BAR BULLETIN

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A Celebration on the Way, by Dick Evans (see page 3)

ARTWORKinternational, INC., Santa Fe

Inside This Issue

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Cover Artist: Dick Evans was born in the Land of Enchantment and grew up in a rural farming community in the panhandle of Texas with no exposure to art until he started college. He graduated from the University of Utah with a BFA in Drawing and Painting and an MFA in Ceramics and Sculpture. Evans has taught art, primarily in ceramics, which is his primary form of expression. He has also produced sculpture in welded steel and cast bronze. Evans' art is found in many art museums, corporate collections and publications. He feels that the more personal the statement is, the more universal it may be. By avoiding the visually expected, his art often aids the viewer to see surroundings in a different and richly rewarding manner. To view more of Evans' work, visit www.dickevansart.com.

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, 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, the fees for E-filing in New Mexico will increase. File and serve fees will went from $10 to $12. File only fees went from $6 to $8. The $4 fee for serve only were dropped to $0.

New Mexico Court of Appeals

Nominees for Vacancy

The Appellate Court Judicial Nominating Commission convened on Dec. 22, 2016, in Santa Fe and completed its evaluation of the seven applicants for the vacancy on the New Mexico Court of Appeals. The Commission recommends the following six applicants (in alphabetical order) to Governor Susana Martinez: **Kristina Bogardus**, **Henry Bohnhoff**, **Daniel Gallegos Jr.**, **Emil Kiehne**, **Kerry Kiernan** and **Jacqueline Medina**.

Stephen French Appointed to Vacancy

On Dec. 22, 2016, Gov. Susana Martinez announced the appointment of Stephen French to the New Mexico Court of Appeals, filling the vacancy created by the retirement of Judge Michael D. Bustamante.

First Judicial District Court

New Policy for Lighters and Matches

Effective Jan. 1, cigarette lighters and/or matches are 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, Judge Levy was 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, 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, Judge Leos was 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, 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, the clerk's office in Cibola, Sandoval and Valencia counties is 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.

Professionalism Tip

With respect to other judges:

I will endeavor to work with other judges to foster a spirit of cooperation and collegiality.

State Bar News

Attorney Support Groups

- Jan. 9, 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, 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, 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.

Alternative Methods of Dispute Resolution Committee

Feedback Survey

The ADR Committee is interested in receiving feedback regarding speaker presentations, topics and participation from State Bar members who are not already involved with the Committee. To complete the survey, visit www.surveymonkey.com/r/66CR2LL.

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.

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 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 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. The award ceremony will be held on June 8. For more details about the award and previous recipients, visit www.nmbar.org/committeeonwomen.

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.

Committee on Diversity in the Legal Profession

2017 Jaramillo Summer Law Clerk Program Accepting Employers

For 25 years, the Arturo Jaramillo Summer Law Clerk Program has diversified applicant pools, lowered artificial barriers to employment opportunities, and produced high-quality law clerks who have become outstanding lawyers and judges in New Mexico. The Committee on Diversity invites you to join along in our common commitment to expand opportunities in the legal profession. To participate, contact Morris Chavez at mo@saucedochavez.com by Jan. 16 or visit www.nmbar.org/clerkshipprogram for more information.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

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Email: attorneyinfochange@nmcourts.gov
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Albuquerque, NM 87199
Online: www.nmbar.org

UNM

Law Library

Hours Through Jan. 15, 2017

Building & Circulation

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

Reference
Jan. 3–6, 2017:
Tuesday–Thursday 9 a.m.–6 p.m.

KANW New Mexico Public Radio

The Law of Rock and Roll with Michael Olivas

The Law of Rock and Roll radio show is hosted by University of Houston Law professor and New Mexico native Michael A. Olivas. THe show explores the legal aspects of stars' careers, cases involving record companies and the business of rock and roll. KANW presents an evening of entertainment with Dr. Olivas at 6:30 p.m., Jan. 20, at Robertson & Sons Violin Shop Recital Hall, 3201 Carlisle Blvd., Albuquerque. Tickets are $30 and proceeds support KANW programming. One hour of CLE credit is available at no extra cost. Tickets can be purchased at www.kanw.com. The event is co-sponsored by the UNM School of Law, New Mexico Hispano Music Association Inc. and the New Mexico Hispanic Bar Association.

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, 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.

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. 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. 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.

Practice Section Awards

Various State Bar practice sections recognize outstanding lawyers throughout the year and this fall the Business Law, Prosecutors and Natural Resources, Energy and Environmental Law sections honored attorneys in their respective area of the law. **Congratulations to all recipients!**

Photos and story by Breanna Henley

Prosecutorial Excellence

The Prosecutors Section recognized prosecutoral excellence in the areas of child abuse, DWI, drugs, white collar, domestic violence, violent crimes (excluding domestic violence and child abuse cases) and children's court at a ceremony at the State Bar Center on Dec. 9, 2016. Nominations were made by peers and colleagues and sometimes even opposing counsel!

Child Abuse (Homer Campbell Award)—Elisa Dimas
Dimas holds a supervisory position in the Crimes Against Children Division at the Second Judicial District Attorney's Office, where she maintains a regular case load of her own, most of them first degree felonies, and goes to trial every one or two months, all while simultaneously training newer prosecutors. Dimas' nominators say she is always able to make time for those around her in order to answer questions and share her knowledge about trial strategies, scientific and medical evidence, helpful contacts in the community such as expert witnesses and is always up for solving a problem.

From left: Prosecutors Section Board Member Devin Chapman (with Elisa Dimas' award), Brianne Bigej, Alesia Cappon, Les Romaine, Johnna Walker, Collin Brennan, Section Board Member Edmund Perea and 2016 Section Chair Kenneth Fladager
Not pictured: Elisa Dimas

DWI—Johnna Walker
At the time of nomination, Walker was in the metropolitan division of the Second Judicial District Attorney's Office and prosecuted misdemeanor DWIs, with a case load of around 150-250 cases at any given time. Walker was nominated based on her ability to maintain a great relationship with DWI officers and because she possesses special skills needed to prosecute DWI cases, including the ever-shifting standards regarding the scientific evidence often needed to secure convictions.

Drugs—Collin Brennan
During his time as a High Intensity Drug Trafficking attorney at the Second Judicial District Attorney's Office, Brennan screened and prosecuted a voluminous docket of drug offenders, conducted more drug trials than any other prosecutor in the office and played key role in the ongoing efforts to make the preliminary hearing program a consistent success. Brennan has since moved into a position handling probation violations, but has continued to pay special attention to violations related to controlled substances, working actively to ensure that offenders receive drug treatment where possible and incarceration when they pose a continuing threat to their community.

Sam Olmstead (center) with his wife, children and Third Judicial District Attorney Mark D'Antonio

White Collar—Alesia Cappon
Cappon is a supervisor in the White Collar Crimes Division and works both passionately and diligently to ensure that some of the most complex cases in the office are prosecuted effectively.

Her nominator states that of particular note is Cappon's ability to communicate very difficult and labyrinthine investigations clearly, precisely and succinctly, ensuring that sophisticated white collar criminals are held accountable for their criminal conduct.

Domestic Violence—Brianne Bigej
Bigej has prosecuted many types of cases during her time at the Second Judicial District Attorney's Office, but her nominator states she has made her biggest impact prosecuting domestic violence cases. While domestic violence cases can be difficult to prosecute, Bigej has never let the difficulty get her down or affect her job or pursuit of justice and she remains very energetic and creative, working tirelessly to help those who are victims of domestic violence.

Violent Crimes—Les Romaine
As a supervisor of the Gang Crimes Division, Romaine takes difficult cases with serious logistical issues, including necessary witness that could be (and often are) defendants themselves, and without fail works through those cases to ensure that organized criminal activity is effectively prosecuted. He is also an ever-calm and approachable resource for guidance in tackling the practical components of presenting a case to jury.

Children's Court Prosecutor—Samuel Olmstead
Olmstead is the only attorney assigned to the Third Judicial District Attorney's Office Juvenile/Children's Court Unit, despite it being the second largest in New Mexico. When Olmstead was assigned to the Juvenile Unit, he inherited a large backlog of cases that included very serious offenses. Olmstead stepped into this difficult situation, conducted expedited and thorough reviews of all backlogged cases, and promptly took the appropriate actions. As a result of his dedication, the entire backlog of cases was cleared. Olmstead has also undertaken the responsibility of revitalizing a dormant Truancy Court and turning it into an efficient and effective prosecution effort.

David Buchholz (third from left) with Business Law Section Board members (from left to right) 2017 Section Chair Charles Seibert, Vanessa Lemrond, 2016 Section Chair Brian Haverly, Sarita Nair and Rosalyn Nguyen

Business Lawyer of the Year Award

David P. Buchholtz was honored as the Business Law Section's 2016 Business Lawyer of the Year at a reception following the Business Law Institute on Nov. 18, 2016. Buchholtz has been practicing business law for 40 years and is currently a member of the Rodey Law Firm's full-service Business Law Department, in which he counsels both government and private sector clients. In addition to numerous accolades, Buchholtz was nominated for his ability to brilliantly balance client needs, professional commitment and community involvement, which was reflected in his award acceptance, where he stated "his partners, coworkers, clients, friends and family, including his wife, were all represented [by this award] today."

2017 NREEL Section Chair Deana Bennett, recipient Greg Ridgley and 2016 Section Chair Sally Paez

NREEL Lawyer of the Year

Greg C. Ridgley of the New Mexico State Engineer's Office was honored as the 2016 NREEL Lawyer of the Year at a reception during the Natural Resources, Energy and Environmental Section's *Turmoil in the Oil Patch* CLE on Dec. 16, 2016. He was selected because he is held in high regard by water law practitioners throughout the west and is a master of the nuanced area of Western water law. Nominators described Rodgley as a true professional with a integrity and a passion for public service, the State of New Mexico, practice of law and mentorship.

Legal Education

January

5 **2017 Wage & Hour Update: New Overtime Rules**
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

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

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

13 **The Law of Background Checks—What Clients May/May "Check"**
1.0 G
Teleseminar
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

19 **Trust and Estate Planning Issues in Divorce**
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

24 **Capital Contributions, Capital Calls & Finance Provisions in Companies**
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

26 **Drafting Special Needs Trusts**
1.0 G
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

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

16 **Use of Trust Protectors in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Ethics in Billing and Collecting Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics in Negotiations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Estate Planning for Retirement Assets**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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 23, 2016

Published Opinions

No. 33798	9th Jud Dist Curry CR-12-496, STATE v C FOX (affirm)	12/20/2016

Unpublished Opinions

No. 35334	3rd Jud Dist Dona Ana LR-15-24, STATE v A MCKINNIS (affirm)	12/20/2016
No. 34440	12th Jud Dist Otero YR-13-1, STATE v R ARIAS (affirm)	12/20/2016
No. 35683	13th Jud Dist Sandoval DM-13-721, F MONTANO v M MONTANO (affirm)	12/20/2016
No. 34913	8th Jud Dist Taos CR-13-109, STATE v A HERRERA (reverse)	12/21/2016
No. 35851	11th Jud Dist San Juan CV-14-784, HIBU INC v ALL PRO BAIL (reverse)	12/21/2016
No. 35491	5th Jud Dist Eddy DM-09-593, S DAVIS v F SUNICO-DAVIS (affirm in part, (dismiss in part)	12/22/2016
No. 35684	2nd Jud Dist Bernalillo CV-13-1923, NATIONSTAR v R PRIMERA (affirm)	12/22/2016
No. 35763	8th Jud Dist Taos CR-15-151, STATE v M FRESQUEZ (dismiss)	12/22/2016

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

In Memoriam

As of August 6, 2016:
Richard N. Carpenter
1048 Bishops Lodge Road
Santa Fe, NM 87501

Clerk's Certificate of Withdrawal

Effective December 20, 2016:
Susan L. Gorman
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Effective December 20, 2016:
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Effective December 20, 2016
Jacqueline Marrast-Simpson
2640 Sandstone Lane
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Effective December 20, 2016:
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Effective December 15, 2016
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Effective December 20, 2016:
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Clerk's Certificate of Reinstatement to Active Status

As of December 19, 2016
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Clerk's Certificate of Change to Inactive Status

Effective December 15, 2016:
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Effective December 15, 2016:
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Clerk's Certificate of Disbarment

On December 7, 2016:
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Dated Dec. 21, 2016

Clerk's Certificate of Address and/or Telephone Changes

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective January 4, 2017

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

1-005.2	Electronic service and filing of pleadings and other papers	01/01/2017
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

Rules of Appellate Procedure

12 101	Scope and title of rules
12 201	Appeal as of right; when taken
12 202	Appeal as of right; how taken
12 203	Interlocutory appeals
12 203.1	Appeals to the Court of Appeals from orders granting or denying class action certification
12 204	Appeals from orders regarding release entered prior to a judgment of conviction
12 206	Stay pending appeal in children's court matters
12 206.1	Expedited appeals from children's court custody hearings
12 208	Docketing the appeal
12 209	The record proper (the court file)
12 302	Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number
12 305	Form of papers prepared by parties.
12 309	Motions
12 310	Duties of clerks
12 317	Joint or consolidated appeals
12 318	Briefs
12 319	Oral argument
12 320	Amicus curiae
12 321	Scope of review; preservation
12 322	Courtroom closure
12 402	Issuance and stay of mandate
12 403	Costs and attorney fees
12 404	Rehearings
12 501	Certiorari from the Supreme Court to the district court regarding denial of habeas corpus
12 503	Writs of error
12 504	Other extraordinary writs from the Supreme Court
12 505	Certiorari from the Court of Appeals regarding district court review of administrative decisions
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
14 304	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
14 308	Aggravated assault; attempted battery with intent to commit a felony; essential elements
14 310	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements
14 311	Aggravated assault; attempted battery with intent to commit a violent felony; essential elements
14 313	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements
14 351	Assault upon a [school employee] [health care worker]; attempted battery; essential elements
14 353	Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements
14 354	Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements
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
14 358	Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements
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
14 361	Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements
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
14 371	Assault; attempted battery; "household member"; essential elements
14 373	Assault; attempted battery; threat or menacing conduct; "household member"; essential elements
14 374	Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements
14 376	Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements
14 378	Aggravated assault; attempted battery with intent to commit a felony; "household member"; essential elements
14 380	Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member"; essential elements
14 381	Assault; attempted battery with intent to commit a

	violent felony; "household member"; essential elements
14 383	Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements
14 990	Chart
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

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

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

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

Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2017-01

Topic: Agreement by personal injury plaintiff's lawyer to personally indemnify opposing party as a condition of the plaintiff's acceptance of a settlement agreement

Rules Implicated: 16-108 (E) NMRA (2016)

Disclaimer:
The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer or, in some instances, upon general issues facing members of the bar. The Committee does not investigate facts presented to it and generally assumes the facts presented are true and complete. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or facts differ from those presented, a different conclusion may be reached by the Committee. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the issue.

Question Presented:
Whether a plaintiff's lawyer may, in the course of settling a personal injury case on behalf of a client agree, as a condition of settlement, to personally indemnify the opposing party from claims to the settlement funds made by third parties.

Short Answer:
No.

Factual Background:
The Ethics Advisory Committee understands that the requesting lawyer is a plaintiff's lawyer who is being asked to enter into an agreement with the opposing party, not opposing counsel, to personally pay for third party claims that might be asserted against the settlement funds in the future after the plaintiff's lawyer has already disbursed the settlement funds to known third party claimants, to the lawyer for the lawyer's fee and to the lawyer's client. Presumably, the third party claims would be for amounts either owed by the client or for which the client is responsible and which would likely be asserted against the opposing party as the settling party.

Analysis:

Rule 16-108 of the Rules of Professional Conduct is comprised of nine specific situations that, because of the lawyer's own interests, are so likely to compromise representation of a client they are recognized as creating per se conflicts between a lawyer and a client. The Rule is entitled "Conflict of Interest; Current Clients; Specific Rules." In most of these situations the conflict cannot be cured by client consent. The lawyer must either avoid the situation entirely, or comply with conditions designed to protect the client against overreaching. [1]

The question presented squarely implicates subsection (E) of Rule 16-108 which states in pertinent part:

> E. **Financial assistance**. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> . . .

This Rule prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. As explained in Comment [10] to the Rule, it prohibits a lawyer from giving or lending money to the client directly. It prohibits a lawyer from guaranteeing loans to the client. One purpose of prohibiting a lawyer from providing financial assistance to the client is to avoid giving the lawyer too great a financial stake in the litigation. The Rule recognizes that a lawyer with too great a financial stake in the litigation creates an essentially per se conflict of interest with the client. As such, there is no provision for the client to waive this conflict and the lawyer must avoid this situation entirely.

The Committee is of the view that subsection (E) prohibits the requesting lawyer from entering into the proposed indemnity agreement. The indemnity agreement is being proposed as a condition of settlement. Whether the requesting lawyer agrees to indemnify the opposing party could affect whether the matter is settled or goes to trial. Therefore, it is being proposed in connection with pending litigation and falls within subsection (E) on that basis. The proposed agreement calls for the lawyer to personally guarantee that the lawyer will pay from the lawyer's personal funds, not from the settlement funds, third party claims that are either owed by the client or for which the client is responsible. As such, the indemnity agreement must be recognized for what it is: an agreement to personally pay the client's bills. In terms of Rule 16-108 (E), it constitutes the provision of financial assistance to the client and is therefore prohibited.

The question presented is a good example for the reason for the prohibition of 16-108 (E). The lawyer's agreement to indemnify the opposing party at the time of settlement would interject the lawyer's own personal interests into the settlement negotiations and unquestionably interfere with the lawyer's ability to provide sound, independent advice to the client concerning settlement of the case. The Rule considers this a per se conflict of such a serious nature that it may not be waived by the client, even if the client desired to waive the conflict. Consequently, even if the client, in order to facilitate a settlement, agreed to repay the lawyer for future payments the lawyer might personally make under the indemnity agreement, it would still be precluded by Rule 16-108 (E).

Recognizing that there is the exception to subsection (E)'s prohibition, it is the Committee's view that the payments anticipated by the proposed indemnity agreement do not fall within this exception for two reasons. First, Comment [10] to Rule 16-108 explains that court costs and litigation expenses are thought to be indistinguishable from contingent fees and that the advancement of these expenses helps ensure access to the courts. Litigation expenses are not defined in the rule and while Comment [10] to the Rule does not attempt to define expenses of litigation it equates them in passing to "expenses of medical examination and the costs of obtaining and presenting evidence." It is hard to imagine that future claims made after settlement funds have been disbursed are likely to fall within one of those categories. Secondly, the (E)(1) exception explicitly contemplates the lawyer's recoupment of these advanced expenses from, in the context of the question presented, the settlement funds. Even if there were some question about whether a particular post-disbursement third party claim could be said to constitute a litigation expense, the (E)(1) exception does not contemplate payment, even of litigation expenses, from the lawyer's personal funds. In contrast, the payments the lawyer would be agreeing to make under the proposed indemnity agreement would not come from the settlement funds, but from the lawyer's personal funds. The (E)(1) exception thus does not apply.

Finally, because we have concluded that Rule 16-108 (E) prohibits the requesting lawyer from entering into the proposed indemnity agreement, we will distinguish letters of protection which are not prohibited by the Rules of Professional Conduct.

> "'Letter of protection' is the customary nomenclature for a document by which a lawyer notifies a medical vendor that payment will be made when the case is settled or judgment is obtained. This is a common practice by which lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded." [2]

While a letter of protection is the lawyer's guarantee of future payments to a third party, it clearly commits only those funds the lawyer receives in trust through judgment or settlement of the personal injury case. The lawyer's personal funds are not committed in a letter of protection. The only way the lawyer might become personally liable for the guarantee made in a letter of protection is if the lawyer failed to properly distribute the funds or otherwise failed to abide by the letter of protection. On the other hand, the proposed indemnity agreement is very different from the guarantee a lawyer makes in a letter of protection. As noted previously, it calls for the lawyer to personally guarantee from the outset that the lawyer will pay from the lawyer's personal funds, not from the settlement funds, third party claims either owed by the client or for which the client is responsible. This is the difference that makes a letter of protection acceptable under Rule 16-108 whereas the proposed indemnity agreement is not.

Conclusion:

A plaintiff's lawyer who, in the course of settling a personal injury case on behalf of a client, signs an agreement as a condition of settlement to personally indemnify the opposing party from claims to the settlement funds that might be made by third parties in the future, violates Rule 16-108 (E).

Endnotes

[1] American Bar Association, Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* at 146 (7th ed.)

[2] *In re Moore*, 2000-NMSC-019 ¶2 fn1, 129 N.M. 217.

Certiorari Denied, September 12, 2016, No. S-1-SC-36047

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-089

No. 33,840 (filed July 27, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THOMAS MORGAN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
DREW D. TATUM, District Judge

HECTOR H. BALDERAS
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Santa Fe, NM
TONYA NOONAN HERRING
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BENNETT J. BAUR
Chief Public Defender
KIMBERLEY CHAVEZ COOK
Assistant Public Defender
Santa Fe, New Mexico

Opinion

J. Miles Hanisee, Judge

{1} Defendant appeals his conviction for child solicitation by electronic device, in violation of NMSA 1978, Section 30-37-3.2 (2007). Defendant makes two arguments: (1) Defendant's attorney was constitutionally ineffective by not advising him that pleading no contest to the charge before July 1, 2013, would exempt him from registration requirements under the Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 through -10 (1995, as amended through 2013); and (2) enforcing SORNA's registration requirement to child solicitation by electronic device violates Defendant's due process rights. Rejecting both arguments, we affirm.

I. BACKGROUND

{2} According to the factual allegations in the criminal complaint, "[D]efendant contacted a profile of what he believed was a 15-year-old girl [who was in fact a police officer posing as a 15-year-old girl] from Clovis, New Mexico, online using a computer." Defendant and the person he believed to be the 15-year-old girl exchanged numerous communications, and the complaint alleges that at some point—at Defendant's instigation—the communications took on a sexual tone. Defendant eventually sought and arranged an in-person meeting. When Defendant arrived, he was arrested.

{3} On November 29, 2011, Defendant was charged by information with one count of violating Section 30-37-3.2(A), (C)(1), which classifies as a third-degree felony "knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance . . . and also appear[ing] for, attend[ing] or [being] present at a meeting that the person arranged pursuant to the solicitation[.]"

{4} Defendant's trial was set for April 10, 2012, and his appointed attorney entered her appearance on February 28, 2012. At Defendant's attorney's behest, the district court reset Defendant's trial for June 18, 2012. The trial was continued a second, third, and fourth time at Defendant's attorney's request, culminating in a fifth trial setting which scheduled jury selection and trial to take place on June 27, 2013.

{5} Also while Defendant's case was pending, and more importantly from the standpoint of this appeal, on March 16, 2013, the New Mexico Legislature passed and on April 3, 2013, the Governor signed into law House Bill 570, enrolled as 2013 N.M. Laws, ch. 152, § 1, effective July 1, 2013 (hereinafter HB 570). HB 570 amended Section 29-11A-3 (2013) to add child solicitation by electronic communication device to the list of offenses that are subject to SORNA's mandatory registration requirements. *See* § 29-11A-3(I)(11). Notably, HB 570 did not impose SORNA registration requirements on all persons convicted of child solicitation by electronic communications device; instead, the registration requirement only applies to "convictions occurring on or after July 1, 2013." Section 29-11A-3(I)(11).

{6} Here, Defendant did not plead guilty and was not sentenced before July 1, 2013. Instead, on June 6, 2013, Defendant, through his attorney, moved to continue the June 27, 2013 trial date. Over the State's opposition, the district court granted Defendant's motion, thereby closing Defendant's window by which he could have avoided the SORNA registration requirement upon conviction of the charged offense. Finally, on March 28, 2014, after another set of continuances that are of no relevance to this appeal, Defendant entered into a plea agreement with the State. Under the plea agreement, Defendant pleaded no-contest to child solicitation by electronic communication device on the condition that he receive no more than one year's imprisonment as a sentence. Defendant also reserved the right to appeal his conviction based on the following issue: "whether it is constitutional to require [D]efendant to register pursuant to [SORNA] when the crime was committed on or about October 8, 2011 and the conviction occurred on March 28, 2014."

II. DISCUSSION

{7} On appeal, Defendant argues (1) that his attorney was constitutionally ineffective by failing to advise him of the benefits of pleading guilty to the information and being sentenced before July 1, 2013; and (2) due process required that Defendant be advised that he would be required upon conviction to register as a sex offender at the time he was charged in 2011, instead of at the time he pleaded guilty in 2014. We address each argument in turn.

1. Reconciling Section 29-11A-3 in 2014 and the Court's Decision in *Ho*

{8} The Legislature intended HB 570 to "reconcil[e] multiple amendments to

[Section 29-11A-3] in Laws 2007." *See* HB 570, 51st Leg., 1st Sess. (N.M. 2013), available at https://www.nmlegis.gov/Sessions/13 Regular/bills/house/HB0570.html. HB 570's reference to "multiple amendments" in Laws 2007 were two bills that, while passed during the same legislative session, purported to both add *and* remove child solicitation by electronic communication device to the list of offenses subject to SORNA's mandatory registration requirements. We described the legislative snafu in *State v. Ho*, 2014-NMCA-038, 321 P.3d 147, as follows:

> Section 29-11A-3(E) [now Section 29-11A-3(I)] and Section 29-11A-5(E) . . . list the crimes for which registration as a sex offender is required and for which the department of public safety must keep records, respectively. *See* §§ 29-11A-3(E) and -5(E). In 2007, the Legislature passed two bills that amended both sections. One, Senate Bill (SB) 735, was introduced on January 31, 2007, and passed by the Senate on March 9, 2007. . . . The other, SB 528, was introduced on January 25, 2007, and passed by the Senate on March 11, 2007. . . . Thus, while SB 528 was introduced first, it was passed in the Senate second. Both bills were passed in the House of Representatives on March 17, 2007, and signed by the Governor on March 29, 2007.
>
> . . . .
>
> The final version of SB 528 did not incorporate the amendments to Section 29-11A-3(E) passed by the Senate two days before. Instead, other than the new crime it added, SB 528 simply incorporated the list of offenses covered by SORNA as it existed before passage of SB 735. *See* 2007 N.M. Laws, ch. 69, §§ 5, 6; § 29-11A-3(E).

2014-NMCA-038, ¶¶ 3-5 (alterations and footnote omitted).

{9} Under NMSA 1978, Section 12-1-8(B) (1977, amended 2013), when the Legislature passes "two or more irreconcilable acts dealing with the same [subject matter] . . . the last act signed by the governor shall be presumed to be the law." Section 12-1-8(B) requires the Compilation Commission to compile only the last-signed act into the NMSA, and in this case the Compilation Commission chose to compile SB 528, which did not include child solicitation by electronic communications device as a registrable offense under SORNA. *Ho*, 2014-NMCA-038, ¶ 7.

{10} Prior to *Ho*, in *State v. Smith*, 2004-NMSC-032, ¶¶ 20-21, 136 N.M. 372, 98 P.3d 1022, our Supreme Court had rejected the mechanical rule set out in Section 12-1-8. In doing so, the Court noted that statutes must be construed so as not to conflict with one another in order to give effect to the Legislature's overall intent with respect to a given subject matter. *Id.* ¶ 8. Our Supreme Court stated that whenever the Legislature amends a statute, Article IV, Section 18 of the New Mexico Constitution requires the Legislature to set out the "section thereof as revised, amended or extended . . . in full." *Smith*, 2004-NMSC-032, ¶ 2 (internal quotation marks and citation omitted). This constitutional requirement, combined with the "the dynamic and sometimes frenzied way in which bills are introduced, passed, and signed into law during a single legislative session," *id.* ¶ 20, led our Supreme Court to conclude that the mere fact that a later-enacted amendment restates the language of the statute prior to an earlier amendment passed in the same legislative session does not imply a repeal of the earlier amendment as a matter of course. *Id.* ¶ 18. Instead, *Smith* adopted a presumption that the Legislature intends all of the amendments it passes in a single legislative session to be made effective. *See id.* ¶ 21. This presumption may be overcome or reinforced by consultation of contextual signals of legislative intent, such as the amendment's announced purpose. *See id.* ¶ 14.

{11} Applying *Smith* in *Ho*, we rejected the Compilation Commission's conclusion that SB 735 and SB 528 were irreconcilable. *Ho*, 2014-NMCA-038, ¶¶ 9-11. We noted that the titles of both bills "indicate that each bill addresses a distinct issue[, and] the substantive changes to SORNA made by each bill do not conflict." *Ho*, 2014-NMCA-038, ¶ 11 (citations omitted). In light of this holding, child solicitation by electronic communications device in fact *was* a registrable offense under SORNA prior to HB 570's enactment, even though the Compilation Commission only chose to compile SB 528 in NMSA. *Ho*, 2014-NMCA-038, ¶ 11. But we went on to hold that the defendant (who had been convicted of child solicitation by electronic communications device) was not required to register under SORNA based on the Legislature's subsequent passage of HB 570, which amended SORNA to only require registration by persons whose convictions for child solicitation by electronic communications device became final on or after July 1, 2013. *Ho*, 2014-NMCA-038, ¶¶ 13, 14.

{12} The upshot of HB 570's enactment on April 3, 2013, was that it created a three-month window during which any defendant facing pending child solicitation by electronic communications device charges was the master of his or her own SORNA destiny. That is because at any time between HB 570's enactment and July 1, 2013, a defendant, including Defendant in this case, could accept a plea agreement, or even simply plead guilty to the indictment or information. If the ensuing judgment and sentence was imposed before July 1, 2013, then that defendant would not be subject to SORNA's registration requirement for the offense or conviction.

2. Defendant's No Contest Plea After the Effective Date of HB 570 Was Not the Result of Ineffective Assistance of Counsel

{13} "Criminal defendants are entitled to reasonably effective assistance of counsel under the Sixth Amendment of the United States Constitution." *State v. Crocco*, 2014-NMSC-016, ¶ 12, 327 P.3d 1068 (internal quotation marks and citation omitted). Claims of ineffective assistance of counsel premised on a defendant's alleged entry into an involuntary plea require analysis under the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799. To establish ineffective assistance of counsel, a defendant must show: "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *Id.* (internal quotation marks and citation omitted).

{14} The test for deficient performance under *Strickland* "is whether the counsel's representation fell below an objective standard of reasonableness." *Paredez*, 2004-NMSC-036, ¶ 14 (internal quotation marks and citation omitted). We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* (internal quotation marks and citations omitted). Moreover, "we do not second guess defense counsel's strategic decisions" when applying the deficient performance prong. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 17, 130 N.M. 179, 21 P.3d 1032.

{15} The "prejudice" element of an ineffective assistance of counsel claim is not

satisfied when the defendant proves that a particular act or omission by his counsel was prejudicial to his defense; instead, the defendant must show a "reasonable probability" that but for the attorney's objectively unreasonable conduct, the result of the proceedings would have been different. *State v. Brazeal*, 1990-NMCA-010, ¶ 23, 109 N.M. 752, 790 P.2d 1033.

{16} The Sixth Amendment right to constitutionally effective assistance of counsel (and with it *Strickland*'s two-part inquiry) applies both to guilty pleas entered based on the advice of counsel and to the process of negotiating a plea agreement from which many guilty pleas result. *See Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1384 (2012). It also applies to a criminal defendant's decision *not* to plead guilty. *State v. Cordova*, 2014-NMCA-081, ¶ 12, 331 P.3d 980. The United States Supreme Court addressed how to apply the prejudice prong of the *Strickland* test when "ineffective advice led not to an offer's acceptance but to its rejection." *Lafler*, ___ U.S. at ___, 132 S.Ct. at 1384-85.

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at ___, 132 S.Ct. at 1385. With respect to potential remedies, the Court explained that in some cases, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id.* at ___, 132 S.Ct. at 1389.

{17} "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *Crocco*, 2014-NMSC-016, ¶ 14 (internal quotation marks and citation omitted). "If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition, although an appellate court may remand a case for an evidentiary hearing if the defendant makes a prima facie case of ineffective assistance." *Id.* (internal quotation marks and citation omitted). A prima facie case of ineffective assistance of counsel is made on appeal where: "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (internal quotation marks and citation omitted).

{18} Defendant's ineffective assistance of counsel argument is straightforward: HB 570 amended Section 29-11A-3(I)(11) on April 3, 2013 to state that SORNA's registration requirement applies to "convictions [for child solicitation by electronic communication device] occurring on or after July 1, 2013[.]" Defendant argues that his attorney should have been, but was not aware of the Legislature's 2013 amendments to Section 29-11A-3 during this roughly three-month period of time. Defendant contends that his attorney's ignorance resulted in her failing to obtain a plea agreement or even advise Defendant of the merits of entering a straight guilty plea to the information in order to be sentenced before July 1, 2013, either of which would have exempted Defendant from SORNA's registration requirements.

{19} In *State v. Edwards*, we held that an attorney's failure to advise the defendant "that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA . . . amounts to deficient performance under the *Strickland* test." *Edwards*, 2007-NMCA-043, ¶ 31, 141 N.M. 491, 157 P.3d 56. Defendant concedes that he was in fact aware of the collateral consequences of his guilty plea when he agreed to plead guilty to the solicitation charge after July 1, 2013. So by direct application of *Edwards*, Defendant was given competent representation because he was advised of the consequences of his plea. But *Edwards* does not answer the related but distinct question presented by this appeal: whether an attorney (in order to be minimally competent under the Sixth Amendment) must be aware of and advise an affected client regarding a recent change in the law that creates a benefit that will soon expire—here, SORNA amnesty for the charge of which Defendant was then accused of committing.

{20} The issue Defendant is arguing appears to be one of first impression. To be sure, there are many cases considering ineffective assistance of counsel claims based on an attorney's failure to be aware of *future* changes to the law. For example, in *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1539-1540 (10th Cir. 1995), *overruled on other grounds*, *United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006) (en banc), the defendant was sentenced roughly twenty days before then President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, which allows district judges to impose a sentence below the mandatory minimum imposed by a statute if the defendant meets certain criteria. The defendant argued that his attorney was constitutionally ineffective by failing to seek a continuance of sentencing in order to give Defendant the opportunity to seek a sentence below the mandatory minimum. *Id.* at 1541-1542. The Tenth Circuit rejected the defendant's argument, reasoning that "[c]ounsel's assistance is not ineffective simply because counsel fails to base its decisions on laws that might be passed in the future. . . . Considering the attorney's perspective at the time of sentencing, it was not only unclear when the amendments would take effect, but also uncertain whether they would take effect at all." *Id.* at 1542 (citations omitted).

{21} Here, however, we are not presented with an ineffective assistance of counsel claim based on the mere *potential* for a change in the law that might benefit defendant. Instead, HB 570 made an immediate change to the law that gave Defendant the ability to avoid a specific consequence—sex offender registration—but only for a short time period and dependent on his willingness to plead guilty to the offense charged. Seen in this light, Defendant's argument acquires some force. If *Edwards* requires attorneys to be aware of the collateral SORNA consequences of a guilty plea, oughtn't they also be charged with awareness that their client can definitively circumvent the SORNA consequence of a plea of guilty if swiftly entered?

{22} But to demand that Defendant's attorney be aware of a three-month-long delay in the SORNA effective date, as expressed by HB 570, would require a particularly high level of attentiveness and diligence. And "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.' " *Harrington v. Richter*, 562 U.S. 86, 110 (quoting *Strickland*, 466 U.S. at 687). Before April 3, 2013, it surely would have been reasonable

for Defendant's attorney to believe that child solicitation *was not* a registrable offense: after all, the Compilation Commission had not included child solicitation by electronic device in the list of registrable offenses in NMSA. It is not reasonable, however, to require Defendant's counsel to anticipate the conflicting amendments to Section 29-11A-3 and correctly predict the way this Court would later analyze Section 29-11A-3 when it decided *Ho*. Yet here we need not decide whether Defendant's attorney should have known about the three-month amnesty after April 3, 2013, because Defendant has failed to demonstrate on this record that the fact that his case persisted beyond July 1, 2013 was caused by his attorney's failure to advise him of his opportunity for amnesty from application of SORNA.

{23} Defendant's decision to raise his ineffective assistance of counsel claim on direct appeal means that he must show how the record establishes unreasonable conduct by his attorney in this case. *See Herrera*, 2001-NMCA-073, ¶ 36. Here, that means Defendant must show that the record supports a finding that his attorney failed to advise Defendant about the effect of HB 570 and advisability of entering into a plea agreement and proceeding to sentencing before July 1, 2013. But the only evidence in the record Defendant can point to is his reservation of the right to appeal a due process challenge to the application of SORNA's notice requirements to Defendant for conduct occurring prior to July 1, 2013, in his plea agreement. Defendant argues that this proves his attorney was not aware of HB 570 before July 1, 2013. We are not persuaded. The fact that Defendant's March 2014 plea agreement reserves a due process challenge to Section 29-11A-3 hardly speaks to what Defendant's attorney knew or did not know between April 3 and July 1, 2013. In other words, the fact that Defendant's attorney reserved a different issue for appellate review in March 2014 does not imply that she was ignorant of the SORNA amnesty window in 2013. Thus, even if we were to agree with Defendant's contention that his attorney was required to be aware of HB 570 in order to provide reasonably satisfactory assistance of counsel, the record does not support a finding that his attorney was in fact unaware of HB 570 during the relevant time period. This conclusion is sufficient by itself to decide Defendant's ineffective assistance of counsel claim on direct appeal. *See Herrera*, 2001-NMCA-073, ¶ 36.

{24} Even if the record supported a finding that Defendant's attorney did not advise Defendant about the Legislature's passage of HB 570, Defendant must show why he was prejudiced by his attorney's failure to do so: in other words, Defendant must show

> that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, ___U.S. at ___, 132 S.Ct. at 1385. In this case, Defendant argues that he would have entered into a plea agreement with the State between April 3, 2013, and July 1, 2013, and that his attorney's errors caused him not to do so.

{25} The record before us does not support Defendant's assertion. At a pretrial conference on June 25, 2012, the State mentioned that the parties were in the process of negotiating a plea agreement. And at a docket call on March 17, 2014, the State mentioned that it had made a plea agreement offer in 2012. But these two references to the existence of plea negotiations in 2012 are insufficient to demonstrate prejudice on direct appeal. The mere existence of a plea offer in 2012 has no bearing on whether Defendant would have accepted it, even assuming the offer remained available between April 3, 2013 and July 1, 2013.

{26} Defendant responds that we should infer prejudice based on the fact that Defendant's incarceration would have been the same had he entered into the plea agreement before July 1, 2013. In other words, Defendant argues that the fact that he entered into a plea agreement in 2014 *ipso facto* proves that he would have entered into the same agreement before July 1, 2013. But the record does not contain any evidence of the State's 2012 plea offer, so there is no way to determine that the terms of the 2014 plea agreement are the same as or worse than the 2012 offer. Indeed, since we can infer that Defendant rejected the 2012 offer (he does not contend his attorney failed to communicate it to him), an opposite inference is more plausible.

{27} Defendant finally appears to suggest that we should conclude that he was prejudiced by his attorney's failure to advise him about HB 570 based on the fact that the sole difference between a child solicitation by electronic communications device conviction entered before July 1, 2013 and one entered afterward is the SORNA registration requirement. While it is true that sex offender registration was required after, but not before July 1, 2013, that hardly implies that Defendant would have pleaded guilty to the information even without a plea agreement with the State simply to avoid the registration requirement. Child solicitation by electronic communications device is a third-degree felony when the child is between thirteen and sixteen and the defendant appears at a meeting arranged pursuant to the solicitation. *See* Section 30-37-3.2(C)(1). Therefore, a straight guilty plea to the information would have exposed Defendant to a possible sentence of six years' confinement. *See* NMSA 1978, § 31-18-15(A)(8) (2007, amended 2016). It is not self-evident that possibly six years imprisonment and no registration is preferable to the maximum one-year prison term followed by ten years sex offender registration provided for in the plea agreement into which Defendant entered and the district court ultimately accepted. Accordingly, Defendant has failed to demonstrate that he suffered prejudice as a result of his attorney's failure to advise him of the Legislature's SORNA amnesty window for pending child solicitation charges resolved between April 3, 2013 and July 1, 2013.

2. Defendant Failed to Preserve His Due Process Argument

{28} Defendant's second issue on appeal is that his right to due process was violated when the district court failed to notify him that HB 570 had made registration under SORNA applicable only to convictions made final after July 1, 2013. Defendant contends that had the district court alerted him to the existence of HB 570 between April 3 and July 1, 2013, Defendant would have entered a guilty plea to the information in order to avoid the registration requirement.

{29} To the extent that Defendant's argument can be distinguished from his

ineffective assistance of counsel argument, Defendant failed to preserve it for appellate review by reserving it in his conditional plea agreement. Normally, "a voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds." *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1. A conditional plea, however, "enable[s] a defendant to reserve a significant pretrial issue for appeal in a case in which conviction seems certain unless the defendant prevails on the pretrial issue." *State v. Celusniak*, 2004-NMCA-070, ¶ 7, 135 N.M. 728, 93 P.3d 10 (internal quotation marks and citation omitted).

{30} Rule 5-304(A)(2) NMRA governs conditional pleas, and provides that "[w]ith the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion." Thus, a "defendant enters a [valid] conditional plea by (1) preserving the error through a pretrial motion, (2) obtaining consent of the prosecution, and (3) obtaining approval of the court." *Celusniak*, 2004-NMCA-070, ¶ 7.

{31} As we explained in *State v. Winters*, apart from the requirement of obtaining the district court's consent,

> [Rule 5-304] embodies two other principles: preservation and reservation. First, the rule requires that there be an "adverse determination of any specified pretrial motion." Rule 5-304(A)(2). Therefore, a defendant must have preserved the issue for appellate review. Second, the defendant must specify the specific issue or issues that he or she is reserving for appellate review. That is, the defendant must "express an intention to reserve a particular pretrial issue for appeal."

Winters, 2015-NMCA-050, ¶ 18, 349 P.3d 524 (emphasis, internal quotation marks, and citation omitted).

{32} In order to preserve an error for appeal, "it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA. In order to fairly invoke the district court's ruling or decision on an issue, "it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted).

{33} Although Defendant reserved an appellate issue in his plea agreement, he never preserved the issue he now raises by making a pretrial motion to the district court. To be sure, Defendant could not have made such a motion prior to July 1, 2013, when any opportunity to be informed of HB 570's temporary SORNA amnesty was still open. But nothing prevented Defendant from raising the issue after July 1, 2013, while trial was pending and prior to his guilty plea in 2014. Having failed to make such a motion, Defendant did not preserve this issue for appellate review. Accordingly, we decline to address it any further.

III. CONCLUSION

{34} Defendant's conviction is affirmed.

{35} IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:
MICHAEL E. VIGIL, Chief Judge
TIMOTHY L. GARCIA, Judge (dissenting).

GARCIA, Judge (dissenting).

{36} I respectfully dissent in this case. Recognizing that we are willing to review matters of record for prima facie evidence of ineffective assistance of counsel, we will not afford the same benefit to arguments based on matters outside the trial record. *See State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 (holding that without any record, we cannot consider claims of ineffective assistance of counsel on direct appeal). However, based upon the evidence and record available in this case, I would hold that Defendant has made a prima facie showing of ineffective assistance of counsel. *See Herrera*, 2001-NMCA-073, ¶ 36 (recognizing that a prima facie case of ineffective assistance of counsel exists where: "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial"). Rather than affirm Defendant's conviction, Majority Opinion ¶ 34, this Court should remand this matter back to the district court for an evidentiary hearing to fully evaluate defense counsel's effectiveness when she failed to address the State's plea offer before July 1, 2013, the expiration date for the SORNA amnesty window. *See Crocco*, 2014-NMSC-016, ¶ 14 ("A prima facie case is made if [a d]efendant produces enough evidence to allow the fact-trier to infer the fact at issue and rule in [a d]efendant's favor." (alteration, internal quotation marks, and citation omitted)).

{37} The majority determined that Defendant failed to established that he would have entered into a plea agreement prior to July 1, 2013, but for his attorney's errors. Majority Opinion ¶¶ 25-27. But a prima facie showing of ineffective assistance of counsel only requires a showing that counsel acted unreasonably and this error resulted in prejudice to the defendant. *Herrera*, 2001-NMCA-073, ¶ 36. Sufficient evidence was presented regarding the existence of the 2012 plea offer that ultimately resulted in a plea after the SORNA amnesty period expired. Majority Opinion ¶ 25. The only apparent issue regarding defense counsel's effectiveness would be whether she was aware of the SORNA amnesty window and sufficiently notified Defendant of its implications before the deadline. *See State v. Talley*, 1985-NMCA-058 ¶ 6, 103 N.M. 33, 702 P.2d 353 (identifying the duty to consult with the defendant regarding important decisions and developments as one of the proper considerations for ineffective assistance of counsel). This opportunity, to both consult and inform Defendant of the new SORNA amnesty window, existed at the pretrial conference on May 6, 2013, and again on June 6, 2013, when defense counsel moved to continue the June 27, 2013 trial date. Defendant asserts that (1) no such notification occurred; and (2) had he been adequately notified, he would have timely addressed the pending 2012 plea offer before the expiration of the amnesty window. Based upon the record available for review, Defendant's assertion of error does meet the required standard of reasonableness that is necessary under *Herrera* to establish the first prima facie factor toward an ineffective assistance claim. 2001-NMCA-073, ¶ 36.

{38} The second *Herrera* factor—a plausible explanation— does not appear to be at issue. *Id.* The State does not assert that a plausible or tactical reason exists for the failure to notify Defendant of the SORNA amnesty window that existed in 2013 while his charges and the June 27, 2013 trial were pending. And I cannot think of one.

{39} Finally, the majority disputes whether the prejudice factor can be established

based upon the record before us. Majority Opinion ¶¶ 25-27. The majority appears to base this position on the fact that the specific 2012 plea offer is not part of the evidence or contained in the record. Majority Opinion ¶ 26. However, once a recognized duty to consult with or inform a defendant regarding important decisions or developments in a case has been established, then a prima facie case of prejudice should exist that requires further evaluation and an explanation of why the duty was not met by counsel. *See Talley*, 1985-NMCA-058 ¶¶ 6-7 (noting that this Court has recognized ineffective assistance to exist when counsel is deficient in meeting any of the recognized duties to adequately represent a defendant in the adversarial process); *State v. Luna*, 1979-NMCA-048 ¶¶ 27-28, 92 N.M. 680, 594 P.2d 340 (remanding for an independent ineffective assistance of counsel hearing where counsel failed to take pretrial action to address the acquittals of co-defendants involved in the same conspiracy charge). Defendant has now offered sufficient inferential evidence of the existence of the 2012 plea offer that was only accepted after the SORNA amnesty deadline. This would be sufficient to show both attorney error and prejudice. *See Crocco*, 2014-NMSC-016, ¶ 14 (requiring the defendant to produce enough evidence to allow the court to infer the fact at issue). The appropriate means for fully addressing the more specific details and timing of counsel's failure to address the plea agreement before July 1, 2013, should be left to the district court during a remand hearing. *See Luna*, 1979-NMCA-048 ¶ 28 (leaving the specific reasons for counsel's inaction to be developed on remand once a prima facie showing of ineffectiveness has been satisfied).

{40} In conclusion, I do not concur with the holding reached by the majority in this case. Sufficient inferential evidence was provided regarding ineffective assistance of counsel so as to bypass the necessity of habeas corpus proceedings. The issue of whether defense counsel was ineffective should have been remanded for an evidentiary hearing in the district court.

TIMOTHY L. GARCIA, Judge

Certiorari denied, September 20, 2016, No. S-1-SC-36053;
Conditional cross petition denied, September 20, 2016, No. S-1-SC-36053

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-090

No. 34,493 (filed July 25, 2016)

MB OIL LTD., CO.,
Plaintiff-Appellee,
v.
THE CITY OF ALBUQUERQUE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CARL J. BUTKUS, District Judge

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Opinion

Linda M. Vanzi, Judge

{1} The City of Albuquerque (the City) appeals from a judgment awarding nearly four million dollars in anticipatory profits for the wrongful termination of a supply contract (Contract) that was expressly terminable for cause or convenience. Because we conclude as a matter of law that the contract was not wrongfully terminated, we reverse and remand for entry of judgment in favor of the City.

BACKGROUND

{2} The following factual background is derived from the district court's findings of fact, to which we generally defer, *see State v. Munoz*, 1998-NMCA-140, ¶ 14, 125 N.M. 765, 965 P.2d 349, and from the terms of the Contract itself, which we can interpret as well as the district court. *See Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 12, 139 N.M. 274, 131 P.3d 661 ("In the absence of ambiguity, the interpretation of language in a contract is an issue of law which we review de novo.").

{3} MB Oil Ltd., Co. (Plaintiff) is a wholesale fuel distributor that contracted with the City to be the primary supplier of certain fuels to the City's Fleet Management Division. The Contract provided that the quantities of fuel to be delivered would vary depending on the City's needs. During the contract period, Plaintiff would treat the City as a "preferred customer," delivering requested fuel within twelve hours of any order and always assigning first priority to the City's requirements. In exchange, the City would treat Plaintiff as its primary fuel supplier, ordering from Plaintiff first at prices agreed upon in the Contract before turning to secondary and tertiary suppliers in the event Plaintiff could not meet the City's needs.

{4} Section 26 of the request for bids, which was later merged into the Contract, gave the City the right to terminate the agreement for default, after giving notice to cure, if Plaintiff failed to fulfill its delivery obligations "in a timely and proper manner[.]" Immediately following the termination for default clause, Section 27 then provided an alternative basis for termination, which is the subject of this Opinion:

> Termination for the Convenience of the City: The City may terminate [the C]ontract . . . at any time by giving at least thirty (30) days' notice in writing of such termination to [Plaintiff]. In such event, [Plaintiff] shall be paid under the terms of the [C]ontract for all goods/services provided to and accepted by the City, if ordered or accepted by the City prior to the effective date of termination.

A termination for convenience clause is generally understood to be a risk-allocating tool, intended to permit a government to "terminate a contract, even in the absence of fault or breach by the other party, without incurring the usual financial consequences of breach." *Mark Dunning Indus. v. Cheney*, 934 F.2d 266, 267 n.1 (11th Cir. 1991) (per curiam) (internal quotation marks and citation omitted). It has become a standard term in federal procurement contracts. *See Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996); *see also* 48 C.F.R. § 49.502 (2007) (noting the types of contracts that utilize a termination for convenience by the government clause). Like other municipalities—and even some private parties—the City has apparently taken the federal government's lead and begun including the clause in its own contracts. *See, e.g.*, *Old Colony Constr., LLC v. Town of Southington*, 113 A.3d 406, 408 n.1 (Conn. 2015); *Vila & Son Landscaping Corp. v. Posen Constr., Inc.*, 99 So. 3d 563, 566-68 (Fla. Dist. Ct. App. 2012). It does so because, as the Director for Finance and Administration for the City of Albuquerque testified at trial, the City needs to be able to cancel its contracts if operational reasons require it to change course.

{5} Plaintiff submitted its bid in October 2009—its first time bidding on a city contract. An exhibit admitted at trial indicates that it offered to charge the City a paltry delivery price of $148,660.46 compared to the second lowest bidder, which proposed a price nearly six times higher. Not surprisingly, the City ultimately awarded the primary supply Contract to Plaintiff, and Plaintiff began performing in March 2010.

{6} There were then various occasions throughout the summer of 2010 where Plaintiff was unable to timely deliver fuel or unable to deliver fuel at all due to what the district court later concluded was a lack of availability of fuel to deliver. The district court also concluded that in each of the instances when fuel was unavailable to Plaintiff, the City was forced to turn to its backup vendors to provide the fuel. It is thus apparent that the fuel that was unavailable to Plaintiff was in fact available to other suppliers, including the City's backup vendors.

{7} On multiple occasions, beginning in July 2010, the City notified Plaintiff in writing that fuel requirements were not being met. Specifically, a letter dated July 12, 2010, informed Plaintiff that it was in default. That letter also stated that Plaintiff had been unable to provide unleaded fuel to the City for a month. And a second letter, dated August 31, 2010, explained that Plaintiff's failure to provide fuel when ordered "creates problems for the City and is in violation of the [C]ontract requirements." The City finally terminated the contract for default and/or convenience on September 9, 2010, citing Plaintiff's failure to "provid[e] fuel within the delivery time requirements of the [C]ontract, i.e., within [twelve] hours of order placement[.]" The cancellation letter also noted that Plaintiff made partial deliveries, and "on several occasions," actually refused to provide fuel.

{8} Plaintiff filed suit alleging various tort claims that have since been dismissed and leaving two contract claims that went to trial. Count I's breach of contract claim essentially alleged a bait-and-switch scheme: that the City's request for bids misrepresented the amounts and types of fuel the City would order to the detriment of vendors who relied on those estimates in formulating their bids. Of particular importance was the City's failure to accurately estimate requirements of E85 (85% ethanol-blended fuel), which was the basis for Plaintiff's profit margin in the Contract. To Plaintiff's detriment, the City "cancell[ed]" all orders of that fuel type early in the Contract term.

{9} Count IV similarly alleged only that the City "breached the covenant of good faith and fair dealing by knowingly and intentionally breaching the contractual agreements with [Plaintiff]." All told, the Complaint was directed at the City's alleged conduct in soliciting bids and making untimely payments and such—behavior that Plaintiff alleged caused it various damages.

{10} Following a bench trial, the district court entered its findings and conclusions ruling in favor of Plaintiff and awarded substantial damages. Liability was not premised on the complaint's bait-and-switch allegations, its late payments theory, or on the alleged cancellation of E85. Instead, the district court concluded that the City wrongfully terminated the Contract for default because the failed and untimely deliveries did not constitute a substantial impairment to the City's benefits under the Contract, and also wrongfully terminated it for convenience, since Plaintiff showed "an absence of valid grounds for invocation of the termination for convenience clause." The court awarded costs plus $378,672.23 in "preparatory damages" and $3,805,840.46 in anticipatory profits "arising directly from the [C]ontract." The City appealed, and we now reverse the district court.

DISCUSSION

{11} The district court in this case found it "difficult to evaluate the City's invocation of the termination for convenience clause" because "[n]either the September 9, 2010 letter nor the evidence at trial specifically identify any 'convenience' other than perhaps the grounds identified for invocation of" the clause allowing termination for default. The court then concluded, for this reason, that Plaintiff carried its burden of persuasion by showing the absence of "persuasive facts" to support the City's right to terminate the Contract for convenience.

{12} But the City was not required to have any good cause or persuasive reason for terminating the Contract. The plain wording of Section 27 allowed the City to unilaterally invoke the clause for its convenience at any time by giving at least thirty days' notice in writing to Plaintiff.

{13} A clause that allows a party to terminate a contract for convenience, as opposed to default, is typically treated as a provision allowing termination "without cause[,]" *Harris Corp. v. Giesting & Assocs.*, 297 F.3d 1270, 1273 (11th Cir. 2002), which is the functional equivalent of an agreement for an indefinite period, terminable at will. *See Lopez v. Kline*, 1998-NMCA-016, ¶ 10, 124 N.M. 539, 953 P.2d 304 ("An at-will employer-employee relationship is subject to termination at any time, with or without cause."). Clauses of this sort are not limited to employment relationships; they have been applied according to their terms in cases, like this one, that are governed by the Uniform Commercial Code. *See, e.g.*, *Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶¶ 13-23, 98 N.M. 541, 650 P.2d 825.

{14} For example, the termination clause in *Smith* allowed either party to terminate a wholesale distributorship "for any reason" by giving proper notice. *Id.* ¶¶ 4, 14. When the defendant terminated the contract because of alleged unsatisfactory performance by the plaintiffs, the plaintiffs—avidly disputing that their performance was unsatisfactory—sued the defendant for wrongful termination. *Id.* ¶¶ 5-6. The Supreme Court held on appeal that it was immaterial whether the plaintiffs' performance was factually unsatisfactory. *Id.* ¶ 23. The plaintiffs' attempt to restrict termination "only to instances supported by a showing of good cause" would have simply read the termination clause out of the contract, resulting in a construction contrary to the plain wording of the agreement. *Id.*

{15} This is not a novel concept. It is an outgrowth of the unremarkable obligation of courts to enforce the bargained-for terms of a contract as written. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, ¶ 17, 106 N.M. 726, 749 P.2d 1105. Parties are free to negotiate for provisions that are beneficial to them, and "[a] dissatisfied party to a valid contract should not be allowed to rewrite the provisions to which he initially assented." *Id.* ¶ 19. Thus, "[c]ontractual provisions relating to termination or cancellation of an agreement not arrived at by fraud, or unconscionable conduct, will be enforced by law." *Smith*, 1982-NMSC-102, ¶ 20.

{16} At a glance, a clause that provides only one party the right to terminate for convenience might seem unfair, or even illusory. At-will employment is generally terminable by either party, *see Melnick*, 1988-NMSC-012, ¶ 14, and so was the distributorship in *Smith*—a fact that was noted by the Supreme Court in its unconscionability analysis in that case. *See Smith*, 1982-NMSC-102, ¶¶ 13-14. Only the City had the right to terminate for convenience in this case.

{17} But there are good reasons to allow the government to include a nonmutual termination for convenience clause in its supply contracts. First, the practice has been expressly authorized by our Legislature. NMSA 1978, § 13-1-170(A)(6) (1997) ("A . . . local public body . . . may require by regulation that contracts include uniform clauses providing for . . . termination of the contract in whole or in part for the convenience of the . . . local public body[.]"). We presume that the City, having been allowed to mandate inclusion of the clause (by regulation) in all of its contracts, can also selectively include it in this one.

{18} Second, the City is a municipality contracting for the benefit of its citizens. The flexibility provided by a termination for convenience clause allows it to limit expenditures without binding successor governments to contractual obligations that are not in the best interests of the citizenry. *See Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988) ("One of the few exceptions to the common law requisite mutuality of contract is that here at issue."). A newly elected mayor might decide that city vehicles should switch to cleaner, alternative fuels that are not available to its existing wholesale supplier. Conversely, the mayor

could decide that those fuels are too costly and prioritize instead the supply of cheaper fuels for the city's fleet. If the current supplier cannot meet increased demands for unleaded fuel resulting from the change in policy, the city may reasonably need to terminate the contract with notice in order to find a supplier that can meet its needs.

{19} That latter example basically summarizes this case. On April 23, 2010, Albuquerque's Chief Administrative Officer—an officer of the new administration—directed the City's fleet management to convert its fleet from E85 and B20 (20% biodiesel) to unleaded gasoline and 5% biodiesel fuel, which were perceived to be "the most cost effective fuel[s] based on the combination of price and efficiency." The district court found that Plaintiff never refused to deliver the unleaded fuel, but that on at least twenty-seven occasions from June through August 2010, Plaintiff advised the City that the fuel was unavailable or that deliveries would be late. After giving Plaintiff notice that delivery requirements were not being met, the City terminated the Contract for cause and convenience, citing Plaintiff's failure to "provid[e] fuel within the delivery time requirements of the [C]ontract[.]"

{20} Termination for convenience clauses in government contracts are designed precisely to apply to these circumstances. *See, e.g.*, *Nesbitt v. United States*, 345 F.2d 583, 586 n.3 (Ct. Cl. 1965). In *Nesbitt*, the United States Court of Claims noted that a supplier's inability to meet the government's increasing demands in a requirements contract would "undoubtedly" give the government power under the termination clause "to terminate the plaintiff's full rights, in order to be free to place orders with other suppliers." *Id.* The only difference here is that the City is a municipality. But, like the federal government, the City is authorized by the Legislature to include termination for convenience clauses in its contracts, *see* § 13-1-170(A)(6), and having bargained for such a clause, its constituent taxpayers should not be saddled with millions of dollars in damages for a supplier's anticipatory profits simply because the government's needs have changed. To the extent Plaintiff argues that termination was wrongful because the City was not operating in the best interests of the taxpayers, that argument is not well taken. *See generally Planning & Design Sols. v. City of Santa Fe*, 1994-NMSC-112, ¶ 5, 118 N.M. 707, 885 P.2d 628 ("[W]e will not substitute judicial discretion for municipal administrative discretion.").

{21} The federal courts do, however, recognize some limitations on the government's ability to terminate its contracts at will. These limitations are designed to ensure that government contracts with nonmutual termination for convenience clauses are not illusory. *See Torncello v. United States*, 681 F.2d 756, 769 (Ct. Cl. 1982) ("It is hornbook law . . . that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract."). Two competing standards have arisen.

{22} The first only requires that the government does not abuse its discretion or act in bad faith. *Krygoski Constr. Co.*, 94 F.3d at 1543 ("In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." (internal quotation marks and citation omitted)). A termination for convenience causes a contract breach only when a plaintiff can show "well-nigh irrefragable proof" that the government did not terminate the contract in good faith. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976) (internal quotation marks and citation omitted). This narrow standard would presumably be met if a plaintiff showed that the contracting officer was (1) motivated by malice, *Gadsden v. United States*, 78 F. Supp. 126, 128 (Ct. Cl. 1948); (2) involved in a conspiracy to get rid of the plaintiff, *Knotts v. United States*, 121 F. Supp. 630, 636 (Ct. Cl. 1954); (3) sought only to secure a better bargain from a competing supplier in a requirements contract, *Torncello*, 681 F.2d at 772; or (4) never intended to keep its promise when the promise was made, *Krygoski Constr. Co.*, 94 F.3d at 1545.

{23} The second standard is a "changed circumstances" test announced by a plurality of the United States Court of Claims in *Torncello*, 681 F.2d at 771 ("[W]e restrict the availability of the clause to situations where the circumstances of the bargain or the expectations of the parties have changed sufficiently that the clause serves only to allocate risk."). The changed circumstances test has since been abandoned by the federal courts, *see Krygoski Constr. Co.*, 94 F.3d at 1545, but two state courts have nevertheless adopted it in cases the district court relied upon when it authored its conclusions of law below. *See Ry-Tan Constr., Inc. v. Wash. Elementary Sch. Dist. No. 6*, 93 P.3d 1095, 1112 (Ariz. Ct. App. 2004), *vacated on other grounds by* 111 P.3d 1019, 1024 (Ariz. 2005) (en banc); *Ram Eng'g & Constr., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 587 (Ky. 2003).

{24} We need not flesh out these competing standards in any greater detail. The City was entitled, under any standard, to terminate the Contract in this case because the district court found that Plaintiff was unable to meet the City's increasing demands for unleaded fuel in a requirements contract. *See Nesbitt*, 345 F.2d at 586 n.3. That is a circumstance that probably justified termination for default, though the district court concluded otherwise. It is certainly a "changed circumstance" and an inconvenience to the City, which contracted and paid to be a preferred customer entitled to the reliable delivery of fuel within twelve hours of its request. *See Torncello*, 681 F.2d at 771.

{25} That the Contract contemplated secondary and tertiary fuel suppliers does not mean that the City expected to rely on those suppliers for the entire summer of 2010. Nor does the district court's finding that Plaintiff never affirmatively refused to deliver fuel mean that the City's expectations under the Contract were met. The City's trucks cannot run on Plaintiff's good intentions and, certainly from the City's perspective, there is little appreciable difference between Plaintiff's wilful refusal to deliver fuel and its frequent inability to timely deliver it. That is obvious from the Contract itself, which expressly provided for cancellation in the event Plaintiff failed to deliver fuel in a "timely and proper manner[.]"

{26} As such, termination pursuant to Section 27 was neither a breach of the Contract nor a breach of the covenant of good faith and fair dealing. *Melnick*, 1988-NMSC-012, ¶ 17 ("We align . . . with those courts that have refused to apply an implied covenant of good faith and fair dealing to override express provisions addressed by the terms of an integrated, written contract."); *see Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc.*, 2005-NMCA-051, ¶ 44, 137 N.M. 524, 113 P.3d 347 ("The implied duty of good faith does not confer on a district court a roving commission to do whatever it[] wishes in the name of fairness." (internal quotation marks and citation omitted)). Since these were the only bases for liability, we reverse for the district court to enter judgment in favor of the City. Of course, the City is responsible for any damages contemplated in the text of Section 27 itself, if those amounts have not yet been paid.

CONCLUSION

{27} The judgment of the district court is reversed.

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

LINDA M. VANZI, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, September 22, 2016, No. S-1-SC-36063

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-091

No. 34,426 (filed July 28, 2016)

THE BANK OF NEW YORK AS TRUSTEE FOR POPULAR FINANCIAL SERVICES MORTGAGE/PASS THROUGH CERTIFICATE SERIES #2006-D,
Plaintiff-Appellant,
v.
JOSEPH A. ROMERO and MARY ROMERO a/k/a MARY O. ROMERO a/k/a MARIA ROMERO,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
SARAH M. SINGLETON, District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} This is the second time this case has been appealed to this Court. The first appeal focused on whether the Bank of New York as Trustee for Popular Financial Services Mortgage/Pass Through Certificate Series #2006-D (the Bank) had standing to bring its foreclosure action against Joseph and Mary Romero (the Romeros). This Court's opinion affirming the district court's determination that the Bank had standing was appealed to the New Mexico Supreme Court. Our Supreme Court held that the Bank did not have standing at the time the complaint was filed and thus reversed this Court and the district court and "remand[ed] to the district court with instructions to vacate its foreclosure judgment and to dismiss the Bank['s] . . . foreclosure action for lack of standing." *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 1, 320 P.3d 1.

{2} Upon remand, the district court vacated the final judgment and dismissed the foreclosure action with prejudice. In this second appeal, the Bank challenges the designation of the district court's dismissal as being "with prejudice," along with the district court's ruling that the Bank "is precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage." We reverse and remand with instructions.

BACKGROUND

{3} On June 26, 2006, the Romeros executed and delivered to Equity One, Inc. an adjustable rate note (the Note) in the principal sum of $227,240. After the Romeros defaulted on the Note, the Bank, on April 1, 2008, filed a complaint for foreclosure. After a bench trial, the district court entered findings of fact and conclusions of law in favor of the Bank. On September 1, 2009, the district court entered its final judgment and order for foreclosure sale. The Romeros appealed the judgment and order. This Court issued an opinion affirming the district court. *Bank of N.Y. v. Romero*, 2011-NMCA-110, 150 N.M. 769, 266 P.3d 638, *rev'd by* 2014-NMSC-007.

{4} The Romeros petitioned for a writ of certiorari, our Supreme Court granted the petition, and the Court held that the Bank "did not establish its lawful standing in this case to file a home mortgage foreclosure action." *Romero*, 2014-NMSC-007, ¶ 1. And the Court remanded to the district court "with instructions to vacate its foreclosure judgment and to dismiss the Bank['s] . . . foreclosure action for lack of standing." *Id.*

{5} On remand, the Romeros filed a motion to vacate the final judgment and for other relief. The district court granted the Romeros' motion, vacated the foreclosure sale, and ordered the Bank to "pay all property taxes due on the property[,]" "remove . . . liens, encumbrances[,] or charges" on the property, "promptly issue a quit claim deed conveying the property that was the subject of this foreclosure action back to [the Romeros,]" and repay any rental fees or monies paid to the Bank or their counsel. Thereafter, the Romeros filed a motion to dismiss the foreclosure with prejudice, arguing that the Supreme Court's opinion supported dismissal with prejudice and that "both res judicata and the statute of limitations bar any subsequent attempts to collect on the accelerated Romero note and accompanying mortgage." The district court granted the motion and dismissed the foreclosure with prejudice.

{6} In its order granting the motion to dismiss and dismissing the foreclosure with prejudice, the district court stated, "it is the opinion of the [c]ourt that by reason of *issue* preclusion . . . [the] Bank . . . is precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage." (Emphasis added.) The court then ordered that "the [c]omplaint for [f]oreclosure is dismissed **with prejudice** and the Bank . . . cannot refile a complaint to enforce the Romeros' note and foreclose on the Romeros' mortgage."

{7} On appeal, the Bank argues that the dismissal with prejudice and the district court's statement that the Bank "is precluded from

raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage" were in error.

{8} Although the district court referred to "issue preclusion" as the basis for its dismissal with prejudice, we address the elements and merits of both issue and claim preclusion because (1) the district court appears to have merged the doctrines in its order when it dismissed the foreclosure *claim* with prejudice due to the Supreme Court's decision on the standing *issue*, and (2) the Romeros argued in district court and now argue on appeal that claim preclusion may also support dismissal with prejudice. As well, the Bank argues that the order is not supported under law of the case, claim preclusion, issue preclusion, or some "hybrid" between the two.

DISCUSSION

I. Law of the Case

{9} "Whether law of the case applies, as well as how it applies, are questions of law subject to de novo review." *State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶ 20, 145 N.M. 769, 205 P.3d 816. "The doctrine of law of the case has long been recognized in New Mexico[.]" *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 1972-NMSC-018, ¶ 13, 83 N.M. 558, 494 P.2d 971. The law of the case doctrine "is a matter of precedent and policy; it is a determination that, in the interests of the parties and judicial economy, once a particular issue in a case is settled it should remain settled." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 40, 125 N.M. 721, 965 P.2d 305 (internal quotation marks and citation omitted). Our Supreme Court has held that "a decision by an appeals court on an issue of law made in one stage of a lawsuit becomes binding on subsequent trial courts as well as subsequent appeals courts during the course of that litigation." *King*, 2009-NMSC-010, ¶ 21. When there "is any doubt or ambiguity regarding the [appellate] mandate, the *meaning* of the [appellate] opinion governs." *Id.* ¶ 22.

{10} The parties disagree as to whether law of the case based on the Supreme Court's opinion in *Romero*, 2014-NMSC-007, dictates a dismissal with prejudice. The Romeros argue that the Supreme Court's opinion "clearly demonstrates that the Supreme Court intended that the foreclosure be dismissed with prejudice." They argue that the Supreme Court's statements regarding mootness of the claim and future foreclosure attempts under the Home Loan Protection Act (HLPA), NMSA 1978, §§ 58-21A-1 to -14 (2003, as amended through 2009), by whichever "institution may be able to establish standing to foreclose on the Romero home" clearly show that the Supreme Court meant to preclude the Bank from bringing future actions. *Romero*, 2014-NMSC-007, ¶ 39. Conversely, the Bank argues that the Supreme Court acknowledged its inability to reach the merits of the case and thus anticipated that a future action may be filed by *any* institution, including the Bank. *See id.* ¶¶ 15, 39. According to the Bank, because law of the case only applies to decisions on the merits, it should not apply, and a dismissal with prejudice is unsupported. The Bank points out that the Supreme Court was silent on whether the dismissal should be with or without prejudice, but argues that the reference to future attempts should be interpreted to mean that dismissal should be without prejudice. The Bank also argues that "changed circumstances" of fact or law have undermined the law of the case to such an extent that dismissing the case with prejudice would be unjust.

{11} We are not persuaded that there is clear law of the case that dictates that the *Romero* Court intended, one way or the other, that the dismissal be with or without prejudice. The Supreme Court expressed nothing from which any reasonable inference can be drawn to support either party's interpretation of the Court's intent. *See id.* ¶ 1 ("We . . . remand to the district court with instructions to . . . dismiss the Bank['s] . . . foreclosure action for lack of standing."). Due to the *Romero* Court's silence on the matter and the resulting ambiguity, we are unable to comfortably opine as to the Supreme Court's intent regarding the dismissal, and we therefore address the preclusion arguments made by both sides. However, before doing so, it is important to understand the connection between dismissals "with" or "without" prejudice and the preclusion principles. We begin by discussing the "with" and "without" designations that accompany dismissals and explain their impact on preclusion.

II. Dismissal With/Without Prejudice

{12} Claim and issue preclusion are doctrines that may arise when a lawsuit is filed by the same plaintiff against the same defendant after the same or similar lawsuit has previously been dismissed. *See, e.g.*, *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶¶ 1-2, 9, 321 P.3d 128 (considering the applicability of claim and issue preclusion when a plaintiff, seeking damages because the defendant refused to provide him with a nutritionally adequate vegetarian diet, first filed a lawsuit for breach of duty, fraud, unfair practices, and violation of the New Mexico Religious Freedom Act, and then later filed a Fraud Against Taxpayers Act claim based on the same or similar facts); *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶¶ 59-62, 148 N.M. 106, 231 P.3d 87 (considering whether a dismissal of the plaintiff's first claim for wrongful denial of benefits against the defendant precluded the plaintiff's later action against the same defendant for enforcement of a writ of garnishment under the doctrine of claim preclusion). Although both doctrines may be implicated in a single case, we note that a designation of a dismissal as being "with prejudice" is relevant in a *claim* preclusion analysis but not in an *issue* preclusion analysis. *See Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶¶ 10-11, 314 P.3d 698 (stating that "[a] dismissal with prejudice is an adjudication on the merits only to the extent that when a claim has been dismissed with prejudice, the . . . element of res judicata (a final valid judgment *on the merits*) will be presumed . . . . We note that this rule applies to preclude *claims* (claim preclusion/res judicata), but not *issues* (issue preclusion/collateral estoppel)" (first omission in original) (first emphasis, internal quotation marks, and citation omitted)); *Bralley v. City of Albuquerque*, 1985-NMCA-043, ¶¶ 17-18, 102 N.M. 715, 699 P.2d 646 (stating that a dismissal without prejudice is not intended to be res judicata and that "[t]he words 'without prejudice' when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought").

{13} When considering whether a subsequent action may be precluded on the basis of *claim* preclusion, subsequent courts may reasonably look to the type of dismissal in the first action, i.e., *with* or *without* prejudice, for guidance. Although a dismissal with prejudice does not automatically result in claim preclusion, "when a claim has been dismissed with prejudice, the fourth element of res judicata (a final valid judgment *on the merits*) will be presumed so as to bar a subsequent suit against the same defendant by the same plaintiff based on the same transaction." *Kirby*, 2010-NMSC-014, ¶ 66 (first emphasis omitted).

But see Turner v. First N.M. Bank, 2015-NMCA-068, ¶ 8, 352 P.3d 661 (concluding that, despite the fact the complaint was dismissed without prejudice, the dismissal constituted a judgment "on the merits" because the complaint failed to state a cause of action and was thus "entitled to claim preclusion effect").

{14} All in all, although not determinative in every case, the designation of a dismissal as "with" or "without" prejudice will generally substantially impact the viability of a plaintiff's future, related claim. As will be explained later in this Opinion, in this case, the district court's inclusion of the "with prejudice" designation on the dismissal of the Bank's foreclosure claim against the Romeros suggests a presumption that any future foreclosure claim would be precluded under claim preclusion principles. In our view, this is problematic insofar as the district court did not dismiss the foreclosure claim under claim preclusion principles but rather did so under issue preclusion, which was improper.

III. Claim Preclusion

{15} Appellate courts in New Mexico review de novo whether elements for claim preclusion have been satisfied. *See Kirby*, 2010-NMSC-014, ¶ 61 (stating that the standard of review for claim preclusion is de novo). The doctrine of claim preclusion, or res judicata, "bars re-litigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *Peterson*, 2014-NMCA-036, ¶ 24 (alteration, internal quotation marks, and citation omitted). " 'The party asserting claim preclusion must satisfy the following four requirements: (1) the parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits.' " *Tunis v. Country Club Estates Homeowners Ass'n*, 2014-NMCA-025, ¶ 20, 318 P.3d 713 (alteration omitted) (quoting *Kirby*, 2010-NMSC-014, ¶ 61). "The purpose of our application of res judicata 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; *see also Turner*, 2015-NMCA-068, ¶ 6 ("Res judicata[,] i.e., claim preclusion[,] is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication." (alteration, internal quotation marks, and citation omitted)).

{16} In the present case, the third and fourth elements have not been met by the Romeros because there has been no adjudication on the merits of the Bank's foreclosure claim in favor of the Romeros, and thus claim preclusion does not apply to preclude the Bank's foreclosure claim. The Supreme Court determined that the Bank lacked standing and determined that due to the lack of standing the foreclosure claim must be dismissed. *Romero*, 2014-NMSC-007, ¶ 1 ("We reverse the Court of Appeals and district court and remand to the district court . . . to dismiss the Bank['s] . . . foreclosure action for lack of standing."). The Romeros argue that the Supreme Court's determination constituted an adjudication on the merits. The Supreme Court did not, however, adjudicate the merits of the foreclosure claim. Although the Romeros argue that "standing is an issue that is essential to get to a claim for relief" and thus, as a threshold issue, standing can ultimately preclude a claim on the basis of claim preclusion, we see no support for such a broad application of claim preclusion. The Romeros' argument circumvents the elements of claim preclusion. And, although the appellate courts of this state have not yet evaluated whether a negative determination on standing in the foreclosure context precludes future foreclosure claims, other courts have held that a dismissal based on lack of standing is not an adjudication on the merits of a foreclosure claim such that future claims are precluded. *See Federal Home Loan Mortg. Corp. v. Schwartzwald*, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 40 ("The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice."), *overruling on other grounds recognized by Bank of N.Y. Mellon v. Grund*, 2015-Ohio-466, 27 N.E.3d 555; *BAC Home Loans Servicing, L.P. v. Devoll*, 2011-Ohio-6607, 2011 WL 6740561, at ¶ 17 (non-precedential) ("[T]he dismissal of an action because one of the parties is not a real party in interest or does not have standing is not a dismissal on the merits for purposes of res judicata."); *see also Brown v. M & T Bank*, 183 So. 3d 1270, 1271 (Fla. Dist. Ct. App. 2016) (holding that the dismissal of a foreclosure action for lack of standing does not operate as an adjudication on the merits, and "[b]ecause there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties" (internal quotation marks and citation omitted)).

{17} Additionally, our Supreme Court has positively cited to cases that either (1) note that dismissal without prejudice is the proper remedy when a party fails to prove standing, or (2) approve of allowance of subsequent lawsuits. *See Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 23, 369 P.3d 1046 (citing *Schwartzwald*, 2012-Ohio-5017); *Deutsche Bank Nat'l Trust v. Brumbaugh*, 2012 OK 3, ¶ 11, 270 P.3d 151, 154 (recognizing "the case may be dismissed without prejudice and the action may be re-filed"); *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 175 (Fla. Dist. Ct. App. 2012) (stating that if the bank had no standing at the time the complaint was filed, "the trial court should dismiss the instant lawsuit and [the bank] must file a new complaint"); *see also U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶¶ 22-23, 27 A.3d 1087 (upholding a dismissal with prejudice but specifically determining that the merits of foreclosure were not litigated and the bank "cannot be precluded from pursuing foreclosure on the merits should it be prepared to prove the necessary elements").

{18} During oral argument, this Court asked the Romeros to "point . . . to a single jurisdiction that on point and definitively has held that when a lending institution fails to demonstrate standing in a cause of action and the case is then dismissed because of that failure . . . , [the claim is forever precluded]." In response, the Romeros stated that the Ohio Supreme Court, in *Bank of America, N.A. v. Kuchta*, 2014-Ohio-4275, 21 N.E.3d 1040, *reconsideration denied*, 2014-Ohio-5251, 20 N.E.3d 730, held that "a determination of standing is accorded res judicata effect" in a foreclosure context. Additionally, the Romeros represented to this Court that the following New Mexico cases held that "a determination of standing is entitled to a preclusive effect": *Kimbrell v. Kimbrell*, 2014-NMSC-027, 331 P.3d 915; *Eastham v. Pub. Employees' Ret. Ass'n Bd.*, 1976-NMSC-046, 89 N.M. 399, 553 P.2d 679; *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2010-NMCA-012, 147 N.M. 643, 227 P.3d 612; *Trujillo v. Acequia de Chamisal*, 1968-NMCA-015, 79 N.M. 39, 439 P.2d 557; *THI of N.M. at Las Cruces, LLC v. N.M. Human Servs. Dep't*, No. 31,588, 2013 WL 6640490,

mem. op. (N.M. Ct. App. Nov. 25, 2013) (non-precedential). After reviewing these cases, we conclude there is no support for the Romeros' propositions in their cited case law.

{19} In *Kuchta*, the Ohio Supreme Court considered the homeowners' ability to collaterally attack a judgment in a foreclosure action by asserting lack of standing in a Rule 60(B) motion. *Kuchta*, 2014-Ohio-4275, ¶ 1; *see* Ohio Rev. Code Ann. Civ.R. 60(B) (2016). The primary holding in that case was that Rule 60(B) cannot be used as a substitute for a timely appeal, and "the doctrine of res judicata bars [the homeowners'] attempted collateral attack against the judgment in foreclosure." *Kuchta*, 2014-Ohio-4275, ¶¶ 1, 16. Importantly, *Kuchta* did not hold that an appellate court's determination of lack of standing would have a preclusive effect on future foreclosure attempts. And, in fact, the Ohio Supreme Court directly addressed the question of what effect a lack of standing determination would have on a second foreclosure action and specifically held that "[t]he lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice." *Schwartzwald*, 2012-Ohio-5017, ¶ 40.

{20} The New Mexico cases cited by the Romeros also do not support the broad proposition offered by the Romeros that an appellate court's ruling as to standing is entitled to preclusive effect under claim preclusion. With the exception of *Trujillo*, 1968-NMCA-015, none of the cases upon which the Romeros rely addressed the "with" versus "without" prejudice designation of the dismissals based on standing or questioned the preclusive effect of the dismissals. The cited cases focused on the appropriateness of the dismissals themselves, as opposed to the designations. And as noted by the Bank in its reply brief, *Trujillo* likewise does not provide support for the Romeros. The primary holding in *Trujillo* was that, because the case was dismissed due to the inclusion of an improper plaintiff, there was no disposition on the merits and thus res judicata was not applicable. 1968-NMCA-015, ¶¶ 3, 11-12, 15. The *Trujillo* Court held that the proper plaintiffs in the trespass claim could proceed with their trespass claim should they decide to proceed. *Id.* ¶ 14. Although this Court noted in dicta that the improper plaintiff was prohibited from proceeding with the trespass claim in the future, that holding is of little value to the present case because the Court provided no explanation or analysis explaining its holding. *Id.*

{21} In addition to asserting that case law supports precluding any future foreclosure attempts by the Bank against the Romeros, the Romeros also argue that there are strong public policies favoring preclusion in this case. Specifically, the Romeros state preclusion reflects the following policies that (1) defendants not be subjected to repetitive, vexatious, and costly lawsuits; (2) judicial resources are conserved; (3) inconsistent decisions on the same issue are prevented; and (4) people are able to rely on the judgments of the court.[1] In regard to the policy favoring finality, the Romeros pose the question of "how many bites at the apple" should the Bank be given when it has had a full and fair opportunity to litigate standing? Although we appreciate the Romeros' concern that parties who have had an opportunity to litigate should not have infinite proverbial "bites at the apple," we do not think that dismissing this case without prejudice runs afoul of our policy favoring finality because there has been no final decision in favor of the Romeros as to the foreclosure claim, and, additionally, relying on policy reasons underlying claim preclusion is not persuasive absent proof of the relevant elements of the doctrine. We decline to affirm based solely on the policy notions underlying claim preclusion.

{22} We reject the Romeros' request that we determine the district court's dismissal was supported by claim preclusion, as well as issue preclusion. And we reject any suggestion that the district court through its "with prejudice" designation appropriately, intentionally, and effectively precluded the Bank from re-filing the foreclosure action under the doctrine of claim preclusion. The fact is that neither the Supreme Court nor the district court on remand addressed the merits of the foreclosure claim and no basis exists to support application of claim preclusion to the district court's issue preclusion dismissal.

IV. Issue Preclusion

{23} In general, "[w]e review a decision by the district court to apply or not apply the doctrine of collateral estoppel for an abuse of discretion." *Brannock v. Lotus Fund*, 2016-NMCA-030, ¶ 7, 367 P.3d 888. However, when the facts are not in dispute, we "review de novo the question of issue preclusion." *Ideal v. Burlington Res. Oil & Gas Co.*, 2010-NMSC-022, ¶ 10, 148 N.M. 228, 233 P.3d 362. "The doctrine of issue preclusion prevents a party from relitigating ultimate facts or issues actually and necessarily decided in a prior suit." *Peterson*, 2014-NMCA-036, ¶ 34 (alteration, internal quotation marks, and citation omitted). Issue preclusion, also known as collateral estoppel, bars re-litigation if the following four elements are met: "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation." *Ideal*, 2010-NMSC-022, ¶ 9 (internal quotation marks and citation omitted). According to *Cutler v. Hayes*, 818 F.2d 879, 889 (D.C. Cir. 1987), "[p]rinciples of collateral estoppel clearly apply to standing determinations" and a key inquiry "is whether the issue presented in the two proceedings is substantially the same." (Internal quotation marks and footnote citation omitted.)

{24} In the present case, the district court's dismissal of the Bank's complaint "with prejudice" on the basis of "issue preclusion" was improper because, as stated earlier, the "with prejudice" designation goes beyond issue preclusion and effectively precludes the entire foreclosure claim, not just the standing issue addressed by the Supreme Court. As indicated in Section III of this Opinion, the designation of a dismissal as being "with" or "without" prejudice typically communicates whether there has been an adjudication on the merits and whether claim preclusion is implicated. *See Kirby*, 2010-NMSC-014, ¶ 66; *Bralley*, 1985-NMCA-043, ¶ 18. To our knowledge,

[1] Despite the Romeros' representations that these policies have been used to support claim and issue preclusion, the cited cases indicate that the enumerated policies support *claim* preclusion, not *issue* preclusion. *See Turner*, 2015-NMCA-068, ¶ 6; *Cordova v. Larsen*, 2004-NMCA-087, ¶ 23, 136 N.M. 87, 94 P.3d 830; *see also First State Bank v. Muzio*, 1983-NMSC-057, ¶ 9, 100 N.M. 98, 666 P.2d 777 (recognizing claim preclusion in a default judgment context), *overruled on other grounds by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 861 P.2d 935; *Pielhau*, 2013-NMCA-112, ¶ 8 (identifying the purposes of the claim preclusion doctrine).

a "with prejudice" designation that reflects adjudication on the merits of a claim is not to be used to communicate that a discrete issue, but not the claim, within a case has been litigated, implicating issue preclusion. We agree with the Bank that when the district court dismissed the action with prejudice, the court appears to have improperly combined or mixed claim and issue preclusion doctrines in applying issue preclusion to prevent the Bank's foreclosure claim. We do not interpret the Supreme Court's ruling in *Romero* regarding the *issue* of standing as precluding the Bank from filing a second action asserting a foreclosure *claim*, and we do not approve the approach of using issue preclusion to form the basis of a dismissal of a claim. The purposes and the elements of issue and claim preclusion are distinct, and the former should not be used to circumvent the requirements of the latter. *See Pielhau*, 2013-NMCA-112, ¶¶ 10-11 ("A dismissal with prejudice is an adjudication on the merits for purposes of res judicata. . . . We note that this rule applies to preclude *claims* (claim preclusion/res judicata), but not *issues* (issue preclusion/collateral estoppel)."). This distinction is based on the fact that issue preclusion requires that the issue was actually litigated and necessarily determined in the first suit, whereas claim preclusion does not so require." (alteration, internal quotation marks, and citations omitted)).

{25} Further, ruling on issue preclusion at this point is premature insofar as there may be additional facts presented or ways of evaluating the standing issue in the second case that re-frame the issue. For its ruling, the district court necessarily speculated that different or additional facts could or would not be pleaded in a second suit that would give rise to standing. But changes in the law or facts may ultimately place into question the application of issue preclusion, and the district court should not have prevented the Bank from bringing a subsequent action based on its assumption that the facts and issues presented in the subsequent case would be substantially the same as the facts and issues in the first case. *See Bellet v. Grynberg*, 1992-NMSC-063, ¶ 14, 114 N.M. 690, 845 P.2d 784 (stating that "changed circumstances may prevent res judicata from operating" (emphasis omitted)); *State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, ¶ 5, 97 N.M. 152, 637 P.2d 834 ("The doctrine of res judicata was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred[,] which may have altered the legal rights or relations of the litigants." (internal quotation marks and citation omitted)); *Town of Atrisco v. Monohan*, 1952-NMSC-011, ¶ 22, 56 N.M. 70, 240 P.2d 216 (stating that, as applied to collateral estoppel, a "subsequent modification of the significant facts or a change or development in the controlling legal principles may make [a prior] determination obsolete or erroneous, at least for future purposes"). The Bank has alleged legal and factual changes that it believes can overcome preclusion and argues that it should have the opportunity to prove any material changes in law or fact in a second suit.[2] Case law cited by both parties contemplates considering the merits of an issue preclusion argument after the filing of a second suit. *See Cutler*, 818 F.2d at 889 (stating that the relevant inquiry "is whether the issue presented in the two proceedings is substantially the same" (internal quotation marks and footnote citation omitted)). Our United States Supreme Court has specifically noted that "a court does not usually get to dictate to other courts the preclusion consequences of its own judgment." *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) (internal quotation marks and citation omitted). Unless and until the Bank is given a full opportunity to argue the merits of its position regarding issue preclusion, we are concerned that the application of issue preclusion at this point would be unfair. *See Albuquerque Police Dep't v. Martinez*, 1995-NMCA-088, ¶ 28, 120 N.M. 408, 902 P.2d 563 ("[E]ven if the elements of collateral estoppel are otherwise met, the district court may still determine that the application of collateral estoppel would be fundamentally unfair and would not further the aim of the doctrine, which is to prevent endless re[-]litigation of issues." (internal quotation marks and citation omitted)).

{26} Because we hold that the district court's order regarding issue preclusion was premature, we do not consider whether the standing issue in a second case will or will not ultimately be precluded.

CONCLUSION

{27} We reverse the district court's dismissal of the foreclosure action with prejudice, and we also reverse the court's ruling that the Bank "is precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclosure on the Romeros' mortgage." On remand, we instruct the district court to dismiss the complaint without prejudice.

{28} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

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

[2] As noted earlier in the background section, the district court appears to have ruled on issue preclusion sua sponte, and thus the parties did not have the opportunity to brief issue preclusion. If and when a second suit is filed and the parties brief issue preclusion, we note that the burden of proving that an issue is precluded falls on "[t]he party invoking the doctrine[.]" *Larsen v. Farmington Mun. Sch.*, 2010-NMCA-094, ¶ 9, 148 N.M. 926, 242 P.3d 493.

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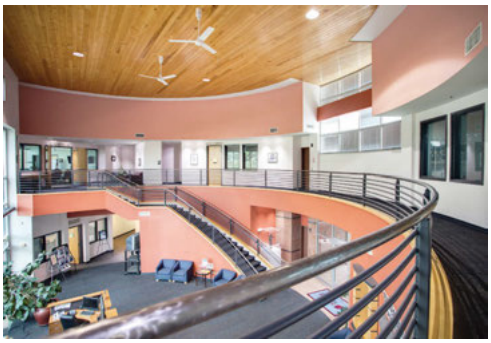

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