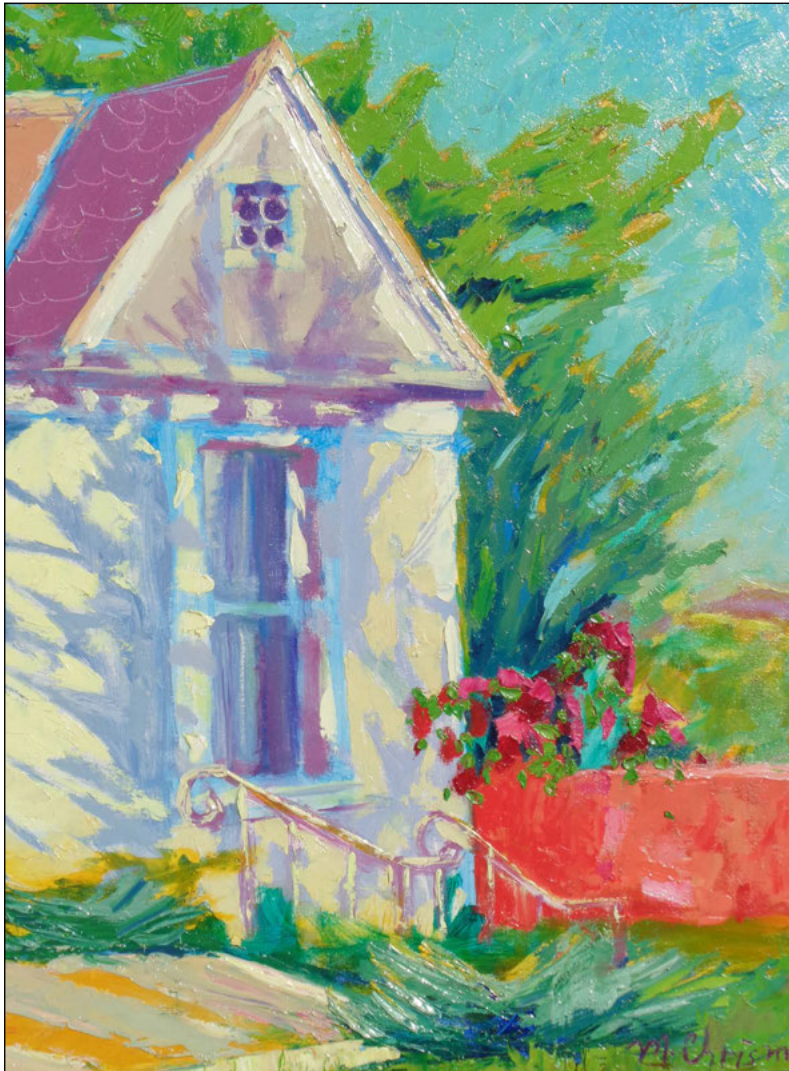


BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

March 15, 2017 • Volume 56, No. 11



7 p.m. Summer Light Splash on Old Victorian,
by Michelle Chrisman (see page 3)

michellechrisman.com/

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Meetings

March

- 15**
Real Property, Trust and Estate Section
Real Property Division,
 Noon, State Bar Center
- 17**
Family Law Section Board,
 9 a.m., teleconference
- 17**
Indian Law Section Board,
 Noon, State Bar Center
- 17**
Trial Practice Section Board,
 Noon, State Bar Center
- 22**
Solo and Small Firm Section Board,
 11 a.m., State Bar Center
- 21**
Committee on Women and the Legal Profession,
 Noon, Modrall Sperlberg, Albuquerque
- 21**
Senior Lawyers Division
 4 p.m., State Bar Center

Workshops and Legal Clinics

March

- 15**
Family Law Clinic
 10 a.m.–1 p.m., Second Judicial District
 Court, Albuquerque, 1-877-266-9861
- 22**
Consumer Debt/Bankruptcy Workshop
 6–9 p.m., State Bar Center, Albuquerque,
 505-797-6094

April

- 5**
Civil Legal Clinic
 10 a.m.–1 p.m., Second Judicial District
 Court, Albuquerque, 1-877-266-9861
- 5**
Divorce Options Workshop
 6–8 p.m., State Bar Center, Albuquerque,
 505-797-6003

About Cover Image and Artist: Michelle Chrisman's landscapes are painted "en plein air." She considers herself a contemporary colorist and modernist, but most of all a visual poet. She is drawn to the visual beauty of New Mexico and the West, the desert and the variety of three cultures. She paints alla prima in direct response to the landscape. Chrisman teaches annual painting workshops for Ghost Ranch in Abiquiu and for the New Mexico Art League and Harwood Art Center in Albuquerque. She can be reached via email at MichelleChrisman78@gmail.com and her website is www.MichelleChrisman.com.

Notices

COURT NEWS

New Mexico Supreme Court Proposed Amendments to Rules of Practice and Procedure

In accordance with the Supreme Court's annual rulemaking process under Rule 23 106.1 NMRA, which includes an annual publication of proposed rule amendments for public comment every spring, the following Supreme Court Committees are proposing to recommend for the Supreme Court's consideration proposed amendments to the rules of practice and procedure summarized below. If you would like to view and comment on the proposed amendments summarized in the March 8 issue of the *Bar Bulletin* (Vol. 56, No. 10) before they are submitted to the Court for final consideration, you may do so by submitting your comment electronically through the Supreme Court's website at supremecourt.nmcourts.gov/openforcomment.aspx, by email to nmsupremecourtclerk@nmcourts.gov, by fax to 505 827 4837, or by mail to Joey D. Moya, Clerk, New Mexico Supreme Court, P O Box 848, Santa Fe, New Mexico 87504 0848. Comments must be received by the Clerk on or before April 5 to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

Bernalillo County Metropolitan Court Investiture Ceremony of Judge Christine E. Rodriguez

The judges and employees of the Bernalillo County Metropolitan Court invite members of the legal community and the public to attend the investiture of the Hon. Judge Christine E. Rodriguez, Division II. The ceremony will be held at 5:15 p.m., April 6, in the Bernalillo County Metropolitan Court Rotunda. Following the investiture, the reception will be held at the Slate Street Café, 515 Slate Avenue, NW. Judges who wish to participate in the ceremony, should bring their robes and report to the 1st Floor Viewing Room by 5 p.m.

STATE BAR NEWS

Attorney Support Groups

- March 20, 7:30 a.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

Professionalism Tip

With respect to my clients:

I will keep my client informed about the progress of the work for which I have been engaged or retained, including the costs and fees.

- April 3, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- April 10, 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#.

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

Animal Law Section

Animal Talk: City of ABQ Trap, Neuter and Return Program

Join the Animal Law Section for a lively discussion of the legal issues arising out of the City of Albuquerque's Trap, Neuter and Return Program. The Animal Talk will be from noon-1 p.m., March 31, at the State Bar Center. The speakers for this event represented the parties in *Britton v. Bruin*, et al., decided by the New Mexico Court of Appeals on Feb. 22, 2016. Professor Marsha Baum of the UNM School of Law will moderate the discussion between A. Blair Dunn and Nicholas H. Bullock, the attorneys who represented the parties in *Britton v. Bruin*. Dunn, of Western Agriculture Resource and Business Advocates LLP, represented Petitioner-Appellant Marci Britton. Bullock, assistant city attorney for the City of Albuquerque, represented Respondent-Appellee City of Albuquerque. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance.

Board of Bar Commissioners Appointment to DNA—People's Legal Services, Inc.

The Board of Bar Commissioners will make two appointments to the DNA—People's Legal Services, Inc., Board for two-year terms. Members interested in serving on the Board should send a letter of interest and brief résumé by April 12 to Executive Director Joe Conte at jconte@nmbar.org or PO Box 92860, Albuquerque, NM 87199-2860.

Jackrabbit Bar Conference Registration Now Open

The Jackrabbit Bar is an association of state bars of the Northwestern Plains and mountains including Idaho, Montana, Nevada, New Mexico, North Dakota, South Dakota, Utah and Wyoming. This year's conference is hosted by the State Bar of New Mexico June 1–3 at the Inn and Spa at Loretto in Santa Fe. The conference is open to anyone. Call 866-582-1646 to reserve a room at the Inn at Loretto. Rooms under the group rate are \$189 (cutoff date: May 2). To register and view a tentative agenda, visit www.nmbar.org/nmstatebar/JBC.aspx. For more information about the conference, contact Kris Becker at 505-797-6083 or kbecker@nmbar.org.

Paralegal Division

Spring Meet and Greet Event

The Paralegal Division invites current and prospective members for a meet and greet event on March 16 at the State Bar Center in Albuquerque. The Board of the Division will provide snacks and camaraderie starting at 4:30 p.m. with a Board meeting to follow at 5:30 p.m. To attend, R.S.V.P. to Nicole@pegasuslaw.org.

Public Law Section

Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 28. Visit www.nmbar.org/publiclaw to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 17. Send nominations to Section Chair Cydney Beadles at Cydney.Beadles@state.nm.us. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Real Property, Trust and Estate Section

Real Property Division Meeting Open to Section Membership

To more effectively promote its activities, the Real Property, Trust and Estate Section established two new divisions

in 2014: the Real Property Division and the Trust and Estate Division. The RPTE Board of Directors overseeing the Real Property Division will meet from noon-1 p.m. on March 15 at the State Bar Center and by teleconference. Section members are encouraged to attend. At the meeting, members will brainstorm the Division's activities for the year and potential CLE topics. Lunch will be provided. R.S.V.P. to Breanna Henley at bhenley@nmbar.org. If you cannot attend the meeting but would like to provide suggestions of what you would like to see from the Real Property Division this year, or have questions about the Division generally, contact Real Property Division Chair Charles Price at cprice@cpricelaw.com or 505-999-1084.

Solo and Small Firm Section March Presentation Features Former DA Kari Brandenburg

The next Solo and Small Firm Section luncheon presentation on unique law-related subjects will be from noon-1 p.m., March 22, at the State Bar Center. Kari Brandenburg, who recently completed four terms as Second Judicial District Attorney, will share impressions, experiences and prospects for criminal justice reforms. A vigorous question and discussion period is expected. All are welcome and lunch will be provided. Regular attendees are reminded that this month's meeting is specially scheduled for a Wednesday. Contact Breanna Henley at bhenley@nmbar.org or R.S.V.P.

Young Lawyers Division ABA YLD Mountain West Regional Summit Registration Open

Join neighboring young lawyer entities from Colorado, Texas, Utah and Wyoming for educational programming and fun during the ABA YLD Mountain West Regional Summit on March 30-April 2 at Hotel Albuquerque in Old Town. Programming includes trial skills for young lawyers, an ethical examination of recently-enacted marijuana recreational use statutes and the inevitable conflict with Federal law and ethical rules governing the practice of law, the perceived and actual challenges regarding the UBE an implementation of reciprocity, diversity and inclusion in the legal profession and in bar leadership, and more! Earn up to 9.5 G and 3.5 EP for only \$80. Law students may attend for free.

The regional summit will also include a welcome reception on Thursday evening, optional excursion activities and a closing dinner on Saturday. To register, visit www.nmbar.org/regionalsummit.

UNM Law Library Hours Through May 13

Building & Circulation

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

Reference

Monday–Friday	9 a.m.–6 p.m.
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Abbreviated Hours for Spring Break

March 12–19	
Monday–Friday	9 a.m.–6 p.m.

Mexican American Law Student Association Annual Fighting for Justice Banquet

Join the Mexican American Law Student Association for the 22nd Annual Fighting for Justice Banquet honoring Emerita Professor Eileen Gauna. Executive Director of Enlace Comunitario Antoinette Sedillo-Lopez will be the keynote speaker for the evening. The event will start at 6 p.m., April 14, at Hotel Albuquerque in Old Town Albuquerque and will feature a cocktail hour, live music and a silent auction. To purchase tickets or sponsorship packages visit www.malsanm.org or contact MALSA President Mish Rosete at mishrosete@gmail.com.

Women's Law Caucus Justice Mary Walters Award

Each year the Women's Law Caucus at the UNM School of Law chooses two outstanding women in the New Mexico legal community to honor in the name of former Justice Mary Walters, the first woman appointed to the New Mexico Supreme Court. In 2017 the WLC will honor Chief Judge Nan Nash of the Second Judicial District and First Assistant Federal Public Defender Margaret Katze at the Awards Dinner on March 22 at the Student Union Building on UNM's main campus. Individual tickets for the dinner can be purchased for \$50. Tables can be purchased for \$400 and seat approximately 10 people. Visit [\[unm.edu/walters\]\(http://unm.edu/walters\) to purchase tickets and receive additional information. For more information, email WLC President Lindsey Goodwin \[goodwili@law.unm.edu\]\(mailto:goodwili@law.unm.edu\).](http://goto.</p>
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OTHER BARS New Mexico Chapter of the Federal Bar Association An Amazing Time in the Supreme Court with Erwin Chemerinsky

The New Mexico Chapter of the Federal Bar Association is pleased to have 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. The price is \$75 for non-FBA members, \$50 for FBA members, and \$20 for law students. Check-in begins at 11:30 a.m., lunch begins at 11:45, and the CLE runs from 12:30 to 1:30. For more information, email nmfedbar@gmail.com.

New Mexico Criminal Defense Trial Skills College

The New Mexico Criminal Defense Lawyers Association's highly popular Trial Skills College is back March 30–April 1 with a new case file and an incredible faculty lineup. Hear lectures and demonstrations by some of the best trial attorneys in the state, then move into small groups for focused practice and feedback. Only 35 seats available at this two-day intensive workshop, with some seats available to civil attorneys as well. Visit www.nmcdla.org to register, or call 505-992-0050 for more information.

OTHER NEWS Christian Legal Aid Donate for a Chance to Win Disneyland Passes

Register for a chance to win four one-day Park Hopper Passes to Disneyland (expiration: Nov. 14, 2018). The price is \$10 for one ticket or \$30 for four tickets. There is no limit on the number of tickets bought. All proceeds go to New Mexico Christian Legal Aid. Visit <http://nmchristianlegallaid.org/disney-passes-affle/> to enter.

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 March 3, 2017

PUBLISHED OPINIONS

No. 33961	12th Jud Dist Otero CR-12-363, STATE v A PATTERSON (reverse and remand)	2/27/2017
No. 34388	2nd Jud Dist Bernalillo CR-11-2591, STATE v W BROWN (affirm)	3/2/2017
No. 34165	2nd Jud Dist Bernalillo CR-09-5676, STATE v A BELLO (affirm)	3/2/2017
No. 34572	12th Jud Dist Lincoln DM-14-26, S BROOKS v R HOUGH (reverse)	3/2/2017

UNPUBLISHED OPINIONS

No. 34853	3rd Jud Dist Dona Ana CR-14-378, STATE v J HOLGUIN (affirm)	2/27/2017
No. 35563	2nd Jud Dist Bernalillo CR-15-986, STATE v J DIAZ (affirm)	2/27/2017
No. 35756	3rd Jud Dist Dona Ana CV-15-942, R LORD v ARCHULETA (affirm)	2/28/2017
No. 35870	2nd Jud Dist Bernalillo CV-15-8415, J GRIEGO v TAX & REV (dismiss)	2/28/2017
No. 35315	3rd Jud Dist Dona Ana CR-14-623, STATE v G YOUNG (affirm)	2/28/2017
No. 34693	2nd Jud Dist Bernalillo CR-14-1145, CR-14-266, STATE v M BARRAZA (affirm)	3/2/2017
No. 35184	2nd Jud Dist Bernalillo CR-15-25, STATE v V GARCIA (reverse and remand)	3/2/2017

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

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

New Inductees to the Roehl Circle of Honor



On Nov. 30, 2016, **Terry R. Guebert** (left) and **John B. Pound** (right) were inducted into the Roehl Circle of Honor for Trial Lawyers. Each year, the photos of the new inductees and names of the previous year are prominently displayed in the lobby of the State Bar Center.

Guebert practices with Guebert Bruckner P.C. in Albuquerque. He handles litigation in many different areas including insurance coverage, insurance bad faith, catastrophic injury, wrongful death and product liability. He attended Pepperdine University (J.D., 1976); North Central College and Southern Illinois University (B.A., 1973). Guebert is a member of the State Bar of New Mexico, U.S. District Court for the District of New Mexico, the State Bar of California, the Navajo Nation Bar Association and the U.S.

Court of Military Appeals. He served in the U.S. Air Force JAG Corps (1977–1982) and the U.S. Air Force Reserves (1982–1987).

John B. Pound is a trial and appellate lawyer in Santa Fe. He attended the University of New Mexico (B.A., History, 1968) and the Boston College Law School (Presidential Scholarship, J.D., 1971). Pound clerked for Hon. Oliver Seth, U.S. Court of Appeals, 10th Circuit. He is a member of the State Bar of New Mexico and American Bar Association. Pound has litigated a variety of complex commercial cases, including class actions. His cases have involved breach of contract, breach of warranty, fraud, tortious interference, breach of fiduciary duty, strict liability and RICO claims, as well as numerous aspects of health law.

Invitation to Participate in Survey: Law Practice in New Mexico

Dear Members of the State Bar of New Mexico:

The Board of Bar Commissioners of the State Bar of New Mexico has contracted with Research & Polling to conduct an Economics of Law Practice in New Mexico Survey. By now you should have received an e-mail from Research & Polling (emails went out the week of March 6) with a link and password to the survey. The

results from survey will provide members of the State Bar with a detailed analysis of information on the types of law practices and the compensation, in addition to perceived barriers to practicing law, in New Mexico. It will gauge whether various legal services are charged to clients, including legal research, duplicating, support staff/paralegal time, travel, etc. The survey will also assist members to better understand the economics of law practice, activities, services, time keeping and billing methods in New Mexico. We encourage you to complete the survey; everyone who completes the survey will have an opportunity to be entered into a drawing for a \$200 or \$100 gift card.

Please be assured that no one with the State Bar will have access to any individual results, so you will remain anonymous and your individual results will remain confidential. The survey instrument is completely confidential; however, participation is crucial to ensure the thoroughness and accuracy of the study. Upon completion of the survey, we will publish the summary results on the State Bar website so that the entire membership will have access.

Sincerely,

A handwritten signature in black ink that reads "Scotty A. Holloman".

Scotty A. Holloman
President, State Bar of New Mexico



Investiture Ceremony for The Honorable Julie J. Vargas

Photos and story by Breanna Henley

On Feb. 17 the National Hispanic Cultural Center Bank of America Theater was at full capacity for the Investiture of the Honorable Julie J. Vargas. Chief Judge Linda M. Vanzi began the ceremony with an introduction of the New Mexico Court of Appeals judges as well as 13 robed judges in the audience from a variety of courts.

Judge E. Wendy York (ret.), a colleague and close, loyal friend of Judge Vargas quoted Dr. Martin Luther King Jr. to illustrate Judge Vargas' commitment to the justice system: "Injustice anywhere is a threat to justice everywhere." Judge York continued that Judge Vargas is "living a life of purpose." While on the campaign trail, Judge Vargas exhibited traits that proved she would be a wonderful judge. She listens to the struggles and dreams of people and leaves her handprints on the lives of all she touches. Judge York described Judge Vargas as "unflappable," explaining that as a judge, you feel as if you are on a boat with deferred maintenance and no checkbook, and that the Constitution sometimes requires you to rule in unpopular ways. Although Judge Vargas is not quite 5' tall, she is a powerhouse who has what it takes to handle these challenges.

Her brother, Ray M. Vargas II, spoke at the ceremony and joked that he can't believe he must now call his big sister

judge! He shared stories of growing up with Judge Vargas. Ray was the only son out of four children and Judge Vargas often mediated between their sisters and him. When he went to her for advice, he recalled that she never told him what to do. Instead, she asked questions so that he thought about things. This quality reminded him of Justice Pamela B. Minzner, who was a mentor of Judge Vargas'.

Though the judges on the Court of Appeals do not need gavels, Judge Vargas has brought her own. She shared a story of her grandfather who decided after first grade that he did not like school. His mother did not make him attend further and instead, he became a woodworker. When Ray Vargas Sr. decided to attend law school, his father was so proud that he hand-carved a wooden gavel for him. While growing up, Judge Vargas would see the gavel but did not know what it meant. She later learned that to her grandfather, his son becoming a lawyer meant that his son was becoming a public servant. Judge Vargas expressed that there was nothing more meaningful to her than to be a public servant. She also spoke of her colleagues at the Court of Appeals, stating "Members of my Court are amazing!" and complimented their intellect.

Judge Vargas was welcomed to the Court and will be mentored by retired



Judge Vargas with a wooden gavel made by her grandfather.

Judge Cynthia A. Fry, whose seat she is filling, along with retired Judge Michael D. Bustamante.

At the end of the ceremony, Judge Vargas took her place in line with the other Court of Appeals judges, standing between Judge Stephen G. French and Judge J. Miles Hanisee.



Julie J. Vargas is sworn in as a judge of the New Mexico Court of Appeals by Justice Barbara J. Vigil.



Judge Vargas with her brother, Ray Vargas II



From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

These tips are part of a series of good signs to look for when choosing a professional liability insurance company, compiled by the Lawyers Professional Liability and Insurance Committee. Look for a new tip in the third issue of each month. Read the full list of tips and introduction (plus a guidance disclaimer) in the Oct. 19, 2016, (Vol. 55, No. 42) issue of the Bar Bulletin.

If the policy is a defense-within-limits policy, the company will provide a separate letter/summary of coverage explaining the terms of the defense within-limits-coverage.

If an insurer intends to place a legal defense cost offset provision in your policy, the application must include such provision on its face in bold type. 13.11.2.11(A) NMAC. Further, any policy containing such a provision must contain a statement signed by the insured, in which the

insured acknowledges the existence of the provision and its effect on coverage. 13.11.2.11(B), (C), and (D) NMAC specify what such signed statement must say. Nevertheless, the Lawyers Professional Liability and Insurance Committee recommends that you specifically ask your

insurance agent or company whether any proposed or existing policy contains a legal defense offset provision. If so, look closely at the content of the provision and evaluate its potential effect.

Company provides access to an independent risk advisor.

Some professional liability insurance companies provide either access to a claims representative or other advisors to discuss pending issues and to provide assistance to their customers. If your insurance carrier provides this service, be sure to find out the level of experience of the people with whom you consult. Are they licensed at-

torneys? Have they handled claims against attorneys?

Whether or not your insurance company provides assistance to evaluate and advise you on a potential claim—or how to avoid a claim—the State Bar of New Mexico provides all New Mexico licensed attorneys

with access to an independent risk advisor through the PALMS Hotline free of charge. New Mexico attorneys can call 1-800-326-8155 to speak with a licensed attorney about any practice or ethics questions. If the PALMS attorney cannot answer your question, they will provide information to you on how to get an answer to your question.

In the last five years, the company has no bad faith judgments entered against it in New Mexico.

“There is implied in every insurance policy a duty on the part of the insurance company to deal fairly with the policy holder.” See UJI 13-1701. “Fair dealing means to act honestly and in good faith in the performance of the contract.” Id.

There are many reasons an insurance company may be sued for bad faith. In the context of professional liability insurance, some of the most common bad faith claims may arise from disputes regarding an insured’s alleged failure to report a claim; the insurer’s improper failure to provide coverage for a malpractice claim; interference with insured’s relationship with the insured’s attorney; or failure to settle a claim within policy limits. When investigating potential professional liability

insurance companies, a company’s history of bad faith claims, and the reasons behind those claims, may be worth investigating.

As most attorneys are well-aware, not every claim has merit. Therefore, spending some time to dig a little deeper into a company’s bad faith claims history may be beneficial. For example, does the company have a pattern of bad faith suits arising out of a failure to provide coverage due to allegations that the insured failed to report a potential claim? How are bad faith suits against the company resolved? Have any bad faith judgments been entered against the insurance company and, if so, how long ago?

Much like prepping a client for deposition, running the potential insurance company

through nmcourts.gov or Pacer may avoid an ugly surprise later on.

So, what happens if the potential insurance company has a bad faith judgment or judgments or a history of bad faith claims? As each attorney’s insurance needs are different, how much weight these claims and judgments are ultimately given is solely within the discretion of the potential insured. “No bad faith judgments against a company in the last five years” is a suggestion—not a hard-and-fast rule for evaluating and choosing an insurance company. If you have options when choosing a professional liability carrier, do your research, and be comfortable with your choice.

Justice for Families Project VOLUNTEER SPOTLIGHT

By Jane Zhi, Staff Attorney/Pro Bono Innovation Project Coordinator, janez@nmlegalaid.org



Monnica Garcia

Monnica Garcia accepted a pro bono case through the Volunteer Attorney Program Justice for Families Project to assist a low-income client with a contract case. The client, whom we will call Sara, is a single mother living in small, rural town. She is also a victim of domestic violence. The lawsuit was brought against Sara in retaliation for an Order of Protection petition she filed against the opposing party's son.

I asked Sara what it has meant to her to have a pro bono attorney representing her in the case. She said, "My ex fiancé was very abusive to me and he used his father to bully me with the justice system. I was left with very little money and a part time job, with two kids to take care of. Monnica helped me rebuild the broken pieces of my life, after the abuse I suffered. Monnica has been very compassionate. She guided me through the court process, and gave me some peace of mind that I would be treated fairly. I am very lucky Monnica is representing me pro bono, I don't know what I would do without her kindness. Her taking on my case has given me more confidence in myself."

JZ: Can you describe your background and your law practice?

MG: I was born and raised in Roswell. In 2006, I graduated from UNM Anderson School of Business Management and then from UNM School of Law in 2009. During law school, I clerked for the U.S. Attorney's Office and the Law Office of the Public Defender. I have been a criminal defense and civil litigation practitioner for the past 7 ½ years. I practice in state, federal and metropolitan/magistrate courts across the state. I started my practice of law as the only Associate Attorney at a small, fast paced law firm, then in September of 2012, I opened my own law firm.

JZ: Why do you do pro bono instead of just making a donation?

MG: I have been blessed with the opportunity to serve our state as an attorney, helping people in their most vulnerable and life changing moments. I have seen the need for pro bono work and one of the benefits of owning my own practice is that I am able to choose my cases and my fees. When I learned about the Justice for Families Project, I saw it as a wonderful opportunity to help more. What I love about pro bono work is knowing that I am doing my part to actually make a difference in a small way. The clients are so appreciative, and I enjoy meeting and working with different people from various communities.



Volunteer Attorney Program

A Program of New Mexico Legal Aid

Justice for Families Project

LSC | America's Partner
for Equal Justice
LEGAL SERVICES CORPORATION

www.nmjusticeforfamilies.org

2017–2018 Bench & Bar Directory

Update Your Contact Information by March 24

To verify your current information: www.nmbar.org/FindAnAttorney

To submit changes (must be made in writing):

Online: Visit www.nmbar.org > for Members > Change of Address
Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860
Fax: 505-828-3765
Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 24.



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and Judges
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2017 | Annual Meeting— Bench & Bar Conference

Call for Nominations



State Bar of New Mexico 2017 Annual Awards

Nominations are being accepted for the 2017 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2016 or 2017. The awards will be presented July 28 during the 2017 Annual Meeting—Bench and Bar Conference at the Inn of the Mountains Gods in Mescalero. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below.*

— Distinguished Bar Service Award-Lawyer —

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Hannah B. Best, Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr.

— Distinguished Bar Service Award-Nonlawyer —

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Tina L. Kelbe, Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman

— Justice Pamela B. Minzner* Professionalism Award —

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: Arturo L. Jaramillo, S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

— Outstanding Legal Organization or Program Award —

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center

— Outstanding Young Lawyer of the Year Award —

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Denise M. Chanez, Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Lucero Jr.

— Robert H. LaFollette* Pro Bono Award —

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Billy K. Burgett, Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

— Seth D. Montgomery* Distinguished Judicial Service Award —

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Justice Richard C. Bosson (ret.), Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.)

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. **Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 12

Legal Education

March

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|---|---|--|
| <p>15 Lawyer Ethics and Investigations for and of Clients
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>20 Attorney vs. Judicial Discipline
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>23 Drafting Demand Letters
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>23–24 Improving Client Relations in Your Practice: Using Microsoft Word, Excel and PDF Files
12.3
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>24 Microsoft Excel for Lawyers and Legal Staff
2.8 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>24 What a Lawyer Needs to Know About PDF Files
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Wildlife/Endangered Species on Public and Private Lands (2016)
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>27 Keynote Address with Justice Ruth Bader Ginsburg (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>27 Lawyers Duties of Fairness and Honesty (Fair or Foul 2016)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>29 2016 Administrative Law Institute
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>29 Environmental Regulations/Oil and Gas Industry (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>29 Fear Factor: How Good Lawyers Get Into Ethical Trouble (2016)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 BDITs: Beneficiary Defective Inheritor's Trusts—Reducing Taxes, Retaining Control
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>30 Family Law Investigative and Legal Research on a Budget
2.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>30 Trial Skills College
14.7 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org</p> <p>30 SALT: How State and Local Tax Impacts Major Business Transactions
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>31 Ethics for Government Attorneys
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
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April

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| <p>4 Retail Leases: Drafting Tips and Negotiating Traps
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> <p>5 All About Basis Planning for Trust and Estate Planners
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>6 Basics of Adoption Law
1.0G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038</p> <p>11 Add a Little Fiction to Your Legal Writing
2.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Estate Planning and Elder Law
5.6 G, 1.0 EP
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com</p> <p>19 Examining the Excessive Cost of Lawyer Stress
2.0 EP
Live Seminar, Albuquerque
TRT CLE
www.trtcle.com</p> |
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April

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| <p>21 Ethics of Representing the Elderly
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Landlord Tenant Law
5.6 G, 1.0 EP
Live Seminar, Albuquerque
Sterling Education Services, Inc.
www.sterlingeducation.com</p> | <p>27 Settlement Agreements in Employment Disputes and Litigation
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
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May

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| <p>5 32nd Annual Bankruptcy Year in Review (2017)
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>12 Ethics of Co-Counsel and Referral Relationships
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Ethics in Discovery Practice
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Deposition Practice in Federal Cases (2016)
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Annual Estate Planning Update
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
www.wilcoxlawnm.com</p> | <p>23 Drafting Gun Wills and Trusts— and Preventing Executor Liability
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 2016 Mock Meeting of the Ethics Advisory Committee
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 2016 Administrative Law Institute
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 Living with Turmoil in the Oil Patch: What It Means to New Mexico (2016)
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Lawyer Ethics and Client Development
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 NM DWI Cases: From the Initial Stop to Sentencing; Evaluation Your Case (2016)
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>26 27th Annual Appellate Practice Institute (2016)
6.4 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Undue Influence and Duress in Estate Planning
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Human Trafficking (2016)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>31 Ethics and Artificial Intelligence in Law Practice Software and Tools
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |

June

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|---|---|---|
| <p>2 Drafting Employee Handbooks
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 2017 Ethics in Civil Litigation Update, Part 2
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 The Ethics of Supervising Other Lawyers
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 2017 Ethics in Civil Litigation Update, Part 1
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective February 15, 2017:
Andrea Christman
132 Lisbon Avenue SE
Rio Rancho, NM 87124
drea_41@yahoo.com

CLERK'S CERTIFICATE OF ADMISSION

February 21, 2017:
Maureen C. Dolan
Office of the State Engineer
PO Box 25102
130 S. Capitol Place (87501)
Santa Fe, NM 87504
505-827-3824
505-476-7408 (fax)
maureen.dolan@state.nm.us

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective February 17, 2017:
Blair I. Fassburg
601 Union Street, Suite 4100
Seattle, WA 98101

Effective February 14, 2017:
Gordon S. Sargent
14 San Pedro View
Tijeras, NM 87059

CLERK'S CERTIFICATE OF SUMMARY SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

Effective **February 15, 2017**:
Elena Moreno Hansen
La Morena Law LLC
225 E. Idaho Avenue Suite 27
Las Cruces, NM 88005
575-932-8335
fax: 505-274-7783
elena@lamorenalaw.com
or
1990 E. Lohman Suite 225
Las Cruces, NM 88001

CLERK'S CERTIFICATE OF CORRECTION

A clerk's certificate of address and/or telephone changes dated Jan. 27, 2017, contained a typographical error in the address change certified for **M. Naomi Salazar**. It is corrected below:

M. Naomi Salazar
PO Box 26542
Albuquerque, NM 87125
505-243-4433
505-243-1441 (fax)
naomisalazar@msn.com

IN MEMORIAM

As of July 10, 2016:
Reed Thompson
1000 New York Avenue
Alamogordo, NM 88310

CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective December 31, 2016:
Heidi M. Struse
908 Princeton Drive SE
Albuquerque, NM 87106

Effective January 1, 2017:
D. Neill Benton
1104 Florida Street NE
Albuquerque, NM 87110

Sarah A. Bond
4317 Glass Drive
Helena, MT 59602

David G. Burlingame
194 Camino Barranca
Placitas, NM 87043

Charles N. Estes Jr.
1315 Lobo Place NE
Albuquerque, NM 87106

Sylvia M. Martinez
4527 Brookwood NE
Albuquerque, NM 87109

Effective January 1, 2017:
Lisa Ann Buechler
755 Parfet Street, Suite 151
Lakewood, CO 80215

Jamye Boone Ward
3014 El Dorado
Alamogordo, NM 88310

Effective January 31, 2017:
Raquel Antonio Muñoz
600 E. Harrison Street #102
Brownsville, TX 78520

Effective January 9, 2017:
Greg L. Gambill
2000 Sixteenth Street
Denver, CO 80202

Effective January 19, 2017:
Tara C. Neda
229 Ashley Lane
Corrales, NM 87048

Abigail Sullivan-Engen
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716
Oakland, CA 94612

Effective January 25, 2017:
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5101 Coors Blvd. NW, Suite G
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Effective January 31, 2017:
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Albuquerque, NM 87110

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1008 S. Madison Street
Amarillo, TX 79101

Effective February 1, 2017:
James C. McKay
8116 E. Whispering Wind
Drive
Scottsdale, AZ 85255

Yolanda Catalina Rodriguez
PO Box 140028
Austin, TX 78714

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective February 28, 2017:
Brandi Nicole Dossier
1442 Pecos Street
Dallas, TX 785204

Effective February 24, 2017:
Debra Y. Romero
2709 Rio Encantado Court NW
Albuquerque, NM 87107

IN MEMORIAM

As of January 30, 2016:
William Nolan Ashford
3313A Shady Lane
Clovis, NM 88101

As of February 11, 2017:
Leslie A. Endean-Singh
2000 Juniper Drive
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As of November 22, 2016:
Charles N. Glass
9900 San Bernadino NE
Albuquerque, NM 87122

As of December 5, 2016:
Jack L. Love
2 Vista de Santa Fe
Sandia Park, NM 87047

As of January 26, 2017:
Stephen M. Peterson
PO Box 2259
Ranchos de Taos, NM 87557

As of July 31, 2015:
Farrell Matthew Smith
PO Box 501127
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**CLERK'S CERTIFICATE
OF NAME CHANGE**

As of February 22, 2017
**Verily A. Jones f/k/a Verily
 Stevenson**
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 7430 Washington Street NE
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As of February 22, 2017
**Mary Ellen Reilly f/k/a Mary
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 15333 N. Pima Road,
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 602-553-4557 (fax)
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**CLERK'S CERTIFICATE
OF REINSTATEMENT TO
ACTIVE STATUS**

As of February 24, 2017:
Kempton T. Lindquist
 9125 Rainridge Court NE
 Albuquerque, NM 87111
 505-299-1631
kempton1@yahoo.com

**CLERK'S CERTIFICATE OF
ADMISSION**

On February 23, 2017:
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 719-337-1093
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Dated Feb. 28, 2017

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Dated March 3, 2017

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective March 15, 2017

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

See the special summary of proposed rule amendments published in the March 8, 2017, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 5, 2017.

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2017 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1 079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Rules of Civil Procedure for the Magistrate Courts

2-112	Public inspection and sealing of court records	03/31/2017
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Rules of Civil Procedure for the Metropolitan Courts

3-112	Public inspection and sealing of court records	03/31/2017
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Civil Forms

4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017

Rules of Criminal Procedure for the District Courts

5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017

Rules of Criminal Procedure for the Magistrate Courts

6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017

Rules of Criminal Procedure for the Metropolitan Courts

7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017

Criminal Forms

9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
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Children's Court Rules and Forms

10-166	Public inspection and sealing of court records	03/31/2017
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Rules of Appellate Procedure

12-314	Public inspection and sealing of court records	03/31/2017
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.

Rules/Orders

<http://www.nmcompcomm.us/>

From the New Mexico Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

FEBRUARY 28, 2017

NO. 17-8300-002

IN THE MATTER OF THE AMENDMENT OF RULE 1-079 NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS, RULE 2-112 NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS, RULE 3-112 NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE METROPOLITAN COURTS, RULE 5-123 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS, RULE 6-114 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS, RULE 7-113 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS, RULE 8-112 NMRA OF THE RULES OF PROCEDURE FOR THE MUNICIPAL COURTS, RULE 10-166 NMRA OF THE CHILDREN'S COURT RULES AND FORMS, AND RULE 12-314 NMRA OF THE RULES OF APPELLATE PROCEDURE

ORDER

WHEREAS, on June 27, 2016, this Court provisionally approved amendments to, *inter alia*, Rule 1-079 NMRA of the Rules of Civil Procedure for the District Courts and Rule 5-123 NMRA of the Rules of Criminal Procedure for the District Courts, *see* Order No. 16-8300-003 (June 27, 2016), which the Court wishes to adopt on a non-provisional basis;

WHEREAS, this matter also came on for consideration by the Court to approve additional amendments to Rules 1-079 and 5-123 NMRA and to amend Rule 2-112 NMRA of the Rules of Civil

Procedure for the Magistrate Courts, Rule 3-112 NMRA of the Rules of Civil Procedure for the Metropolitan Courts, Rule 6-114 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rule 7-113 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, Rule 8-112 NMRA of the Rules of Procedure for the Municipal Courts, Rule 10-166 NMRA of the Children's Court Rules and Forms, and Rule 12-314 NMRA of the Rules of Appellate Procedure, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 1-079 and 5-123 NMRA provisionally approved by Supreme Court Order No. 16-8300-003 are APPROVED;

IT IS FURTHER ORDERED that the amendment of Rules 1-079, 2-112, 3-112, 5-123, 6-114, 7-113, 8-112, 10-166, and 12-314 NMRA is APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective for all cases pending or filed on or after March 31, 2017**; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the *Bar Bulletin* and *New Mexico Rules Annotated*.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 28th day of February, 2017.

Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico

1-079. PUBLIC INSPECTION AND SEALING OF COURT RECORDS.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) "lodged" means a court record that is temporarily

deposited with the court but not filed or made available for public access;

(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) "public access" means the inspection and copying of court records by the public; and

(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access.** In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act,

Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A58 NMSA 1978;

(2) proceedings to detain a person commenced under Section 24115 NMSA 1978;

(3) proceedings for testing commenced under Section 242B5.1 NMSA 1978;

(4) proceedings commenced under the Adult Protective Services Act, Sections 27714 to 27731 NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in Section 43119 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(6) wills deposited with the court pursuant to Section 452515 NMSA 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 452515 NMSA 1978;

(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person subject to the disclosure requirements of Subsection I of Section 455303 NMSA 1978 [1978] and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(8) proceedings commenced for the appointment of a conservator subject to the disclosure requirements of Subsection M of Section 455407 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; and

(9) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; and

(10) proceedings commenced under the Assisted Outpatient Treatment Act, Chapter 43, Article 1B NMSA 1978, subject to the disclosure requirements in Section 43-1B-14 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. Protection of personal identifier information.

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a nonsanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse. Any attorney or other person granted electronic access to court records containing protected personal identifier information shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed by the attorney or other person or by anyone under the supervision of that attorney or other person. Failure to comply with the provisions of this subparagraph may subject the attorney or other person to sanctions or the initiation of disciplinary proceedings.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse to file any document that does not comply with this paragraph. The court

clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. **Motion to seal court records required.** Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. Any party or member of the public may file a response to the motion to seal. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 1008.1 and 1010 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a filestamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. Requirements for order to seal court records.

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

- (a) the existence of an overriding interest that overcomes the right of public access to the court record;
- (b) the overriding interest supports sealing the court record;
- (c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;
- (d) the proposed sealing is narrowly tailored; and
- (e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted

version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. Sealed court records as part of record on appeal.

(1) Court records sealed in the magistrate, metropolitan, or municipal court, or records sealed in an agency proceeding in accordance with the law, that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. Motion to unseal court records.

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. **Failure to comply with sealing order.** Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order No. 108300004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 108300023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 108300037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; by Su-

preme Court Order No. 118300006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 138300017, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

Committee commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(4), (5), (7) and (8). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. *See* NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations

on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, Section 714.2(H) NMSA 1978 (providing for confidentiality of taxpayer information); Section 1461(A) NMSA 1978 (providing for confidentiality of patient health information); Section 2419.5 NMSA 1978 (limiting disclosure of test results for sexually transmitted diseases); Section 29104 NMSA 1978 (providing for confidentiality of certain arrest record information); Section 2912A4 NMSA 1978 (limiting disclosure of local crime stoppers program information); Section 29168 NMSA 1978 (providing for confidentiality of DNA information); Section 31253 NMSA 1978 (providing for confidentiality of certain communications between victim and victim counselor); Section 4082 NMSA 1978 (providing for sealing of certain name change records); Section 406A312 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); Section 4010A209 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act); Section 40137.1 NMSA 1978 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); Section 401312 NMSA 1978 (providing for limits on internet disclosure of certain information in domestic violence cases) Section 447A18 NMSA 1978 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a nonsanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion

to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access. If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to

seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to

unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 108300004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 118300006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

The Supreme Court approved corresponding amendments to Rules 2-112(C)(1), 3-112(C)(1), 5-123(D)(1), 6-114(C)(1), 7-113(C)(1), 8-112(C)(1), 10-166(D)(1), and 12-314(D)(1) NMRA. To view the full text of the amended rules, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx>.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

FEBRUARY 28, 2017

NO. 17-8300-003

IN THE MATTER OF THE WITHDRAWAL OF PROVISIONALLY ADOPTED RULE 1-131 NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS AND RULE 5-615 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS, THE AMENDMENT OF RULE 1-131 NMRA OF THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS AND RULE 5-615 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS, THE APPROVAL OF PROVISIONALLY ADOPTED FORM 4-940 NMRA OF THE CIVIL FORMS AND FORM 9-515 NMRA OF THE CRIMINAL FORMS, AND THE ADOPTION OF NEW FORM 4-941 NMRA OF THE CIVIL FORMS

ORDER

WHEREAS, on June 27, 2016, this Court approved, *inter alia*, the out-of-cycle adoption of Rule 1-131 NMRA of the Rules of Civil Procedure for the District Courts, Rule 5-615 NMRA of the Rules of Criminal Procedure for the District Courts, Form 4-940 NMRA of the Civil Forms, and Form 9-515 NMRA of the Criminal Forms on a provisional basis in light of recently enacted statutory changes in 2016 N.M. Laws, ch. 10, § 2 (H.B. 336, 52nd Leg., 2nd Sess.). *See* Order No. 16-8300-003 (June 27, 2016);

WHEREAS, the provisionally adopted rules and forms were made retroactively effective to May 18, 2016, to coincide with the effective date for 2016 N.M. Laws, ch. 10, § 2 (H.B. 336, 52nd Leg., 2nd Sess.). *See* Order No. 16-8300-003 (June 27, 2016);

WHEREAS, notwithstanding the need to provisionally adopt the rules and forms on an expedited basis in light of the recently enacted statutory changes, the Court directed the Clerk to publish for comment the provisionally adopted rules and forms and to also seek input from the Rules of Civil Procedure for the District Courts Committee and the Rules of Criminal Procedure for the District Courts Committee;

WHEREAS, the public comments and rules committee input were subsequently referred to the Ad hoc Committee on Rules for Mental Health Proceedings for further review and recommendation; and

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Ad hoc Committee on Rules for Mental Health Proceedings to withdraw and amend provisionally adopted Rules 1-131 and 5-615 NMRA, to approve provisionally adopted Forms 4-940 and 9-515 NMRA, and to adopt new Form 4-941 NMRA, and the Court having considered the recommendation and being otherwise sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that provisionally adopted Rules 1-131 and 5-615 NMRA are WITHDRAWN, **effective retroactively to May 18, 2016**;

IT IS FURTHER ORDERED that amended Rules 1-131 and 5-615 NMRA and provisionally adopted Forms 4-940 and 9-515 NMRA are APPROVED, **effective for all orders filed on or after March 31, 2017**;

IT IS FURTHER ORDERED that new Form 4-941 NMRA is ADOPTED, **effective for all cases filed on or after March 31, 2017**; and

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission web site and publishing them in the *Bar Bulletin* and *New Mexico Rules Annotated*.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 28th day of February, 2017.

Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico

1-131. NOTICE OF FEDERAL RESTRICTION ON RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION.

A. **Notice required.** ~~The court shall provide written notice to a~~ A person who is the subject of an order set forth in Paragraph B of this rule ~~[that] shall be given written notice of the following:~~

(1) ~~[the] The person is prohibited under federal law from receiving or possessing a firearm or ammunition[-] as provided by 18 U.S.C. § 922(g)(4);~~

(2) ~~[The notice shall further state that] The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about the person's [identifying information will be transmitted] identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System[-] and;~~

(3) ~~The person may petition the court as provided in Section 34-9-19 NMSA 1978 to restore the person's right to possess or receive a firearm or ammunition and to remove the person's name from the National Instant Criminal Background Check System.~~

B. **Orders requiring notice.** The written notice required under Paragraph A of this rule shall be ~~[in the form substantially approved by the Supreme Court and shall be attached to] included in or made a part of the following orders:~~

(1) An order appointing a full or plenary guardian for an adult that includes a finding that the person is totally incapacitated under Section 455304(C) NMSA 1978;

(2) An order appointing a full or plenary conservator for an adult that includes a finding that the person is totally incapacitated under Section 455407(I) NMSA 1978;

(3) An order of commitment under Sections 43111, 12, or 13 NMSA 1978;

~~[(4) An order appointing a treatment guardian under Section 43115 NMSA 1978;]~~

~~[(5)](4) An order for involuntary protective services or~~

protective placement under Section ~~[27724]27-7-26~~ NMSA 1978; and

~~[(6)](5) An order to participate in assisted outpatient treatment [under Chapter 84 of New Mexico Laws of 2016] that includes a finding of serious violent behavior or of threatened or attempted serious physical harm under Section 43-1B-3(C)(2) NMSA 1978.~~

[Provisionally approved by Supreme Court Order No. 168300003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34919(C) requires the Administrative Office of the Courts to notify a person who has been “adjudicated as a mental defective” or “committed to a mental institution” that the person “is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” Federal law declares it a crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to, among other things, receive or possess a firearm or ammunition. See 18 U.S.C. § 922(g)(4) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation and New Mexico law as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked sub-normal intelligence, or mental illness, incompetency, condition, or disease:

- (1) is a danger to himself or to others; or
- (2) Lacks the mental capacity to contract or manage his own affairs.

~~[(b) The term shall include—~~

- ~~(1) A finding of insanity by a court in a criminal case; and~~
- ~~(2) Those persons found incompetent to stand trial]~~

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11; NMSA 1978, § 34-9-19(M) (“[T]he terms “adjudicated as a mental defective” and “committed to a mental institution” have the same meaning as those terms are defined in federal regulations at 27 C.F.R. Section 478.11 . . .”).

[This rule sets forth the procedure for providing the notice required under Section 34-9-19(C) and identifies the orders under New Mexico law for which notice is required in a civil proceeding]. Paragraph A of this rule prescribes the notice that must be given under Section 34-9-19(C) to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.” See also Form 4940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition). Paragraph B identifies the types of orders in a civil proceeding that require the prescribed notice because the orders may include one or more findings that substantially align with the federal definition of “adjudicated as a mental defective” or “committed to a mental institution.” The orders listed in Subparagraphs (B)(3) and (4) necessarily include such a finding and therefore require notice in every case. However, the orders listed in Subparagraphs (B)(1), (2), and (5) may be issued without a finding or combination of findings that satisfies either definition. The rule therefore clarifies that notice is required under Subparagraphs (B)(1), (2), and (5) only when the order includes a specific finding that, taken with other findings that are statutorily required, ensures that the order substantially aligns with one of the federal definitions.

[Provisionally approved by Supreme Court Order No. 168300003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

5-615. NOTICE OF FEDERAL RESTRICTION ON RIGHT TO RECEIVE OR POSSESS A FIREARM OR AMMUNITION.

A. Notice required. ~~[The court shall provide written notice to a] A person who is the subject of an order set forth in Paragraph B of this rule [that] shall be given written notice of the following:~~

~~(1) [the] The person is prohibited under federal law from receiving or possessing a firearm or ammunition[-] as provided by 18 U.S.C. § 922(g)(4);~~

~~(2) [The notice shall further state that] The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about the person’s [identifying information will be transmitted] identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System[-] and;~~

~~(3) The person may petition the court as provided in Section 34-9-19 NMSA 1978 to restore the person’s right to possess or receive a firearm or ammunition and to remove the person’s name from the National Instant Criminal Background Check System.~~

B. Orders requiring notice. The notice required under Paragraph A of this rule shall be ~~[in the form substantially approved by the Supreme Court and shall be attached to the following:] included in or made a part of an order,~~

~~(1) that was issued after a hearing~~

- ~~(a) of which the defendant received actual notice, and~~
- ~~(b) at which the defendant had an opportunity to participate with the assistance of counsel, and~~

~~(2) that finds the defendant,~~

- ~~[(+)](a) [An order finding a defendant] incompetent to stand trial; [and] or~~
- ~~[(2)](b) [An order finding a defendant] not guilty by reason of insanity at the time of the offense.~~

[Provisionally approved by Supreme Court Order No. 168300003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been “adjudicated as a mental defective” or “committed to a mental institution” that the person “is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” Federal law declares it a crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to, among other things, receive or possess a firearm or ammunition. See 18 U.S.C. § 922(g)(4) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation and New Mexico law as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked sub-

normal intelligence, or mental illness, incompetency, condition, or disease:

- (1) is a danger to himself or to others; or
- (2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

- (1) A finding of insanity by a court in a criminal case; and
- (2) Those persons found incompetent to stand trial [.....] or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11; NMSA 1978, § 34-9-19(M) (“[T]he terms ‘adjudicated as a mental defective’ and ‘committed to a mental institution’ have the same meaning as those terms are defined in federal regulations at 27 C.F.R. Section 478.11 . . .”).

This rule sets forth the procedure for providing the notice required under Section 34919(C) and identifies the orders under New Mexico law for which notice must be given in a criminal proceeding]. Paragraph A of this rule prescribes the notice that must be given under Section 34-9-19(C) to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.” See also Form 4940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition). Paragraph B identifies the orders that require notice in a criminal proceeding because they presumptively meet the federal definition of “adjudicated as a mental defective” or “committed to a mental institution.”

The requirements in Paragraph (B)(1) are intended to ensure that adequate due process protections are present before notice is provided and the person’s identifying information is reported to the National Instant Criminal Background Check System (NICS). *Accord, e.g., United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (“[T]he right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process. Ordinarily, to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required.”); *Open Letter to the States’ Attorneys General from the Bureau of Alcohol, Tobacco, Firearms, and Explosives*, U.S. Department of Justice (May 9, 2007), <https://www.atf.gov/file/83751/download> (explaining that the ATF historically has required “traditional protections of due process be present, including adequate notice, an opportunity to respond, and a right to counsel”); cf. 18 U.S.C. § 921(a)(33) (providing that “[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence under § 922(g)(9)], unless . . . the person was represented by counsel in the case . . .”).

The inclusion in Paragraph (B)(2)(a) of a finding of incompetency to stand trial is not free from doubt. The federal definition of “adju-

dicated as a mental defective” arguably is limited in Subsection (b) (2) to a finding of incompetent to stand trial in proceedings under the Uniform Code of Military Justice (UCMJ) and therefore may not apply to such a finding in a state criminal proceeding. However, the federal agency that promulgated the definition interprets Subsection (b)(2) as applying to findings of incompetency both in criminal cases and in proceedings under the UCMJ. See 79 Fed. Reg. 774, 777 (2014) (statement in proposed rule by the Bureau of Alcohol, Tobacco, Firearms, and Explosives). That interpretation is consistent with federal law that governs the reporting of information to the NICS. See NICS Improvement Amendments Act of 2007, Pub. L. 110-180, § 101(c)(1)(C), 121 Stat. 2559, 2562-63 (2008) (providing that no law shall prevent a federal department or agency from providing to the Attorney General any record that includes a finding of incompetent to stand trial “in any criminal case or under the Uniform Code of Military Justice” (emphasis added)).

Further, the standards for determining competency in a proceeding under the UCMJ and under New Mexico law in a criminal case are substantially the same. Compare 10 U.S.C. § 876b(a)(1) (requiring commitment to the Attorney General’s custody of a person “presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case”); with, e.g., *State v. Rotherham*, 1996-NMSC-048, ¶ 12, 122 N.M. 246, 923 P.2d 1131 (“A person is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and he has a rational as well as factual understanding of the proceedings against him. An accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment.” (internal quotation marks, alterations, and citations omitted)). Requiring notice for a finding of incompetency in a criminal proceeding, therefore, is consistent with the intent and scope of the federal definition, which is controlling under New Mexico law. See NMSA 1978, § 34-9-19(M).

[Provisionally approved by Supreme Court Order No. 168300003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

4-940. NOTICE OF FEDERAL RESTRICTION ON RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION.

[For use with Rule 1-131 NMRA]

STATE OF NEW MEXICO
 COUNTY OF _____
 _____ JUDICIAL DISTRICT

_____,
 Petitioner,

v. _____ No. _____

_____,
 Respondent.

NOTICE OF FEDERAL RESTRICTION ON RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION

TO: _____

ADDRESS: _____

YOU ARE HEREBY NOTIFIED that as a result of the order entered against you in this proceeding, you are prohibited from possessing or receiving a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4).

YOU ARE FURTHER NOTIFIED that the Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about your identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System (NICS).

YOU ARE FURTHER NOTIFIED that you may petition the Court as provided in Section 34-9-19 NMSA 1978 to restore your right to possess or receive a firearm or ammunition and to remove your name from the NICS.

DISTRICT COURT

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016; approved by Supreme Court Order No. 17-8300-003, effective for all orders filed on or after March 31, 2017.]

4-941. PETITION TO RESTORE RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION.

[For use with Section 34-9-19 NMSA 1978]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT

In the matter of _____,
No. _____
Petitioner.

PETITION TO RESTORE RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION¹

I, _____ (name), am the Petitioner in this proceeding under Section 34-9-19(D) NMSA 1978 and state as follows:

1. On _____ (date), I was notified that I am subject to the firearm and ammunition prohibitions set forth in 18 U.S.C. § 922(g)(4) as a result of the following order or finding (select one):

- Order appointing a full or plenary guardian that includes a finding of total incapacitation.
- Order appointing a full or plenary conservator that includes a finding of total incapacitation.
- Order for involuntary commitment.
- Order for involuntary protective services or protective placement.
- Order for assisted outpatient treatment that includes a finding of serious violent behavior or of threatened or attempted serious physical harm.
- Finding of incompetent to stand trial.
- Finding of not guilty by reason of insanity at the time of the offense.

2. The Court entered the order or finding identified in Paragraph 1, above, in Case No. _____.

YES (required) I have attached a copy of the order or finding to this petition.

3. I request that this Court restore my right to possess or receive a firearm or ammunition, including my right to be eligible for a concealed handgun license.

4. I have not filed a Petition To Restore Right To Possess or Receive a Firearm or Ammunition within the past two (2) years.

5. I request that this Court schedule a hearing to consider whether my rights should be restored under Section 34-9-19(E) NMSA 1978.²

WHEREFORE, I ask the Court to grant this petition and for any other relief that the Court deems proper.

Respectfully submitted,

Signature of Petitioner

Name of Petitioner (print)

Mailing address

Telephone number

VERIFICATION

I, the Petitioner, affirm under penalty of perjury under the laws of the State of New Mexico the following:

- (A) I am the petitioner in the above-entitled cause;
- (B) I have read the petition to restore right to possess or receive a firearm or ammunition;
- (C) The contents of the petition are true and correct to the best of my information and belief; and
- (D) I understand the following:

- (1) If the Court sets a hearing on the petition, I must offer evidence of the following when I come to Court:
 - (a) The circumstances regarding the firearm disabilities from which I am seeking relief;
 - (b) My mental health records and criminal history records, if any (It is my responsibility to provide these records);

- (c) My reputation, which must be supported, at the very least, by a person who can come to the hearing to testify about my character; a sworn, written statement by a person familiar with my character; or by other character evidence; and
- (d) Changes in my condition or circumstances since the order or finding identified in Paragraph 1 of this petition was entered;
- (2) The evidence described above will be used to determine whether I am likely to act in a manner dangerous to public safety and whether restoring my right to possess or receive a firearm or ammunition is contrary to the public interest; and
- (3) After I file this petition with the court, I must mail or hand-deliver a court-stamped copy to the Office of the Attorney General and to all parties to the proceeding that resulted in the order identified in Paragraph 1 of this petition.³

Date _____ Petitioner _____

USE NOTES

1. You must pay a filing fee to the court clerk in cash or money order at the time the petition is filed. If you cannot afford to pay the filing fee, you may ask the court to allow you to file for free or for a reduced rate by filing an application for free process, Form 4-222 NMRA.
2. You must bring a self-addressed stamped envelope with you when you file your petition. The clerk will use the envelope to notify you by mail of the date and time of your hearing.
3. You should bring the original and at least two copies of the petition with you when you file the petition. The clerk will file the original and will stamp and return the copies to you. You may keep one copy for your records, and you must mail or hand-deliver the other copies to the attorney general and to all parties to the original proceeding as required by NMSA 1978, § 34-9-19(D). The court may ask you for proof that you mailed or hand-delivered the other copies.

[Approved by Supreme Court Order No. 17-8300-003, effective for all cases filed on or after March 31, 2017.]

9-515. NOTICE OF FEDERAL RESTRICTION ON RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION.

[For use with Rule 5-615 NMRA]

STATE OF NEW MEXICO
 COUNTY OF _____
 _____ JUDICIAL DISTRICT

STATE OF NEW MEXICO,
 v. _____ No. _____
 a _____
 _____,
 Defendant.

NOTICE OF FEDERAL RESTRICTION ON RIGHT TO POSSESS OR RECEIVE A FIREARM OR AMMUNITION

TO: _____
 ADDRESS: _____

YOU ARE HEREBY NOTIFIED that as a result of the order entered against you in this proceeding, you are prohibited from possessing or receiving a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4).

YOU ARE FURTHER NOTIFIED that the Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about your identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System (NICS).

YOU ARE FURTHER NOTIFIED that you may petition the Court as provided in Section 34-9-19 NMSA 1978 to restore your right to possess or receive a firearm or ammunition and to remove your name from the NICS.

DISTRICT COURT

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016; approved by Supreme Court Order No. 17-8300-003, effective for all orders filed on or after March 31, 2017.]

Certiorari Granted, September 19, 2016, No. S-1-SC-36028

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-004

No. 34,908 (filed July 7, 2016)

STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
 Petitioner-Appellee,
 v.
 KEON H.,
 Respondent-Appellant,
 and
 HALLEY R.,
 Respondent,
 IN THE MATTER OF ANHAYLA H.,
 Child.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

WILLIAM E. PARNALL, District Judge

CHARLES E. NEELLEY
 Chief Children's Court Attorney
 KELLY P. O'NEILL
 Children's Court Attorney
 CHILDREN, YOUTH & FAMILIES
 DEPARTMENT
 Albuquerque, New Mexico
 for Appellee

JANE B. YOHALEM
 LAW OFFICE OF JANE B. YOHALEM
 Santa Fe, New Mexico
 for Appellant

W. KAREN CANTRELL
 Placitas, New Mexico
 Guardian ad litem

Opinion**Roderick T. Kennedy, Judge**

{1} The district court, upon the Children, Youth, and Families Department's (CYFD) motion, terminated Father's parental rights with regard to Child. Father was incarcerated for the majority of time between February 2013, when CYFD took custody of Child, and February 2015, when Father's parental rights were terminated. Father appeals the termination of his parental rights, asserting that neither CYFD nor the district court followed the procedures required for termination of parental rights under the Abuse and Neglect Act, NMSA

1978, §§ 32A-4-1 to -34 (1993, as amended through 2016). Specifically, Father asserts that CYFD never satisfied its duty to create a treatment plan and put forth reasonable efforts to assist him with reunification as required by Section 32A-4-28(B)(2). CYFD argues that it satisfied the requirement that it make reasonable efforts to assist Father. We are being asked to determine whether the evidence proffered is sufficient to constitute clear and convincing evidence that CYFD put forth "reasonable efforts" under the Abuse and Neglect Act. We conclude that it is not and reverse.

I. PROCEDURAL HISTORY

{2} CYFD filed a petition against Keon H. (Father) and Halley R. (Mother), al-

leging Anhayla H. (Child) was an abused child and a neglected child¹ under Section 32A-4-2(B) and (E).² See § 32A-4-15. CYFD took custody of Child, and the district court issued an ex parte custody order awarding CYFD custody. See § 32A-4-16(A). Father entered a plea of no contest to the allegations that Child was abused. On May 20, 2013, the district court accepted that plea and adopted CYFD's proposed treatment plan for Father. See § 32A-4-21. The treatment plan required only one thing of Father—that he participate in a psychosocial assessment.

{3} The district court held a permanency hearing in November 2013, during which CYFD recommended a permanency plan of adoption based on the failure of both parents to put forth effort in completing their treatment plans. See § 32A-4-25.1. As a result of CYFD's report regarding the lack of efforts of both parents, the district court set a permanency planning goal of adoption. The district court held another permanency hearing in February 2014. CYFD reported that Father had made no progress with his treatment plan. One month later, CYFD filed a motion to terminate Father's parental rights. See § 32A-4-28.

{4} During the termination of parental rights (TPR) hearing, CYFD presented testimony regarding the severity of Child's physical and mental impairment and testimony from Richard Gaczewski, Father's permanency planning worker (PPW) from March 2014 to November 2014. Father also testified at the TPR hearing. After Father's testimony, CYFD stated that it intended to call a rebuttal witness, and the district court recessed the proceedings. The TPR hearing was in recess for approximately six months. During that time, CYFD provided Father with a written psychosocial assessment, which Father returned within the month. Accordingly, Gaczewski created a new treatment plan containing additional requirements, such as participation in Child's medical appointments, participation in a psychological assessment, participating in a substance abuse assessment, maintaining a safe home environment, and maintaining contact with his PPW at least once per month.³ At the second TPR

¹We do not question whether Child was an abused and neglected child.

²Mother's parental rights were eventually terminated, and she did not appeal that termination. As such, we are concerned only with Father's portion of the proceedings.

³Despite Gaczewski stating in that letter that he intended to propose that the court adopt the plan at the next court hearing, scheduled for September 29, 2014, that hearing was vacated, and it does not appear that Father's revised treatment plan was ever adopted by the court prior to the second TPR hearing. See *State ex rel. Children, Youth & Families Dep't v. Athena H.*, 2006-NMCA-113, ¶ 9, 140 N.M. 390, 142 P.3d 978 ("The court must approve a treatment plan in an abuse and neglect case in order to provide the framework for the efforts of CYFD and the parent." (emphasis added)).

hearing in February 2015, CYFD again presented testimony from Gaczewski, and also presented testimony from Lareina Manuelito, who was Father's PPW after Gaczewski. Both PPWs explained CYFD's interactions with Father since the last hearing, acknowledging Father's prompt return of the psychosocial assessment.

{5} In making its ruling on CYFD's TPR motion, the district court expressed disdain for CYFD's handling of the case. The district court expressed the view that CYFD ought to do more for incarcerated individuals than it did in this case. The district court stated that it was "not happy" with the manner in which CYFD dealt with Father's case and cautioned CYFD that it ought not to deal with other cases in the same way. The district court ultimately held that CYFD had put forth the reasonable effort required by the Abuse and Neglect Act, but stated that it was drawing that conclusion only because, under the circumstances of the case, little more could have been done to change Father's circumstances. The district court found, by clear and convincing evidence, that the causes and conditions of the abuse had not been alleviated and were unlikely to be alleviated in the near future. As such, the district court granted CYFD's motion for to terminate Father's parental rights. Father filed a notice of appeal.

II. DISCUSSION

{6} The standard of proof in a TPR proceeding is clear and convincing evidence. Section 32A-4-29(I). The issue on appeal in this case is whether CYFD provided sufficient evidence under the clear and convincing standard establishing that it made reasonable efforts to assist Father. See *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2009-NMCA-039, ¶¶ 13-14, 146 N.M. 60, 206 P.3d 171 (concluding that the father's challenge to the court's finding regarding abandonment required sufficiency review on appeal). We uphold the district court's judgment if, viewing the evidence in the light most favorable to the judgment, a fact finder could properly conclude that the clear and convincing standard was met. See *State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 11, 144 N.M. 222, 185 P.3d 1072. Clear and convincing evidence is such that "instantly tilts the scales in the affirmative when weighed against the

evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *State ex rel. Children, Youth & Families Dep't v. Lance K.*, 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778 (alteration, internal quotation marks, and citation omitted).

{7} In order to terminate parental rights based on abuse or neglect, the district court must "make three separate findings: (1) [Child was] neglected or abused; (2) the conditions and causes of neglect and abuse were unlikely to change in the foreseeable future; and (3) CYFD made reasonable efforts to assist Father in adjusting the conditions that rendered Father unable to properly care for [Child]." *State ex rel. Children, Youth & Families Dep't v. Nathan H.*, 2016-NMCA-043, ¶ 32, 370 P.3d 782, cert. denied, 2016-NMCERT-____ (No. 35,712, May 3, 2016); see § 32A-4-28(B)(2). On appeal, Father challenges the district court's conclusion that CYFD made reasonable efforts. Father also asserts that he should have been given more time to work his treatment plan prior to the termination of his parental rights. As support, Father asserts that if he had been informed of the available services and urged to stay in contact with CYFD, "he likely would have made contact the times he was released[.]"

{8} In this case, it is apparent the district court had grave reservations about the reasonableness of CYFD's efforts, but resolved the question with the observation that, at the end of the process, greater effort would not have made any difference. "What constitutes reasonable efforts may vary with a number of factors, such as the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting." *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 23, 132 N.M. 299, 47 P.3d 859; see *id.* ¶ 24 (acknowledging that reasonable efforts are not defined by any particular length of time). Though our courts have not yet tackled the issue of what constitutes "reasonable efforts" when a parent is incarcerated, case law is quite clear that a parent's incarceration does not remove or even diminish CYFD's obligation to put forth reasonable efforts. In *State ex rel. Children, Youth & Families Dep't v. William M.*, CYFD initiated abuse

and neglect proceedings against the father while he was incarcerated, and those proceedings eventually led to the termination of the father's parental rights. 2007-NMCA-055, ¶¶ 3-5, 141 N.M. 765, 161 P.3d 262. In concluding that substantial evidence supported a finding of reasonable efforts, we noted that prior to filing a motion to terminate the father's parental rights, CYFD had maintained contact with the father both directly and through counsel, informed the father of the children's problems and treatment, visited the father during his incarceration, and provided the father with an interpreter to assist him with the psychosocial evaluation that it gave him. *Id.* ¶ 69. CYFD interacted with the father both in person at the prison as well as over the phone. *Id.* Even when the father was on parole in a different state, CYFD attempted to maintain contact with the father by telephone. *Id.* ¶ 71. Using these facts, we concluded that CYFD had made reasonable efforts to assist the father and affirmed the termination, reasoning that the father's incarceration and unwillingness to work with CYFD made reunification impossible. *Id.*

{9} Similar to *William M.*, in *Hector C.*, CYFD initiated termination proceedings prior to the father's release from jail, and the father was unable to participate in any treatment while he was incarcerated. 2008-NMCA-079, ¶ 25. During the father's incarceration, CYFD attempted to arrange visits between the children and the father and provided the father with a psychological examination. *Id.* ¶ 26. After the father's release, CYFD provided the father with parenting classes, family counseling, substance abuse counseling, and visits with the children. *Id.* Concluding that CYFD had made reasonable efforts to assist the father, we reasoned that the father's inability to work the treatment plan while incarcerated ultimately prevented reunification. *Id.* ¶ 27.

{10} This case presents a much more sparse picture of CYFD's involvement. Here CYFD points to Father's failure to complete a psychosocial assessment until September 2014, and his "unavailability" in particular, as noncompliance with the treatment plan.⁴ It is important to mention here that, although it is clear that Father was in and out of Metropolitan Detention Center (MDC) for much of the

⁴This reference to Father's unavailability could easily be construed as a thinly veiled reference to his incarceration. We remind CYFD that they are prohibited by statute from terminating parental rights based solely on the fact that the parent is incarcerated. Section 32A-4-28(D).

time that Child was in CYFD custody, it remains unclear from the record and briefs precisely when and how long Father was incarcerated. It is equally unclear when and how many times CYFD attempted to contact or locate Father. The record does, however, reflect that CYFD's actions were incomplete as to both implementing an appropriate treatment plan for Father and in facilitating interaction with him during his incarceration and when he was released from incarceration.

{11} Precedent that supports the reasonableness of CYFD's efforts to assist an incarcerated parent typically entails persistent efforts to communicate with the parent, provision of opportunities for the parent to interact with the children, suggestion of alternate placement opportunities for the children, and identification of available services designed to assist the parent, coupled with an absence of effort on the part of the parent to do things necessary to achieve reunification. *See Hector C.*, 2008-NMCA-079, ¶¶ 24-27; *William M.*, 2008-NMCA055, ¶¶ 68-71. Because CYFD did not provide him the services and opportunities that were available in the cases discussed above, this case presents a situation in which it is difficult to gauge Father's involvement and willingness to put forth effort. We will not speculate how Father might have completed the treatment plan under different circumstances.

{12} The district court implemented Father's initial treatment plan suggested by CYFD, stating the sole requirement that he complete a psychosocial assessment. At the adjudicatory hearing in April 2013, the treatment plan was amended to include additional requirements over a year later, and six months after CYFD had moved to terminate Father's parental rights. But Father's treatment plan never developed past the single requirement of a psychosocial assessment because the assessment was a prerequisite to any further action under the treatment plan. This is an abdication of CYFD's duties; if no follow up is provided,

reasonable efforts have not been made. *See, e.g., Hector C.*, 2008-NMCA-079, ¶ 27; *William M.*, 2007-NMCA-055, ¶ 69. Although Father had a treatment plan in place for almost two years, completing a psychosocial assessment was the sole item listed under the treatment plan for the majority of that time period. And with this lone requirement, Father complied when provided the assessment material by CYFD.

{13} At the TPR hearing, CYFD presented evidence regarding the number of times it attempted to contact Father, any difficulties it had in contacting father, or the manner in which it attempted to contact Father prior to filing a TPR motion. When the treatment plan, such that it was, was implemented in April 2013, CYFD reported that Father had not returned his PPW's calls and did not attend a scheduled office visit. CYFD's report to the district court at a subsequent hearing in May 2013 stated simply that Father had not been in touch with CYFD. At a permanency hearing held in November 2013, CYFD's report was contradictory, in that it claimed to have arranged for office visits with Father, but that Father had not been in touch with CYFD. It also noted that Father had one visit with his daughter and that Father's PPW visited him at MDC that month, but Father had not participated in his treatment plan. CYFD reported to the district court at the next permanency hearing in February 2014 that Father had been scheduled for a psychosocial assessment but had cancelled two appointments.⁵ Otherwise, CYFD reiterated the same information that it provided previously regarding Father's visit with his daughter and the PPW's visit.

{14} In March 2014, the same month that the motion for TPR was filed, Gaczewski was assigned as Father's new PPW. Gaczewski was the only CYFD witness to testify regarding any pre-termination contact with Father. While he was Father's PPW, Gaczewski's efforts to locate Father were limited to asking Mother if she knew

of Father's whereabouts or if she had any recent involvement with him⁶ and checking the MDC website to see whether Father was being held there. Gaczewski checked the MDC website in July 2014 and in April or May 2014; Father's name did not appear in the website's database.⁷ Gaczewski never set up an appointment in order to conduct the psychosocial assessment. Prior to the first TPR hearing, Gaczewski did not send Father any letter containing information regarding the process, Child's development, or what was required of him, nor did he send Father any self-addressed stamped envelopes or call Father. Father testified at the TPR hearing, confirming that prior to the first TPR hearing, he had not received any information from CYFD regarding a psychosocial assessment.

{15} On September 2, 2014, *after* the first TPR hearing, Gaczewski wrote a letter to Father that introduced himself to Father, gave an update on Child, included self-addressed stamped envelopes, and attached a written psychosocial assessment for Father to complete. As noted, Father returned the assessment within the month, along with a letter that he had written to Child.⁸ Gaczewski wrote back to Father in a letter dated September 23, 2014, and set forth a new proposed treatment plan and included suggestions on how Father could best accomplish its requirements while incarcerated. The new, unadopted treatment plan suggested that during Father's incarceration, Father send letters and photographs for Child, inform Gaczewski of any relatives who could serve as possible placements for Child, inform Gaczewski if any classes were available in MDC, and make a plan that Father intended to follow once released. The rest of the requirements could not be completed while Father was incarcerated. Gaczewski sent a similar letter in October 2014. Two months after the first TPR hearing, Gaczewski wrote to inform Father that he would no longer be Father's permanency planning worker and provided the name and contact information of Father's new PPW within CYFD,

⁵It is unclear whether these cancellations were the result of Father's incarceration. It is unclear whether these cancellations were the result of Father's incarceration. But considered alongside the fact that Father had provided information to CYFD regarding the assessment, evidence of cancelled appointments alone cannot support the conclusion that Father had not participated in what his treatment plan required.

⁶We note that prior to this, Mother had been admonished for her continued contact with Father, and warned by both the district court and CYFD that continued interaction with Father would likely be harmful to the chances of her getting custody of Child.

⁷Though the PPW stated that he believed he checked the website twice between March 2014 and August 2014, he could not pinpoint any month other than July during which the second check took place.

⁸There is also evidence that Father wrote multiple letters to Child after the first TPR hearing and before Manuelito became Father's PPW.

Lareina Manuelito. Manuelito received letters that Father wrote to Child in December 2014 and January 2015. Manuelito wrote to Father shortly before the second TPR hearing, including self-addressed stamped envelopes and a description of Child's progress in that letter.

{16} Through these facts, the record reveals a pattern of unsustainable non-chalance from both CYFD and possibly Father as well, until after the first TPR hearing in August 2014. As late as November 2013, CYFD knew Defendant was incarcerated. There is, however, nothing in the record indicating that CYFD ever reached out to Father between November 2013 and March 2014 to provide him with the required psychosocial assessment. Even though Father's PPW visited him at MDC in November 2013, the PPW made no attempt to give Father a psychosocial assessment at that time. In fact, it is only after the TPR hearing in August 2014 that CYFD began initiating monthly contact with Father.

{17} The completion of a psychosocial assessment—the sole item in Father's treatment plan for more than a year prior to CYFD's motion for TPR—was in no way hindered by Father's incarceration. The administering of that assessment was not contingent on Father's physical presence at a meeting with his PPW or with CYFD, as evidenced by the fact that CYFD sent the assessment to Father in a letter immediately following the first TPR hearing and Father timely returned it complete with all necessary answers. We find it troubling that, although CYFD used Father's failure to undergo a psychosocial assessment to terminate his parental rights, the record reveals virtually no evidence that CYFD timely put forth effort to assist Father in getting that psychosocial assessment. See *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶

48, 141 N.M. 692, 160 P.3d 601 (expressing similar concerns regarding efforts to assist a father with housing and employment issues).

{18} We are aware of and acknowledge Father's failings throughout this process, as well as the gravity of the abuse suffered by Child. Father neglected to contact CYFD, missed a scheduled visitation with Child, and cancelled appointments with CYFD. A parent is obligated to work with CYFD in completing the treatment plan, but CYFD is obligated to make reasonable efforts in the first instance. See Section 32A-4-22(C). While Father's repeated incarcerations doubtlessly hindered his ability to work with CYFD, they did not relieve him of his obligation to follow the treatment plan and work with CYFD. See *Nathan H.*, 2016-NMCA-043, ¶ 41 (stating that “[a]lthough [the f]ather's repeated incarceration hindered the treatment plan, incarceration does not release [the f]ather from following treatment that affects his parental duties to [his c]hildren”). But here, the one item on Father's treatment plan as adopted by the court was not properly pursued by CYFD, and the amended treatment plan was never formalized and actually arose following the initiation of TPR proceedings by CYFD. The record clearly reveals that CYFD failed to put forth reasonable efforts to assist Father, but “we are cognizant of the fact that Child is not a trophy to be awarded to whichever party prevails in court[.]” *Benjamin O.*, 2007-NMCA-070, ¶ 38 (noting that evidence did not support the conclusion that CYFD complied with the court's orders). Despite CYFD's failure to proffer sufficient evidence of reasonable efforts, we note that CYFD is not foreclosed from pursuing termination of Father's parental rights on remand: “If, as it appears in the case at bar, CYFD does not believe that reunification is possible and that termination of parental

rights is in Child's best interests, it can bring new or current allegations of abuse, neglect, or abandonment to the district court's attention.” *Id.* ¶ 39.

III. CONCLUSION

{19} Although Father's behavior throughout these proceedings has been neither exemplary nor commendable, neither has CYFD presented any real effort to assist Father in any way that could be construed as “reasonable,” or that would support CYFD's burden of proof that it complied with its statutory duty to make reasonable efforts on Father's behalf. CYFD presented virtually no evidence of any efforts to assist Father prior to November 2013. CYFD presented evidence of one visit to MDC in November 2013, but presented no evidence regarding what that visit entailed or why a psychosocial assessment was not conducted at that point. CYFD made no contact with Father between November 2013, when it knew Father was incarcerated, and March 2014, when it filed the TPR motion. The extent of CYFD's efforts to contact Father between the filing of the TPR motion and the TPR hearing was limited to inquiries to Mother and two website searches. The majority of CYFD's efforts have occurred since the first TPR hearing, but were both tardy and incomplete from the standpoint of this appeal. We conclude that such evidence cannot be sufficient to constitute reasonable efforts. Because the sole issue on appeal is the sufficiency of evidence to support the district court's conclusion that CYFD put forth reasonable efforts, and not whether Father's actions were adequate to permit reunification, we reverse.

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

RODERICK T. KENNEDY, Judge

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

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-005

No. 34,653 (filed July 12, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DANIEL G. ARAGON,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

MARY L. MARLOWE SOMMER, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, NM

TONYA NOONAN HERRING
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

GREGORY GAHAN
Albuquerque, New Mexico
for Appellant

Opinion

Jonathan B. Sutin, Judge

{1} On appeal, Defendant Daniel G. Aragon attempts to have a misdemeanor driving while intoxicated (DWI) conviction in a de novo bench trial in district court dismissed because the DWI charge and a traffic citation were not joined under the compulsory joinder rule, Rule 5-203(A) NMRA. We hold that the compulsory joinder rule does not require joinder in this case, and therefore the district court did not err in denying Defendant's motion to dismiss.

BACKGROUND

{2} Defendant was stopped by Officer Adrian Diaz for driving 111 miles per hour in a 55 miles-per-hour zone. During the traffic stop, Officer Diaz determined that Defendant was impaired, and he placed Defendant under arrest for DWI.

{3} Defendant was arraigned on a third degree felony DWI charge in the Santa Fe County Magistrate Court, but the charge was quickly dismissed without prejudice pending the outcome of the prosecution's investigation into whether the DWI was Defendant's sixth offense, which would be a third degree felony.

See NMSA 1978, § 66-8-102(I) (2010). The speeding charge was filed in a separate magistrate court cause two days after the dismissal without prejudice of the DWI felony charge, and Defendant pleaded no contest to the speeding charge and agreed to pay the fine and fees.

{4} Approximately three months after Defendant's plea to the speeding citation, the State determined, based on its felony investigation, that the DWI should be charged as a misdemeanor second offense and not a felony sixth offense. Thereafter, the State filed a misdemeanor DWI (0.08) second offense charge against Defendant in the original magistrate court DWI cause. Defendant filed and the magistrate court denied a motion to dismiss based on Rule 5-203(A), which is a district court rule.¹ Compare Rule 5-203(A), with Rule 6-306(A) NMRA (Rules of Criminal Procedure for the Magistrate Courts). Defendant was convicted by a jury of DWI (0.08) second offense, and he appealed to the district court.

{5} In his district court appeal, Defendant filed a motion to dismiss under Rule 5-203(A), again arguing that the misdemeanor charge should be dismissed

because it had not been joined with the speeding citation. The district court denied the motion, and after a de novo bench trial, the court entered an order finding Defendant guilty and remanding the matter to magistrate court for imposition of that court's sentence.

{6} On appeal to this Court from the district court's orders denying his motion to dismiss and finding Defendant guilty and remanding the matter to the magistrate court to impose sentence, Defendant argues that the prosecution of the DWI charge was barred by Rule 5-203(A) (and perhaps, but not clearly, also by the magistrate court compulsory joinder Rule 6-306(A)), as interpreted and applied in *State v. Gonzales*, 2013-NMSC-016, ¶¶ 25-33, 301 P.3d 380.

DISCUSSION

{7} Whether a criminal statute applies to particular conduct is a question of law to be reviewed de novo. *State v. Office of Pub. Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 13, 285 P.3d 622.

{8} The critical issue is whether Rule 5-203(A) was violated when the DWI and traffic offense were not joined. Rule 5-203(A), broadly states:

Two or more offenses shall be joined in one complaint, indictment[,] or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

- (1) are of the same or similar character, even if not part of a single scheme or plan; or
- (2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

Gonzales provides no limitations, but states the purpose of compulsory joinder.

The purpose of a compulsory joinder statute, viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation.

Gonzales, 2013-NMSC-016, ¶ 26 (alteration, internal quotation marks, and citation omitted). We conclude that nothing

¹The applicable rule was magistrate court compulsory joinder Rule 6-306(A), which is virtually identical to Rule 5-203(A).

in the language of Rule 5-203(A) required compulsory joinder in this case.²

{9} The uniform traffic citation for speeding containing a hearing notice is a complaint. NMSA 1978, § 66-8-128 (2013); NMSA 1978, § 66-8-131 (1990); *see also* NMSA 1978, § 66-8-116(A)(7) (2011, amended 2016) (setting the penalty assessments for speeding more than 35 miles per hour over the speed limit at \$200). We see no reason why the State could not proceed with and resolve the traffic citation in magistrate court with Defendant's no contest plea. Nor do we see any reason why later, after determining that the DWI should not be filed as a felony, the State could not then file a misdemeanor DWI charge in magistrate court.³ Further, the speeding offense played no part in the per se 0.08 charge and conviction. Thus, the offenses are not of the same or similar character, nor are the offenses based on the same conduct. *See* Rule 5-203(A). In addition, to hold that joinder here was compulsory would, in our view, not be a rational disposition. American Bar Association (ABA) Standards for Criminal Justice Section 13-2.3(d) (2d ed. 1980) and Model Penal Code Section 1.11(2) (Am. Law Inst. 2015), each side with the view that a defendant's entry of a no contest plea to a lesser offense such as the traffic citation here does not bar a subsequent prosecution of an additional, greater offense even if the two offenses occur during one episode. *See* ABA Standards § 13-2.3(d) ("Entry of a plea of guilty or nolo contendere to one offense does not bar the subsequent prosecution of any additional offense based upon the same conduct or the same criminal episode."); Model Penal Code § 1.11(2) (stating that a prosecution is not barred where the "former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed"). A defendant should not be allowed to bar his later prosecution simply by rushing to plead to a considerably lesser traffic offense.⁴

CONCLUSION

{10} The district court did not err in denying Defendant's motion to dismiss the DWI charge based on the compulsory joinder rule. We affirm the district court's sentencing-related order.

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

JONATHAN B. SUTIN, Judge

I CONCUR: LINDA M. VANZI, Judge

MICHAEL E. VIGIL, Chief Judge

(specially concurring).

VIGIL, Chief Judge (specially concurring).

{12} The majority states that the "critical issue is whether Rule 5-203(A) was violated when the DWI and traffic offense were not joined." Majority Op. ¶ 8. I disagree with this characterization of the issue because I conclude there was no traffic offense to join with the DWI charge in the district court. For this reason I conclude that Rule 5-203(A) did not apply and therefore specially concur.

{13} We do not have copies of all the pleadings filed in the magistrate court. *See* Rule 5-826(F)(2) NMRA (requiring the magistrate court clerk to file with the district court clerk a copy of all papers and pleadings filed in the magistrate court in appeals from the magistrate court to the district court). For the factual background, we are therefore required to rely on Defendant's motion to dismiss and the State's response. According to these pleadings, Defendant was issued a citation for speeding and arrested and charged with felony DWI (sixth offense) in the Santa Fe County Magistrate Court on November 24, 2012. Defendant was arraigned in the magistrate court on the felony DWI charge on November 26, 2012, and on December 5, 2012, the felony DWI charge was dismissed without prejudice so that the State could investigate how many prior DWI convictions Defendant actually had. There is no allegation that this was done for any improper purpose. On March 25, 2013, Defendant pleaded no contest to the speeding charge. The DWI charge was re-filed in the magistrate court on July 10, 2013, as a misdemeanor DWI (second offense), and

trial on the re-filed DWI case was held in the magistrate court on April 18, 2014.

{14} When Defendant pleaded no contest to the speeding charge on March 25, 2013, that was the only charge pending because the separately filed felony DWI had been dismissed. When the misdemeanor DWI charge was re-filed on July 10, 2013, that was the only charge pending because the speeding case was already resolved. Thus, the joinder requirement of the magistrate court, Rule 6-306(A), was not applicable. There never were two or more offenses to join.

{15} But that does not end the matter. Defendant was found guilty of the misdemeanor DWI charge in the magistrate court on April 18, 2014. He was found guilty of the only charge pending against him, and he appealed that conviction to the district court for a de novo trial. This meant that the case was to be tried in the district court anew as if no trial had been held in the magistrate court. *State v. Armijo*, No. 34,400, 2016 WL 3266595, 2016-NMSC-___, ¶ 28, ___ P.3d ___ (June 13, 2016). Defendant moved the district court to dismiss the DWI with prejudice "based on [Rule 5-203(A),] the compulsory joinder rule[.]" When Defendant filed his motion to dismiss in the district court, there was only one charge—the DWI—and there was no other crime that could be joined with the DWI under Rule 5-203(A). The district court therefore properly denied Defendant's motion.

{16} The majority does not explain how mandatory joinder under Rule 5-203(A) should be considered under these circumstances. I conclude it does not and that there was no error in denying Defendant's motion to dismiss. Even if mandatory joinder could somehow be invoked, Defendant would not be entitled to relief under the harmless error rule set forth in Rule 6-303(A) NMRA and Rule 6-704 NMRA. Moreover, I respectfully submit that the majority's discussion of ABA Standards Section 13-2.3(d) and Model Penal Code Section 1.11(2) is purely advisory under the circumstances.

MICHAEL E. VIGIL, Chief Judge

² In his special concurrence, Chief Judge Vigil concludes that Rule 5-203(A) does not apply because the traffic offense was not pending concurrently with the DWI charge in the district court. We did not adopt the Chief Judge's interpretation because the compulsory joinder rule focuses on the similarity in character or conduct of offenses and does not state that compulsory joinder only applies to related offenses that are concurrently pending. If the relevant inquiry was whether charges were concurrently pending, prosecutors would be able to avoid the compulsory joinder rule by making sure only one charge is pending at any given time. That sort of piecemeal approach to prosecuting appears to be what the compulsory joinder rule seeks to prevent.

³ Defendant has at no time suggested that the State was required to dismiss the citation without prejudice along with the DWI charge and to then bring both charges in one proceeding.

⁴ An analysis of *Gonzales* and of the compulsory joinder rule's breadth and lack of reasonable limitations, as well as related expectations and concerns about the consequences, and case-by-case court imposed limitations on the rule, is contained in Ryan C. Schotter, *State v. Gonzales: Re-invigorating Criminal Joinder in New Mexico*, 44 N.M. L. Rev. 467 (2014). Schotter makes good points in his article and brings to light the breadth of Rule 5-203(A) with its lack of reasonable limitations, requiring case-by-case considerations of reasonable limitations. Schotter, *supra*, at 500.

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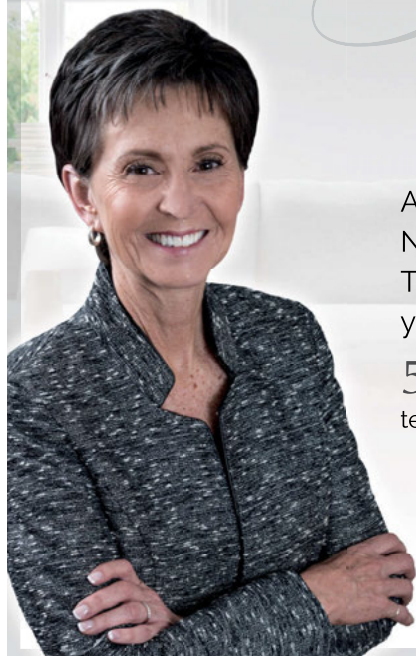
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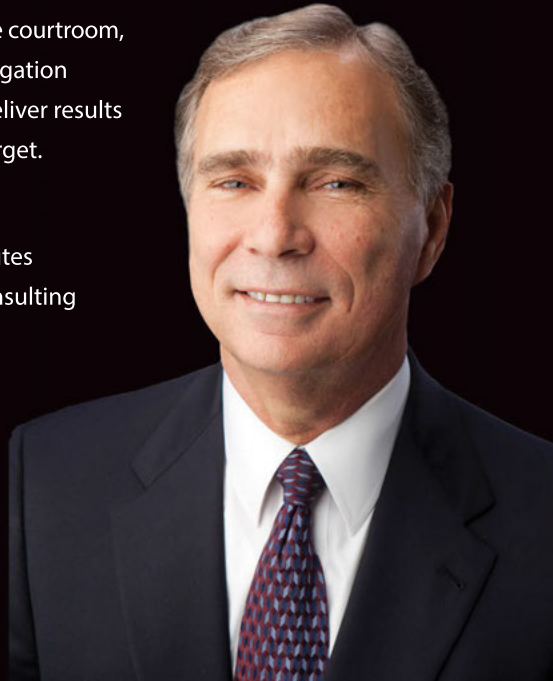
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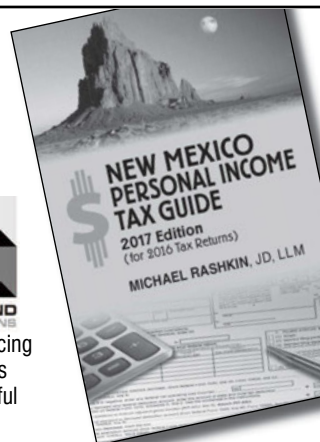
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Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 5-8 years experience in real estate matters for our Albuquerque office. Experience in land use, natural resources, water law, environmental law and/or other real estate related practice areas a plus. Prefer New Mexico practitioner with strong academic credentials and broad real estate background. Firm offers excellent benefit package. Salary commensurate with experience. Please send indication of interest and resume to Cathy Lopez, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Legal Notice

Notice is hereby given that Taos Pueblo/Taos Pueblo Tribal Court calls for Sealed Proposals for: RFP #2017-002: Proposal for Legal Services Contract: Taos Pueblo Children's Court Improvement Project-Development of Children's Court Policies and Procedures and Revision of Taos Pueblo Children's Code. Interested parties may secure a copy of the Proposal Packet from Cecily Romero, Taos Pueblo Tribal Court, 195 Rio Lucero, Taos Pueblo, New Mexico 87571, (575) 751-0488, ext. 201. Proposals must be received no later than: March 27, 2017 at 4:00 P.M. and submitted to: Taos Pueblo, Central Management Systems, Cecily Romero, Taos Pueblo Tribal Court Administrator, 1075 Veterans Highway P.O. Box 1846, Taos, New Mexico 87571. Proposals must be submitted in a sealed envelope that is clearly marked "Proposal for Legal Services: Taos Pueblo Children's Court Improvement Project." If mail delivery is used, the proposer should mail the proposal early enough to ensure arrival by the deadline. The proposal uses mail or courier service at his/her own risk. Taos Pueblo will not be liable or responsible for any late delivery of proposals. Postmarks will not be accepted. Until the award of the contract, proposals shall be held in confidence and shall not be available for public view. No proposal shall be returned after the date and time set for opening thereof. Taos Pueblo CMS reserves the right to reject any or all proposals and to waive any information in the proposal process.

Senior Trial Attorney/Deputy District Attorney Union County

The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Clayton Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

Associate University Counsel

This position is within UNM's Office of University Counsel. The Office of University Counsel is seeking an experienced attorney to provide legal counsel to the institution that will cover a broad range of higher education and other legal issues. Areas of practice will include real estate, business matters; contract review and drafting, construction, property sale/acquisition, bonds, tax, research issues, and providing training to University departments and personnel as needed. This position will report to the University Counsel and will entail working with all areas of the University, mid-level and senior university officials as well as faculty/academic leaders. Prior experience representing public institutions with educational and/or research missions is highly preferred. Candidates must be able to work in a fast-paced environment where advice and counsel leads to client-oriented solutions. This position requires interaction with a variety of university constituents and the successful candidate must be able to build relationships and inspire confidence. The University of New Mexico is committed to hiring and retaining a diverse workforce. We are an Equal Opportunity Employer, making decisions without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class. TO APPLY: For complete information including closing dates, minimum requirements, and instructions on how to apply for this or any UNM position please visit our website at <http://UNMJobs.unm.edu>, or call (505) 277-6947, or visit our HR Service Center at 1700 Lomas NE, Suite 1400, Albuquerque, NM 87131. EEO/AA

Associate University Counsel

This position is within UNM's Office of University Counsel. The Office of University Counsel is seeking an experienced attorney to provide legal counsel to the institution that will cover a broad range of higher education and other legal issues. Areas of practice will include hospital-physician contractual relationships (including physician professional services agreements); the legal implications of, and compliance with, HIPAA and state privacy laws including health information exchanges, and population health data management; the Stark law; the Anti-Kickback Statute; the legal implications of value-based reimbursement and shared/full risk contracting; corporate law and advising UNMHSC supporting corporate entities; contract review in respect of the foregoing; patient health-care decision making and surrogate health-care decision making; bonds and bond financing; research issues including clinical trial agreements, material transfer agreements, data use and sharing agreements; and, providing training to University departments and personnel as needed. This position will report to the University Counsel and will entail working with all areas of the University, mid-level and senior university officials as well as faculty/academic leaders. Prior experience representing public institutions with educational and/or research missions is highly preferred. Candidates must be able to work in a fast-paced environment where advice and counsel leads to client-oriented solutions. This position requires interaction with a variety of university constituents and the successful candidate must be able to build relationships and inspire confidence. The University of New Mexico is committed to hiring and retaining a diverse workforce. We are an Equal Opportunity Employer, making decisions without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class. TO APPLY: For complete information including closing dates, minimum requirements, and instructions on how to apply for this or any UNM position please visit our website at <http://UNMJobs.unm.edu>, or call (505) 277-6947, or visit our HR Service Center at 1700 Lomas NE, Suite 1400, Albuquerque, NM 87131. EEO/AA

Assistant City Attorney (Part-Time) City of Santa Fe

The Santa Fe City Attorney's Office seeks a part-time (32 hours/week) lawyer to provide legal services to multiple City departments, including the Public Utilities Water and Wastewater Divisions, the Convention and Visitors Bureau, Finance, Land Use, Public Works, and Economic Development, as well as civil and criminal litigation services. The City is seeking someone with good people skills, strong academic credentials and excellent written and verbal communications skills. Pay and benefits package are excellent and are partially dependent on experience. The position is located in downtown Santa Fe at City Hall and reports to the City Attorney. This position is exempt and is open until filled. Please submit a resume and cover letter to the Office Manager, City Attorney's Office, PO Box 909, 200 Lincoln Ave., Santa Fe, NM 87504-0909.

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Busy personal injury firm seeks paralegal with experience in personal injury litigation. Ideal candidate must possess excellent communication, grammar and organizational skills. Must be professional, self-motivated and a team player who can multi-task. Salary depends on experience. Firm offers benefits. Fax resumes to (505) 242-3322 or email to: nichole@whitenerlawfirm.com

Paralegal

Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

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Office Manager/Paralegal

Poulos and Coates, an established Las Cruces law firm, is seeking to hire a full time office manager/paralegal. Duties will include: Office management, management of advertising, bookkeeping, accounts receivable, accounts payable, payroll administration and line of credit administration. Excellent hours and salary. Submit resume and cover letter to: victor@pouloscoates.com

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Financial services firm seeks responsible individual with excellent communication skills for a busy office. This individual must be able to handle administrative, client management and marketing support responsibilities. Must be personable, a self-starter, well-organized, accurate with details and service-oriented. To be considered for this position apply online at www.edwardjones.com/careers Job Code 17543BR

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For the past 20 years I have provided research and writing for NM attorneys, including some who are recognized as Super Lawyers, Best Lawyers in America, and AV-rated, as well as other hard-working lawyers who also may deserve such recognition. I have litigation and appellate experience. I have a talent for finding authority that others may have difficulty finding. I am a published author and a former professor of Canon Law. Terence Grant, J.D., magna cum laude. legalresearch@comcast.net. 505-508-1755.

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BULLETIN

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All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

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