

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

December 28, 2016 • Volume 55, No. 52



Like an Old Friend, by Barry Schwartz (see page 3)

www.flickr.com/photos/barryabq

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The partners of Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP,
are pleased to announce the firm's new name

ROTHSTEIN DONATELLI



to welcome our newest partners

April E. Olson, Donna M. Connolly, and Sarah E. Bennett

and to wish John C. Bienvenu well as he returns to solo practice

Established in 1976 by Bob Rothstein, the firm continues to provide the highest quality legal representation with an emphasis in the areas of criminal defense, civil rights, wrongful death, Indian law, and family law. Serving clients nationwide, with offices in New Mexico and Arizona.

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ALICIA C. LOPEZ (NM)

CAROLINE "KC" MANIERRE (NM)

PETER SCHOENBURG, Of Counsel (NM)

MARISSA J. MERCULIEFF, Of Counsel (AZ)

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Executive Director Joe Conte
 Communications and Member Services
 Program Manager Evann Kleinschmidt
 505-797-6087 • notices@nmbar.org
 Graphic Designer Julie Schwartz
 jschwartz@nmbar.org
 Account Executive Marcia C. Ulibarri
 505-797-6058 • mulibarri@nmbar.org
 Digital Print Center
 Manager Brian Sanchez
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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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Meetings

January 2017

- 3**
Bankruptcy Law Section Board
 Noon, U.S. Bankruptcy Court, Albuquerque
- 3**
Health Law Section Board
 9 a.m., teleconference
- 4**
Employment and Labor Law Section Board
 Noon, State Bar Center
- 6**
Criminal Law Section Board
 Noon, Kelley & Boone, Albuquerque

Workshops and Legal Clinics

January 2017

- 4**
Divorce Options Workshop
 6–8 p.m., State Bar Center, Albuquerque,
 505-797-6003
- 4**
Civil Legal Clinic
 10 a.m.–1 p.m., Second Judicial District
 Court, Albuquerque, 1-877-266-9861
- 25**
Consumer Debt/Bankruptcy Workshop
 6–9 p.m., State Bar Center, Albuquerque,
 505-797-6094

Cover Artist: Barry Schwartz photographs what he sees in daily life to bring out the unusual beauty of usual things. He especially likes shooting older buildings and businesses, salvage yards, ghost towns and cemeteries to preserve the beauty and ruggedness of the past. He uses angles, colors, lighting, shapes and shadows to bring out the uniqueness and beauty. Schwartz is a member of the Albuquerque Enchanted Lens Camera Club, which has been a great help with his photography. A summary of his photography is available at www.flickr.com/photos/barryabq.

Notices

COURT NEWS

New Mexico Supreme Court Commission on Access to Justice Meeting Notice

The next meeting of the Commission on Access to Justice is 12:30–4 p.m., Jan. 6, 2017, at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

Judicial Information Division E-Filing Fee Increase

Effective Jan. 1, 2017, the fees for E-filing in New Mexico will increase. File and serve fees will go from \$10 to \$12. File only fees will go from \$6 to \$8. The \$4 fee for serve only will be dropped to \$0.

First Judicial District Court New Policy for Lighters and Matches

Effective Jan. 1, 2017, cigarette lighters and/or matches will not be allowed in the courthouse. They should be left in the car or they will be confiscated.

Second Judicial District Court Notices of Mass Reassignment

Gov. Susana Martinez has announced the appointment of Jane Levy to fill the vacancy of Division XXV of the Second Judicial District Court. Effective Jan. 1, 2017, Judge Levy will be assigned Family Court cases previously assigned to Judge Elizabeth Whitefield. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Jan. 4, 2017, to excuse Judge Levy.

Pursuant to the Constitution of the State of New Mexico, Cindy Leos has been elected to Division IX of the Second Judicial District Court. Effective Jan. 1, 2017, Judge Leos will be assigned Criminal Court cases previously assigned to Judge David N. Williams, Division IX. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have ten days from Jan. 4, 2017, to excuse Judge Leos.

13th Judicial District Court New Clerk's Office Hours

The 13th Judicial District Court has new clerk's office hours. Beginning Jan. 3,

Professionalism Tip

With respect to other judges:

In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

2017, the clerk's office in Cibola, Sandoval and Valencia counties will be open to the public from 9 a.m.-noon and 1 p.m.-5 p.m., Monday to Friday.

Bernalillo County Metropolitan Court Notices of Mass Reassignment

Bernalillo County Metropolitan Court Chief Judge Henry A. Alaniz announced a mass reassignment of cases in Division II as a result of the recent election of Judge-Elect Christine E. Rodriguez. Pursuant to Rule 23-109 NMRA, effective Dec. 19, all Criminal Court cases previously assigned to Judge Chris J. Schultz were reassigned to Judge-elect Rodriguez. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 19 to excuse Judge-elect Rodriguez.

Chief Judge Alaniz announced the mass reassignment of cases in Division III as a result of the recent election of Judge-Elect Renée Torres. Pursuant to Rule 23-109 NMRA, Chief Judge Alaniz announced that effective Dec. 30, all Criminal Court cases previously assigned to Judge R. John Duran will be reassigned to Judge-elect Torres. Parties who have not yet exercised a peremptory excusal, pursuant to Supreme Court Rule 7-106 NMRA, will have 10 business days from Dec. 30 to excuse Judge-elect Torres.

U.S. District Court, District of New Mexico Federal Bar Dues for the District of New Mexico

Attorney federal bar dues (\$25) will be collected for calendar year 2017. Delinquent payments for prior years must still be made in order to maintain good standing. For information on making payments and checking on bar status, visit www.nmd.uscourts.gov/admissions.

STATE BAR NEWS

Attorney Support Groups

- Jan. 9, 2017, 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#.

- Feb. 6, 2017, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month but will not meet in January due to the New Years holiday.)
- Feb. 20, 2017, 7:30 a.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month but will not meet in January due to Martin Luther King Jr. Day.)

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

2017 Licensing Notification Due by Dec. 31

2017 State Bar licensing fees and certifications are due Dec. 31, 2016, and must be completed by Feb. 1, 2017, to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org/licensing. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6084 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Board of Bar Commissioners Commissioner Vacancies

Two vacancies exist on the Board of Bar Commissioners. Applicants should plan to attend the 2017 Board meetings scheduled for April 21, July 27 (Ruidoso, in conjunction with the annual meeting), Sept. 15 and Dec. 13, 2017 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte (jconte@nmbar.org) by Jan. 16, 2017.

A vacancy was created in the First Bar Commissioner District, representing

Bernalillo County, due to Julie Vargas' appointment to the bench. The Board will make the appointment at the Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2017.

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Jan. 27, 2017, meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2017. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply.

Committee on Women and the Legal Profession Nominations: 2016 Outstanding Advocacy for Women Award

Nominations for the 2016 Justice Pamela B. Minzner Outstanding Advocacy for Women Award are now open. Each year the Committee gives this award to a New Mexico attorney, male or female, who has distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. To make a nomination, submit one to three letters describing the work and accomplishments of the nominee to Zoe Lees at zoe.lees@modrall.com by Jan. 31, 2017. The award ceremony will be held on June 8, 2017. For more details about the award and previous recipients, visit www.nmbar.org/committeewomen.

Legal Services and Programs Committee Breaking Good Video Contest Seeks Sponsor

The Legal Services and Programs Committee will host the second annual Breaking Good Video Contest for 2016-2017. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The 2016-2017 prompt is "Who needs legal services in our country and why are they important?" The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes

awarded to first, second and third place student teams and the first place teacher sponsor. The Video Contest sponsor will be recognized during the presentation of the awards, to take place at the Albuquerque Bar Association Law Day Luncheon in early May and on all promotional material for the Video Contest. For more information regarding details about the prize scale and the Video Contest in general or additional sponsorship information, contact Breanna Henley at bhenley@nmbar.org.

UNM Law Library Hours Through Jan. 15, 2017

<i>Building & Circulation</i>	
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.
<i>Reference</i>	
Jan. 3–6, 2017:	
Tuesday–Thursday	9 a.m.–6 p.m.
<i>Closure</i>	
Dec. 23–Jan. 2, 2017	

OTHER BARS Albuquerque Lawyers Club Government Accountability Luncheon Presentation

New Mexico State Auditor Tim Keller will present "Holding the Government Accountable" at the Albuquerque Lawyers Club's next luncheon. The event will be at noon, Jan. 4, 2017, at Seasons Rotisserie & Grill in Albuquerque. Non-members are welcome. For more information about the Club and its luncheon events, visit albuquerquelawyersclub.com.

Federal Bar Association, New Mexico Chapter Save the Date for Chemerinsky Event in March

The New Mexico Chapter of the Federal Bar Association is pleased to have University of California Irvine School of Law Dean Erwin Chemerinsky return to Albuquerque. On March 31, 2017, Dean Chemerinsky will present his popular talk about the Supreme Court and its recent cases, "An Amazing Time in the Supreme Court." The talk will be presented at the Hotel Andaluz in downtown Albuquerque at lunchtime. CLE credit is pending. Save the date! For more information, email nmfedbar@gmail.com.

—Featured— **Member Benefit**



Members, their employees, and immediate family members can enjoy a discounted rate of approximately \$42/month (plus tax) with access to all five club locations, group fitness classes and free supervised child care.

Bring proof of SBNM membership.

Contact Shawn Gale,
sgale@defined.com or 505-814-2355.

Visit www.defined.com.



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Judges 888-502-1289

www.nmbar.org/JLAP

OTHER NEWS Workers' Compensation Administration Notice of Vacancy

The Director of the New Mexico Workers' Compensation Administration hereby announces the vacancy of an Administrative Law Judge effective April 1, 2017. The primary location of the position is in Albuquerque, New Mexico, with travel throughout the state. The agency is currently accepting applications and will begin the review process beginning Jan. 3, 2017. The application process will be ongoing until the vacancy is filled. For more information about this position, visit www.workerscomp.state.nm.us. The Workers' Compensation Administration is an Equal Opportunity Employer.

Legal Education

December

- | | | | | | |
|----|---|----|---|----|--|
| 28 | Human Trafficking
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org | 28 | Deposition Practice in Federal
Cases (2016)
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org | 29 | Trial Know-How (The Reboot)
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org |
| 28 | Journalism, Law and Ethics (2016
Annual Meeting)
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org | | | | |

January 2017

- | | | | | | |
|----|--|----|---|----|--|
| 5 | 2017 Wage & Hour Update: New
Overtime Rules
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 13 | The Law of Background Checks—
What Clients May/May “Check”
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 24 | Capital Contributions, Capital
Calls & Finance Provisions in
Companies
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org |
| 6 | 2017 Legislative Preview
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org | 17 | Property Management Agreements
in Commercial Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 25 | UCC Issues in Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org |
| 6 | “Saying Just Enough, But Not Too
Much”: Letters of Intent in Business
Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 19 | Trust and Estate Planning Issues in
Divorce
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 26 | Drafting Special Needs Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org |
| 12 | 2017 Uniform Commercial Code
Update—Everything You Need to
Know About the Past Year
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 20 | Lawyer Ethics and Texting
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 31 | Just Between Us: Drafting Effective
Confidentiality & Non-disclosure
Agreements
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org |

February 2017

- | | | | | | |
|---|--|---|--|----|---|
| 7 | 2017 Ethics Update, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 8 | 2017 Ethics Update, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org | 10 | Estate Planning for Digital Assets
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org |
|---|--|---|--|----|---|



A Message from State Bar President J. Brent Moore

Dear Members of the State Bar of New Mexico:

This past year I have been honored to serve as your State Bar President. It has been an incredible experience for me to serve in this capacity, and it is an experience that I will never forget. Meeting lawyers and legal professionals here in New Mexico and across the country has been a truly enriching experience, and I am thankful to have had this opportunity. This past year has made me even more proud to be a New Mexico native and a lawyer.

As we close out 2016, I am happy to report that the State Bar has had an excellent year, both financially and programmatically, and the State Bar is on a solid path for the future. The State Bar's finances and staffing are stable, solid, and ever improving. As I leave the presidency, I do so knowing that the future leaders of the State Bar will do an outstanding job representing the organization and its members. Scotty Holloman was recently sworn in as the 2017 president, with Wesley Pool and Jerry Dixon to follow. It's a stellar line up of State Bar leaders. In addition, you have an exemplary professional staff serving you with a strong commitment to serving members and the public.

I began my year as State Bar President by focusing on several specific goals. These goals were the development of the legal incubator for new lawyers, the rejuvenation and strengthening of the New Mexico State Bar Foundation, and the planning of an exceptional annual meeting. I'm happy to report that each of these goals were accomplished.

The legal incubator program, called Entrepreneurs in Community Lawyering, began operations in October. The program is running smoothly and gaining notoriety. As you may know, the program helps new lawyers start successful and profitable solo and small firm practices in an effort to increase legal services for underrepresented populations. ECL is serving in the areas of foreclosure and family law and is accepting referrals from legal service organizations and members. In 2017, please watch for updates on the program and for the first annual report from ECL.

The New Mexico State Bar Foundation is proving to be a successful friend-making and fund-raising entity. With its dynamic and personable director, Stephanie Wagner, the Bar Foundation has made tremendous progress in a short amount of time. The Bar Foundation is the charitable arm of the State Bar, and it is dedicated to providing services to the public and members. You can expect great things in the future from the Bar Foundation as it actively works to support and grow the legal community's commitment to access to justice and justice for all.

The greatest highlight of my year as State Bar President was welcoming Supreme Court Associate Justice Ruth Bader Ginsburg to the Annual Meeting at Buffalo Thunder last July. Justice Ginsburg began her remarks with a very moving tribute to the late Justice Antonin Scalia and offered her thoughtful insight on professionalism and friendship. Her message was that while we may be philosophically opposed we can still be respectful and even friends with those of differing views. The program then shifted to a "chat" with renowned New Mexico lawyer, Roberta Cooper Ramo. The chat between Justice Ginsburg and Roberta Ramo covered a range of topics and kept the 1,000 attendees engaged and enamored.

In closing, I am very proud of what the State Bar does for its members, the judicial system, the profession, and the public. I would encourage each member of the State Bar to look at the organization as a source of information, a place to connect with other lawyers, and an opportunity to enrich the legal profession. We have a tremendous opportunity to help shape and move the profession forward, and I strongly encourage you to be aware and get involved for the betterment of the State Bar organization and the legal profession as a whole.

Kind regards,

A handwritten signature in black ink that reads "J. Brent Moore". The signature is written in a cursive, slightly slanted style.

J. Brent Moore
President

2017 BOARD OF BAR COMMISSIONERS OFFICERS



Scotty Holloman is sworn in next to wife Terry by Justice Charles W. Daniels.

The 2017 officers Board of Bar Commissioners were sworn in on Dec. 14 at the New Mexico Supreme Court in Santa Fe by Chief Justice Charles W. Daniels. The officers are President Scotty A. Holloman, President-Elect Wesley O. Pool, Secretary-Treasurer Gerald G. Dixon and Immediate Past President J. Brent Moore.

After taking the oath, the officers, other bar commissioners and members of the Court headed over to the Inn at Loretto for a reception and the passing of the gavel. Congratulations to 2017's officers! We look forward to a great year.



Scotty Holloman was joined by (from left) father in law Jackie Payne, mother in law Kay Payne, sister in law Amy Payne, daughter in law Lacey Holloman, son Jacob Holloman, wife Terry Holloman, daughter Emily Holloman, son Aaron Holloman and father Ribble Holloman.



Wesley O. Pool is sworn in.



Gerald G. Dixon is sworn in.



2017 Officers Scotty Holloman, Wesley Pool, Brent Moore and Jerry Dixon

Opinions

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

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

Effective December 16, 2016

PUBLISHED OPINIONS

No. 34462	2nd Jud Dist Bernalillo CR-19-6029, STATE v D BREGAR (affirm)	12/13/2016
No. 34469	2nd Jud Dist Bernalillo CR-09-6029, STATE v D BREGAR (affirm)	12/13/2016

UNPUBLISHED OPINIONS

No. 34174	2nd Jud Dist Bernalillo LR-13-29, STATE v T CHAVEZ (reverse)	12/14/2016
No. 34156	8th Jud Dist Taos CR-13-135, STATE v E HERNANDEZ (vacate and remand)	12/15/2016
No. 34201	6th Jud Dist Hidalgo CR-14-12, STATE v D BECKNER (reverse)	12/15/2016
No. 35223	4th Jud Dist San Miguel JQ-13-5, CYFD v LUIS C Q (affirm)	12/15/2016
No. 35037	12th Jud Dist Otero CR-13-409, STATE v A JONES (affirm)	12/15/2016
No. 35760	1st Jud Dist Santa Fe CV-15-2588, CITY OF SANTA FE v 1988 BLUE CHEVY (reverse and remand)	12/15/2016

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

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

On December 13, 2016:
John Lomax Anderson
Ruhmann Law Firm
5915 Silver Springs Drive,
Bldg. 1
El Paso, TX 79912
915-845-4529
915-845-4534 (fax)
janderson@ruhmannlaw.com

On December 13, 2016:
John Brendan Campbell
400 Gold Avenue SW,
Suite 220
Albuquerque, NM 87102
505-629-8262
friendlylawsuits@gmail.com

On December 13, 2016:
Robert W. Haas
15906 Bayou River Court
Houston, TX 77079
713-724-0136
robhaasesq@aol.com

On December 13, 2016:
John Mark Ogden
Littler Mendelson, PC
2425 E. Camelback Road,
Suite 900
Phoenix, AZ 85016
602-474-3601
602-957-1801 (fax)
mogden@littler.com

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective December 12, 2016:
Linda Chmar
921 Amsterdam Avenue NE
Atlanta, GA 30306

Effective December 12, 2016:
Frank P. Dickson Jr.
500 Rodeo Road, Apt. 1014
Santa Fe, NM 87505

Effective December 9, 2016:
Dennis Fennell
568 Mt. Vernon Road
Newark, OH 43055

Effective December 12, 2016:
Nikolai N. Frant
Colorado Department of Law
1300 Broadway, 6th Floor
Denver, CO 80203

Effective December 12, 2016:
Bridget M. Gavahan
9921 Barrinson NE
Albuquerque, NM 87111

Effective December 12, 2016:
Jeffrey A. Goldberg
7990 Topeka Avenue, Unit 4
Cascade, CO 80909

Effective December 7, 2016:
Hugh E. Hegyi
101 W. Jefferson, Suite 714
Phoenix, AZ 85003

Effective December 9, 2016:
Sandra Trent Horton
8302 W. Roundup Trail
Flagstaff, AZ 86001

Effective December 12, 2016:
Susan Crill Simmons

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective November 30, 2016:
Gail Gottlieb
5621 Cometa Court NE
Albuquerque, NM 87111
505-250-1810
gailgottlieb1952@gmail.com

Effective December 1, 2016:
Marian Burge Hand
11729 Woodmar Lane NE
Albuquerque, NM 87111
505-501-5153
attorneymarianhand@gmail.com

Dated Dec. 14, 2016

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

Sarah J. Arellano
Goldberg & Loren, PA
500 Marquette Avenue NW,
Suite 1212
Albuquerque, NM 87102
505-369-3699
888-272-8822 (fax)
sarellano@goldbergloren.com

Erika Lorraine Friis Baylor
N.M. Children, Youth and
Families Department
1031 Lambertton Place NE
Albuquerque, NM 87107
505-469-5263
505-841-6524 (fax)
erika.baylor@state.nm.us

Armine Bldrian
Pacific Law Group
3769 Tibbetts Street, Suite A
Riverside, CA 92506
951-784-9999
951-784-3333 (fax)
armine081672@aol.com

Marc D. Blonstein
Berens Blonstein PLC
7033 E. Greenway Parkway,
Suite 210
Scottsdale, AZ 85254
480-624-2703
mblonstein@bkl-az.com

Kathleen Brockel
175 E. Seventh Avenue, #418
Denver, CO 80203
517-581-1873
kathleenbrockel@gmail.com

Brian Thomas Burris
1015 Whitneys Court
San Antonio, TX 78260
361-290-5090
bburris@burrisfirm.com

Douglas H. M. Carver
New Mexico Ethics Watch
PO Box 30586
Albuquerque, NM 87190
505-445-8222
dcarver@nmethicswatch.org

James P. Deacon
Law Office of Dorene A.
Kuffer, PC
500 Fourth Street NW, Suite 250
Albuquerque, NM 87102
505-924-1000
505-672-7768 (fax)
james@kufferlaw.com

Meryl Elizabeth Francolini
Office of the Second Judicial
District Attorney
520 Lomas Blvd. NW
Albuquerque, NM 87102
505-222-1133
mfrancolini@da2nd.state.nm.us

L. Bernice Galloway
Galloway Legal Group, PA
423 Sixth Street NW
Albuquerque, NM 87102
505-503-8970
505-214-5606 (fax)
berniceg@gallowaylegalgroup.com

David C. Kramer
Eric Ortiz & Associates
510 Slate Avenue NW
Albuquerque, NM 87102
505-720-0070
david@ericortizlaw.com

Jeneva Alicia LiRosi
2044 Galisteo Street, Suite 4
Santa Fe, NM 87505
505-476-8402
jeneva.lirosi@gmail.com

William C. Nedbalek
Nedbalek Law Office, LLC
PO Box 301
Carrizozo, NM 88301
575-524-4588
575-541-3009 (fax)
chris@ned4law.com

Clinton Patrick Nicley
N.M. Department of Finance
and Administration
407 Galisteo Street, Suite 180B
Santa Fe, NM 87501
505-827-3013
clinton.nicley@state.nm.us

Karla Kaye Poe
Moses, Dunn, Farmer
& Tuthill, PC
PO Box 27047
612 First Street NW (87102)
Albuquerque, NM 87125
505-843-9440
505-247-3213 (fax)
karla@moseslaw.com

Annabelle D. Quintana
Laguna Development
Corporation
14500 Central Avenue SW
Albuquerque, NM 87121
505-352-7945
aquentana@poldc.com

Gloria Diana Regensberg
N.M. Department of
Transportation
PO Box 1149
1120 Cerrillos Road (87505)
Santa Fe, NM 87504
505-827-5439
505-827-0709 (fax)
gloria.regensberg@state.nm.us

Courtney A. Schumacher
Brownstein Hyatt Farber
Schreck, LLP
201 Third Street NW, Suite 1700
Albuquerque, NM 87102
505-724-9582
cschumacher@bhfs.com

Lara C. Sundermann
Office of the City Attorney
PO Box 2248
One Civic Plaza NW (87102)
Albuquerque, NM 87103
505-768-4500
505-768-2525 (fax)
lsundermann@cabq.gov

Anna C. Swain
169 Ute Pass West Rd.
Durango, CO 81301
970-946-4605
annacswain@gmail.com

Teague Williams
3350 Thurmond Road
Las Cruces, NM 88012
575-649-5725
whimbur@gmail.com

**Jonathan Christopher
Worbington**
Worbington Law Firm, PLLC
PO Box 422103
Houston, TX 77242
713-485-4350
jonathan@worbingtonlaw.
com

Hon. Julie N. Altwies
910 Mountain Phlox Way
Bernalillo, NM 87004
505-977-5268
juliealtwies@aol.com

Judith A. Cregan
1917 Newport Avenue
Sacramento, CA 95822
530-388-0955
jcregan1@earthlink.net

Laurie A. Gallegos
The Trinity Law Firm
999 Central Avenue, Suite 316
Los Alamos, NM 87544
505-662-8955
505-214-5700 (fax)
laurie@thetrinitylawfirm.com

Arash Kashanian
13501 Sunset Canyon Blvd. NE
Albuquerque, NM 87111
631-805-0027
505-212-0279 (Fax)
asherkashanian@gmail.com

Amy L. Propps
Environment International
and Acadia Law PLLC
1305 NE 45th Street, Suite 206
Seattle, WA 98105
amy.propps@eilt.net

Rose Eileen Provan
2905 Vista Bonita
Santa Fe, NM 87505
provanbeau@msn.com

Kaili Gordon Rosett
PO Box 901421
Kula, HI 96790
kailirossett@gmail.com

Rebecca M. Salwin
828-A Onaha Street
Honolulu, HI 96816
becca.salwin@gmail.com

Andrew Sefzik
Strasburger & Price, LLP
2600 Dallas Parkway, Suite 600
Frisco, TX 75034
469-287-3989
469-227-6552 (fax)
andrew.sefzik@strasburger.com

Hon. Reed S. Sheppard
10 Bleu Lake Drive
Covington, LA 70435
541-782-7116
reedsheppard@aol.com

Robert J. Aragon
Aragon Moss Law LLP
2201 Menaul Blvd. NE
Albuquerque, NM 87107
505-872-3022
505-888-6040 (fax)
aragonmosslaw@outlook.com

Tyler W. Benting
Benting Law Firm, LLC
115 E. Ash Street
Deming, NM 88030
575-546-6300
575-546-4053 (fax)
tyler@bentinglaw.com

Steven Hugh Cummings
PO Box 808
Carlsbad, NM 88221
575-887-6686
575-885-0529 (fax)
steve@cummings-law.net

Robert H. Moss
Aragon Moss Law LLP
2201 Menaul Blvd. NE
Albuquerque, NM 87107
505-872-3022
505-888-6040 (fax)
aragonmosslaw@outlook.com

John A. Armijo
(john@cclawnm.com)
Donna L. Chapman
(donna@cclawnm.com)
Nicole Marie Charlebois
(nicole@cclawnm.com)
M. Clea Gutterson
(clea@cclawnm.com)
John Lovelace
(johnlovelace@cclawnm.com)
Ada B. Priest
(ada@cclawnm.com)
Jessica Singer
(jessica@cclawnm.com)
Chapman and Charlebois, PC
PO Box 92438
4100 Osuna Road NE,
Suite 2-202 (87109)
Albuquerque, NM 87199
505-242-6000
505-213-0561 (fax)

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 December 28, 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

(except where noted differently: 12/31/2016)

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

1 007.2	Time limit for filing motion to compel arbitration	
1 009	Pleading special matters	07/01/2017
1 017	Parties plaintiff and defendant; capacity	07/01/2017
1 023	Class actions	
1 054	Judgments; costs	
1 055	Default	07/01/2017
1 060	Relief from judgment or order	07/01/2017
1 079	Public inspection and sealing of court records	05/18/2016
1 083	Local rules	
1 093	Criminal contempt	
1 096	Challenge of nominating petition	
1 104	Courtroom closure	
1 120	Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants	
1 128	Uniform collaborative law rules; short title; definitions; applicability	
1 131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
1 128.1	Collaborative law participation agreement; requirements	
1 128.2	Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer	
1 128.3	Proceedings pending before tribunal; status report; dismissal	
1 128.4	Emergency order	
1 128.5	Adoption of agreement by tribunal	
1 128.6	Disqualification of collaborative lawyer and lawyers in associated law firm	
1 128.7	Disclosure of information	
1 128.8	Standards of professional responsibility and mandatory reporting not affected	
1 128.9	Appropriateness of collaborative law process	
1 128.10	Coercive or violent relationship	
1 128.11	Confidentiality of collaborative law communication	
1 128.12	Privilege against disclosure for collaborative law communication; admissibility; discovery	

1 128.13 Authority of tribunal in case of noncompliance

RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS

2 110	Criminal contempt
2 114	Courtroom closure
2 305	Dismissal of actions
2 702	Default
2 705	Appeal

RULES OF CIVIL PROCEDURE FOR THE METROPOLITAN COURTS

3 110	Criminal contempt
3 114	Courtroom closure
3 204	Service and filing of pleadings and other papers by facsimile
3 205	Electronic service and filing of pleadings and other papers
3 702	Default

CIVIL FORMS

4 204	Civil summons	
4 226	Civil complaint provisions; consumer debt claims	07/01/2017
4 306	Order dismissing action for failure to prosecute	
4 309	Thirty (30) day notice of intent to dismiss for failure to prosecute	
4 310	Order of dismissal for failure to prosecute	
4 702	Motion for default judgment	
4 702A	Affirmation in support of default judgment	
4 703	Default judgment; judgment on the pleadings	
4 909	Judgment for restitution	
4 909A	Judgment for restitution	
4 940	Notice of federal restriction on right to possess or receive a	05/18/2016
4 982	Withdrawn	
4 986	Withdrawn	
4 989	Withdrawn	
4 990	Withdrawn	

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

5 102	Rules and forms	
5 104	Time	
5 112	Criminal contempt	
5 123	Public inspection and sealing of court records	05/18/2016
5 124	Courtroom closure	
5 304	Pleas	
5 511	Subpoena	
5 511.1	Service of subpoenas and notices of statement	
5 614	Motion for new trial	

5 615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/2016
5 801	Reduction of sentence	

**RULES OF CRIMINAL PROCEDURE FOR THE
MAGISTRATE COURTS**

6 102	Conduct of court proceedings	
6 109	Presence of the defendant	
6 111	Criminal contempt	
6 116	Courtroom closure	
6 201	Commencement of action	
6 209	Service and filing of pleadings and other papers	
6 506	Time of commencement of trial	05/24/2016
6 601	Conduct of trials	

**RULES OF CRIMINAL PROCEDURE FOR THE
METROPOLITAN COURTS**

7 109	Presence of the defendant	
7 111	Criminal contempt	
7 115	Courtroom closure	
7 201	Commencement of action	
7 209	Service and filing of pleadings and other papers	
7 304	Motions	
7 506	Time of commencement of trial	05/24/2016
7 606	Subpoena	

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

8 102	Conduct of court proceedings	
8 108	Presence of the defendant	
8 110	Criminal contempt	
8 114	Courtroom closure	
8 201	Commencement of action	
8 208	Service and filing of pleadings and other papers	
8 506	Time of commencement of trial	05/24/2016
8 601	Conduct of trials	

CRIMINAL FORMS

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/2016
9 611	Withdrawn	
9 612	Order on direct criminal contempt	
9 613	Withdrawn	

CHILDREN’S COURT RULES AND FORMS

10 103	Service of process	
10 163	Special masters	
10-166	Public inspection and sealing of court records	05/18/2016
10 168	Rules and forms	
10-171	Withdrawn	05/18/2016
10-315	Custody hearing	11/28/2016
10-318	Placement of Indian children	11/28/2016
10 322	Defenses and objections; when and how presented; by pleading or motion	
10 325	Notice of child’s advisement of right to attend hearing	
10 340	Testimony of a child in an abuse or neglect proceeding	
10 408A	Withdrawn	

10 413	Withdrawn	
10 414	Withdrawn	
10 417	Withdrawn	
10 502	Summons	
10-521	ICWA notice	11/28/2016
10 560	Subpoena	
10 570	Notice of child’s advisement of right to attend hearing	
10 571	Motion to permit testimony by alternative method	
10-604	Withdrawn	05/18/2016
10 701	Statement of probable cause	
10 702	Probable cause determination	
10 703	Petition	
10 704	Summons to child Delinquency Proceeding	
10 705	Summons to parent or custodian or guardian – Delinquency Proceeding	
10 706	Order of appointment of attorney for child and notice and order to parent(s), guardian(s), or custodian(s)	
10 707	Eligibility determination for indigent defense services	
10 711	Waiver of arraignment and denial of delinquent act	
10 712	Plea and disposition agreement	
10 713	Advice of rights by judge	
10 714	Consent decree	
10 715	Motion for extension of consent decree	
10 716	Judgment and Disposition	
10 717	Petition to revoke probation	
10 718	Sealing order	
10 721	Subpoena	
10 722	Affidavit for arrest warrant	
10 723	Arrest warrant	
10 724	Affidavit for search warrant	
10 725	Search warrant	
10 726	Bench warrant	
10 727	Waiver of right to have a children’s court judge preside over hearing	
10 731	Waiver of arraignment in youthful offender proceedings	
10 732	Waiver of preliminary examination and grand jury proceeding	
10 741	Order for evaluation of competency to stand trial	
10 742	Ex parte order for forensic evaluation	
10 743	Order for diagnostic evaluation	
10 744	Order for pre dispositional diagnostic evaluation	
10 745	Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel)	

Rule Set 10 Table Table of Corresponding Forms

On June 27, 2016, the Court issued Order No. 16-8300-003 provisionally approving amendments to Rule 10-166 NMRA and provisionally approving new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. On November 28, 2016, the Court issued Order No. 16-8300-037, withdrawing the provisionally-approved amendments to Rule 10-166 NMRA and the provisionally-approved new Rule 10-171 NMRA and new Form 10-604 NMRA, effective retroactively to May 18, 2016. Accordingly, Rule 10-166 NMRA has been restored to the version approved by Order No. 11-8300-010, and Rule 10-171 and Form 10-604 have been withdrawn.

RULES OF EVIDENCE			
11-803	Exceptions to the rule against hearsay – regardless of whether the declarant is available as a witness	14 304	Aggravated assault; attempted battery with a deadly weapon; essential elements
		14 306	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
RULES OF APPELLATE PROCEDURE			
12 101	Scope and title of rules	14 308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
12 201	Appeal as of right; when taken	14 310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
12 202	Appeal as of right; how taken		
12 203	Interlocutory appeals	14 311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
12 203.1	Appeals to the Court of Appeals from orders granting or denying class action certification	14 313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
12 204	Appeals from orders regarding release entered prior to a judgment of conviction	14 351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
12 206	Stay pending appeal in children’s court matters	14 353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
12 206.1	Expedited appeals from children’s court custody hearings	14 354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
12 208	Docketing the appeal	14 356	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements
12 209	The record proper (the court file)		
12 302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number	14 358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
12 305	Form of papers prepared by parties.	14 360	Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
12 309	Motions		
12 310	Duties of clerks	14 361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
12 317	Joint or consolidated appeals	14 363	Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
12 318	Briefs		
12 319	Oral argument	14 371	Assault; attempted battery; “household member”; essential elements
12 320	Amicus curiae	14 373	Assault; attempted battery; threat or menacing conduct; “household member”; essential elements
12 321	Scope of review; preservation	14 374	Aggravated assault; attempted battery with a deadly weapon; “household member”; essential elements
12 322	Courtroom closure	14 376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; “household member”; essential elements
12 402	Issuance and stay of mandate	14 378	Aggravated assault; attempted battery with intent to commit a felony; “household member”; essential elements
12 403	Costs and attorney fees		
12 404	Rehearings	14 380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; “household member”; essential elements
12 501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus	14 381	Assault; attempted battery with intent to commit a violent felony; “household member”; essential elements
12 503	Writs of error		
12 504	Other extraordinary writs from the Supreme Court	14 383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; “household member”; essential elements
12 505	Certiorari from the Court of Appeals regarding district court review of administrative decisions	14 990	Chart
12 601	Direct appeals from administrative decisions where the right to appeal is provided by statute		
12 602	Appeals from a judgment of criminal contempt of the Court of Appeals		
12 604	Proceedings for removal of public officials within the jurisdiction of the Supreme Court		
12 606	Certification and transfer from the Court of Appeals to the Supreme Court		
12 607	Certification from other courts to the Supreme Court		
12 608	Certification from the district court to the Court of Appeals		
UNIFORM JURY INSTRUCTIONS – CIVIL			
13-1830	Measure of damages; wrongful death (including loss of consortium)		
UNIFORM JURY INSTRUCTIONS – CRIMINAL			
14 301	Assault; attempted battery; essential elements		
14 303	Assault; attempted battery; threat or menacing conduct; essential elements		

14 991	Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements
14 992	Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements
14 993	Providing false information when registering as a sex offender; essential elements
14 994	Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements
14 2200	Assault on a peace officer; attempted battery; essential elements
14 2200A	Assault on a peace officer; threat or menacing conduct; essential elements
14 2200B	Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements
14 2201	Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements
14 2203	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements
14 2204	Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements
14 2206	Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements
14 2207	Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements
14 2209	Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 3106	Possession of a dangerous drug
14 4503	Driving with a blood or breath alcohol concentration of eight one hundredths (.08) or more; essential elements
14 4506	Aggravated driving with alcohol concentration of (.16) or more; essential elements
14 5120	Ignorance or mistake of fact

RULES GOVERNING ADMISSION TO THE BAR

15 104	Application
15 205	Grading and Scoring
15 302	Admission to practice

RULES OF PROFESSIONAL CONDUCT

16-108	Conflict of interest; current clients; specific rules
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RULES GOVERNING DISCIPLINE

17 202	Registration of attorneys
17 204	Trust accounting
17 208	Incompetency or incapacity
17 214	Reinstatement

RULES GOVERNING THE CLIENT PROTECTION FUND

17A-005	Composition and officers of the commission
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**RULES GOVERNING THE
UNAUTHORIZED PRACTICE OF LAW**

17B 005	Civil injunction proceedings
17B 006	Determination by the Supreme Court

**RULES GOVERNING THE RECORDING OF
JUDICIAL PROCEEDINGS**

22 101	Scope; definitions; title
22 204.1	Temporary Certification for Court Reporters

SUPREME COURT GENERAL RULES

23 107	Broadcasting, televising, photographing, and recording of court proceedings; guidelines
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RULES GOVERNING THE NEW MEXICO BAR

24 101	Board of Bar Commissioners
24 102	Annual license fee
24 110	“Bridge the Gap: Transitioning into the Profession” program
24 111	Emeritus attorney

**RECOMPILED AND AMENDED LOCAL RULES FOR
THE FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH,
SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH,
TWELFTH, AND THIRTEENTH JUDICIAL DISTRICT
COURTS**

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

From the New Mexico Supreme Court and Court of Appeals

Certiorari Denied, September 22, 2016, No. S-1-SC-36064

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-086

No. 34,083 (filed July 13, 2016)

MARVIN ARMIJO,
Plaintiff-Appellee,
v.
CITY OF ESPAÑOLA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY

FRANCIS J. MATHEW, District Judge

DIANE GARRITY
SERRA & GARRITY, P.C.
Santa Fe, New Mexico

VIRGINIA ANDERMAN
MILLER STRATVERT P.A.
Albuquerque, New Mexico
for Appellant

MARGARET KEGEL
KEGEL LAW OFFICES
Santa Fe, New Mexico
for Appellee

Opinion

M. Monica Zamora, Judge

{1} Appellant, the City of Española (the City), appeals from a judgment in favor of Plaintiff, Marvin Armijo. After the City's grievance board determined that the City had just cause to terminate Armijo, Armijo appealed the grievance board's decision in district court. While that appeal was pending, Armijo also filed a separate complaint against the City in district court alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The district court entered a judgment in favor of Armijo on the breach of contract claim. The administrative appeal was dismissed by the district court.

{2} The City appeals from the district court's judgment, arguing that: (1) Armijo's breach of contract claim was barred by the doctrine of claim preclusion; (2) the district court erred in allowing Armijo to bring a claim for breach of implied employment contract because Armijo had not yet exhausted his administrative remedies; and (3) the district court erred in considering issues related to the collective

bargaining agreement between the City and the police union. We hold that Armijo was barred from bringing the separate claim for breach of contract in the district court and reverse.

BACKGROUND

{3} In 2008 Armijo was employed as a police officer for the City. In September 2008 Armijo received a payroll deposit, which included a miscellaneous payment in the amount of \$2,399.52. In the spring of 2009, the unexplained deposit came to light during an audit of the City's payroll records. The City's finance director discovered unexplained payroll disbursements. Concerning Armijo's miscellaneous payment, Armijo's supervisor determined that Armijo was authorized to receive \$958.49 of the \$2,399.52 due to a retroactive pay increase. However, the remaining \$1,441.03 was considered an unauthorized overpayment. In July 2009, Armijo was terminated for failing to report and repay the overpayment.

{4} Armijo appealed pursuant to the City's grievance policy. Following a hearing, a grievance board hearing officer upheld the decision to terminate Armijo's employment. In November 2009, Armijo

appealed that decision to the district court pursuant to Rule 1-074 NMRA (governing appeals to the district court of administrative agency decisions when there is a statutory right to appeal).

{5} In August 2011 Armijo filed this separate action against the City for, among other things, breach of contract. In June 2012 Armijo amended his complaint alleging breach of implied contract and breach of the covenant of good faith and fair dealing. Twice the district court denied motions by the City to stay the proceedings in the breach of contract suit due to the pending administrative appeal. Following a trial on the merits, the district court found that the City breached its implied contract with Armijo by failing to provide correct notice regarding his hearing rights, and by failing to follow its internal policies, which required the City to initiate an internal affairs investigation. The district court entered judgment in favor of Armijo on the breach of contract claim and awarded Armijo approximately \$40,000 in lost wages and \$10,000 in consequential damages.

{6} Armijo filed a motion for reinstatement in the pending administrative appeal, arguing that the district court's judgment in the contract action was binding in the administrative appeal under the doctrine of issue preclusion. In his motion, Armijo seeks reinstatement to his former position as well as restoration of his retirement benefits and lost wages. The City is appealing the district court's judgment in favor of Armijo on his contract claim.

DISCUSSION

Claim Preclusion

{7} As a preliminary matter we briefly address the City's argument that we must determine whether Armijo exhausted his administrative remedies before we can determine whether Armijo's contract claim is barred under the doctrine of claim preclusion. The City asserts that Armijo's administrative remedies have not been exhausted since the administrative appeal is still pending in district court. The City argues that because the issues raised in Armijo's contract claim are the same as the issues raised in the pending administrative appeal, the district court should not have allowed Armijo to proceed with his contract claim until a final decision was issued in the administrative appeal. Armijo contends that his administrative remedies were exhausted once the grievance board's

decision was issued, citing the City's personnel handbook, which provides that the grievance board's decision is the final step in the administrative process.

{8} We need not decide whether or at what point Armijo exhausted his administrative remedies because, for the purposes of claim preclusion, the grievance board's decision is considered a final judgment. See *Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 1993-NMSC-015, ¶ 12, 115 N.M. 293, 850 P.2d 996 (holding that a court may apply claim preclusion to decisions of administrative or quasi-judicial bodies acting within the scope of their authority); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 19, 124 N.M. 479, 952 P.2d 474 (holding that a decision by the city's grievance board was a final judgment for purposes of precluding a municipal employee's subsequent contract claim).

{9} Our application of claim preclusion in this case focuses instead on whether Armijo has had a full and fair opportunity to litigate issues arising out of his claims. See *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87 (“[Claim preclusion] precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim.” (internal quotation marks and citation omitted)). The purpose of applying claim preclusion “is to protect individuals from multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent judgments.” *Moffat v. Branch*, 2002-NMCA-067, ¶ 14, 132 N.M. 412, 49 P.3d 673. A party asserting claim preclusion “must establish that (1) there was a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties in the two suits are the same, and (4) the cause of action is the same in both suits.” *Potter v. Pierce*, 2015-NMSC-002, ¶ 10, 342 P.3d 54.

{10} There is no question that the parties in the administrative action and the contract action are the same. And as we previously discussed, for the purposes of claim preclusion, the grievance board decision is a final judgment on the merits. Thus, at issue here is whether the cause of action is the same in both proceedings. To answer this question “we apply the transactional test from the Restatement (Second) of Judgments § 24(2) (1982).” *Chavez*, 1998-NMCA-004, ¶ 22. “This approach disregards the specific legal theories or claims that were or were not invoked in a prior action[.]” *Moffat v. Branch*, 2005-NMCA-103, ¶ 17, 138 N.M.

224, 118 P.3d 732. Instead, we “engage in a pragmatic assessment of the transaction, with a ‘transaction’ being described as a natural grouping or common nucleus of operative facts.” *Id.* (internal quotation marks and citation omitted).

{11} Here, the operative facts of both actions are centered around the terms and conditions of Armijo's employment and the circumstances surrounding his termination. As the basis for his contract claim, Armijo asserted that the City, through its policies and procedures, created an implied contract, and that the City breached the implied contract when it failed to follow its own policies and procedures during the disciplinary and termination process. Specifically, Armijo claimed that the City dismissed him without just cause and that the City breached its implied contract with him by: failing to address his claim that he thought the money was properly deposited in connection with a retroactive pay differential; failing to conduct an internal investigation concerning the deposit; failing to notify him of the deposit discrepancy before initiating discipline; failing to follow its progressive discipline policy; and failing to recognize that he repaid the City for the overpayment.

{12} The decision of the grievance board hearing officer is of record; however, the record on appeal does not contain a record of the grievance board hearing. The decision indicates that the hearing officer considered the propriety of Armijo's termination, as well as the City's adherence to its disciplinary policies and procedures. The hearing officer specifically found that Armijo's termination was imposed for just cause and in accordance with the City's personnel rules. The questions addressed by the hearing officer overlap with the questions addressed in Armijo's contract action in that their disposition requires an examination of the facts surrounding Armijo's termination and of the City's personnel policies. Accordingly, we conclude that the claims arose from the same transaction.

{13} Where “two actions are the same under the transactional test and all other elements are met, [claim preclusion] bar[s] a subsequent action [if] the plaintiff could and should have brought the claim in the former proceeding.” *Potter*, 2015-NMSC-002, ¶ 15. Claim preclusion “is a judicial creation ultimately intended to serve the interests of justice.” *Kirby*, 2010-NMSC-014, ¶ 65. The essence of claim preclusion is the parties' full and fair opportunity to

litigate the issues. *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 11, 139 N.M. 99, 128 P.3d 1076.

{14} Claim preclusion “reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so.” *Id.* (internal quotation marks and citation omitted). Our application of claim preclusion “does not depend upon whether the claims arising out of the same transaction were actually asserted in the original action, as long as they could have been asserted.” *Id.* ¶ 10 (internal quotation marks and citation omitted). In the present case, Armijo's contract claim was based on his assertions that the City failed to follow the policies and procedures set forth in its personnel handbook. These issues were within the purview of the grievance board hearing officer. Armijo was able to raise his contract claims during the grievance board proceeding, and “in the interest of judicial economy [he] should have done so.” *Chavez*, 1998-NMCA-004, ¶ 28; see *Mascarenas v. City of Albuquerque*, 2012-NMCA-031, ¶¶ 27-28, 274 P.3d 781 (recognizing that claim preclusion bars a claim that the plaintiff could have and should have asserted in a prior action).

{15} Armijo argues that he could not have asserted his contract claim before the grievance board because the board's hearing officer was limited in what it could consider. We disagree. Based on the record before us it appears that the City's personnel policy handbook requires the hearing officer to submit findings of fact and a decision to the human resources director within ten days of the closure of the grievance hearing record. According to the handbook, “[t]he [h]earing [o]fficer may take one of the following actions: [(1) a]ccept the [d]epartment [d]irector's decision; [(2) m]odify the [d]epartment [d]irector's decision; [(3) r]eject the [d]epartment [d]irector's decision.” Nothing in the record indicates that the hearing officer is precluded from considering all of the facts and arguments available to Armijo in his breach of contract claims.

{16} We reject Armijo's contention that *Deflon v. Sawyers*, 2006-NMSC-025, 139 N.M. 637, 137 P.3d 577, and *State ex rel. Peterson v. Aramark Correctional Services, LLC*, 2014-NMCA-036, 321 P.3d 128, are analogous to this case and are instructive concerning the applicability of claim preclusion to employment claims. Both *Deflon* and *Peterson* are distinguishable. In both cases, claim preclusion was not applied because the parties in the first and

subsequent actions were not the same. See *Deflon*, 2006-NMSC-025, ¶ 27 (“Because privity does not exist between the present [d]efendants and the defendant in the federal lawsuit, [claim preclusion] does not bar [the p]laintiff’s state court lawsuit.”); *Peterson*, 2014-NMCA-036, ¶ 33 (holding that claim preclusion did not apply where the “[p]laintiff’s capacity in the two lawsuits differed”). As a result, an analysis of the remaining claim preclusion elements was unnecessary. See *Peterson*, 2014-NMCA-036, ¶ 33 (explaining that unless all four elements are met, claim preclusion does not bar a subsequent lawsuit; consequently, the parties’ remaining claim preclusion arguments are not considered). Analyzing the elements of *issue* preclusion, which are distinct from the elements of claim preclusion, the courts in both *Deflon* and *Peterson* determined that the plaintiffs’ claims were not precluded since the relevant issues to the subsequent actions were not litigated or necessarily decided in the prior actions. See *Deflon*, 2006-NMSC-025, ¶ 27; *Peterson*, 2014-NMCA-036, ¶ 49.

{17} Here, issue preclusion has not been raised. As to claim preclusion, there is no question that the parties are the same; therefore, an analysis of the elements was required. Having considered those elements, we conclude that claim preclusion does apply; that the issues raised in an administrative appeal and in the contract claim arise from the same transaction; and that Armijo had a full and fair opportunity to litigate his contract claim in the grievance proceeding.

{18} To the extent that Armijo relies on *Madrid v. Village of Chama*, 2012-NMCA-071, 283 P.3d 871, for the proposition that he may seek redress for the City’s failure to provide procedural protections during the grievance board proceeding, we are not persuaded. *Madrid* is both factually and procedurally distinguishable from the present case.

{19} In *Madrid*, the plaintiff was discharged from his employment with the Village of Chama. *Id.* ¶ 2. The plaintiff requested a post-termination hearing in order to contest the allegations that led to his termination. *Id.* The appeal hear-

ing was treated by the Village Council as a pre-termination hearing. *Id.* The next day, a letter was issued stating that the plaintiff was terminated at that time, even though the plaintiff had been terminated approximately one week prior and had not received any income from the Village since then. *Id.* The plaintiff then appealed the second termination decision, and a post-termination hearing was conducted. *Id.* ¶ 3. The Village Council voted in favor of discharging the plaintiff from his position. *Id.*

{20} The plaintiff did not appeal that decision to the district court. *Id.* Instead, he filed a complaint for breach of implied contract, breach of the covenant of good faith and fair dealing, and wrongful discharge. *Id.* ¶ 4. Without a hearing, the district court granted the Village’s motion to dismiss the complaint pursuant to Rule 1-012(B)(6) NMRA. *Madrid*, 2012-NMCA-071, ¶¶ 4-5. The plaintiff appealed to this Court. *Id.* The relevant question in *Madrid* was whether the district court had jurisdiction to hear the claims brought in an original complaint rather than in a Rule 1-075 NMRA appeal. *Madrid*, 2012-NMCA-071, ¶ 5. We concluded that the applicable ordinance in that case did not preclude the plaintiff from seeking compensatory damages in a separate contract claim. *Id.* ¶ 11. Our decision was based on the fact that the ordinance “[d]id not state what administrative remedies [we]re afforded to an aggrieved employee, and it contain[ed] no express language that the remedies [we]re or [we]re not exclusive.” *Id.* And unlike the City’s personnel policies at issue in this case, the ordinance at issue in *Madrid* did not provide for the modification of an adverse employment action. *Id.*

{21} Here, Armijo was afforded the opportunity to seek modification of the decision to terminate his employment. He has also availed himself of the opportunity to appeal the grievance board’s decision pursuant to Rule 1-074, which is the appropriate procedural mechanism for challenging an administrative decision. See *Paule v. Santa Fe Cty. Bd. of Cty. Comm’rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117

P.3d 240 (stating that in reviewing administrative decisions, reviewing courts must determine “whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the agency’s decision is supported by substantial evidence; or whether the agency acted in accordance with the law”). However, Armijo also filed this contract claim in a separate proceeding in a different tribunal, which arose out of the same transaction. Then, after obtaining a favorable ruling on his contract claim, Armijo attempted to use the district court’s judgment to preclude an adverse ruling in the administrative appeal.

{22} This is precisely the type of situation that the doctrine of claim preclusion seeks to avoid. See *Moffat*, 2002-NMCA-067, ¶ 14 (“The purpose of our application of [claim preclusion] is to protect individuals from multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent judgments.”); cf. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶¶ 1, 24, 142 N.M. 786, 171 P.3d 300 (holding that a declaratory judgment action cannot be used “to circumvent established procedures for seeking judicial review of a municipality’s administrative decisions” and recognizing “no sound judicial policy for allowing a party aggrieved by an administrative decision to forego [sic] an available avenue of judicial review only to allow that same party to initiate judicial review in another form at some future date that no one can predict or rely upon with any certainty. Indeed, the efficient administration of justice requires just the opposite”). Armijo could have and should have brought all his claims related to his termination before the hearing officer in the interest of judicial economy.

CONCLUSION

{23} For the foregoing reasons we conclude that claim preclusion barred Armijo’s breach of contract claim. We reverse.

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

M. MONICA ZAMORA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL D. BUSTAMANTE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-087

No. 33,370 (filed July 21, 2016)

HENRY P. MARQUEZ,
Plaintiff-Appellee,

v.

FRANK LARRABEE and LARRABEE, INC., a New Mexico Corporation,
G&D CONSTRUCTION, INC., a New Mexico Corporation,
and MELVILLE HEDGES, and
JUANITA GAIL HEDGES, husband and wife, GALEN LARRABEE,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY

GEORGE P. EICHWALD, District Judge

DAVID A. GARCIA
BARNETT LAW FIRM
Albuquerque, NM
for Appellee

NANCY L. SIMMONS
AMANDA LAVIN
LAW OFFICES OF NANCY L. SIM-
MONS, P.C.
Albuquerque, NM
for Appellants

Opinion

J. Miles Hanisee, Judge

{1} Defendants-Appellants G & D Construction, Inc., Melville Hedges, Juanita Gail Hedges, Frank Larrabee and Larrabee Inc. appeal from the district court's denial of their motion to set aside a default judgment under Rule 1-060(B)(6) NMRA. The district court entered the default judgment as a sanction pursuant to Rule 1-037(B)(2)(c) NMRA and awarded Plaintiff compensatory and punitive damages as well as attorney fees and costs. Although the conduct of Defendants' attorney may have warranted the district court's sanction, we hold that the district court abused its discretion in denying Defendant's motion to set aside the default judgment without making findings of fact as to Defendants' own diligence in pursuing their defenses and awareness of their attorney's conduct. We therefore vacate the district court's default judgment and remand this case for further proceedings.

BACKGROUND

{2} Plaintiff's lawsuit alleges that Defendants sold a house to Plaintiff that suffered from numerous construction defects in violation of various warranties that Defen-

dants had made to Plaintiff in the purchase agreement and other documents. Shortly after discovery began, it became apparent that Defendants' attorney, Peter Everett IV, was incapable of discharging his responsibilities as Defendants' representative and an officer of the court.

{3} From September 2012 and throughout the duration of the underlying litigation, Mr. Everett underwent several major surgeries and was under the influence of narcotic pain killers at the direction of his physician. Mr. Everett also explained that he represented Defendants Gail and Melville Hedges (the Hedges) during the negotiations with Plaintiff for the purchase of the home that became the subject of the litigation. As Mr. Everett acknowledged, this rendered him a fact witness, prohibiting him from representing any of the parties named as Defendants in Plaintiff's lawsuit. The record thus reflects Mr. Everett's own concern that his status as a fact witness and his use of narcotic pain killers undermined his ability to adequately discharge his duties as an advocate on all of his clients' behalf.

{4} Despite his concerns, however, Mr. Everett did not withdraw from represent-

ing Defendants or seek to obtain substitute counsel. Mr. Everett went on to file numerous frivolous motions and other pleadings, refused to participate in discovery, and failed to appear for scheduled hearings on important pretrial motions and discovery matters. Mr. Everett also verbally abused and threatened Plaintiff's attorney in open court, attacked the integrity of the district court, and otherwise acted in a matter unbecoming of a licensed attorney, who is an officer of the court as well as his clients' advocate. *See In re Chavez*, 2013-NMSC-008, ¶ 26, 299 P.3d 403.

{5} The district court's decision to enter a default judgment against Defendants was ultimately occasioned by Plaintiff's inability to obtain discovery. Repeatedly, Defendants had failed to appear for depositions and failed to produce documents requested by Plaintiff. This gave rise to several motions to compel, which the district court granted.¹ Still, Defendants failed to appear at depositions or produce documents that the district court ordered, and eventually Plaintiff moved the district court to enter a default judgment against Defendants for failing to comply with an order compelling discovery. *See* Rule 1-037(B)(2)(c) ("If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make . . . an order . . . rendering a judgment by default against the disobedient party[.]"). The district court scheduled a hearing on the motion, notice of which was sent both to Mr. Everett and Defendants personally. Neither Defendants nor Mr. Everett appeared at the hearing, and the district court granted Plaintiff's motion for a default judgment. The court scheduled another hearing on the amount of damages that Plaintiff ought to be awarded, notice of which was again served on both Mr. Everett and Defendants personally. Neither Defendants nor Mr. Everett appeared at the damages hearing. On May 30, 2013, the district court entered a default judgment against Defendants in Plaintiff's favor and awarded Plaintiff \$648,124.27 in compensatory damages, unpaid court sanctions in the amount of \$3,150, attorney fees of \$48,255.87, and punitive damages in the amount of \$300,000 for "willfully and intentionally thwarting every effort by the Plaintiff in its discovery process."

¹The record is unclear as to whether Defendants were ever personally served with the subpoenas or the district court's order granting Plaintiff's motions to compel.

{6} On June 7, 2013, Defendants filed a motion to set aside the default judgment. The district court held a hearing on the motion on September 20, 2013. At the hearing, Mr. Everett explained that he was in intensive care when the district court heard arguments on Plaintiff's motion for a default judgment. Mr. Everett also appeared to dispute Plaintiff's claim that he had not participated in discovery, saying that Defendants had "responded to every bit of discovery[,] but that "Mr. Larrabee had no other documents to give." The district court did not accept Mr. Everett's explanation, and refused to set aside its default judgment against Defendants. Defendants now appeal the district court's denial of their motion to set aside the default judgment.

DISCUSSION

{7} Defendants raise four issues on appeal: (1) whether a default judgment was an appropriate sanction under Rule 1-037; (2) whether the district court abused its discretion in refusing to grant Defendants' motion to set aside the default judgment under Rule 1-060(B)(6); (3) whether Rule 1-037 permits the assessment of punitive damages as a sanction for discovery violations; and (4) whether the district court abused its discretion in awarding Plaintiff attorney fees and costs as a sanction under Rule 1-037.

{8} As an initial matter, we note that Rule 12-201(A)(2) NMRA requires a party to file a notice of appeal in the district court "within thirty (30) days after the judgment or order appealed from." But the filing of a motion to set aside a judgment under Rule 1-060 does not toll the period of time for filing a notice of appeal. See Rule 1-060(B)(6); see also *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2007-NMCA-011, ¶ 14, 140 N.M. 920, 149 P.3d 1017 (noting that motions under Rule 1-060(B)(6) do not fall within the enumerated exceptions in Rule 12-201(D) and (E)(4) to Rule 12-201(A)(2)'s thirty day deadline for filing a notice of appeal).²

{9} In this case, Defendants filed a notice of appeal on November 8, 2013, nearly five months after the district court entered its default judgment. Thus, Defendants' notice of appeal was timely only as to the district court's denial of their motion to set aside the default judgment under Rule

1-060, not the district court's order granting Plaintiff's motion for a default judgment. Because the first, third, and fourth issues raised by Defendants relate to the merits of Plaintiff's motion for a default judgment as a sanction for discovery violations under Rule 1-037, we conclude that Defendants failed to timely appeal those issues. Accordingly, we address only the question of whether the district court correctly denied Defendants' motion under Rule 1-060.

{10} We now turn to the merits of Defendants' contention that the district court erred in denying their motion to set aside the default judgment. Rule 1-060(B) provides that a district court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1-059 NMRA;
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

Rule 1-060(B)(6) further provides that a motion to set aside a judgment under Rule 1-060 "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one (1) year after the judgment, order, or proceeding was entered or taken." Our Supreme Court has interpreted Rule 1-060(B)(6) to require "[the] party seeking to set aside a default judgment under Rule 1-060(B)(6) [to] show the existence of *exceptional* circumstances and reasons

for relief other than those set out in Rules 1-060(B)(1) through (5)." *Rodriguez v. Conant*, 1987-NMSC-040, ¶ 22, 105 N.M. 746, 737 P.2d 527 (emphasis added). We review the district court's decision to grant or deny a motion under Rule 1-060(B)(6) for an abuse of discretion. *Rodriguez*, 1987-NMSC-040, ¶ 18.

{11} Defendants contend that Mr. Everett's gross negligence as their attorney is an exceptional circumstance that entitles them to relief from the default judgment entered against them as a result of his misconduct. Generally, "mere attorney negligence [does] not constitute exceptional circumstances for purposes of applying [Rule] 1-060(B)(6), and a claimant's proper recourse would be to bring a malpractice suit against the negligent attorney." *Resolution Tr. Corp. v. Ferri*, 1995-NMSC-055, ¶ 17, 120 N.M. 320, 902 P.2d 738 (citing *Inryco, Inc. v. Metro. Eng'g Co.*, 708 F.2d 1225, 1235 (7th Cir. 1983)). "However, when an attorney's failure rises to the level of *gross negligence*, the trial court may find exceptional circumstances warranting reopening a default judgment under [Rule] 1-060(B)(6)." *Ferri*, 1995-NMSC-055, ¶ 18 (citing *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122 (D.C. Cir. 1977); *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964)).

{12} "The New Mexico Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, and the substance of Rule 1-060(B) is virtually identical to its federal counterpart, Federal Rule of Civil Procedure 60(b)." *Kinder Morgan CO₂ Co. v. N.M. Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 11, 145 N.M. 579, 203 P.3d 110. "Because our rule closely tracks this language, the federal construction of Rule 60(b) is persuasive authority for the construction of Rule 1-060(B)." *Kinder Morgan CO₂ Co.*, 2009-NMCA-019, ¶ 11. In the following paragraphs, we analyze federal circuit courts of appeal's differing approaches to the question of whether an attorney's gross negligence justifies reopening a judgment under Federal Rule 60(b)(6) in order to provide a helpful grounding to our application of New Mexico's rule to this case.

{13} The minority approach, adopted by the Seventh and Eighth Circuit Courts

²We note that under the current version of Rule 12-201(D), a motion under Rule 1-060(B) filed within 30 days of a judgment extends the time for filing a notice of appeal until the motion is withdrawn or denied. Given the amendments to Rule 12-201(D), it appears that *Capco Acquisub, Inc.* is no longer a correct statement of the law. However, because the judgment in this case and the district court's denial of Defendants' Rule 1-060(B) motion occurred before current Rule 12-201(D) came into effect, the rule in *Capco Acquisub, Inc.* applies.

of Appeal, is that gross attorney negligence never constitutes an “exceptional circumstance” justifying reopening of a judgment under Federal Rule 60(b)(6). See *United States v. 8136 S. Dobson St., Chicago, Ill.*, 125 F.3d 1076, 1083 (7th Cir. 1997); accord *Heim v. Comm’r of Internal Revenue Serv.*, 872 F.2d 245, 248 (8th Cir. 1989). The minority approach is based on three rationales: first, “[h]olding the client responsible for the lawyer’s deeds ensures that both clients and lawyers take care to comply. If the lawyer’s neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either.” *8136 S. Dobson St.*, 125 F.3d at 1084. Second, preventing a party from obtaining relief from a judgment entered as a result of his attorney’s gross negligence does not leave the party without a remedy: the party may seek recourse for the damages caused by the execution of the judgment in a malpractice action. *Id.* Finally, the acts of an attorney on behalf of his client are imputed to the client under common law principles of agency. See *Ferri*, 1995-NMSC-055, ¶ 17 (stating that “all parties are deemed bound by the acts and failures of their lawyers. Indeed, to set aside the default merely because the defendant should not be penalized for the omissions of the attorney would be visiting the sins of the defendant’s lawyer upon the plaintiff.” (alterations, internal quotation marks, and citations omitted)). Under this rationale, it would seem incongruous to hold a client responsible for the ordinary negligence of his attorney as well as his attorney’s willful misconduct, but not for conduct that falls between these two extremes. See *United States v. 7108 W. Grand Ave., Chicago, Ill.*, 15 F.3d 632, 634 (7th Cir. 1994) (stating in the context of attorney error that liability for both negligence and intentional misconduct is inclusive of an attorney’s gross negligence).

{14} A majority of federal circuit courts of appeal have held that a showing of gross negligence by an attorney is an exceptional

circumstance sufficient to set aside a default judgment. See *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806 (3d Cir. 1986); *Shepard Claims Serv., Inc. v. William Darrach & Assocs.*, 796 F.2d 190, 195 (6th Cir. 1986); *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002); *L.P. Steuart, Inc.*, 329 F.2d at 235; *Primbs v. United States*, 4 Cl. Ct. 366, 370 (1984). There are two apparent rationales for this rule: (1) Federal Rule 60 is remedial, and judgment by default “is an extreme measure and a case should, whenever possible, be decided on the merits[;]” and (2) “[w]hen an attorney is grossly negligent, . . . the judicial system loses credibility as well as the appearance of fairness, if the result [was] that an innocent party is forced to suffer drastic consequences.” *Cnty. Dental Servs.*, 282 F.3d at 1170 (internal quotation marks and citation omitted).

{15} Our Supreme Court’s decision in *Ferri* falls somewhere between these two approaches. On the one hand, *Ferri* recognizes the “general rule of attorney-as-agent” principle underlying the Seventh and Eighth Circuits’ approach. 1995-NMSC-055, ¶¶ 17, 19. But on the other hand, *Ferri* acknowledges “the harsh result of penalizing diligent clients who were affirmatively misled by their attorneys into unintentionally allowing their legitimate claims or defenses to be lost.” *Id.* ¶ 19. Our Supreme Court has modified *Ferri*’s rule by requiring a party seeking to reopen a judgment based on allegations of gross attorney negligence or misconduct to make two additional showings: (1) that “the moving party had a legitimate claim or defense” and (2) “there is little, if any, likelihood of prejudice to the non-moving party should there be a vacation of the judgment[.]” *Meiboom v. Watson*, 2000-NMSC-004, ¶ 32, 128 N.M. 536, 994 P.2d 1154 (citation omitted).³ These two factors appear to be equity-driven, requiring the district court to weigh one party’s loss of a legitimate claim or defense against the prejudice that reopening the judgment would visit on the judgment creditor. See *Jackson v. Wash. Monthly Co.*, 569 F.2d 119, 122 n.19 (D.C. Cir. 1977) (“[I]f [the] appellant is correct in

his claims that [the] appellees contributed to the delay in effectuating the purported settlement, and that for almost a year they allowed him to believe that his suit was in good standing although they knew that it was not, [the appellant] could not fairly be charged with any prejudice that [the] appellees might have suffered”), cited in *Ferri*, 1995-NMSC-055, ¶ 18.

{16} *Ferri* and *Meiboom* give district courts latitude when asked to reopen a default judgment based on allegations of gross attorney negligence. This approach acknowledges that application of Rule 1-060(B)(6) in this context entails application of equitable considerations that led our Supreme Court to adopt Rule 1-060(B)(6) in the first place. See *Meiboom*, 2000-NMSC-004, ¶ 31 (“Rule 60([B])(6) provides a reservoir of equitable power to do justice in a given case[.]” (quoting *Battersby v. Bell Aircraft Corp.*, 1958-NMSC-135, ¶ 7, 65 N.M. 114, 332 P.2d 1028)). But this approach requires courts to make a somewhat probing inquiry into the defaulting party’s own diligence in pursuing a claim or preparing a defense.

{17} *Ferri* itself demonstrates the importance of creating a record in order to allow meaningful appellate review of a district court’s decision to grant or deny a motion to reopen a judgment under Rule 1-060(B)(6) for gross attorney negligence; in that case, the Court reversed the district court’s denial of the appellants’ Rule 1-060(B)(6) motion without inquiring into whether the record supported the district court’s ultimate decision based on the district court’s failure to make findings of fact as to the defaulting party’s diligence in pursuing her defenses. *Ferri*, 1995-NMSC-055, ¶ 20. The Court remanded the case to the district court to conduct an evidentiary hearing into these issues. *Id.* ¶ 20. The Court also stated that the district court could properly consider evidence that the appellant herself had been given notice of various important procedural developments in evaluating her diligence. *Id.*

{18} We conclude that this appeal requires a similar outcome. Although the record supports a finding of gross attorney

³*Meiboom* cites *Ferri*, requiring a moving party seeking to reopen a judgment under Rule 1-060(B)(6) on grounds of gross attorney negligence to show that “the moving party had a legitimate claim or defense[.]” *Meiboom*, 2000-NMSC-004, ¶ 32, but the cited portion of *Ferri* concluded that a judgment based on a mistake of law could only be reopened under Rule 1-060(B)(1), which provides for setting aside a judgment based on a “mistake.” See *Ferri*, 1995-NMSC-055, ¶¶ 8-9. It is hard to square *Meiboom*’s citation of *Ferri* as requiring a showing that a party has a meritorious claim or defense in order to reopen a judgment under Rule 1-060(B)(6) with the well-established rule that the grounds for reopening a judgment under Rule 1-060(B)(1) and Rule 1-060(B)(6) are mutually exclusive. See *Ferri*, 1995-NMSC-055, ¶ 10 (stating that “we have long held that [Rule] 1-060(B)(6) provides relief only for reasons other than those enumerated in [Rule] 1-060(B)(1) through (5)”).

negligence, there is little if any evidence of Defendants' personal acquiescence in their attorney's conduct. In neither its oral decision to grant Plaintiff's motion for a default judgment nor its written default judgment does the district court make any findings of fact as to whether Defendants were aware of their attorney's gross negligence. This alone requires us to reverse the district court and remand for an evidentiary hearing for inquiry into Defendants' complicity, if any, in their attorney's intransigence and obstruction of the discovery process. *See id.* (reversing the district court for failing to make a finding of fact as to the defaulting party's diligence in pursuing her defense and remanding for an evidentiary hearing on that issue).⁴ As well, our own review of the record produces inconsistency regarding the provision of notice to Defendants themselves and their awareness of Mr. Everett's conduct.

{19} On remand, Defendants bear the burden of proving that they were diligent in pursuing their claims and that Mr. Everett affirmatively caused their default.

See id. ¶ 19 ("On remand, [the appellant] has the burden of demonstrating her diligence in pursuing her case."). We recognize that this inquiry is all the more difficult in cases like this one where the attorney who brought about his client's default continues to represent the client past the entry of the default judgment. However, on appeal Defendants have obtained substitute counsel; after remand, the district court can properly consider any continued failure by the Defendants to participate in this litigation in determining whether Defendants should be charged personally with their previous attorney's egregious conduct, and also make its own evaluation in the first instance about the merits of Defendants' defenses.

{20} The district court also failed to make a necessary inquiry into the prejudice that Plaintiff would suffer if the default judgment were reopened. For example, Defendants have asserted that Defendants Melville and Juanita Hedges filed for bankruptcy after entry of the district court's default judgment. On remand, the

district court should inquire into whether this or other developments subsequent to the district court's entry of default have increased or decreased the prejudice that Plaintiff would suffer if the judgment were reopened. The district court should also consider the extent to which Plaintiff's own conduct brought about Defendants' default (the district court suggested to counsel for Plaintiff that he move to disqualify Mr. Everett from representing Defendants; whether Plaintiff's decision not to file such a motion contributed to Defendants' failure to participate in the litigation is thus also a valid avenue of inquiry).

{21} The district court's denial of Plaintiff's motion to set aside its default judgment is reversed and this case is remanded for further proceedings.

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

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

JAMES J. WECHSLER, Judge

⁴*Ferri* sets out the following list of non-exclusive facts that are relevant in evaluating the defaulting party's diligence: whether the party seeking to reopen the judgment "actively and repeatedly attempted to communicate with her attorney; [whether] her attorney misrepresented the status or nature of the case; [whether] she relied on her attorney's representations in good faith; and [whether] a reasonably prudent person involved in such litigation similarly would have relied on those representations and would not have made further inquiries or efforts to advance his or her position." *Id.*, ¶ 20. The district court should consider these and other factors it deems relevant in determining Defendants' diligence in pursuing their case upon remand.

Certiorari Denied, September 12, 2016, No. S-1-SC-36043

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-088

No. 34,182 (filed July 18, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MATIAS LOZA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

MARK T. SANCHEZ, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
CHARLES J. GUTIERREZ
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

ALDERMAN LAW FIRM
KIMBERLY L. ALDERMAN-PENIX
Denver, Colorado
for Appellant

Opinion**James J. Wechsler, Judge**

{1} Defendant Matias Loza appeals his convictions for racketeering, contrary to NMSA 1978, Section 30-42-4(C) (2002, amended 2015), and conspiracy to commit racketeering, contrary to Section 30-42-4(D). On appeal, Defendant first argues that the district court improperly admitted evidence of uncharged crimes, wrongs, or other acts. However, when, as here, the uncharged crimes, wrongs, or other acts are the predicate offenses to charges of racketeering and conspiracy to commit racketeering, Rule 11-404(B) NMRA is inapplicable. Defendant additionally argues that the district court improperly admitted the transcript of an audio recording in which a sheriff's office detective identified four distinct voices, including Defendant's. We conclude, however, that the detective was sufficiently familiar with the recorded voices to make identification under New Mexico law. We therefore affirm.

BACKGROUND

{2} Defendant was indicted for statutory violations allegedly committed during his

association with an organization referred to as the AZ Boys.¹ The principal criminal enterprise of the AZ Boys was the distribution of methamphetamine.

{3} In the early morning hours of November 1, 2011, Otero County Sheriff's Office Sergeant Geraldine Martinez was on routine patrol on Taylor Ranch Road near Alamogordo, New Mexico. At approximately 3:30 a.m., Sergeant Martinez was dispatched to investigate a possible home invasion on San Pedro Drive. While proceeding to San Pedro Drive, Sergeant Martinez observed a vehicle completely engulfed in flames near the intersection of San Pedro Drive and Hamilton Road. Sergeant Martinez attempted to determine if the vehicle was occupied, but she was unable to do so. She then proceeded as dispatched.

{4} Upon her arrival, Sergeant Martinez made contact with the homeowner who directed her to a shed on the southwest portion of the property. While searching in and around the shed, Sergeant Martinez observed Defendant lying under a trailer. She instructed Defendant to exit. After

exiting, Defendant was "sweating heavily, and appeared to be really nervous, and smelled of gas." Defendant was taken into custody and transported for medical evaluation.

{5} At approximately the same time, the Otero County Fire Department responded to the vehicle fire observed by Sergeant Martinez. Fire department personnel extinguished the fire and discovered a deceased person inside the vehicle. Investigation indicated that the fire was intentionally ignited by use of an ignitable liquid. The deceased person was subsequently identified as Richard Valdez, and the cause of death was determined to be homicidal violence. The vehicle was identified as a 2006 Suzuki station wagon purchased by a member of the AZ Boys.

{6} After being identified as a suspect in Valdez's death, Defendant was transported to Gerald Champion Regional Medical Center by Otero County Sheriff's Office Deputy Edward Garcia to have a blood sample drawn. While at the hospital, Defendant offered Deputy Garcia \$40,000 if Deputy Garcia would release Defendant from custody. Deputy Garcia refused. Defendant then offered Deputy Garcia \$50,000. Deputy Garcia again refused. Deputy Garcia recorded this interaction on his pocket recorder and reported it to his supervisor.

{7} Defendant was initially charged with racketeering, conspiracy to commit racketeering, arson, two counts of tampering with evidence, and bribery of a public official. With the exception of racketeering and conspiracy to commit racketeering, the charges against Defendant were dismissed without prejudice and re-filed as a separate cause of action. Prior to trial, the State filed notice of its intent to introduce Rule 11-404(B) evidence, including evidence of murder, arson, and bribery.

{8} Included in this evidence and introduced at trial was an audio recording downloaded from one of Defendant's cellular telephones in which various members of the AZ Boys discussed the disposal of a dead body. The disposal mechanism discussed was to "torch" a car with the body inside. Otero County Sheriff's Office Detective Fabian Picazo identified the voices on the recording as those of

¹During the course of Defendant's trial, the State offered a substantial amount of testimony and evidence to demonstrate (1) the AZ Boys' status as a criminal enterprise, (2) Defendant's affiliation with the AZ Boys, and (3) Defendant's participation in a pattern of racketeering activities. See *State v. Crews*, 1989-NMCA-088, ¶ 47, 110 N.M. 723, 799 P.2d 592 (describing the essential elements of racketeering). This opinion discusses only the testimony and evidence necessary to resolve the legal issues raised on appeal.

Defendant and AZ Boys members Bob Chavez, Joe Chavez, and Joe Chavez Jr. The audio recording and a transcript of the discussion, which identified the individual speakers, were admitted into evidence over objection.²

{9} Defendant was convicted in a jury trial of racketeering and conspiracy to commit racketeering. This appeal followed.

STANDARD OF REVIEW

{10} We review a district court's admission of evidence for an abuse of discretion. *State v. Jaramillo*, 2012-NMCA-029, ¶ 17, 272 P.3d 682. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Thompson*, 2009-NMCA-076, ¶ 11, 146 N.M. 663, 213 P.3d 813 (internal quotation marks and citation omitted).

RULE 11-404(B)

{11} As a general rule, evidence of uncharged crimes, wrongs, or other bad acts is referred to as character evidence or propensity evidence, and is inadmissible in criminal trials. See Rule 11-404(B)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."); see *State v. Beachum*, 1981-NMCA-089, ¶ 6, 96 N.M. 566, 632 P.2d 1024 ("Under Rule [11-]404(B), evidence of other crimes, wrongs, or acts is not admissible to show that the defendant had a propensity to commit those crimes."). This rule is expressly limited by Rule 11-404(B)(2), which allows the admission of character evidence if the evidence is offered for "another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." For character evidence to be admissible in a criminal trial, the state must "provide reasonable notice of the general nature of any such evidence[.]" Rule 11-404(B)(2) (a).

{12} New Mexico's Rule 11-404(B)(1) mirrors Rule 404(b)(1) of the Federal Rules of Evidence and was adopted in 2012 "to be consistent with the restyling of the Federal Rules of Evidence[.]" Rule 11-404 comm. cmt. Since the language of our Rule 11-404(B)(1) is identical to that of federal Rule 404(b)(1), we may

look to the federal courts for guidance as to the proper application of the rule. See *Kipnis v. Jusbasche*, 2015-NMCA-071, ¶ 7, 352 P.3d 687 ("When the state and federal evidence rules are identical, we may rely on interpretations of the federal rule as persuasive authority."), cert. granted, 2015-NMCA-006, 367 P.3d 852.

Inapplicability of Rule 11-404(B) to Charges of Racketeering and Conspiracy to Commit Racketeering

{13} Defendant was tried on charges of racketeering, contrary to Section 30-42-4(C), and conspiracy to commit racketeering, contrary to Section 30-42-4(D). Defendant argues on appeal that the district court's admission of evidence of "other" crimes including murder, arson, and bribery was error. Specifically, Defendant claims that "the State used evidence of the alleged homicide, arson, and bribery to show that [Defendant] committed the charged offenses because he committed the other similar acts."

{14} Although Defendant was additionally charged with murder, arson, and bribery in separate criminal proceedings,³ Rule 11-404(B), if applicable, would limit the State's ability to introduce evidence of these crimes in the current case. See *State v. Gallegos*, 2007-NMSC-007, ¶ 21, 141 N.M. 185, 152 P.3d 828 (describing the prejudicial effect of propensity evidence and the proper application of Rule 11-404(B)). Therefore, the applicability of Rule 11-404(B) to the racketeering and conspiracy to commit racketeering charges against Defendant is central to our inquiry.

{15} Section 30-42-4(C) provides that "[i]t is unlawful for a person employed by or associated with an enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs by engaging in a pattern of racketeering activity." Section 30-42-4(D) provides that "[i]t is unlawful for a person to conspire to violate the provisions . . . of this section." The racketeering statute defines "pattern of racketeering activity" as "engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in [Section 30-42-4(A)-(D)]." NMSA 1978, § 30-42-3(D) (2009). The statute further defines "racketeering" in terms of twenty-five distinct predicate offenses, including murder,

arson, and bribery. Section 30-42-3(A).

{16} Because New Mexico's racketeering statute defines violations by reference to predicate offenses, the predicate offenses are essential components of a racketeering offense. Evidence of the predicate offenses is, therefore, intrinsic rather than extrinsic to a racketeering charge. United States circuit courts have held that federal Rule 404(b) does not apply to such intrinsic evidence. See *United States v. Parker*, 553 F.3d 1309, 1314 (10th Cir. 2009) ("Because Rule 404(b) only limits evidence of 'other' crimes—those extrinsic to the charged crime—evidence of acts or events that are part of the crime itself, or evidence essential to the context of the crime, does not fall under the other crimes limitations of Rule 404(b)."); see also *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010) ("If uncharged misconduct directly proves the charged offense, it is not evidence of some 'other' crime."); see also *Black's Law Dictionary* 899 (9th ed. 2009) (defining "intrinsic" as "[b]elonging to a thing by its very nature; not dependent on external circumstances; . . . essential").

{17} While this Court has not previously determined the applicability of Rule 11-404(B) to the predicate offenses of a racketeering charge, our appellate court opinions determining the applicability of Rule 11-404(B) to "other" and "extrinsic" acts are in accord with the United States Circuit Court holdings cited above.

{18} For example, in *State v. Ruiz*, the defendant was charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact with a minor. 2007-NMCA-014, ¶ 1, 141 N.M. 53, 150 P.3d 1003. The victim was a friend of one of the defendant's daughters, and she frequented the defendant's home. *Id.* ¶ 2. The defendant was charged with five offenses, including one in July 1997, based upon the victim's ability to distinguish the general nature and timing of the assaults. *Id.* ¶ 29. At trial, the state offered testimony from the defendant's eldest daughter in which she described witnessing the defendant touching the victim's genital area in July 1997. *Id.* ¶ 27. The defendant argued that such testimony constituted evidence of "prior bad acts" and was subject to exclusion under Rule 11-404(B). *Ruiz*, 2007-NMCA-014, ¶ 27. This Court, after

²Defendant objected to the admission of audio recordings downloaded from his cellular telephone on the ground that the State failed to obtain an independent search warrant for the contents of his cellular telephone. Defendant did not raise this argument on appeal.

³Otero County District Court Cause Nos. D-1215-CR-2011-00467 and D-1215-CR-2014-00063.

determining that the witness's testimony corroborated the July 1997 charged offense, disagreed with the defendant's interpretation of Rule 11-404(B) and held that "[t]he inclusion of the word 'other' [in Rule 11-404(B)] connotes crimes, wrongs, or acts that are not the subject of the [current] proceedings[.]" *Ruiz*, 2007-NMCA-014, ¶¶ 27-28.

{19} In *State v. Gallegos*, our Supreme Court applied a similar rationale in arriving at the opposite conclusion. 2007-NMSC-007, ¶ 28, 141 N.M. 185, 152 P.3d 828. The defendant was indicted on seven counts of criminal sexual contact of a minor (CSCM) and three counts of aggravated indecent exposure stemming from incidents while he was a guard at the Youth Diagnostic and Detention Center (YDDC). *Id.* ¶ 4. The CSCM charges arose from conduct with a female YDDC resident, J.S. *Id.* The indecent exposure charges arose from separate conduct with another female resident, U.C. *Id.* ¶ 5. The district court denied the defendant's motion to sever the two trials. *Id.* ¶ 2. The defendant was convicted on one charge of CSCM and two charges of aggravated indecent exposure. *Id.* ¶¶ 4, 6. On certiorari from this Court, our Supreme Court reversed the defendant's CSCM conviction, concluding that "we are not confident the jury did not misuse the evidence pertaining to [U.C.] to convict [the defendant] of CSCM." *Id.* ¶ 3. Following analysis that resulted in a conclusion that no Rule 404(B) exception was applicable, our Supreme Court held that "the extrinsic acts of indecent exposure" committed against U.C. "would not have been cross-admissible at separate trials[.]" *Gallegos*, 2007-NMSC-007, ¶¶ 26-36.

{20} The crimes of racketeering and conspiracy to commit racketeering are defined by reference to predicate offenses. Rule 11-404(B) is, therefore, inapplicable to evidence admitted to demonstrate these predicate offenses. Because admitted evidence of murder, arson, and bribery related directly to the predicate offenses of racketeering and conspiracy to commit racketeering, the district court's admission of this intrinsic evidence did not constitute an abuse of discretion.

RULE 11-901(B)(5) NMRA

{21} In support of its case against Defendant, the State introduced (1) an audio recording recovered from Defendant's cellular telephone and (2) a transcript of that audio recording. Defendant argues that the State's witness, Detective Picazo, lacked sufficient familiarity with Defendant's voice, as well as the voices of other members of the AZ Boys, to positively identify and differentiate between four otherwise unidentified voices on the admitted audio recording.

{22} Rule 11-901(A) provides that "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." With respect to the identification of a person's voice, a witness may offer an opinion "based on hearing the voice at any time under circumstances that connect it with the alleged speaker." Rule 11-901(B)(5). In interpreting Rule 11-901(B)(5), this Court, citing various federal court opinions, has held that "once a *minimal* showing has been made that the witness has *some* familiarity with the voice he identified, his identification testimony may be admitted and the jury may then determine the weight to be accorded to that testimony." *State v. Padilla*, 1982-NMCA-100, ¶ 5, 98 N.M. 349, 648 P.2d 807 (emphasis added). As an indication of the low threshold for admissibility established by Rule 11-901(B)(5), *Padilla* discussed *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980), a case in which the testifying witness heard the appellant's voice on only two other occasions. *Padilla*, 1982-NMCA-100, ¶ 5.

{23} During the course of his investigation, Detective Picazo heard Defendant's voice numerous times. On the day of Defendant's arrest, Detective Picazo spoke with Defendant in person on two separate occasions: first, for several minutes at the hospital and, subsequently, for between sixty and ninety minutes at the Otero County Sheriff's Office. Detective Picazo also monitored between six and eight of Defendant's telephone conversations during Defendant's pre-trial incarceration. These in-person conversations and

monitoring activities provide sufficient foundation for Detective Picazo to identify Defendant's voice on the admitted audio recording.

{24} Furthermore, Detective Picazo either interviewed, or monitored telephone conversations involving, the three other individuals on the admitted audio recording: AZ Boys members Bob Chavez, Joe Chavez, and Joe Chavez Jr. Detective Picazo conducted an in-person interview with Bob Chavez during the investigation and monitored between eight and ten of Bob Chavez's telephone conversations during his incarceration. Detective Picazo monitored a similar number of Joe Chavez's telephone conversations during his incarceration and became familiar with Joe Chavez Jr.'s voice during these telephone conversations.

{25} Defendant calls our attention to certain segments of the transcript in which the speaker is undetermined, arguing that Detective Picazo's inability to differentiate among the speakers in all instances negates his ability to offer an opinion as to identity. This argument is unpersuasive. Detective Picazo's exposure to the voices of Defendant and other members of the AZ Boys is sufficient to make the "minimal showing" of familiarity required to allow Detective Picazo to offer an opinion as to the identity of speakers on the admitted audio recording. *Id.* Any inability to do so with respect to individual segments of the audio recording goes to the weight of the evidence, not the admissibility. *See id.* ("The completeness of the identifications goes to the weight of the evidence and not its admissibility." (internal quotation marks and citation omitted)).

{26} Because the transcript of admitted audio recordings was admissible under Rule 11-901(B)(5), the district court's admission of this evidence did not constitute an abuse of discretion.

CONCLUSION

{27} For the foregoing reasons, we affirm.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
J. MILES HANISEE, Judge

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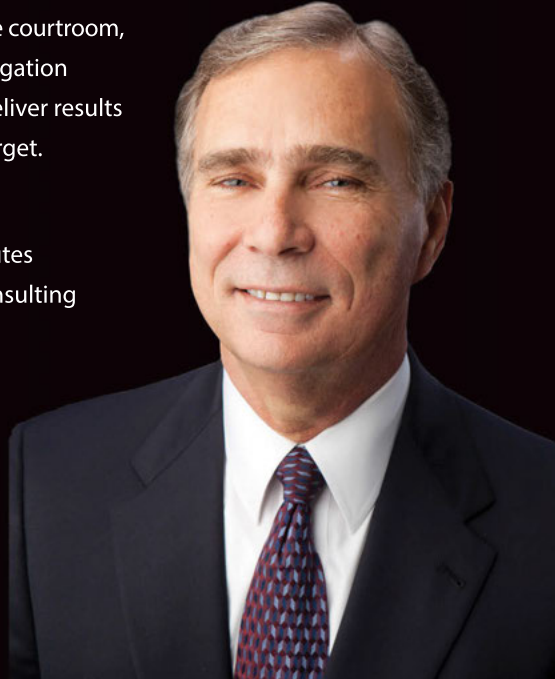
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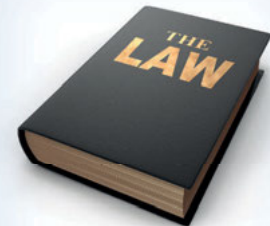


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Miscellaneous

Will for Charles Raymond Black

Searching for a Will for Charles Raymond Black, deceased Call Susan Tomita (505) 883-4993

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