

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

June 14, 2017 • Volume 56, No. 24



Thunderstorm, by Rachel Rankin (see page 3)

Weyrich Gallery, Albuquerque

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ATKINSON, BAKER & RODRIGUEZ, P.C.

(formerly known as Atkinson, Thal & Baker, P.C. and Atkinson & Thal, P.C.)

Proudly celebrates its 25th Anniversary.

As someone recently remarked,
who would have thought it was possible!
With continued good fortune, we look
forward to the next 25 years!



Atkinson, Baker & Rodriguez is proud that
Rebecca Sitterly, former Second Judicial District
Judge (Ret.), has joined the firm “Of Counsel.”



Additionally, the Firm welcomes
Susan Barela as an Associate Attorney.



Finally, the Firm congratulates our
dear friend **John Thal** on the one year
anniversary of his retirement!
(Yes, we do still miss him – sometimes!)

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Albuquerque, NM 87102
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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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Meetings

June

- 14**
Animal Law Section Board
Noon, State Bar Center
- 14**
Children's Law Section Board
Noon, Juvenile Justice Center
- 14**
Taxation Section Board
11 a.m., teleconference
- 15**
Business Law Section Board
4 p.m., teleconference
- 15**
Public Law Section Board
Noon, Montgomery and Andrews, Santa Fe
- 16**
Family Law Section Board
9 a.m., teleconference
- 16**
Trial Practice Section Board
Noon, State Bar Center
- 21**
Real Property, Trust and Estate Section:
Real Property Division
Noon, State Bar Center
- 23**
Immigration Law Section Board
Noon, teleconference
- 27**
Intellectual Property Law Section Board
Noon, Lewis Roca Rothgerber Christie

Workshops and Legal Clinics

June

- 21**
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District
Court, Albuquerque, 1-877-266-9861
- 22**
Common Legal Issues for Senior Citizens
Workshop Presentation 9:30–10:45 a.m.,
Mary Esther Gonzales Senior Center,
Santa Fe, 1-800-876-6657
- 28**
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094
- 29**
Common Legal Issues for
Senior Citizens Workshop
Presentation 10–11:15 a.m.,
Socorro County Senior Center, Socorro,
1-800-876-6657

July

- 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: Rachel Rankin grew up under the big skies and beautiful mountains in Albuquerque. These influences have been an inspiration all of her life. Rachel's technique utilizes a palette knife to create the layered texture in her plein air paintings. View more of her work at rachelrankinart.com.

Notices

COURT NEWS

New Mexico Supreme Court Commission on Access to Justice

The next meeting of the Commission on Access to Justice noon–4 p.m., June 16, State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at nmcourts.gov > Court Administration > Access to Justice Commission.

Board of Legal Specialization Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Federal Indian Law
Thomas L. Murphy

New Mexico Judicial Compensation Committee Notice of Public Meeting

The Judicial Compensation Committee will meet at 9 a.m.–noon, July 5, in Room 208 of the New Mexico Supreme Court, 237 Don Gaspar, Santa Fe. The Committee will discuss fiscal year 2019 recommendations for compensation for judges of the magistrate, metropolitan and district courts, the Court of Appeals and justices of the Supreme Court. The Commission will thereafter provide its judicial compensation report and recommendation for fiscal year 19 compensation to the Legislature prior to the 2018 session. The meeting is open to the public. For an agenda or more information call Jonni Lu Pool, Administrative Office of the Courts, 505-476-1000.

Sixth Judicial District Court Investiture Ceremony for the Honorable Timothy L. Aldrich

Join the Sixth Judicial District Court in an investiture ceremony for Hon.

Professionalism Tip

With respect to opposing parties and their counsel:

I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

Timothy L. Aldrich at 3:30 p.m., June 16, at the Grant County Courthouse, 201 N. Cooper Street, 2nd Floor, New Mexico with a reception to follow.

Notice of Right to Excuse Judge

Governor Susana Martinez appointed Timothy L. Aldrich to fill the vacant position and to take office on June 19 in Division I of the Sixth Judicial District Court. All pending and reopened civil, domestic, domestic violence, guardianship, lower court appeals, abuse and neglect and adoption cases previously assigned to the Hon. Henry R. Quintero, District Judge, Division I, shall be assigned to Hon. Aldrich. All pending criminal, juvenile, mental and probate cases previously assigned to the Hon. Quintero shall be assigned to Hon. J.C. Robinson, District Judge, Division III. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days to excuse Judge Aldrich or Judge Robinson.

Eighth Judicial District Court Notice of Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, the Eighth Judicial District Court, Taos County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) all unmarked exhibits, oversized poster boards/maps and diagrams; 2) exhibits filed with the court, in civil cases for the years 1994–2010 and probate cases for the years 1989–2010. Counsel for parties are advised that exhibits may be retrieved through July 31. For more information or to claim exhibits, contact Bernabe P. Struck, court manager, at 575-751-8601. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

STATE BAR NEWS

Attorney Support Groups

- June 19, 7:30 a.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

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

Pollinators: Laws, Policies, Action

Join Julie McIntyre, pollinator coordinator for the Southwest Region 2 of U.S. Fish and Wildlife, for an Animal Law Section Animal Talk. McIntyre will discuss the importance of pollinators, along with federal, state and tribal protections for pollinators from noon–1 p.m., June 22, at the State Bar Center and by teleconference. Snacks and refreshments will be provided. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance or to obtain teleconference information.

Board of Bar Commissioners Appointment of Young Lawyer Delegate to ABA House of Delegates

The Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association (ABA) House of Delegates (HOD) for a two-year term, which will begin at the conclusion of the 2017 ABA Annual Meeting in August 2017 and expire at the conclusion of the 2019 ABA Annual Meeting. The delegate must be willing to attend ABA mid-year and annual meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar. However, the ABA provides reimbursement for expenses to attend

the ABA mid-year meetings. Members who want to serve as the young lawyer delegate to the HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; be an ABA member in good standing throughout the tenure as a delegate; and report to the N.M. YLD Board during the YLD Board's scheduled board meetings throughout the tenure as a delegate. Qualified candidates should send a letter of interest and brief résumé by June 16 to Kris Becker at kbecker@nmbar.org or by fax to 505-828-3765.

Young Lawyers Division Wills for Heroes Events in Roswell and Farmington

YLD is seeking volunteer attorneys for its Wills for Heroes events in Roswell and Farmington. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Join the YLD from 8:30-noon, June 24, at the Roswell Police Department located at 128 W 2nd St in Roswell. Join the YLD from 9 a.m.-noon, July 8, at the 11th Judicial District Attorney's Office located at 335 S Miller Ave in Farmington. Volunteers should arrive at 8 a.m. for breakfast and orientation. Contact YLD Region 3 Director Anna Rains at arains@sbw-law.com to volunteer for the Roswell WFH. Contact YLD Region 1 Director Evan Cochnar at ecochnar@da.state.nm.us to volunteer for the Farmington WFH. Please indicate if you are able to bring a Windows laptop or if you will need one provided for you. Paralegal and law student volunteers are also needed to serve as witnesses and notaries.

UNM Law Library Hours Through Aug. 20

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.
---------------	---------------

Holiday Closures

May 29: Memorial Day	
July 4: Independence Day	

OTHER BARS First Judicial District Bar Association CLE Luncheon with Kevin Washburn

The First Judicial District Bar Association's next luncheon will be noon–1:30 p.m., June 26, at the Santa Fe Hilton. Kevin K. Washburn will present "Enlisting Tribal Governments in Public Lands Management," a discussion of the laws authorizing tribal contracts and the practical challenges for tribes and the federal government in implementing these initiatives in the public lands context. The price of admission is \$15 for members and \$20 for non-members. Arrive early to get signed in for CLE credit. For more information or to R.S.V.P., contact Mark Cox at mcox@hatcherlawgroupnm.com. R.S.V.P. by June 22 with your bar number.

New Mexico Defense Lawyers Association Nominations for Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2017 NMDLA Outstanding Civil Defense Lawyer and the 2017 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmddefense@nmdla.org or 505-797-6021. Deadline for nominations is July 28. The awards will be presented at the NMDLA Annual Meeting Luncheon on Sept. 29, at the Hotel Chaco, Albuquerque.

OTHER NEWS Rocky Mountain Mineral Law Foundation Cross-Border Natural Resource Transactions Workshop

The RMMLF Young Professionals Committee has designed a 90-minute video-linked CLE program so that new professionals can learn the basics of the complex area of cross-border natural resource transactions. The workshop will be webcast live at 3 p.m., June 15, at the Modrall Sperling Law Firm, located at 500 Fourth Street, Suite 1000 in Albuquerque. A networking reception will follow. Registration is \$30. Visit www.rmmlf.org for more information and to register.



New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

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505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

ADDRESS CHANGES

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

Supreme Court

Web: supremecourt.nmcourts.gov

Email: attorneyinfochange@nmcourts.gov

Fax: 505-827-4837

Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar

Web: www.nmbar.org

Email: address@nmbar.org

Fax: 505-797-6019

Mail: PO Box 92860
Albuquerque, NM 87199

Workers' Compensation Administration Notice of Vacancy

The Director of the New Mexico Workers' Compensation Administration hereby announces the vacancy of an administrative law judge effective July 1 due to the retirement of Judge David Skinner. The primary location of the position is in Albuquerque with travel throughout the state. The agency is currently accepting applications and will begin the review process June 26. The application process will be ongoing until filled. For additional information about this position, visit www.workerscomp.state.nm.us. The Workers' Compensation Administration is an equal opportunity employer.



SUPREME COURT ISSUES NEW PROCEDURAL RULES GOVERNING PRETRIAL DETENTION AND RELEASE

The New Mexico Supreme Court has issued comprehensive procedural rules governing pretrial detention and release in all criminal cases.

The rules are the result of more than two years of study and recommendations by the Court's Ad Hoc Pretrial Release Committee, chaired by former University of New Mexico Law School Dean Leo Romero, and consisting of a broad range of interests, including judges, legislators, prosecutors, defense attorneys, detention officials, and commercial bail industry representatives, as well as input from other local and national sources.

The rules reflect national best practices and provide detailed guidance to judges, prosecutors, and defense lawyers for applying the requirements of the bail reform constitutional amendment unanimously recommended by the New Mexico Senate and House of Representatives and adopted by 87% of New Mexico voters in the November 2016 general election.

Among the key provisions of the new rules to comply with the constitutional mandates are (1) expedited procedures for pretrial detention of clearly dangerous defendants, (2) expedited procedures for assuring that non-dangerous low-risk defendants are not jailed while awaiting trial solely because they cannot buy a bail bond, and (3) expedited reviews in the trial courts and appellate courts of detention and release orders.

The rules require that all release and detention decisions by courts be based on evidence of individual risk posed by defendants, rather than by fixed money bond schedules that do not take into account individual dangerousness or flight risk.

In announcing the issuance of the new rules on Monday, Chief Justice Charles Daniels said, "The Justices of our Court agreed with our committee's view that the old system of basing pretrial release and detention decisions on who could come up with the money to buy his or her way out of jail, instead of on evidence of individual risk of dangerousness or flight, served neither community safety nor constitutional rights of accused citizens. New Mexico, like a growing number of states around the country, has now taken significant steps to address important reforms toward safer and fairer administration of pretrial justice."

The newly approved procedural rules for district, metropolitan, magistrate, municipal and appellate courts can be found on the New Mexico Compilation Commission's website at www.nmcompcomm.us/nmrules/NMRuleSets.aspx.

Basket Fundraising Extravaganza

Donate to a good cause *and*
compete with YOUR Bar Commissioners to win!

At this year's Annual Meeting, you can compete with other attendees to win one of our beautifully themed gift baskets, generously funded by local restaurants, shops and members of our legal community. Baskets are valued at more than \$500 and proceeds benefit the New Mexico State Bar Foundation which is the charitable arm of the State Bar representing the legal community's commitment to serving the people of New Mexico and the profession.



Aja Brooks



Raynard Struck and Jerry Dixon



Stephanie Wagner and President Scotty Holloman

Members of the Board of Bar Commissioners
have already been busy buying their tickets to win.
Have you?

Tickets are only \$10 each! For an even better advantage, purchase 10 tickets and get two free. Act now – this advance purchase bonus is not available at the event!

Purchase tickets at
www.nmbar.org/AnnualMeeting.

The raffle will take place during the Annual Meeting at the Inn of the Mountain Gods on July 28. You must be present to win.



Choose from packages like:



Craft Brewery Package



UNM Spirit Basket



Jewelry Collection



Vacation Package



Staycation Package



Trip Around the World
(without leaving New Mexico)



Fitness Package



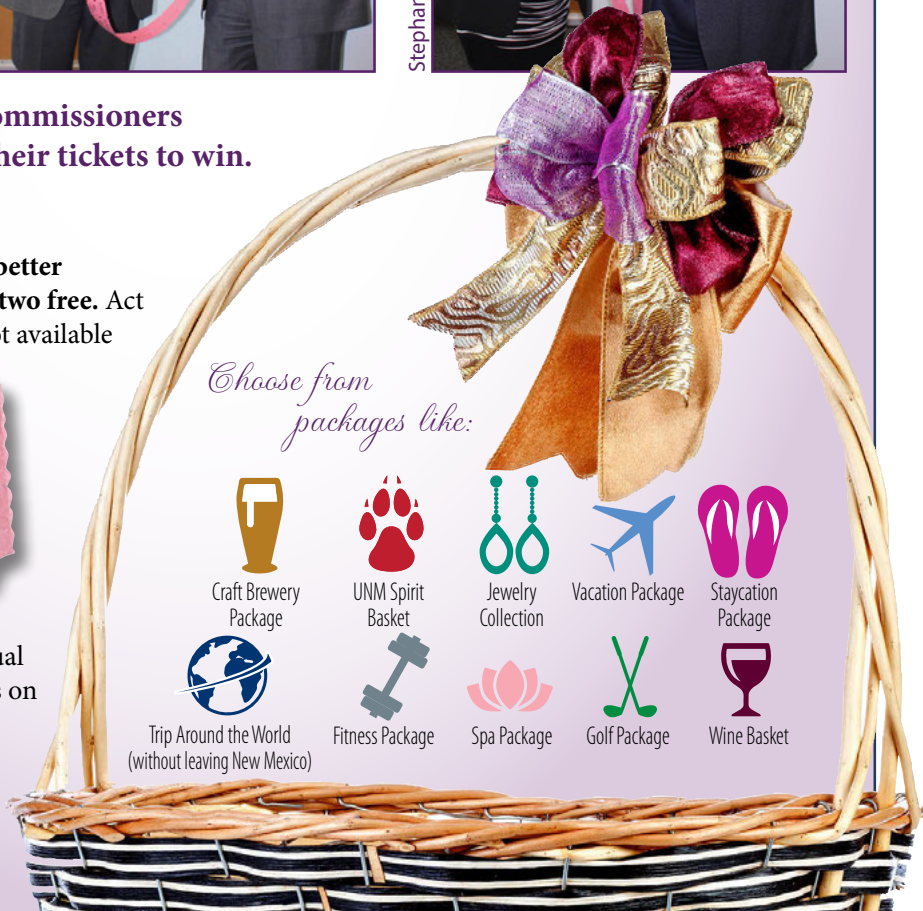
Spa Package



Golf Package



Wine Basket





Overcoming Habits that Hinder Us

Read more tips from the Judges and Lawyers Assistance Program in the first issue of each month. For more support, visit www.nmbar.org/JLAP.

As discussed in the April article on decision fatigue, many habits such as waking up, brushing our teeth, and making coffee are almost automatic; these habitual behaviors benefit us by sparing our brains the effort of decision-making, but what about other habits that are not so innocuous? We all have habits we acknowledge as harmful or unproductive, so why do we persist in these behaviors and how can we overcome them?

Research conducted by psychiatrist and Yale School of Medicine psychology professor Dr. Judson Brewer and associates (2011) strongly suggests that mindfulness and meditation can help us identify and counter everyday cravings that lead to unmanageable habits.

First, it's important to understand the underlying "behavioral loop" of habit formation: trigger > behavior > reward. For example, you may feel stressed (trigger), eat junk food or smoke a cigarette

(behavior) and feel better (reward). When you receive (and later, anticipate) the reward, your brain releases dopamine in a neural process that embeds a memory of that behavior and helps you "learn" to repeat that behavior the next time you're stressed. Each time this behavioral loop is activated, it becomes more entrenched in the brain – a process referred to as "reward-based learning."

Dr. Brewer describes reward-based learning as a powerful mechanism that forms and reinforces a wide range of inconvenient habits, from ruminating to smoking to repetitively checking one's phone. It is so potent that even when we are aware of how harmful a habit is, we maintain the behavior in order to relieve the inadvertent cravings for reward.

The solution, Dr. Brewer asserts, is to employ the mindfulness skills of curiosity and attentiveness to explore our cravings rather than try to dispel unwanted cravings as quickly as possible. The paradoxical process of fully attending to what is happening in our bodies and our minds when we experience a trigger allows us to emotionally

disengage. We begin to see that cravings are composed of body sensations – "Oh, there's tightness, tension, there's restlessness, and... these sensations come and go." Utilizing curiosity and attentiveness turns the experience into bite-size pieces that we can manage from moment to moment as opposed to being overwhelmed by the habit. Brewer explains, "We step out of our old, fear-based, reactive habit patterns and we step into being."

A randomized clinical trial conducted by Brewer illustrates the effectiveness of this approach in which smokers in a mindfulness-based program quit at twice the rate of those who used the gold standard "Freedom from Smoking" program sponsored by the American Lung Association. The study also found that the specific practice associated with the greatest reductions in smoking was RAIN:

- Recognize/relax into what is arising
- Accept/allow it to be there
- Investigate bodily sensations, emotions, thoughts
- Note what is happening from moment to moment

RESILIENCY GROUP for Lawyers

Resilience rə'zilyəns/ or Resiliency = the capacity to recover quickly from difficulties

Is the practice of law dragging you down?

Have you lost some of your passion for work and life?

If yes, then ...

Consider joining the Lawyers and Judges Assistance Program's monthly
RESILIENCY GROUP FOR LAWYERS.

In this confidential and supportive group, we will explore life concerns, give and receive helpful feedback, try out various tools to deal with difficulties and share a laugh or two.

To learn more about the group and see if it's "a fit" for you, call either group facilitator:

Jill Yeagley, LCSW, at 505-797-6003 • Dina Afek, J.D., M.A., at 505-814-6719

(Videoconference participation available for lawyers outside of Albuquerque)



Legal Education

June

- | | | |
|--|--|---|
| <p>16 Reforming the Criminal Justice System (2017)
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>16 Long Term Care
1.0 EP
Live Seminar, Albuquerque
UNM School of Medicine
som.unm.edu/ethics</p> | <p>23 2016 Real Property Institute
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Avoiding Discrimination in the Form I-9 or E-Verify (2017)
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Fourth Amendment: Comprehensive Search and Seizure Training for Trial Judges
25.0 G
Live Seminar, Santa Fe
National Judicial College
775-784-6747</p> | <p>27 Complete Trust Course
7.0 G
Live Seminar, Albuquerque
Halfmoon Education
www.halfmoonseminars.com</p> |
| <p>16 Ethical Issues of Social Media and Technology in the Law (2016)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>22 Lawyer Ethics and Credit Cards
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act
1.0 G
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>22 Decanting and Otherwise Fixing Broken Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Representing Victims of Domestic and Sexual Violence in Family Law Cases
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038</p> | <p>23 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 Best and Worst Practices in Ethics and Mediation (2016)
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>16 Representing Victims of Domestic and Sexual Violence in Family Law Cases
2.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-5038</p> | <p>23 Copy That! Copyright Topics Across Diverse Fields (2016)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>30 The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |

July

- | | | |
|---|---|--|
| <p>10 Protecting Consumers Against Fraudulent or Unfair Practices
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com</p> | <p>12 Technical Assistance Seminar
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995</p> | <p>18 Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
|---|---|--|

July

- | | | |
|--|--|---|
| <p>18 Natural Resource Damages
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com</p> | <p>21 Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27 Evidence and Discovery Issues in Employment Law
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>20 Default and Eviction of Commercial Real Estate Tenants
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>25 Commercial Paper: Drafting Short-Term Notes to Finance Company Operations
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>27-29 24th Annual Advanced Course: Current Developments in Employment Law
17.5 G, 1.0 EP
Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002</p> |
| <p>20 Annual Rocky Mountain Mineral Law Institute
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org</p> | <p>27 Current Developments in Employment Law
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.org</p> | <p>27-29 2017 Annual Meeting—Bench & Bar Conference
Possible 12.0 CLE credits (with a possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org</p> |

August

- | | | |
|---|--|---|
| <p>4 Drugs in the Workplace (2016)
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 Diversity Issues Ripped from the Headlines (2017)
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>17 10th Annual Legal Service Providers Conference
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>4 Effective Mentoring—Bridge the Gap (2015)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 Attorney vs. Judicial Discipline (2017)
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>24 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>8 Lawyers Ethics in Employment Law
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>28 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
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www.nmbar.org</p> |
| <p>9 Tricks and Traps of Tenant Improvement Money
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 Human Trafficking (2016)
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>29 The Use of “Contingent Workers”—Issues for Employment Lawyers
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>9 Gross Receipts Tax Fundamentals and Strategies
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com</p> | <p>14 Traffic Law
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davidmiles.com</p> | |

Opinions

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

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Effective June 2, 2017

PUBLISHED OPINIONS

No. 34867 2nd Jud Dist Bernalillo CV-11-3068, W CATES v MOSHER ENTERPRISES (reverse and remand) 5/31/2017

UNPUBLISHED OPINIONS

No. 36007 2nd Jud Dist Bernalillo CR-15-1120, STATE v S VASQUEZ (affirm) 5/29/2017
No. 34938 11th Jud Dist San Juan CR-14-1110, STATE v W HICKEY (affirm in part reverse in part and remand) 5/31/2017
No. 35638 13th Jud Dist Valencia CV-12-1436, US BANK v M CHAVEZ (affirm) 5/31/2017
No. 35669 11th Jud Dist San Juan CR-15-1569, STATE v R CHARLEY (affirm) 5/31/2017
No. 35945 5th Jud Dist Chaves CR-15-584, STATE v D FUENTES (affirm) 5/31/2017
No. 36106 2nd Jud Dist Bernalillo LR-16-8, STATE v D SUTTON (affirm) 5/31/2017
No. 34301 3rd Jud Dist Dona Ana CR-06-546, STATE v D MONTOYA (affirm) 6/01/2017
No. 35457 9th Jud Dist Roosevelt CR-13-52, STATE v R WILTSE (affirm) 6/01/2017

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

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated May 26, 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 June 14, 2017

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

There are no proposed rule changes currently open for comment.

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 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

5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information and indictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017

5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
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
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017

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
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts			9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
8-112	Public inspection and sealing of court records	03/31/2017	Children's Court Rules and Forms		
8-206	Bench warrants	04/17/2017	10-166	Public inspection and sealing of court records	03/31/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017	Rules of Appellate Procedure		
8-401	Pretrial release	07/01/2017	12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017	12-205	Release pending appeal in criminal matters	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017	12-307.2	Electronic service and filing of papers	07/01/2017*
8-403	Revocation or modification of release orders	07/01/2017	12-314	Public inspection and sealing of court records	03/31/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017	* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.		
8-408	Pretrial release by designee	07/01/2017	Disciplinary Rules		
8-506	Time of commencement of trial	07/01/2017	17-202	Registration of attorneys	07/01/2017
8-703	Appeal	07/01/2017	17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017
Criminal Forms			Rules Governing Review of Judicial Standards Commission Proceedings		
9-301A	Pretrial release financial affidavit	07/01/2017	27-104	Filing and service	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017			
9-303	Order setting conditions of release	07/01/2017			
9-303A	Withdrawn	07/01/2017			
9-307	Notice of forfeiture and hearing	07/01/2017			
9-308	Order setting aside bond forfeiture	07/01/2017			
9-309	Judgment of default on bond	07/01/2017			
9-310	Withdrawn	07/01/2017			

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

From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-012

No. S-1-SC-35469 (filed February 6, 2017)

IN THE MATTER OF EMILIO JACOB CHAVEZ, ESQUIRE

An Attorney Licensed to Practice Law Before the Courts
of the State of New Mexico

Consolidated With:

IN THE MATTER OF DONALD A. GALLEGOS, ESQUIRE

An Attorney Licensed to Practice Law Before the Courts
of the State of New Mexico

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Chavez

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RICHARD J. MORAN

AHMAD ASSED & ASSOCIATES

Albuquerque, New Mexico

for Respondent Donald A. Gallegos

Opinion

Barbara J. Vigil, Justice

{1} This disciplinary action involves Respondents Emilio Jacob Chavez, Deputy District Attorney for the Eighth Judicial District, and his supervisor Donald A. Gallegos, District Attorney for the Eighth Judicial District. Over the course of two years, Chavez engaged in a pattern of issuing investigative subpoenas unconnected to court or grand jury proceedings. Gallegos authorized the issuance of a subset of the subpoenas, but was unaware of most of them.

{2} We hold that Chavez violated Rule 16-404(A) NMRA of the Rules of Professional Conduct, and that Gallegos violated Rules 16-404(A) and 16-501(C) NMRA of the Rules of Professional Conduct. This opinion clarifies an issue of fundamental importance: it is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action.

I. BACKGROUND

{3} Between 2012 and 2013, Chavez signed and issued at least ninety-four subpoenas concerning numerous separate investigations. The subpoenas were directed primarily to various cellular phone providers seeking subscriber information and call activity in order to narrow potential suspects, but several sought medical records, CYFD records, and utility records. The subpoenas were not issued by a sitting grand jury nor reviewed by any judicial officer and were not connected to any cases before the court. All of the subpoenas were filed with the Eighth Judicial District Court prior to service and assigned to a miscellaneous criminal file. Because there were no cases, there were no parties, and so Chavez issued the subpoenas without notice to the individuals whose information was being sought. Many of the subpoenas were captioned *State of New Mexico v. John Doe*.

{4} During a robbery investigation in April 2013, Chavez and a detective wished to issue subpoenas *duces tecum* for inves-

tigative purposes and asked Gallegos to approve them. Respondents conducted research into the issuance of such subpoenas and concluded that they were lawful. Gallegos eventually approved the practice of issuing investigative subpoenas for phone subscriber information. Eleven subpoenas were issued in connection with the robbery investigation. In October 2013, defendants in the robbery case filed a motion to quash their indictments based on the improper issuance of subpoenas. The motion was granted and the state appealed to the Court of Appeals. That appeal is now pending before this Court. *State v. Martinez*, No. S-1-SC-35757, order of certification at 1-2 (N.M. Ct. App. Mar. 7, 2016) (non-precedential).

{5} In October 2014, the Disciplinary Board initiated disciplinary actions against Respondents over the issuance of the subpoenas. The Disciplinary Board alleged that Chavez unlawfully issued subpoenas, improperly issued subpoenas without notifying parties in several of the controversies, and issued subpoenas that failed to follow proper form as required by Rule 5-511 NMRA and Form 9-217 NMRA. The Disciplinary Board claimed Chavez violated Rules 16-101 NMRA, 16-304(A), (C) NMRA, 16-305(C) NMRA, 16-404(A) NMRA, and/or 16-804(D) NMRA. Aside from the subpoenas Gallegos authorized in the robbery case, he did not know of any others until the filing of the disciplinary action. Gallegos also did not know that subpoenas had been issued in improper form, had been issued without notice to parties in the various cases, or had been improperly filed. Gallegos is implicated primarily due to his supervisory position with respect to Chavez. The Disciplinary Board claimed violations against Gallegos including Rules 16-101, 16-304(A), (C), 16-305(C) 16-404(A), 16-501(A)-(C), and/or 16-804(D).

{6} The Disciplinary Board designated a Hearing Committee, which found that Chavez's research into the issuance of the subpoenas was reasonable and thorough, had not revealed a clear answer to the question, and that neither Respondent had "knowingly avoided or subverted a legal obligation or duty arising from either of their respective offices." The Hearing Committee found that disciplinary counsel had failed to prove violations of the Rules of Professional Conduct by either Respondent and recommended that the

charges of misconduct be dismissed as to both Respondents.

{7} On review of the Committee's findings, Disciplinary Board counsel rejected numerous findings of fact as containing conclusions of law, including findings that the Respondents had acted reasonably, and disagreed with the Hearing Committee's conclusions of law.

{8} The disciplinary panel recommended, and the Disciplinary Board requested of this Court, formal reprimand for Gallegos and public censure, a more serious punishment, for Chavez. The Board also recommended that costs for the disciplinary action be shared between the Respondents. At the conclusion of the hearing before this Court, we ruled from the bench that both Respondents should receive formal reprimands but deferred the issuance of those formal reprimands for one year and provided that the issuance of the formal reprimands would be automatically withdrawn if the Respondents committed no further violations of the Rules of Professional Conduct during the one-year deferral period. We also denied the assessment of costs against the Respondents and indicated that we would issue an opinion at a later date to further explain our decision.

II. DISCUSSION

{9} Rule 17-316(A)(1) NMRA grants this Court the authority to review the disciplinary recommendation of a public censure against Chavez. Rule 17-316(A)(2), subparagraphs (b) and (d) grant this Court authority to review the recommendation of a formal reprimand against Gallegos because the Disciplinary Board's petition alleges a significant question of law and an issue of substantial public interest.

{10} With respect to the findings and conclusions of a hearing committee, the standard of review for a disciplinary panel and for this Court is the same: both entities afford deference to findings of fact and review conclusions of law de novo. *In re Bristol*, 2006-NMSC-041, ¶¶ 18, 26, 140 N.M. 317, 142 P. 3d 905. This Court is not bound by the Disciplinary Board's legal conclusions about which Rules of Professional Conduct have been violated by Respondents. *See In re Estrada*, 2006-NMSC-047, ¶¶ 7, 19, 140 N.M. 492, 143 P.3d 731. This Court also does not defer to recommendations regarding the appropriate level of discipline; we are free to impose lesser or greater levels of discipline as we deem appropriate. *Bristol*, 2006-NMSC-041, ¶ 27.

A. The Law Does Not Support The Unilateral Issuance of Subpoenas

{11} Rule 5-511(A)(1)(b) provides that every subpoena shall "state the title of the action and its criminal action number." Rule 5-511(A)(2) further provides that "[a]ll subpoenas shall issue from the court for the district in which the matter is pending." This language plainly requires that subpoenas be issued only in connection with existing judicial actions. The Court of Appeals declared unauthorized subpoenas to be prosecutorial misconduct in 1985 after a district attorney unilaterally issued subpoenas to financial institutions while investigating an embezzlement case. *State v. Eder*, 1985-NMCA-076, ¶¶ 2, 5, 103 N.M. 211, 704 P. 2d 465. The Court of Appeals stated that using unauthorized subpoenas to compel witnesses to produce documents "has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness." *Id.* ¶ 5. The Court of Appeals has also held that not even a sitting district court judge possesses the authority to compel a person to submit evidence when no complaint, information or indictment has been filed against the person and thus when no criminal prosecution has commenced. *Sanchez v. Attorney General*, 1979-NMCA-081, ¶¶ 12, 20, 93 N.M. 210, 598 P. 2d 1170.

{12} Respondents argue that they made a reasonable decision in issuing the subpoenas at issue because their research revealed no New Mexico authority disallowing the process. Chavez relied on several authorities that he determined were ambiguous on the issue: NMSA 1978, Section 36-2-11 (1953); federal stored communications laws, 18 U.S.C. §§ 2701-2712 (2012); and Rule 1-045 NMRA.

{13} Section 36-2-11(A) provides:

An attorney has authority: to execute in the name of his client any bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein[.]

We read the language "an action . . . about to be or already commenced" to include only those actions sanctioned by a grand jury or a district court. This view is

supported by *Sanchez*. 1979-NMCA-081, ¶¶ 27-28. We hold that Section 36-2-11(A) does not provide authority for a prosecutor to unilaterally issue subpoenas prior to the commencement of a judicial action.

{14} The federal communications laws on which Chavez relied provide that a governmental entity may require the disclosure of stored electronic communication records "only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction." 18 U.S.C. § 2703(a). Subsection (b)(1) provides that notice to customers or subscribers is not required where the information is requested pursuant to a warrant but is required if the information is requested pursuant to a court order or "an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena." As Chavez recognized, this authority does not address the question of whether an action must be pending before a subpoena issues.

{15} Rule 1-045 is a Rule of Civil Procedure analogous to the Rule of Criminal Procedure, Rule 5-511, applicable to this case. One of the differences between the rules appears in Rule 1-045(A)(3), which provides that "[a]n attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court." The rule provides no authority for the issuance of a subpoena by a prosecutor in the absence of the court's authority; without such authority, a prosecutor is not acting "on behalf of the court." Further, both rules require that a subpoena state the title of the action and its case number. Rule 1-045(A)(1)(b); Rule 5-511(A)(1)(b). It is impossible to include an accurate title and case number when no judicial action has been established.

{16} Chavez concluded that in the absence of an express prohibition, the issuance of unilateral subpoenas should be permissible, and he convinced Gallegos of the same. We disagree for several reasons. As a practical matter, we read all of the laws relied upon by Chavez—Section 36-2-11, 18 U.S.C. Section 2703, and Rule 1-045—to require a court's acquiescence to the issuance of a subpoena, and this in turn requires an existing judicial action. More importantly, as a matter of fundamental policy, we emphasize that the absence of a prohibition does not equal permission.

{17} Prosecutors bear significant responsibility in the administration of the law. The Ninth Circuit has observed, “[t]he Government is the strongest litigant in the world. You have got the F.B.I. and all the government agencies available to you. You represent the strongest client in the world.” *Lenske v. United States*, 383 F.2d 20, 22 (9th Cir. 1967). The United States Supreme Court has said that the United States Attorney represents not an ordinary party to a controversy but

a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). This duty of fairness extends to all parties to judicial actions, and in this case it extended to the recipients of subpoenas as well as the people whose information was being sought, none of whom were parties to judicial actions.

{18} Disciplinary counsel identified the gravamen in this case as the Respondents’ issuance of “pre-indictment” subpoenas. As a point of clarification, pre-indictment subpoenas are not per se unlawful. Subpoenas are routinely issued pre-indictment in connection with grand jury proceedings under NMSA 1978, Section 31-6-12(A) (1979):

The grand jury has power to order the attendance of witnesses before it, to cause the production of all public and private records or other evidence relevant to its inquiry and to enforce such power by subpoena issued on its own authority through the district court convening the grand jury and executed by any public officer charged with the execution of legal process of the district court.

{19} Necessarily, subpoenas issued pursuant to that statute in a grand jury proceeding are pre-indictment subpoenas. Conversely, some post-indictment subpoenas may be unlawful. For example, if these same subpoenas were issued unilaterally by a prosecutor or defense attorney or other lawyer after dismissal or other resolution of a case,

they would be unlawful even though they occurred after indictment. The problem in this case was not whether the subpoenas were issued pre-indictment or post-indictment, but that they were not issued in connection with an authorizing proceeding.

B. The Issuance of Unilateral Subpoenas Violated the Rules of Professional Conduct

{20} We hold that Chavez violated Rule 16-404(A) and that Gallegos violated Rules 16-404(A) and 16-501(C). Rule 16-305(D) requires intent to disrupt a tribunal, which is not evident here. Respondents’ conduct did arguably implicate the remaining rules, but because Rules 16-404(A) and 16-501(C) adequately address the conduct, we decline to reach violations of Rules 16-101, 16-304, or 16-804.

{21} Rule 16-404(A) provides that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” Chavez has argued that no rights were violated because a defendant lacks a right to know who is subpoenaed for grand jury proceedings, and because no evidence was presented supporting the claim that any individual’s rights were violated. Gallegos cites *Smith v. Maryland* for the proposition that telephone subscribers should harbor no expectation that the numbers they dial will remain secret. 442 U.S. 735, 743 (1979). But *Smith* is plainly distinguishable. *Smith* considered the admissibility of dialed phone numbers detected by a monitoring device installed on a defendant’s line by a phone company at the request of police. *Smith*, 442 U.S. at 737. The United States Supreme Court held that such a monitoring device does not constitute a search under the Fourth Amendment to the United States Constitution and that defendants should not expect privacy in the numbers they dial. *Id.* at 742. *Smith* does not address the key issue in this case, which is the improper issuance of subpoenas.

{22} Form 9-217, which provides a template for subpoenas, contains a stern warning to its addressees: “IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment.” In this case, sending subpoenas that implied court authority, but lacked it, affected the rights of the subpoena recipients and third parties in two impermissible ways.

First, the unauthorized subpoenas sent to communications providers unfairly deprived those providers of the right to conduct ordinary business and forced them to expend resources and personnel to respond before a response was required in the name of justice. Second, because the subpoenas were unconnected to pending judicial actions, the third parties whose information was being sought were not parties, were not notified, and therefore had no opportunity to contest the release of their personal information. This is especially troublesome in the few cases where the subpoenas sought private information including medical records, CYFD records, and utility records. Furthermore, in general, the practice of issuing subpoenas outside the authority and acquiescence of a court or a grand jury poses foreseeable and alarming risks to the fundamental rights of ordinary citizens. A person may have a right to decline to cooperate with a police investigation. Once a subpoena issues properly, it deprives the recipient of the right not to cooperate. A subpoena that issues improperly, but has the guise of authority and carries the threat of punishment, falsely suggests that the recipient is legally required to answer and has therefore lost the right not to respond. This is misleading and unfair, and represents an abuse of the government’s substantial power and responsibility.

{23} Gallegos alone violated Rule 16-501(C), which provides that a supervising attorney bears responsibility for a subordinate’s violation if the supervising attorney knows about the improper conduct and ratifies it, or if the supervising attorney knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Gallegos argues that he did not know the issuance of unilateral subpoenas was improper, and therefore he did not knowingly endorse a violation. We hold that Gallegos did knowingly ratify the issuance of the subpoenas, and his mistake as to the law does not protect him. Based on the analysis above, Gallegos should have known that the issuance of the subpoenas violated the Rules of Professional Conduct. Furthermore, we are concerned that Gallegos was not aware of the practice until Chavez brought it to his attention and that his office lacked sufficient controls to preclude the practice. We urge New Mexico district attorneys to maintain sufficient training and oversight to avoid the improper issuance of subpoenas in the future.

C. Disciplinary Disposition

{24} The American Bar Association (ABA) Standards for Imposing Lawyer Sanctions, Standard 5.22, provides that suspension is the appropriate consequence “when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.” Because Respondents should have known that the subpoenas in these cases were issued without legal support and in violation of our Rules of Professional Conduct, suspension might ordinarily be

the proper course. However, this Court recognizes that there is no evidence in the record to show Respondents exhibited bad faith or an intent to deceive when they issued the subpoenas. We also recognize that Respondents have complied fully with the disciplinary proceedings against them. Both of these are factors warranting mitigation under ABA Standards 9.32(b) and (e).

{25} We hold that formal reprimand is the proper sanction for both Respondents, and as previously ordered by this Court, the reprimand as to each Respondent has been deferred for one year. If neither Re-

spondent engages in further violations of the Rules of Professional Conduct within that time, the reprimands will be withdrawn. We also waive Respondents’ costs arising from this proceeding.

{26} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-013

No. S-1-SC-36030 (filed February 6, 2017)

DAVID G. CRUM,
Plaintiff-Appellant,
v.

DIANNA J. DURAN, New Mexico Secretary of State,
MAGGIE TOULOUSE OLIVER, Bernalillo County Clerk, REPUBLICAN PARTY
OF NEW MEXICO, and DEMOCRATIC PARTY OF NEW MEXICO,
Defendants-Appellees,
and
STATE OF NEW MEXICO, ex rel. HECTOR BALDERAS, Attorney General,
Intervenor-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS

DENISE BARELA-SHEPHERD, District Judge

J. EDWARD HOLLINGTON
J. EDWARD HOLLINGTON
& ASSOCIATES, P.A.
Albuquerque, New Mexico
for Appellant

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for Intervenor

JOHN C. ANDERSON
LARRY J. MONTANO
HOLLAND & HART, L.L.P.
Santa Fe, New Mexico
for Appellee Republican Party of
New Mexico

Opinion

Edward L. Chávez, Justice

{1} Petitioner David Crum is a resident of Albuquerque, Bernalillo County, New Mexico and is registered to vote in New Mexico as a qualified voter who declines to designate or state his political party affiliation (DTS). He sought to vote during the 2014 primary election by selecting either a Democratic or a Republican ballot without having to amend his voter registration. Crum was not permitted to vote during the June 3, 2014 primary election because he was not registered as either a Democrat or a Republican¹ on or before May 6, 2014. See NMSA 1978, § 1-4-5.1(F) (2007) (requiring voters to register at least twenty-eight days before an election to be

eligible to vote during that election). Under New Mexico's closed primary election system, a voter who wants to vote during the primary election must be affiliated with a major political party, see NMSA 1978, § 1-12-7(B) (2003), and can only vote for candidates of a party which is designated on the voter's current voter registration certificate, see NMSA 1978, § 1-12-7(C) (2003).

{2} Crum contends that the Free and Open Clause of Article II, Section 8 of the New Mexico Constitution entitles him to vote during primary elections without registering with a major political party because he is a qualified voter under Article VII, Section 1. We disagree. Although the Free and Open Clause is intended to promote voter participation during elections, the Legislature has the

constitutional power to enact laws that "secure the secrecy of the ballot and the purity of elections and guard against the abuse of [the] elective franchise." N.M. Const. art. VII, § 1(B) (2014). Requiring voters to designate their affiliation with a major political party at least twenty-eight days before the primary election, and only allowing voters to vote for candidates of a party which is designated on their voter registration, are reasonably modest burdens which further the State's interests in securing the purity of and efficiently administering primary elections. We therefore affirm the district court's grant of the motion to dismiss Crum's complaint for failing to state a claim upon which relief could be granted.

I. DISCUSSION

{3} Crum sued the Secretary of State and the Bernalillo County Clerk (Defendants), seeking an injunction to enjoin them from prohibiting DTS voters from voting during the primary election. The New Mexico Attorney General intervened on behalf of the State. The district court ordered that the Democratic Party of New Mexico (DPNM) and the Republican Party of New Mexico (RPNM), New Mexico's two major political parties, should be joined as party defendants under Rule 1-019 NMRA. Only RPNM entered an appearance. RPNM filed a motion to dismiss Crum's lawsuit for failure to state a claim under Rule 1-012(B)(6) NMRA, based on the contention that allowing DTS voters to vote in the primary election without designating a major political party would unconstitutionally infringe on RPNM's freedom of association.

{4} The district court granted RPNM's motion to dismiss, concluding that the Legislature had the authority to enact Section 1-12-7(B) and (C) under its manner, time, and place of voting power in the second paragraph of Article VII, Section 1 of the New Mexico Constitution. The district court also found that the requirement to affiliate protects political parties' freedom of association. Crum timely appealed the district court's decision to the Court of Appeals, which then certified the case to this Court pursuant to Rule 12-606 NMRA and NMSA 1978, Section 34-5-14(C) (1972). *Crum v. Duran*, No. 34,586, order of certification at 1-5 (N.M. Ct. App. Aug. 8, 2016) (non-precedential).

¹The Democratic and Republican Parties were the only major political parties in New Mexico for the 2014 election. See NMSA 1978, § 1-7-7(A) (2011) (defining "major political party" under the Election Code); www.sos.state.nm.us/Elections_Data/NM_Political_Parties.aspx (last accessed January 30, 2017).

{5} Whether New Mexico's closed primary system violates Article II, Section 8 and Article VII, Section 1 is a question of statutory and constitutional interpretation which we review de novo. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. An appeal of an order dismissing a case under Rule 1-012(B)(6) is also reviewed de novo with the reviewing court accepting "all well-pleaded factual allegations as true and determin[ing] whether the plaintiff might prevail under any state[ment] of facts provable under the claim." *Sambrano v. Savage Arms, Inc.*, 2014-NMCA-113, ¶ 4, 338 P.3d 103 (internal quotation marks and citation omitted).

A. The Free and Open Clause Provides a Broad Protection of the Right to Vote; However, the Legislature May Constitutionally Impose Safeguards to Protect the Integrity of Elections

{6} Article II, Section 8 of the New Mexico Constitution provides that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Crum contends that the Free and Open Clause requires all elections, including primary elections, to be free and open to all voters who meet the age, residency, and competency qualifications in the first paragraph of Article VII, Section 1.²

{7} The Free and Open Clause is intended to promote—not restrict—citizen participation in New Mexico elections. *State ex rel. Walker v. Bridges*, 1921-NMSC-041, ¶ 8, 27 N.M. 169, 199 P. 370 (clarifying that a citizen's supreme right is to vote in public elections, and therefore election regulations should be construed in favor of a citizen's right to vote). Whether the Free and Open Clause of Article II, Section 8 was intended to apply to primary elections is unclear because at the time of the adoption of the New Mexico Constitution on January 21, 1911, primary elections did not exist in New Mexico. See *State ex rel. Palmer v. Miller*, 1964-NMSC-072, ¶¶ 9-10, 74 N.M. 129, 391 P.2d 416 (per curiam) (explaining that New Mexico's first Primary Election Code was adopted in 1938 to take political party nomina-

tions away from conventions and give the power directly to qualified voters of those parties).

{8} What existed even before the adoption of the Free and Open Clause is the requirement that voters officially document their qualifications to vote either by registration or affidavit. See *Bridges*, 1921-NMSC-041, ¶¶ 9-11 (citing registration requirements that existed before the New Mexico Constitution's enactment, which required qualified voters to either register or demonstrate by affidavit, and corroborate by two qualified voters, that the affiant was a qualified voter). At the adoption of Article VII, Section 1, the Legislature's authority to require qualified voters to register to vote became a constitutional power.³ Article VII, Section 1 also empowers the Legislature to "enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of [the] elective franchise." N.M. Const. art. VII, § 1(B) (2014).

{9} In *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. 1951) (en banc), the Missouri Supreme Court interpreted a substantively identical Free and Open Clause to that of New Mexico to mean that "every qualified voter may freely exercise the right to . . . vote without restraint or coercion of any kind and that his [or her] vote, when cast, shall have the same influence as that of any other voter." (internal quotation marks and citation omitted). However, in an earlier case, the Missouri Supreme Court had also acknowledged "[t]hat all elections shall be 'free and open' does not mean that there cannot be reasonable regulations of elections in the interest of good citizenship and honest government." *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 958 (Mo. 1914) (in banc). The United States Supreme Court has also held that the constitutional rights to vote in any manner and to associate for political purposes are not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Although state legislatures cannot unduly infringe on a voter's right to vote, *Richardson v. State Board of Elections*, 697 F. Supp. 295, 297 (W.D. Ky. 1988), legislatures may reasonably regulate elections and impose voter qualifications. *Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("There can be no

doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, (t)he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." (alteration in original) (internal quotation marks and citations omitted)).

{10} When a court reviews a challenge to a state election law, it must weigh the asserted injury the plaintiff seeks to vindicate against "the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (internal quotation marks and citations omitted). "If a statute imposes only modest burdens, . . . then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (internal quotation marks and citation omitted). "[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

{11} In this case, the Legislature requires a voter who wants to vote during the primary election to be affiliated with a major political party, Section 1-12-7(B), and prohibits the voter from voting for any candidate of a party who is not designated on the voter's current voter registration, Section 1-12-7(C). During the 2014 primary election, there were only two major parties: Democratic and Republican. Registered Democrats could only vote for democratic candidates, registered Republicans could only vote for republican candidates, and no other registered voters could vote in the primary election. A qualified voter who wishes to vote in a primary election may register with a major political party by delivering or mailing a certificate of registration twenty-eight days before the election. Section 1-4-5.1(F). With respect

²The 2008, 2010, and 2014 amendments to Article VII, Section 1 were compiled in 2016 following our decision in *State ex rel. League of Women Voters of New Mexico v. Advisory Committee to the New Mexico Compilation Commission*, No. S-1-SC-35524, order at 1-2 (N.M. Sup. Ct. Sept. 21, 2016) (non-precedential); N.M. Const., art. VII, § 1 (2014) (Compiler's Note).

³The Legislature's power appeared in the second paragraph of Article VII, Section 1. In a recent amendment, New Mexico voters reiterated the Legislature's power to require voter registration by stating that qualified voters are "subject to residency and registration requirements provided by law." N.M. Const. art. VII, § 1(A) (2014).

to the 2014 primary election, an unregistered qualified voter could have registered as either a Democrat or a Republican no later than May 6, 2014, which would have been twenty-eight days before the June 3, 2014 primary election. See NMSA 1978, § 1-4-8(A) (2008). Similarly, a registered qualified voter—regardless of political party affiliation or DTS status—could have changed his or her certificate of registration to register as either a Democrat or a Republican as late as May 6, 2014. *Id.* The qualified voter could then file a new certificate of registration as early as the Monday following the primary election. Section 1-4-8(B).

{12} The stated purpose of the Election Code, and thus the preelection registration requirement, includes securing the purity of elections and providing for their efficient administration. NMSA 1978, § 1-1-1.1 (1979). The controlling question before us is whether requiring qualified voters to register with a political party that is participating in the primary election, at least twenty-eight days before the primary election, is a reasonably modest burden that furthers the State's interest in securing the purity of elections and efficiently administering them. For the following reasons, we conclude that it is.

{13} Generally, “registering as a member of a political party is not particularly burdensome, and it is a minimal demonstration by the voter that he [or she] has some commitment to the party in whose primary he [or she] wishes to participate.” *Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995) (internal quotation marks and citation omitted). Not only is this burden minimal, but “[s]tates have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds.” *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (emphasis added). “The registration laws are designed to settle beforehand the question as to who is eligible to vote at any given election [so that] the turmoil and inconvenience of controversies about the qualifications of voters at the polls on election day are eliminated.” *Bridges*, 1921-NMSC-041, ¶ 8.

{14} In *Rosario v. Rockefeller*, the United States Supreme Court analyzed a registration requirement that voters claimed abridged their right to vote in a primary election. 410 U.S. 752, 756 (1973). At issue in *Rosario* was the constitutionality of a

New York state election law that required voters to register with a political party at least thirty days before the previous general election to be able to participate in the state's subsequent closed primary election. *Id.* at 760. Under the New York scheme, voters had to be registered approximately eight months before a presidential primary election and eleven months before a non-presidential primary election to participate in the primary. *Id.* at 760. The Court held that this registration requirement did not disenfranchise the voters because it merely provided a deadline for registering with which the voters could have complied to exercise their right to vote. See *id.* at 757-58. The *Rosario* Court noted that the voters could vote in a different political party primary election every year as long as they were properly registered. *Id.* at 759. The Court also held that the registration deadline was not too onerous because (1) states are “justified in imposing some reasonable cutoff point for registration or party enrollment,” *id.* at 760, and (2) such a deadline reasonably deters political party raiding by opposing party members “whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary,” *id.* at 760-61. Therefore, the Court concluded that the registration requirement did not violate the petitioners' constitutional rights. See *id.* at 762.

{15} The *Rosario* petitioners sought to affirmatively associate with a political party, *id.* at 755-756, unlike the DTS voters in this case. We find *Rosario* persuasive insofar as the act of voting in a party's primary is, in itself, an act of affiliation. *Miller v. Cunningham*, 512 F.3d 98, 107 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of rehearing en banc). Like the registration requirement in *Rosario*, New Mexico's twenty-eight-day registration requirement does not unconstitutionally infringe on the right to vote because it does not “totally den[y] the electoral franchise to [any] particular class of residents.” *Id.* at 757 (noting that courts which have held that a registration requirement was unconstitutional found that “there was no way in which the members of that class could have made themselves eligible to vote”). Crum and other DTS voters could have made themselves eligible to vote by timely registering with the political party that offered candidates and policies that more favorably addressed the issues with which they were immediately concerned. Unlike

the *Rosario* Court, we cannot justify the New Mexico registration deadline as a deterrent to political party raiding because that deadline occurs after the candidates and their platforms are known. There is no evidence that political party raiding is a concern in New Mexico.

{16} New Mexico's registration deadline is also defensible because it is not too burdensome. The registration requirement permits qualified voters to vote in a different political party primary election each year because it does not require them to be locked into their party affiliation. See *Kusper v. Pontikes*, 414 U.S. 51, 52-53, 58, 60-61 (1973) (holding that the State's legitimate interest in preventing political party raiding was not sufficient to justify the substantial restraint of a statute prohibiting voters from voting in a party primary if they had voted in another party's primary within the preceding twenty-three months); see also § 1-4-8(A)(2) (requiring county clerks to reopen registration the Monday following an election). The twenty-eight-day registration requirement does not deprive voters of their right to change their political party registrations as often as they desire, as long as the reasonable statutory time limit for doing so is observed. Thus, voter participation in New Mexico is encouraged—not discouraged—and a voter's participation is not made so onerous that qualified voters would not be able to effectively participate in primary elections.

{17} It is also significant that New Mexico voters who desire to participate in the primary elections have a reasonable time to determine whether a political party offers candidates and platforms that comport with their beliefs and principles. If so, they may register with that particular party and vote in the primary election. Primary elections are held “on the first Tuesday after the first Monday in June of each even-numbered year.” NMSA 1978, § 1-8-11 (2011). Political parties and their candidates announce their platforms and positions on issues well before the registration deadline. Candidacy declarations by preprimary convention designation are filed on the first Tuesday in February for statewide offices or United States representatives. NMSA 1978, §§ 1-8-21.1(A) (2013) & 1-8-26(A) (2014). State conventions are held no later than the second Sunday in March preceding the primary election. Section 1-8-21.1(B). Candidacy declarations for any other office who are nominated in the primary election are

filed on the second Tuesday of March. See § 1-8-26(B).

{18} Candidates in New Mexico must declare a political party by January and file their declarations of candidacy by either February or March. Crum and other DTS voters are not required to register until May. Therefore, they have two to three months to decide which political party's candidates are more appealing to them before registering with that party. And, as previously stated, the very act of voting in a party's primary is itself the act of affiliating with that party. If during the next election cycle Crum or any other DTS voter decides that his or her immediate interests are favorably addressed by a different political party, he or she may simply change his affiliation at any time up to twenty-eight days preceding the next election.

{19} The registration law incidentally furthers the interest in assuring that primary elections reflect the will of political party members. *Nader v. Schaffer*, 417 F. Supp. 837, 846-47 (D. Conn.), *aff'd*, 429 U.S. 989 (1976). In *Nader*, a federal district court upheld Connecticut's closed primary

system and rejected the plaintiffs' arguments, including that the law forced them to enroll in a party in order to participate in the state's primary elections. 417 F. Supp. at 844-45. The *Nader* court reasoned that "a state has a more general, but equally legitimate, interest in protecting the overall integrity of the . . . electoral process [, which] includes preserving parties as viable and identifiable interest groups [, and] insuring that the results of primary elections . . . accurately reflect the voting of party members." *Id.* at 845. The same legitimate interests support the constitutionality of the modest burden on voters that was challenged in this case. We therefore hold that requiring voters to designate their affiliation with a major political party at least twenty-eight days before the primary election, and only allowing voters to vote for candidates of a party which is designated on their voter registration, are reasonably modest burdens which further the State's interests in securing the purity of and efficiently administering primary elections.

{20} Finally, we note that the instant case calls upon this Court to determine

only whether New Mexico's current closed primary system is constitutional and *not* whether it is the only constitutional option available to the Legislature. Our holding in this case should in no way be interpreted as foreclosing the possibility that a different primary system adopted by the Legislature—an open primary, for example—could also be constitutional. See *Cunningham*, 512 F.3d at 106-12 (Wilkinson, J., dissenting from denial of rehearing en banc) (comparing the relative constitutional merits of open and closed primary systems).

II. CONCLUSION

{21} For the foregoing reasons, we conclude that Section 1-12-7(B)-(C), which establishes New Mexico's closed primary election system, is not unconstitutional. Accordingly, we affirm the district court's grant of RPNM's motion to dismiss.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PETRA JIMENEZ MAES, Justice

BARBARA J. VIGIL, Justice

Certiorari Granted, February 14, 2017, No. S-1-SC-36269

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-029

No. 33,798 (filed December 20, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHIP FOX,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

STEPHEN K. QUINN, Judge

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Opinion**Michael E. Vigil, Chief Judge**

{1} Defendant appeals from a jury verdict finding him guilty of voluntary manslaughter, in violation of NMSA 1978, Section 30-2-3(A) (1994), and felony and criminal solicitation to commit tampering with evidence, in violation of NMSA 1978, Section 30-28-3(A) (1979). Concluding that the evidence supports the convictions, we affirm, but remand the case to the district court to correct a clerical error in the judgment, sentence, and order determining habitual offender status.

I. BACKGROUND

{2} On August 16, 2012, Defendant, his girlfriend Tiffany Pryor, and his friend Kevin Reardon were visiting Defendant's aunt at her home in Clovis, New Mexico. While Defendant and Kevin were changing a tire, Kevin was stabbed. After the stabbing, Defendant went next door where his childhood friend Chad Jackson lived. Defendant was holding a bloody knife and looked terrified. Defendant told Chad, "I stabbed my best friend, and I'm scared, and I don't know what to do." Defendant also said that when Kevin became aggressive and repeatedly charged at him, Defendant told Kevin he had a knife and to leave him alone. Defendant said, "My friend charged

me and ran into the knife, and I stabbed him, and I'm scared, and I don't know what to do." Chad told Defendant to put the knife on a nearby table, and Defendant complied.

{3} When Officer Jimmy Brown arrived on the scene, Defendant denied knowing what had happened. Officer Brown also spoke to Kevin, who was sitting on the aunt's porch, bleeding, and going in and out of consciousness. Kevin said he was "talking shit to somebody" who then stabbed him. The ambulance arrived and took Kevin to the hospital. Detective Rick Smith met with Kevin at the hospital, and asked Kevin what had happened. Kevin answered that he was "talking shit and my homie stabbed me." After initially refusing to identify who stabbed him, Kevin identified Defendant. Later Kevin died from the stabbing.

{4} At the scene, Officer Brown placed Defendant in investigative detention after speaking to Chad. In an interview at the police station, Defendant eventually admitted he stabbed Kevin, but asserted he did not mean to do so and never intended to hurt him. While he initially said he could not explain the reason for Kevin's aggression, Defendant later said that Kevin had become enraged while sniffing or "huffing" Dust-Off and started swinging his fists at Defendant, making him afraid. Defendant said he tried to calm Kevin down and pushed him away but Kevin kept coming

at him, and eventually ran into the knife in Defendant's hand. Defendant explained that the knife was part of the camping gear he was putting into the car at the time. The Chief Medical Investigator agreed that while it was possible for Kevin's wound to have been caused by Kevin moving toward the knife and falling on it if it was held rigidly, it was his opinion this was not likely, and that Kevin's wound was more consistent with being stabbed by the thrust of a knife. {5} The police investigation included a search of the property where they found Dust-Off cans, including some cans in a black backpack. Defendant called Tiffany from the jail. When Tiffany told Defendant the police were going to take Defendant's black backpack with six Dust-Off cans in it, Defendant asked her to get the backpack out of the house. Tiffany told Defendant she could not because the police were "everywhere" in the house. Defendant then asked Tiffany to pull all his "shit" out of the backpack and tell the police it was someone else's backpack. Tiffany told Defendant the other person's backpack "is in the car," and Defendant told Tiffany to tell the police he had two backpacks. Defendant then told Tiffany, "If they ask you, just tell them the truth[.]"

{6} The jury found Defendant guilty of voluntary manslaughter as a lesser included offense to the charge of second degree murder and solicitation to commit tampering with evidence. A judgment, sentence, and order determining habitual offender status was then filed, and Defendant appeals.

II. DISCUSSION

{7} Defendant raises three issues on appeal; however, these issues raise challenges to the sufficiency of the evidence for each conviction. We therefore consolidate the appeal into two issues and analyze Defendant's sufficiency of the evidence arguments as they relate to each conviction.

{8} Our review of the sufficiency of the evidence is highly deferential. *State v. Slade*, 2014-NMCA-088, ¶ 13, 331 P.3d 930, *cert. quashed*, 2015-NMCERT-001, 350 P.3d 92. "When reviewing a challenge to the sufficiency of the evidence, we must determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Carpenter*, 2016-NMCA-058, ¶ 10, 374 P.3d 744 (internal quotation marks and citation omitted). Under this standard, we view "the evidence in the light most favorable to the state, resolving all conflicts and indulging

all permissible inferences in favor of the verdict.” *Id.* (alteration, internal quotation marks, and citation omitted). “The appellate courts do not search for inferences supporting a contrary verdict or re-weigh the evidence because this type of analysis would substitute an appellate court’s judgment for that of the jury.” *Slade*, 2014-NMCA-088, ¶ 13 (internal quotation marks and citation omitted). “The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured.” *State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (alterations, internal quotation marks, and citation omitted).

A. Sufficient Evidence for Voluntary Manslaughter

{9} Under the jury instructions for voluntary manslaughter, the State was required to prove beyond a reasonable doubt that “[D]efendant killed Kevin[,] . . . [D]efendant knew that his acts created a strong probability of death or great bodily harm to Kevin [, . . . and] did not act in [self-defense.]” With regard to self-defense, it “is only a justification for a killing, and thus a lawful act, if all the elements necessary for self-defense are met.” *State v. Abeyta*, 1995-NMSC-051, ¶ 23, 120 N.M. 233, 901 P.2d 164, *abrogated on other grounds by State v. Campos*, 1996-NMSC-043, ¶ 32 n.4, 122 N.M. 148, 921 P.2d 1266. In order to find that Defendant acted in self-defense, the jury was required to find, in pertinent part, that “[a] reasonable person in the same circumstances as [D]efendant would have acted as [D]efendant did.” *See State v. Johnson*, 1998-NMCA-019, ¶ 14, 124 N.M. 647, 954 P.2d 79 (“One requirement of self-defense is that the force used must be reasonable in relation to the threat.” (internal quotation marks and citation omitted)). “If excessive force is exerted, the entire action becomes unlawful.” *Id.*

{10} In the instructions on voluntary manslaughter, the jury was specifically instructed that “[t]he difference between second degree murder and voluntary manslaughter is sufficient provocation[,]” because “[i]n second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation.” The jury was further instructed that “[i]n the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.” “Sufficient provocation,” the jury was told, is “any action, conduct or circumstance which arouse[s] anger, rage, fear, sudden resent-

ment, terror or other extreme emotions[,]” and “must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition” and that the “‘provocation’ is not sufficient if an ordinary person would have cooled off before acting.” *See State v. Melendez*, 1982-NMSC-039, ¶ 9, 97 N.M. 738, 643 P.2d 607 (“Provocation supporting a conviction for voluntary manslaughter, on the other hand, is an act committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense.” (internal quotation marks and citation omitted)).

{11} Defendant contends that it was unreasonable for the jury to reject his plea of self-defense, and that the killing here could not have been more than involuntary manslaughter. We disagree. When the facts support a plea of self-defense, “it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter.” *Id.* ¶ 9 (internal quotation marks and citation omitted). “[T]he critical difference between self-defense and voluntary manslaughter lies not in provocation or the emotion of fear, but rather in the reasonableness of the defendant’s conduct in killing.” *Abeyta*, 1995-NMSC-051, ¶ 17 (internal quotation marks and citation omitted). As we have reiterated, “reasonableness in the use of force is generally a matter for the jury.” *Johnson*, 1998-NMCA-019, ¶ 16.

{12} After reviewing the record in accordance with our mandated standard of review, we conclude that the State presented sufficient evidence for the jury to find sufficient provocation, and that Defendant’s actions were not taken in self-defense. The jury could properly find that Kevin’s actions in repeatedly charging at Defendant aroused sufficient fear in Defendant, which would affect the ability to reason and cause a temporary loss of self control, but that a reasonable person in the same circumstances would not have used a knife to stab Kevin when Kevin did not have a weapon. *See Abeyta*, 1995-NMSC-051, ¶ 17 (“If the jury rejects the theory of self-defense, it may still find the defendant acted under provocation of fear and may mitigate the charge of murder to the lesser charge of voluntary manslaughter.”). The jury was free to accept Defendant’s version of the facts to find sufficient provocation, and it was also free to reject Defendant’s version of the facts that he acted as a “reasonable person” under the circumstances and therefore failed

to act in self-defense. *See State v. Stefani*, 2006-NMCA-073, ¶ 39, 139 N.M. 719, 137 P.3d 659 (recognizing that “the jury was free to believe or disbelieve [the defendant’s] theory”).

B. Sufficient Evidence for Solicitation

{13} Defendant argues that there was insufficient evidence to convict him of criminal solicitation to commit tampering with evidence.

{14} Defendant’s arguments require us first to consider the statutory framework. Section 30-28-3(A) makes criminal solicitation a crime. It requires the perpetrator to intend “that another person engage in conduct constituting a felony[.]” *Id.* When the perpetrator has this intent and “solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony,” criminal solicitation is committed. *Id.* Criminal solicitation is punishable as a second, third, or fourth degree felony depending on the degree of the felony solicited. Section 30-28-3(E).

{15} The substantive crime of tampering with evidence “consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.” NMSA 1978, § 30-22-5(A) (2003). Tampering with evidence is punishable as a third degree felony if the tampering relates to a capital, first degree, or second degree felony; it is punishable as a fourth degree felony if the tampering relates to a third degree or fourth degree felony; and it is punishable as a petty misdemeanor if the tampering relates to a misdemeanor or petty misdemeanor. Section 30-22-5 (B)(1)-(3). Applicable to this case, where the tampering relates to a crime that is “indeterminate,” it is punishable as a fourth degree felony. Section 30-22-5(B)(4).

{16} In order to find Defendant guilty of criminal solicitation to commit tampering with evidence, the jury was instructed that it was required to find beyond a reasonable doubt that “[D]efendant intended that another person commit the crime of [t]ampering with [e]vidence[,]” and “solicited, commanded, or requested the other person to commit the crime of [t]ampering with [e]vidence[.]” *See* UJI 14-2817 NMRA. “[A] charge of solicitation is complete when the solicitation to commit the intended felony is made and it is immaterial that the object of the solicitation is not carried out or that no overt steps were in

fact taken toward the consummation of the offense.” *State v. Cotton*, 1990-NMCA-025, ¶ 26, 109 N.M. 769, 790 P.2d 1050. Because Section 30-28-3(A) requires that the crime solicited is a felony, the jury was also given an instruction on the essential elements of tampering with evidence. This instruction advised the jury that the elements of tampering with evidence required proof that “[D]efendant destroyed, changed, hid, fabricated or placed a backpack[,]” and that “[D]efendant intended to prevent the apprehension, prosecution or conviction of himself [or] to create the false impression that another person had committed a crime[.]”

{17} Defendant asserts that the only “crime” the tampering of evidence could relate to is possession of inhalants, a misdemeanor. NMSA 1978, § 30-29-2 (1979). Because criminal solicitation requires that the crime solicited is a felony, Defendant contends that his conviction cannot stand. Moreover, Defendant asserts, because the crime to which the tampering related was not unknown or undetermined, his conviction for criminal solicitation of an “indeterminate” crime fails. In support of this argument, Defendant relies on *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754. Finally, Defendant asserts that the criminal solicitation conviction must be set aside because he renounced his request to tamper with evidence.

{18} *Jackson* is of no assistance to Defendant here. In *Jackson*, the defendant entered into a conditional guilty plea to tampering with evidence by providing a false urine sample while on probation. *Id.* ¶¶ 3, 5. The defendant argued on appeal that tampering with evidence requires proof of tampering with evidence of a separate, underlying crime, and that while providing a false urine sample to his probation officer might constitute a probation violation, it was not an independent crime. *Id.* ¶¶ 4, 6. Our Supreme Court disagreed and held that the “indeterminate crime” provision of Section 30-22-5(B)(4) applies “to punish acts of tampering with evidence where no underlying crime could be identified.” *Jackson*, 2010-NMSC-032, ¶ 21. An example where a crime could not be identified is *State v. Alvarado*, 2012-NMCA-089, ¶ 14, ___ P.3d ___. In *Alvarado*, as in this case, the jury instruction on tampering with evidence did not require the jury to determine what crime, if any, to which the tampered evidence related. *Id.* ¶¶ 10, 14. We held that under these circumstances, the defendant must be sentenced under the “indeterminate crime” provi-

sion of Section 30-22-5(B)(4). *Alvarado*, 2012-NMCA-089, ¶ 14. We also recently recognized in *State v. Radosevich* that “tampering with evidence can be a stand-alone crime that is not tied to a separate crime.” 2016-NMCA-060, ¶ 25, 376 P.3d 871, *cert. granted*, 2016-NMCERT-007, ___ P.3d ___, (No. 35,864, July 1, 2016). “Where there is no separate, identified crime, the tampering offense is linked to an indeterminate crime under Section 30-22-5(B)(4), and is punished as a fourth-degree felony.” *Radosevich*, 2016-NMCA-060, ¶ 25. Since the jury was not required to find in the instruction that “[the d]efendant tampered with any particular crime or degree of crime, tampering was instructed as a stand-alone crime.” *Id.* ¶ 31. We therefore review whether there was sufficient evidence under our mandated standard of review to convict Defendant of criminal solicitation to commit tampering with evidence as a stand-alone crime.

{19} Defendant called Tiffany from the jail knowing that the police were present and investigating the stabbing. Defendant had already told the police the stabbing resulted from Kevin becoming enraged from sniffing or “huffing” Dust-Off. When Tiffany told Defendant that the police were going to take his black backpack with Dust-Off cans inside it, Defendant told her to take it out of the house. Tiffany told Defendant she could not because the police were everywhere, and Defendant asked her to take the Dust-Off cans out of the backpack and tell the police the backpack belonged to someone else. The evidence clearly supports findings that Defendant intended Tiffany to tamper with evidence consisting of his backpack and the Dust-Off cans inside it and that Defendant requested Tiffany to tamper with that evidence by concealing it and lying about ownership of the backpack, for the purpose of preventing his prosecution or conviction for stabbing Kevin. This was all that was required under the instructions given to the jury. We therefore conclude that sufficient evidence supports Defendant’s conviction of criminal solicitation to commit tampering with evidence as a stand-alone crime and reject Defendant’s sufficiency of the evidence arguments.

{20} This brings us to Defendant’s last argument that, as a matter of law, he voluntarily withdrew his criminal solicitation to Tiffany when he told her to tell the truth if police officers questioned her. It is an affirmative defense in a prosecution for criminal solicitation when “under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant: (1) notified the person solicited; and

(2) gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.” Section 30-28-3(B). We have already concluded that the evidence is sufficient to support Defendant’s conviction for criminal solicitation to commit tampering with evidence. At best, therefore, the evidence on whether Defendant presented sufficient evidence on the affirmative defense is conflicting, and there was no error in failing to direct a verdict in Defendant’s favor. *Cf. Gutierrez v. Valley Irrigation & Livestock Co.*, 1960-NMSC-124, ¶¶ 15-16, 68 N.M. 6, 357 P.2d 664 (stating that where the evidence is capable of differing interpretations in connection with an affirmative defense, a jury question is presented). Moreover, because Defendant did not argue that the evidence supported the affirmative defense as a matter of law, nor request an instruction on the affirmative defense, he waived the defense. *See State v. Kerby*, 2005-NMCA-106, ¶ 39, 138 N.M. 232, 118 P.3d 740 (stating that an affirmative defense can be “forfeited” by a defendant’s failure to assert it in a timely manner); *see State v. Savage*, 1992-NMCA-126, ¶¶ 10-11, 115 N.M. 250, 849 P.2d 1073 (stating that an affirmative defense must be raised in the district court and preserved for review by submitting a requested instruction on the defense); *see also* § 30-28-3(B) (stating that the burden of raising the affirmative defense is on the defendant).

{21} To conclude our discussion regarding Defendant’s conviction in this regard, we note that a correction must be made to the judgment, sentence, and order determining habitual offender status. The document correctly recites that Defendant was convicted of solicitation to commit tampering with evidence, but it incorrectly cites to the tampering with evidence statute, Section 30-22-5. Although it will not alter the sentence imposed, we remand this case to the district court to correct this clerical error to substitute Section 30-28-3 (A) and (E)(3).

III. CONCLUSION

{22} We remand this case to the district court to correct the judgment, sentence, and order determining habitual offender status, and otherwise affirm Defendant’s convictions and sentence.

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

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



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Jon began his legal career as a litigation associate at Mayer Brown LLP in Palo Alto, California. His practice at Mayer Brown was spread across diverse areas of civil litigation, including contract law, tort law, antitrust law, and administrative law. In 2015, Jon came to New Mexico to work as a law clerk for the Honorable Edward L. Chávez of the New Mexico Supreme Court.

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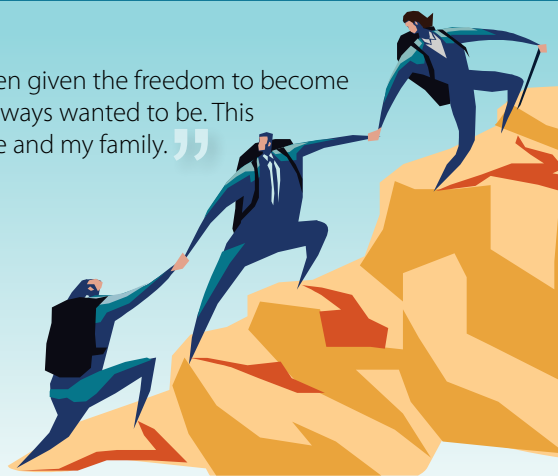
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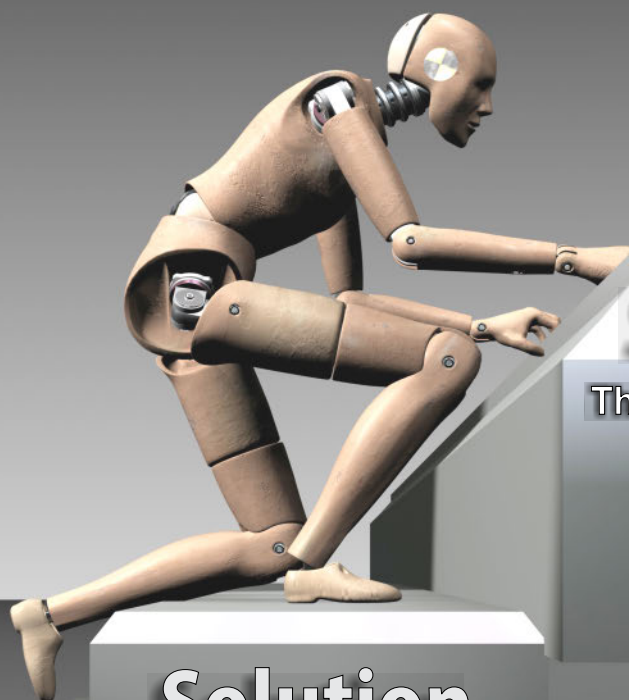
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