* 972. "Poultry" are "domesticated birds kept for eggs or meat[.]" *Id.*; *Oxford Dictionaries*, [www.oxforddictionaries.com/us/definition/american\\_english/poultry](http://www.oxforddictionaries.com/us/definition/american_english/poultry) (defining "poultry" as "[d]omestic fowl, such as chickens, turkeys, ducks, and geese"). Finally, "a domesticated animal kept for pleasure rather than utility" and "kept for companionship or pleasure" is a pet. *Merriam-Webster's Collegiate Dictionary* 926; *Oxford Dictionaries*, [www.oxforddictionaries.com/us/definition/](http://www.oxforddictionaries.com/us/definition/)

[american\\_english/pet](http://www.oxforddictionaries.com/us/definition/american_english/pet) (defining "pet" as "[a] domestic or tamed animal kept for companionship or pleasure"). The parties do not spar much over what a "pet" is. The definitions do not state that pets cannot also have utility. For purposes here, hens kept as a source of eggs are poultry, and hens also kept as a source of companionship or pleasure can be a pet. It is manifestly unclear, however, what "recognized" means.

### The District Court's Decision

{8} We commend the district court for favoring the parties with a detailed letter decision that included procedural history, arguments, applicable law, legal analyses, evidence including historical facts, and the court's analyses and interpretations and views about the covenants and the words in Section 11. It is from the court's letter decision that the association primarily hinges its arguments.

{9} The district court cited our Supreme Court's four unchanged rules for interpreting restrictive covenants set out in *Hill v. Community of Damien of Molokai*, 1996-NMSC-008, ¶ 6, 121 N.M. 353, 911 P.2d 861. "[I]f the language is unclear or ambiguous, [the appellate courts] will resolve the restrictive covenant in favor of the free enjoyment of the property and against restrictions." *Id.* The appellate courts "must interpret the covenant reasonably, but strictly, so as not to create an illogical, unnatural, or strained construction." *Id.* We "will not read restrictions on the use and enjoyment of the land into the covenant by implication." *Id.* We "must give words in the restrictive covenant their ordinary and intended meaning." *Id.* These rules constitute "our four rules for construing restrictive covenants[.]" *Sabatini v. Roybal*, 2011-NMCA-086, ¶ 13, 150 N.M. 478, 261 P.3d 1110. "Failure to apply the rules of construction [of restrictive covenants] is an error of law." *Id.* ¶ 7.

{10} Although it explicitly acknowledged the four *Hill* rules of interpretation, the district court focused its attention on an analysis in *Agua Fria Save the Open Space Ass'n v. Rowe*, 2011-NMCA-054, 149 N.M. 812, 255 P.3d 390, in which this Court held that "extrinsic evidence is admissible to explain or clarify, but not to vary or contradict, a restrictive covenant's terms." *Id.* ¶ 21. The district court stated that *Agua Fria's* approach did not obligate the courts to apply the rule of strict construction in resolving a factual dispute regarding the restrictive covenant's meaning.

{11} In the district court, relying on *Agua Fria*, the association focused on a view that the covenant language in question unambiguously set a community-wide standard as to what is a "recognized household pet"—meaning the standard must "come from the Eldorado community through the [d]emocratic process of amending the [c]ovenants[.]" Although, at the same time, the association broadened this standard to a "broader society" standard and offered testimony about the pet chicken trend nationally. The association alternatively argued that if the district court found an ambiguity, the affidavits and evidence offered from individuals in the local and national community supported a finding that "a chicken is . . . not a recognized household pet" and that, although "[p]eople may like them [and] they want to have them as pets[.] . . . it doesn't meet the standard in this community."

{12} The district court ultimately agreed with the owners that the phrase "recognized household pets" was not defined in the covenants and was unclear on its face. However, upon determining that the covenant was ambiguous, the district court looked to *Agua Fria* and in doing so went beyond our Supreme Court's interpretative rules for determining restrictive covenant meaning. *Agua Fria* states that extrinsic evidence can be admitted to explain or clarify a restrictive covenant's terms to obtain contextual understanding and holds that "a court may hear evidence of the circumstances surrounding the making of the contract and any relevant usage of trade, course of dealing, and course of performance." 2011-NMCA-054, ¶ 20 (internal quotation marks and citation omitted). *Agua Fria* also states that the Supreme Court's "rule of strict construction must be subordinate to the intention of the parties as reflected by the language of the whole instrument, the circumstances surrounding the transaction, and the purposes animating the restrictions" and that the rule favoring free enjoyment and against restrictions "cannot be applied to defeat the obvious purpose of the restrictions." *Id.* ¶ 18 (internal quotation marks and citation omitted). *Agua Fria* holds that, when interpreting restrictive covenants, "[t]he intent of the parties . . . govern[s]." *Id.* (internal quotation marks and citation omitted).

{13} To animate these additional rules of interpretation, *Agua Fria*, which addressed the propriety of a grant of summary judgment, relied on a view that restrictive

covenants are contracts and are to be interpreted under the rules of contract interpretation set out in *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶¶ 12-18, 112 N.M. 504, 817 P.2d 238, and *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶¶ 9-13, 114 N.M. 778, 845 P.2d 1232. The *Agua Fria* Court felt free to consider extrinsic evidence to explain the purposes and contextual understanding underlying restrictive covenants as though the covenants were a contract. *Agua Fria*, 2011-NMCA-054, ¶¶ 20-21. It felt free, then, to consider evidence surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance. *Id.* And the *Agua Fria* Court concluded that “the courts are not obligated to apply the rule of strict construction . . . regarding [a] restrictive covenant’s meaning.” *Id.* ¶ 21.

{14} The district court in the case now before us treated the covenants as a contract and called on the contract interpretation rules stated in *Agua Fria*, *Mark V*, and *C.R. Anthony*. In granting summary judgment, the district court concluded that the owners’ interpretation of Section 11 was “inconsistent with the uniformity contemplated by the covenants” and would “create an illogical result[.]” The district court determined that the owners’ interpretation would “render the covenant meaningless” and was “inconsistent with the intent and purposes of the covenants when analyzed under the modern rule of construction and results in foreseeable illogical results when analyzed under the general rule of construction.” In addition, the district court expressed concern that “[c]onstruing the covenant to allow individual owners complete freedom to designate any creature they want as a household pet would frustrate the purposes of the covenants and create a dangerous precedent leaving other property owners without [any] recourse (unless it was a nuisance under the covenants).” Furthermore, the court determined that the owners’ interpretation “would open the door to an unlimited multitude of different kinds of creatures being kept inside and outside of homes . . . without regulation or control under the covenants (except nuisances) leaving the other homeowners without recourse.” These determinations were significantly driven by the association’s extrinsic evidence offered to uncover the covenants’ original meaning.

#### The Evidence

{15} The district court considered the developer’s 1972 covenants and even

considered the reputation of the subdivision in the 1970s and 1980s. It considered evidence that the association historically viewed the covenant not to permit chickens—a history, as explained by the court, that indicated that chickens had not been considered by the association as recognized household pets and that the association had historically taken enforcement action against individual owners who had chickens on their property. Also, according to the court, no historical evidence existed that chickens or other livestock had been contemplated by the developer or accepted by the association as allowable.

{16} The association’s evidence in major part consisted of affidavits. William Donohue, who was general manager of the association beginning in 2006, provided an affidavit and documents relating to what the association’s “policy and practice” was and had been. He also reported on the association’s planning and enforcement activities, on its grants of variances, and on holding an election on proposed alternative covenant amendments. Mark Conkling, who served as manager of the association from 1987 to 1995, as a member of the association’s architectural committee, and as a member of the association’s board of directors, also provided an affidavit. Conkling was one of the first home builders in the subdivision and provided some information in his affidavit subject to valid hearsay, speculation, and lack of foundation objections.

{17} In the owners’ view, even were the foregoing extrinsic evidence allowable, any opinion of the current association board or past boards, any surmised intent of the original developer in 1972, any surmised intent of voters in 1995 apart from the language in the covenant, and any hearsay evidence presented by a subdivision home builder, constituted elusively speculative and fleeting evidence. Specifically, this evidence consisted of unreliable factors that were changeable at any given time due to changes in association membership and residential makeup and depending on who at any given time might be interpreting Section 11, with contrary views always present. According to the owners, even if allowable, the extrinsic evidence could not support an interpretation that Section 11 flatly forbids hens.

{18} The association also presented an affidavit of Dr. Kristy Pabilonia, an associate professor and diagnostic veterinarian at Colorado State University, and an expert

in commercial poultry populations and backyard poultry flocks, both rural and urban. Dr. Pabilonia discussed disease found in flocks and opined as to the classification of backyard poultry flocks. She stated that “[p]oultry has not historically been considered ‘household pets,’ and traditional household pets, such as dogs and cats, are not regulated as agricultural animals by the USDA.” She further stated that her scientific surveys of owners of backyard poultry flocks showed that 86% maintained chickens as a source of food, meat, or eggs, and that 42% maintained chickens as pets, companions, or hobby animals. In addition, she stated that “keeping backyard poultry flocks for any purpose, including as a source of food, meat[,] or eggs, or as hobby animals, has become a significant phenomenon only within the past ten years [or] so, since the mid-2000s.” The district court concluded that “[t]his significantly indicates that in broader society[,] chickens are not recognized as household pets by most.”

{19} The district court also found to be significant the vote in a subdivision-sponsored election held in 2012, relating to two proposed changes to Section 11 language, one allowing chickens and one not allowing chickens. Presumably based on the association arguments that by a vote of 55.4% to 44.6% the voting homeowners rejected the proposed covenant amendment that would have specifically allowed chickens under the Section 11 definition of “household pets,” the court concluded that the voting homeowners of the subdivision voted not to include chickens within the meaning of “household pets” under the covenant language.

{20} The owners describe the election differently. In their view, the association’s arguments fail because the covenants require that 50% plus one of all subdivision property owners had to vote in favor of an amendment for it to be enacted. The owners show that of the total of subdivision property owners, only 35.07 % voted for a covenant that would expressly forbid hens; 29.99% voted for a covenant that would expressly allow residents to keep pet hens on their property; leaving 35.04% of the subdivision residents who did not vote. The vote was therefore insufficient under the covenants for any amendment to be adopted, and the election left in place the original acknowledged ambiguity. Therefore, the owners argue that the election was an “ad hoc inconclusive opinion poll[.]” having no bearing on covenant interpretation.

### The Covenant Must Be Construed to Favor the Owners

{21} The notions expressed in the covenants of maintaining the “pastoral” and “rural” nature of the area and the historical traditions of the region would appear to lend themselves to allowing animals, birds, and poultry as recognized pets. If the Eldorado community did not want poultry because poultry were not recognized as household pets, it is reasonable to assume that the residents would have removed the language that anticipates and permits poultry as household pets. We do not think that it is reasonable to read the language of Section 11 to reflect an intent that the only way poultry could be “recognized” as household pets was if the association or a large number but less than a majority of lot owners recognized poultry as such.

{22} We agree with the district court that the covenant language was unclear and ambiguous. Ambiguity is created when provisions are reasonably and fairly susceptible to different constructions. *Levenson v. Mobley*, 1987-NMSC-102, ¶ 7, 106 N.M. 399, 744 P.2d 174. In light of the ambiguity, the district court should have applied the reasoning in *Hill*, which addressed a restrictive covenant governing use, not the reasoning in *Agua Fria*, which addressed an ambiguity in a landowner’s ability to extinguish restrictive covenants under a saving clause in restrictive covenants. The ambiguity was not in any particular restrictive covenant as to use. We see no reasonable basis in the case presently before us on which to treat enforcement of the covenants governing the use of lots as a contract to be governed by the rules and approach used in *Agua Fria*. *Hill*, rather than *Agua Fria*, governs this case. The facts here and in *Hill* differ significantly from the facts in *Agua Fria*. *Agua Fria* did not resolve an ambiguity in a covenant governing use. And restrictive use covenants involve valuable property rights and extrinsic evidence should not provide the basis for interpretation of those covenants.

{23} In *Agua Fria*, the issue on appeal was whether, as a matter of law, the defendant developer had properly extinguished restrictive covenants on a tract of undeveloped land (the country club tract) pursuant to a “saving clause.” 2011-NMCA-054, ¶¶ 2-9. The plaintiff in *Agua Fria* argued that the extinguishment provision in the saving clause did not apply to the country club tract, and thus, the developer should not have been permitted to extinguish restrictive covenants. *Id.* ¶¶ 9, 14. This

Court ultimately determined that the saving clause was ambiguous as applied to the tract, *id.* ¶ 17, and then proceeded to analyze the saving clause pursuant to contract law. *Id.* ¶¶ 18-25. The *Agua Fria* opinion’s broad swath of contract interpretation of ambiguous restrictive covenants could not have purposely been intended to apply to restricted land use. The extinguishment provision in the saving clause did not and was not intended to place any additional restrictions on the use of land. *Agua Fria* is therefore significantly distinguishable. To that end, we firmly side with a view that the meaning of ambiguous restrictive use provisions should be tested under the *Hill* qualifiers and not under contract interpretation rules.

{24} We suspect that the interpretive variances between *Agua Fria* and *Hill* stem from the types of issues that the parties sought to resolve. In *Hill*, our Supreme Court considered whether a group home constituted “residential use” of a property and whether the individuals in the group home were a “single family” as required by the restrictive use covenant. 1996-NMSC-008, ¶¶ 7-21. The Court rightly held that, when ambiguous, covenants restricting the use of land should be resolved in favor of free use. *Id.* ¶ 6. In applying its test, the Court was able to fully resolve the issues in favor of the property owners. *Id.* ¶¶ 11, 21, 52. In *Agua Fria*, however, *Hill*’s test likely would not have fully resolved the matter because the dispute was not direct with regard to the use of land. Because the covenant at issue in *Agua Fria* dealt with a party’s ability to extinguish covenants, *Hill*’s factors regarding free enjoyment of the property and restrictions by implication would not have translated and would not have guided the Court in *Agua Fria* to a clear resolution. Here, application of the *Hill* factors alone can and does resolve the issue.

{25} Further, it is important to keep in mind that restrictive “covenants constitute valuable property rights of the owners of all lots in the tract.” *Montoya v. Barreras*, 1970-NMSC-111, ¶ 12, 81 N.M. 749, 473 P.2d 363. Reliance on restrictive covenants is a valuable property right. *Wilcox v. Timberon Protective Ass’n*, 1990-NMCA-137, ¶ 42, 111 N.M. 478, 806 P.2d 1068, *abrogated on other grounds by Agua Fria*, 2011-NMCA-054, ¶ 22. Thus, the rules set out by our Supreme Court in *Hill* are controlling in the case before us. See *Hill*, 1996-NMSC-008, ¶ 6. The *Hill* interpretative rules have been fully recognized by this Court. See *Sabatini*, 2011-NMCA-086,

¶¶ 7-10; see also *Wilcox*, 1990-NMCA-137, ¶ 18 (acknowledging a four-part test applies to restrictive covenants); cf. *Mayer v. Smith*, 2015-NMCA-060, ¶ 17, 350 P.3d 1191 (stating that “[t]his Court has established a distinction between contract interpretation and easement interpretation with regard to extrinsic evidence”).

{26} What the developer may have had in mind, how individual association members over time may have viewed the language, whether the association over time successfully enforced Section 11 without court assistance, and any “community” or “broader society” sense of Section 11’s meaning, constitute fleeting and speculative proof of meaning in this case, as did that of Dr. Pabilonia regarding when the advent of chickens as pets may have emerged in contemporary society. Dr. Pabilonia actually confirmed that a substantial percentage of chicken owners keep chickens as pets.

{27} We therefore disagree that Section 11 disallows hens that can be and are treated as pets. And we disagree that to allow hens as household pets creates or opens up any likely circumstances of ruination as expressed by the association and the district court that warrants an interpretation that allowing the hens as pets could never have been intended at any time and under any circumstance. We are not persuaded that in permitting pet chickens “the sky will fall.” Such a Chicken Little-esque view of possible results and calamity is not convincing. We also disagree with an interpretation that whether hens may be permitted depends on a majority vote of the members of the association or on a vote of some particular number below 50% of voting lot owners. If the association or the lot owners of the subdivision want a different result, the lot owners must effectuate the change through the required covenant amendment election process set out in the covenants.

### CONCLUSION

{28} Section 11 of the covenants cannot be enforced under the circumstances in this case to preclude the owners from keeping their hens as recognized household pets. We reverse the judgment of the district court.

{29} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

### WE CONCUR:

LINDA M. VANZI, Judge  
J. MILES HANISEE, Judge



From the New Mexico Court of Appeals

**Opinion Number: 2016-NMCA-058**

No. 33,823 (filed April 18, 2016)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
JESS CARPENTER,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

JANE SHULER GRAY, District Judge

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**Opinion**

**M. Monica Zamora, Judge**

{1} Defendant, Jess Carpenter, appeals his conviction for involuntary manslaughter. Defendant argues that there is insufficient evidence to support the fourth element of the jury instruction given at trial—that he committed an unlawful act not amounting to a felony. Defendant also contends that the State’s failure to prove each element of involuntary manslaughter implicates his constitutional right to a jury trial. We conclude that the evidence, assessed against the elements of the charged crime, is sufficient to support Defendant’s involuntary manslaughter conviction and that Defendant was not denied his right to a jury trial. We affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

{2} On the evening of May 20, 2011, Defendant and his friend, Joe Darras, were out drinking at three Artesia establishments. After leaving the third establishment, at approximately 1:30 a.m. on May 21, 2011, the men went to Defendant’s house. At some point between 1:30 a.m. and 2:00 a.m., Defendant called 911 and reported that he shot his friend and that his gun had gone off accidentally. Eddy County Sheriff’s deputies arrived at Defendant’s residence shortly after 2:00 a.m. Defendant told one

deputy that he and Darras had a problem with someone at the bar and they were going to get their guns and take care of it, then the gun accidentally went off. Darras’ body was found in Defendant’s bedroom. He had been shot in the head.

{3} Defendant was taken into custody. His blood was drawn at approximately 5:46 a.m. and his blood alcohol content was 0.116 grams per milliliter. Defendant was charged with second degree murder, contrary to NMSA 1978, § 30-2-1(B) (1994), and negligent use of a deadly weapon, contrary to NMSA 1978, § 30-7-4(A)(2) (1993). The case proceeded to a jury trial.

**A. Defendant’s Testimony at Trial**

{4} Defendant testified that Darras had an altercation with someone at the last establishment the two visited and that on the way back to Defendant’s house, Darras was still upset about the incident and was going on and on about it. Both men were under the influence of alcohol. Defendant thought he could get Darras to drop the issue if Defendant got his guns and told Darras he would go back after the people from the bar. He expected Darras to tell him to forget about it. Defendant thought he could then lock the guns up.

{5} When Defendant and Darras arrived at Defendant’s house, Defendant got out of Darras’ truck, went into his bedroom, got a shotgun from his closet, and got a pistol from a dresser drawer. He placed the shotgun by

his bed and the pistol in the back of his pants. As Darras came into the bedroom and asked Defendant what he was doing, Defendant decided he would toss the pistol on the bed so that he did not have it on him as Darras approached. As Defendant pulled the gun out of his pants, he heard a loud boom and saw that Darras had been shot in the head. Defendant tried to stop the bleeding and realized that Darras was not alive. Defendant called 911 and waited for police to arrive.

{6} Defendant admitted that he was familiar with firearms, that he had hunted with his family, and he had taken a gun safety course as a child. As an adult, Defendant practiced shooting and hunted. Defendant testified that on the night that Darras was killed, the pistol should not have fired unless the hammer was cocked back, and that to his knowledge he never cocked the hammer back. Defendant did admit that at some point as he removed the pistol from his pants, it must have been pointed toward Darras, since Darras was shot in the head. Defendant also admitted that his drinking had impaired his judgment and that he should not have been handling his guns that night.

**B. Involuntary Manslaughter**

{7} Under the provisions of NMSA 1978, Section 30-2-3(B) (1994), “involuntary manslaughter” is “the unlawful killing of a human being without malice . . . committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act[,] which might produce death in an unlawful manner or without due caution and circumspection.” (Emphasis added.) The jury was instructed that in order to convict Defendant of involuntary manslaughter, it had to find beyond a reasonable doubt that:

1. [D]efendant pointed a loaded pistol at . . . Darras while [Defendant] was under the influence of alcohol;
2. [D]efendant should have known of the danger involved by pointing a loaded pistol at . . . Darras while [D]efendant was under the influence of alcohol;
3. [D]efendant acted with a willful disregard for the safety of others;
4. [D]efendant committed an unlawful act not amounting to a felony;
5. [D]efendant’s act caused the death of . . . Darras; [and]
6. This happened in New Mexico on or about the 21 day of May, 2011.

The involuntary manslaughter instruction given at trial tracks the uniform jury instruction on manslaughter but then added that fourth element not contained in UJI 14-231 NMRA. It is not clear from the record how this additional element was added to the instruction. However, Defendant did not object to it at trial.

{8} A jury found Defendant guilty of negligent use of a deadly weapon and involuntary manslaughter, a lesser included offense of second degree murder. Prior to sentencing, the district court determined that Defendant's conviction for negligent use of a deadly weapon was subsumed within his conviction for involuntary manslaughter and dismissed that charge. This appeal followed.

## II. DISCUSSION

{9} On appeal Defendant argues that there was insufficient evidence to support an added fourth element to the involuntary manslaughter instruction. Defendant also asserts that affirming his conviction with this added element would violate his right to a trial by jury. We address these arguments in turn.

### A. Sufficiency of the Evidence

{10} "When reviewing a challenge to the sufficiency of the evidence, we must determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Cordova*, 2016-NMCA-019, ¶ 16, 366 P.3d 270 (internal quotation marks and citation omitted), *cert. granted*, 2015-NM-CERT-008, \_\_ P.3d \_\_. "We must view the evidence in the light most favorable to the [s]tate, resolving all conflicts and indulging all permissible inferences in favor of the verdict." *State v. Reed*, 2005-NMSC-031, ¶ 14, 138 N.M. 365, 120 P.3d 447.

{11} Defendant argues that there was insufficient evidence to support the added element that he committed an unlawful act not amounting to a felony. We disagree. Defendant's argument rests on the faulty premise that the added element is an essential element of involuntary manslaughter. Defendant does not dispute that the evidence was sufficient for the remaining elements.

{12} After briefing was completed in this case, the United States Supreme Court decided the question of "how a court should assess a challenge to the sufficiency of the evidence in a criminal case when a jury instruction adds an element to the charged crime and the Government fails

to object." *Musacchio v. United States*, \_\_ U.S. \_\_, 136 S. Ct. 709, 713 (2016). In *Musacchio* the defendant was indicted under 18 U.S.C. § 1030(a)(2)(C) (2008), which provides that a person commits a crime when he "intentionally accesses a computer without authorization or exceeds authorized access," and in doing so "obtains . . . information from any protected computer." *Musacchio*, \_\_ U.S. at \_\_, 136 S. Ct. at 713 (omission in original) (internal quotation marks and citation omitted). The Court noted that "[t]he statute thus provides two ways of committing the crime of improperly accessing a protected computer: (1) obtaining access without authorization; and (2) obtaining access with authorization but then using that access improperly." *Id.*; see § 1030(e) (6) (defining "exceeds authorized access" (internal quotation marks omitted)). The defendant was charged with conspiring to make unauthorized access to a computer. *Musacchio*, \_\_ U.S. at \_\_, 136 S. Ct. at 713. {13} The proposed jury instructions identified the conspiracy count as involving unauthorized access to protected computers, and did not require the jury to find that the defendant also conspired to exceed authorized access to protected computers. *Id.* However, the trial court diverged from the indictment and the proposed instructions and instructed the jury "that § 1030(a)(2)(C) makes it a crime for a person to intentionally access a computer without authorization and exceed authorized access." *Musacchio*, 136 S. Ct. at 714 (internal quotation marks and citation omitted). The government did not object to the instruction. *Id.* A jury found the defendant guilty of conspiring to make unauthorized access to a computer. *Id.*

{14} The defendant challenged the sufficiency of the evidence to support his conspiracy conviction. *Id.* at 713. The Supreme Court rejected the defendant's argument that "the sufficiency of the evidence should be assessed against the erroneous jury instruction that included the additional element." *Id.* at 714. The Court recognized that in reviewing for the sufficiency of the evidence, the reviewing court "makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt.'" *Id.* at 715 (citation omitted). "The reviewing court considers only the legal question whether, after viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted).

{15} The Court concluded that "the sufficiency of the evidence should be assessed against the elements of the charged crime." *Id.* at 713. "[I]f the jury instruction requires the jury to find [guilt on] those elements . . . beyond a reasonable doubt, the defendant has been accorded the procedure that this Court has required to protect the presumption of innocence." *Id.* at 715 (internal quotation marks and citations omitted). In that case, the addition of an element by using the word "and" in the instruction rather than eliminating the option, as permissible by the statute's use of the word "or," did not make the additional element an essential element under the statute. *Id.* at 714. Thus, "[t]he Government's failure to introduce evidence of [the] additional element [did] not implicate the principles that sufficiency review protects." *Id.* at 715. We believe *Musacchio* is dispositive here.

{16} In the present case, Defendant does not dispute that he was properly charged with the statutory elements for involuntary manslaughter as a lesser included offense to second degree murder; that he was given a meaningful opportunity to defend himself against those charges; or that the evidence was sufficient to convict him of the statutory elements of involuntary manslaughter. See § 30-2-3(B) (defining "involuntary manslaughter" as "the unlawful killing of a human being without malice . . . committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act[,] which might produce death in an unlawful manner or without due caution and circumspection." (emphasis added)). For the reasons explained in *Musacchio*, we reject Defendant's assertion that the statutory element added to the involuntary manslaughter instruction is an essential element under the statute.

{17} As a final matter, Defendant does not dispute that the State presented sufficient evidence to support the jury's verdict. We agree. The evidence presented at trial was that Defendant was familiar with firearms and that on May 21, 2011, while Defendant handled a loaded firearm under the influence of alcohol the firearm discharged in the direction of Darras, who was hit in the head by the discharged bullet and killed. Based on this evidence, a reasonable jury

could have found the essential elements of involuntary manslaughter beyond a reasonable doubt.

#### **B. Right to a Jury Trial**

{18} Defendant argues that the State's failure to present any evidence that he committed an unlawful act not amounting to a felony implicates his constitutional right to a jury trial. This argument, like Defendant's sufficiency of the evidence challenge, relies on the added element in the given instruction—the commission of an unlawful act, not amounting to a felony—as an essential element of involuntary manslaughter. Defendant's constitutional argument is also without merit.

{19} The Fourteenth Amendment requires due process in criminal proceedings involving state statutes, and together with the Sixth Amendment right to a trial by jury, entitles "a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

*Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (alteration, internal quotation marks, and citation omitted).

{20} Thus, if a jury is instructed on the elements of the crime with which the defendant is charged, and the instruction requires the jury to find those elements beyond a reasonable doubt, "the defendant has been accorded the procedure that this Court has required to protect the presumption of innocence." *Musacchio*, 136 S. Ct. at 715. Where an instruction includes all of the elements of the charged crime and an alternative element, the alternative element does not become an essential element simply because it is not identified as an alternative element in the given instruction. *See id.* We conclude that Defendant's right to a jury trial under the federal constitution is not implicated under the circumstances of this case.

{21} To the extent Defendant broadly asserts that he may be entitled to greater protection under the New Mexico Con-

stitution, he provides this Court with no argument in support of this assertion, and for this reason we do not engage in a separate analysis to address his conviction under the New Mexico Constitution. *See State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that this Court has no duty to review an argument that is not adequately developed); *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (same).

#### **III. CONCLUSION**

{22} For the foregoing reasons, we affirm Defendant's conviction for involuntary manslaughter.

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

**M. MONICA ZAMORA, Judge**

**WE CONCUR:**

**JAMES J. WECHSLER, Judge**

**LINDA M. VANZI, Judge**

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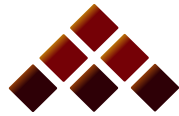


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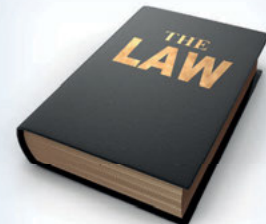
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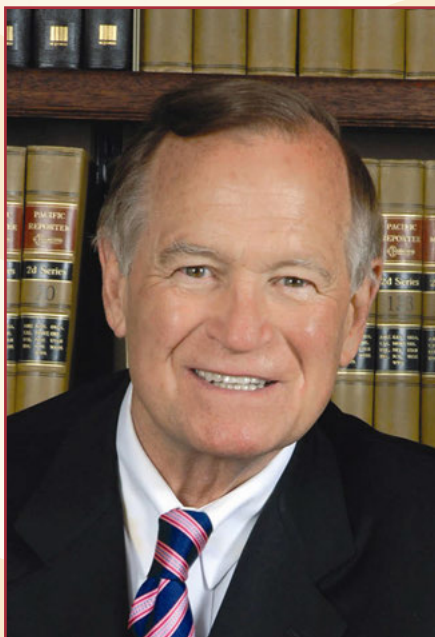
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# TURNER W. BRANCH

*August 22, 1938 to August 4, 2016*



**Turner W. Branch** passed on August 4, 2016. Turner was born in Houston Texas on August 22, 1938 to James A. and Juanita W. Branch. Turner attended the Marist School in Atlanta, Georgia graduating in 1956. Turner then attended the University of New Mexico graduating in 1960 with a B.A. in Political Science. While at UNM Turner also served as student body president and a member of Phi Sigma Alpha, the Political Science Honors Society. Prior to attending law school, Turner served for three and a half years in the U.S. Marine Corps, commissioned as a second lieutenant. Following his military service, he attended Baylor Law School, where he was a section editor of the Law Review. He received the T.R. McDonald Award as the outstanding student at the law school and graduated in 1965. Upon graduation from Law School Turner returned to Albuquerque to practice law. In 1986 Turner along with his wife Margaret founded the Branch Law Firm, now one of the oldest

personal injury firms in New Mexico. Throughout his career, Turner took on challenging and controversial cases involving personal injury, wrongful death, products liability, as well as catastrophic class actions and mass torts against pharmaceutical companies on a national and international basis. Turner also helped shape New Mexico law when, in 1976, he was lead counsel in the landmark decision of *Hicks v. The State of New Mexico*, which for the first time allowed injured individuals to recover damages for the state's wrongful conduct. Turner was selected by U.S. Senator Tom Udall and Attorney General Paul Bardacke to represent the State of New Mexico's interest in a 2.1 Billion Dollar settlement against the tobacco industry. Turner recently celebrated his 50th year in practice as a plaintiff trial lawyer. Turner was a member of the American Board of Trial Advocates and was actively involved in the American Association for Justice (AAJ) including being a member of the Leaders Forum and President's Club and was a frequent speaker for AAJ CLE programs. He also served as a trustee on AAJ's National College of Advocacy. Turner was known for his open mind and heart; his generosity to family, friends, and strangers; and for the way he defined success. He was known for saying, "I think success is being able to know you've given it your very best and looking in a rearview mirror of life and saying I did my best." Turner is survived by his wife and law partner, Margaret Moses Branch; son Brian Branch and his wife Dawn Chavez Branch; daughter Rebecca Branch and her husband Clyde DeMersseman and grandchildren Nicholas, Samuel, Victoria and Branch.



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