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Bar Bulletin

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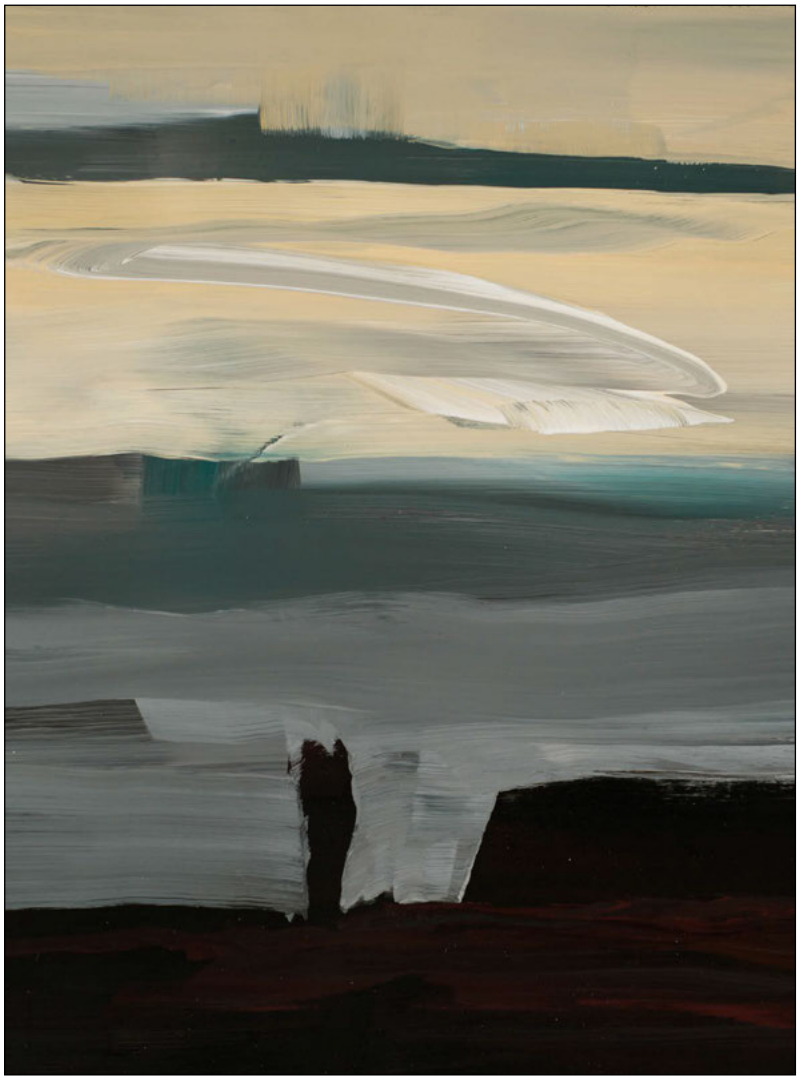

Chance Encounter, by Dick Evans (see page 4) ARTWORKinternational, INC., Santa Fe

Inside This Issue

FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD P.A.

MEDIATION SERVICES

FREEDMAN + BOYD

David Freedman and **John Boyd** are accepting cases for **mediation**.

David and John have together and separately litigated a wide variety of matters over the more than 44 years they have been in the practice of law, bringing their expertise and knowledgeable perspective to mediations.

Both are recognized as Preeminent Lawyers in Martindale Hubbell, and have been listed in Best Lawyers and SuperLawyers in multiple practice areas for many years.

They are available for mediation in the following practice areas:

Personal Injury
Wrongful Death
Products Liability
Commercial Litigation, including complex matters
Class Actions
Civil Rights
Labor Employment, including whistleblower matters
First Amendment / Defamation
Fee Disputes
IPRA
Antitrust and Securities

Contact Emails:
DAF@fbdlaw.com or JWB@fbdlaw.com

20 First Plaza, Suite 700 | Albuquerque, New Mexico 87102
505.842.9960 | Fax 505.842.0761 | www.FBDLAW.com

2017

FREE CLE

4th ANNUAL VEHICLE FORFEITURE CONFERENCE FOR NEW MEXICO COMMUNITIES

6.0 CREDITS, INCLUDING 1 HOUR OF ETHICS

Deadline for Registration August 25, 2017

Photo Credit: Penny Martin

SEPTEMBER 13, 2017

SANTA FE, NEW MEXICO

SANTA FE COMMUNITY CONVENTION CENTER
Sweeney Ballroom A & B

Javier M. Gonzales
Mayor, City of Santa Fe

Program information:
http://www.santafenm.gov/city_attorney and click on the link,
"4th Annual Vehicle Forfeiture Conference"
Or contact Irene Romero @ 505-955-6512

Susana Martinez
Governor, State of New Mexico

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

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21
Family Law Section Board
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21
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21
Trial Practice Section Board
Noon, State Bar Center

25
Intellectual Property Law Section Board
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13
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Ft. Sumner Senior Center, Ft. Sumner,
1-800-876-6657

14
Metropolitan Court Legal Clinic
10 a.m.–2 p.m., Bernalillo County Metropolitan Court, Albuquerque
505-841-9817

18
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m.,
Alamo Senior Center, Alamogordo,
1-800-876-6657

19
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m.,
Deming Senior Center, Deming,
1-800-876-6657

About Cover Image and Artist: Chance Encounter, 12 by 12'
Dick Evans was born in the Land of Enchantment and grew up in a rural farming community in the panhandle of Texas with no exposure to art until he started college. He graduated from the University of Utah with a BFA in Drawing and Painting and an MFA in Ceramics and Sculpture. Evans has taught art, primarily in ceramics, which is his primary form of expression. He has also produced sculpture in welded steel and cast bronze. Evans' art is found in many art museums, corporate collections and publications. He feels that the more personal the statement is, the more universal it may be. By avoiding the visually expected, his art often aids the viewer to see surroundings in a different and richly rewarding manner. To view more of Evans' work, visit www.dickevansart.com.

A Message from State Bar President

Scotty A. Holloman

Dear State Bar of New Mexico Members,

It is hard to believe we are already halfway through the year! It has been my pleasure to serve as your president and there are still many things to look forward to in 2017. Many of you have already registered for or heard about this year's Annual Meeting—Bench & Bar Conference at the Inn of the Mountain Gods in Mescalero, N.M. We are excited to welcome Marcia Clark who will participate in a moderated Q&A "Lessons Learned from the 'Trial of the Century' Relevant to the Rule of Law Issues of Today." Ms. Clark is a bestselling author and prosecutor known for her work in high profile cases—most notably, the O.J. Simpson murder trial. Former local news anchor Carla Aragon will moderate the Q&A session. A meet and greet event and book signing will follow Ms. Clark's presentation.

In addition to Ms. Clark, this year's Annual Meeting will host many other high profile speakers including Mark Curriden of the *Dallas Morning News* and *ABA Journal* and Chicago-Kent College of Law Professor Sheldon H. Nahmod. We also have plenty of fun events lined up for the conference including the ever-popular golf outing, a performance at the historic Spencer Theater for the Performing Arts and a charity raffle event supporting the Bar Foundation. Plus, enjoy refreshments and mingle with other attendees, bar commissioners and me each night in the Texas Tech School of Law Red Raider Hospitality Suite.

I am particularly excited to attend this year's Annual Meeting in my corner of the state. Often, bar events are located in Albuquerque and Santa Fe. It is my priority to serve all of our members, regardless of their location. This year's event is the perfect opportunity for bar leadership to engage with members in the southern part of the state. I encourage each of you to attend this year's event and I look forward to seeing you there.

In other State Bar news, earlier this year, the Board of Bar Commissioners contracted Research & Polling to conduct an update of the compensation survey for the State Bar. I am happy to announce that the results are available online now. In addition to income, billing rates and methods for various types of practice, the recent results provide information regarding what services are generally charged to clients, perceived barriers to practicing law in New Mexico and career satisfaction.

In June, the State Bar hosted the 50th Jackrabbit Bar Conference in Santa Fe. This group of bar leaders from the northwestern plains and mountain west states convene annually to network and address bar association trends and issues. I am proud to say that this year's event was the most well attended one in history!

The Bar Foundation's Entrepreneurs in Community Lawyering program has been in effect for a year now, and is continuing to improve and grow. In fact, the applicants for the fall exceed the number of openings. We are excited about the future of this program and I encourage you to learn more about it and refer qualified applicants.

You can find more information about the programs and events I've mentioned at the State Bar's website at www.nmbar.org or by calling 505-797-6000.

I am honored to serve as your president and do what I can to further the legal profession in New Mexico. I will be in contact again throughout the year but I am available to you if you have concerns.

Sincerely,

Scotty A. Holloman
President, State Bar of New Mexico

2017 State Bar of New Mexico Annual Awards

The 2017 Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2016 or 2017. They will be presented July 28 during the 2017 Annual Meeting—Bench & Bar Conference at the Inn of the Mountain Gods in Mescalero, N.M. To attend the awards ceremony and register for the Annual Meeting, visit **www.nmbar.org/AnnualMeeting.**

SCOTT M. CURTIS

Distinguished Bar Service Award

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

Scott M. Curtis received his law degree from Texas Tech University and went into practice in Farmington, NM in 1976. He was blessed to learn to practice law from giants of the San Juan County Bar. First and foremost, he was guided by James B. Cooney followed closely by Felix Briones, the Honorable James Musgrove and the Honorable Byron Caton. During his forty years of practice he's been honored to serve with many great and honorable lawyers and blessed to practice with many talented young lawyers. When he could he would pass on the lessons learned from his mentors and from his 40 years of practice. Over the years he has learned as much, if not more, from those brilliant young men and women as he might have taught. They've enriched his life and have kept the practice fun.

CATHY ANSHELES

Distinguished Bar Service Nonlawyer Award

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

Cathy Ansheles learned about collaboration early on, growing up in a family of nine. She graduated from Davidson College and taught in Kenya at a harambee school. After working with Maine's Refugee Resettlement Program, Cathy moved to New Mexico where she monitored prison conditions under the Duran Consent Decree and did mitigation investigation on a federal death penalty case. Cathy also served for six years as coordinator of the NM Coalition to Repeal the Death Penalty, which met its goal in 2009. As the New Mexico Criminal Defense Lawyers Association director for over 20 years, Cathy has had the opportunity to partner with a variety of legal and community organizations on issues ranging from solitary confinement and women in prison to police reform and alternatives to incarceration. In collaboration with lawyers and activists, she has organized trainings, public forums and legislative actions to effect social justice change in New Mexico.

HON. ELIZABETH E. WHITEFIELD

Justice Pamela B. Minzner Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism. Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

Judge Elizabeth Whitefield was raised in Pennsylvania and was the first college-educated in her family of Irish/Swiss immigrants, putting herself through undergraduate and law school. In 1982, Elizabeth joined the firm of Keleher & McLeod, and was the first woman shareholder and the first woman in firm management. She practiced until her appointment to the bench in 2007. In 1991, Elizabeth, Carol Conner and Margaret Branch founded the NM Women's Bar Association; Elizabeth received the NMWBA's Henrietta Pettijohn and Founder's Awards. As a NM Bar Commissioner, Elizabeth supported and implemented a policy of inclusion in the State Bar. This initiative included active recruitment of minorities and diverse attorneys. In recognition for her efforts, Elizabeth was awarded the State Bar Past President's Award. Judge Whitefield was presiding as a Family Court Judge from 2007 to 2016. She was elected in 2008, and retained in 2014. In that capacity, she worked closely with family law attorneys to institute a pro bono program. Elizabeth served on the Family Court Bench for nine years with honor and distinction and was the recipient of the UNM School of Law Distinguished Alumni Award, the Albuquerque Bar's Outstanding Judge Award, and the Albuquerque Journal & Chamber of Commerce Spirit Award.

YOUNG LAWYERS DIVISION WILLS FOR HEROES PROGRAM

Outstanding Legal Program Award

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

Since 2006, the **New Mexico Young Lawyers Division** (YLD) has been implementing the American Bar Association Young Lawyers Division national service project created by the Wills for Heroes Foundation, **Wills for Heroes** (WFH), which provides wills, advance healthcare directives and powers of attorney free of charge to first-responders. The WFH program helps to put first-responders' minds at ease as they work hard to protect our communities every day. The YLD provides these hard-working professionals who have dangerous and life-threatening jobs with some relief knowing that they have planned to provide for their families in the event that tragedy hits. The YLD regularly schedules events throughout the state, and in 2016 alone the YLD drafted 232 wills for New Mexico first-responders.

SPENCER L. EDELMAN

Outstanding Young Lawyer of the Year Award

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

Spencer Edelman is a Shareholder at the Modrall Sperling law firm, where his practice deals with creditors' rights and litigation with a focus on bankruptcy and real estate. Edelman's efforts with YLD include organizing Wills for Heroes events for first responders, assisting with the Veterans Civil Justice Initiative, organizing volunteers for the Law Day Call-in Program, and assisting with the NMHBA's Law Camp. In 2013-2014 he served as a law clerk for U.S. Bankruptcy Judge David Thuma. He is a graduate of the James E. Rogers College of Law at the University of Arizona and Macalester College in St. Paul, Minn. He plays tennis regularly and attends as many Isotopes games as possible.

STEPHEN C. M. LONG

Robert H. LaFollette Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney. Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Steve Long graduated from UNM Law School in 1977 and was admitted to the bar that year. He and other Christian lawyers began providing pro bono services to the poor that resulted in the formation of Christian Legal Aid and Referral Service in 1983. Working under the direction of the Bankruptcy Law Section Board of Directors in the late 1980's, Steve drafted a model to provide pro bono bankruptcy services. He created forms for Legal Aid's Pro Se Divorce Clinic that the Second Judicial District Court adapted for its use. He participates in the Volunteer Attorney Program and says that pro bono service is his favorite part of the practice of law. Steve holds a BBA degree in Economics from New Mexico State University as well as Master of Divinity and Doctor of Ministry degrees from Gateway Seminary. He is an ordained minister and adjunct faculty member in the Gateway Doctor of Ministry program.

HON. MICHAEL D. BUSTAMANTE

Seth D. Montgomery Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring. Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

Judge Michael Bustamante is a native New Mexican with deep roots in the state. On his mother's side he can trace his family to the Onate expedition! His father's side of the family are relative newcomers and probably came to New Mexico in the early 1700s. He graduated from Grants High School in 1967, received his B.A. in Economics from UNM in 1971 and graduated from UNM Law School in 1974. He was in private practice with the law firm of Ortega and Snead and its successors from then until he went into solo practice in 1990. He was appointed to the Court of Appeals in December 1994 and served until October 2016. He has been and is still active in many community, bar and court related organizations and committee work. He emphasizes that his constant aim is to be useful and leave all things in which he gets involved better than he found them.

Notices

Court News

First Judicial District Court

Judicial Notice of Retirement

The First Judicial District Court, Division II announces the retirement of Hon. Sarah M. Singleton effective Aug. 31. A Judicial Nominating Commission will be convened in Santa Fe in September to interview applicants for this vacancy. Further information on the application process can be found at lawschool.unm.edu/judsel/index.php along with updates regarding this vacancy and the news releases.

Second Judicial District Court

Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon, July 21, in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque, NM 87107. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 505-841-7644 for more information.

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.

12th Judicial District Court

Judicial Vacancy

A vacancy on the 12th Judicial District Court will exist as of Sept. 4 due to the retirement of Hon. Jerry H. Ritter effective Sept. 1. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the 12th Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications can be found at lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m. July 13. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The 12th Judicial District Court Judicial Nominating Commission will meet at 9 a.m. on Aug. 3, to interview applicants for the position at the Otero County Courthouse located at 1000 New York Avenue in Alamogordo. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the courts and other tribunals:

I will refrain from filing frivolous motions.

Bernalillo County Metropolitan Court

Volunteer for Bernalillo County Metro Court Clinic

The Bernalillo County Metropolitan Court Legal Clinic takes place on the second Friday of each month. The YLD is co-sponsoring the Clinic from 10 a.m.-1 p.m. on July 14 on the Court's ninth floor and seeks volunteers to help pro se individuals with civil legal advice including: landlord/tenant, consumer rights, trial preparation, employee wage, debts/bankruptcy, discovery and more. Volunteers are also needed to provide this service electronically at the Court to New Mexico residents outside of Albuquerque. Contact Renee Valdez at metrrmv@nmcourts.gov for more information and to volunteer.

State Bar News

Attorney Support Groups

- July 17, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Aug. 7, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Aug. 14, 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.

Bankruptcy Law Section

Bankruptcy Get-Together

Join the Bankruptcy Law Section for a get-together at 5:30 p.m., July 21, at Monk's Taproom located at 205 Silver Ave. SW, Ste. G in Albuquerque. Drinks and appetizers will be available for purchase. For more information, contact Section Chair-elect Dan White at dwhite@askewmazelfirm.com.

Lawyers and Judges Assistance Program

Stress and Your Heart Workshop

Stress impacts health and the heart. Men Go Red NM and the Lawyers and Judges Assistance Program invite all members to attend an informative session on the subject from 5:30–7 p.m., July 12, at the State Bar Center. For more information or to R.S.V.P., contact Hailey Smith at 505-485-1332.

Legal Services and Programs Committee

Breaking Good Video Contest Seeks Sponsor

The LSAP Committee will host the third annual Breaking Good Video Contest for 2017-2018. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The Video Contest sponsors will be recognized during the

presentation of the awards, to take place at the Albuquerque Bar Association Law Day Luncheon in early May, and on all promotional material for the Video Contest. For more information regarding details about the prize scale and the Video Contest in general, or additional sponsorship information, contact Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

Young Professionals Flamenco Performance-Networking Event

Join the YLD, the Young Professionals of Albuquerque, the Hispanic National Bar Association and the Hispano Chamber of Commerce for a live Flamenco performance and networking reception at 5 p.m., July 19, at Tablao Flamenco at Hotel Albuquerque. The event is free, complimentary appetizers will be provided and a cash bar will be available. Register by July 14 at ypabq.org.

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.

Public Citator Notice

As of July 1, UNM's University Libraries will no longer provide LexisNexis Academic, a publicly accessible version of Lexis that includes Shepard's citator. The UNMSOL Library will continue to provide Westlaw PRO on select library computer terminals. Westlaw PRO is a public patron version of Westlaw that includes KeyCite.

Other Bars

New Mexico Criminal Defense Lawyers Association

CLE in Farmington

Coming to your neck of the woods, the New Mexico Criminal Defense Lawyers Association is hosting a special regional CLE on DWI, native culture, cross-examination and digital evidence in Farmington on July 14. This CLE will also include a criminal case law update as well as a question and answer session with some current sitting judges. This seminar provides 6.0 total CLE credits including 1.0 ethics credit. Visit www.nmcdla.org to register for this CLE today.

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 nmdefense@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.

New Mexico Women's Bar Association

Annual Meeting and Presentation

The New Mexico Women's Bar Association will hold its annual meeting at 1:30 p.m., July 14, at the State Bar Center in Albuquerque. At noon, the same day, the Women's Bar will host a luncheon presentation by Elizabeth Lynch Phillips. Phillips is a member of the State Bar and a Certified Professional Coach. She will talk about how to learn to recognize the three primary internal voices we all use to tell about and relate to, the circumstances in our lives. She will explain how we can become aware of which voice has the microphone in each of our stories and how to consciously choose to speak from the most powerful and effective voice – that of an empowered adult. More information about Phillips can be found at lawyersevolving.com. Contact Sharon Shaheen at 505-986-2678, sshaheen@montand.com, to register for the presentation. There is no charge to attendees who register by July 10.

Legal Education

July

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

14 **DWI, Native Culture, Cross-Examination, & Digital Evidence CLE**
5.0 G, 1.0 EP
Live Seminar, Farmington
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

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

18 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

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

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Seminar, Santa Fe
ALI-CLE
www.ali-cle.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

27–29 **2017 Annual Meeting—Bench & Bar Conference**
12 total CLE credits (with possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

4 **Drugs in the Workplace (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Effective Mentoring—Bridge the Gap (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2017 ECL Solo and Business Bootcamp Parts I and II**
3.4 G, 2.7 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

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

11 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

August

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

11 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **New Mexico Defense Lawyers Association and West Texas TADC Joint Seminar**
4.5 G, 1.5 EP
Live Seminar, Ruidoso
New Mexico Defense Lawyers Association
www.nmdla.org

11 **Introduction to New Mexico Money Laundering**
1.5 G
Live Seminar, Las Cruces
Peter Ossorio
575-522-3112

14 **Traffic Law**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davidmiles.com

17–18 **10th Annual Legal Service Providers Conference**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Use of "Contingent Workers"—Issues for Employment Lawyers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Law and Bioethics of Using Animals in Research**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **What Notorious Characters Teach About Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **New Mexico Conference on the Link Between Animal Abuse and Human Violence**
11.7 G
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Opinions

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

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

Effective June 30, 2017

PUBLISHED OPINIONS

No. 33847	2nd Jud Dist Bernalillo CR-113937, STATE v G LEONG (affirm in part, reverse in part and remand)	6/28/2017
No. 34090	2nd Jud Dist Bernalillo LR-12-75, STATE v V GONZALES (affirm)	6/28/2017
No. 34260	3rd Jud Dist Dona Ana CR-13-452, STATE v A SWEAT (affirm)	6/28/2017
No. 34680	3rd Jud Dist Dona Ana DV-12-619, S BEST v C MARINO (affirm in part, reverse in part)	6/29/2017
No. 34897	1st Jud Dist Santa Fe CV-13-1427, B ULLMAN v SAFEWAY (reverse and remand)	6/28/2017
No. 35017	2nd Jud Dist Bernalillo LR-12-43, STATE v L GARCIA (affirm in part and remand)	6/28/2017
No. 35507	9th Jud Dist Curry CR-14-473, STATE v B SAIZ (affirm)	6/28/2017
No. 35411	2nd Jud Dist Bernalillo CR-15-1400, STATE v M WEBB (affirm and remand	

UNPUBLISHED OPINIONS

No. 36119	5th Jud Dist Eddy DM-04-25, M STAHLBAUM v A PINSON (reverse and remand)	6/27/2017
No. 33989	11th Jud Dist San Juan CR-12-1061, CR-12-283, STATE v D CHAVEZ (affirm)	6/28/2017
No. 34330	5th Jud Dist Chaves CR-12-290, STATE v M FARMER (affirm in part, reverse in part and remand)	6/28/2017
No. 35096	1st Jud Dist Santa Fe CV-11-3177, US BANK v P RODRIGUEZ (reverse and remand)	6/28/2017
No. 35691	8th Jud Dist Colfax CV-15-56, BOKF v H GONZALEZ JR (affirm)	6/28/2017
No. 35764	5th Jud Dist Lea YR-07-1, STATE v J GUTIERREZ (affirm)	6/28/2017
No. 34026	3rd Jud Dist Dona Ana CV-11-839, S STRAUMANN v K MASSEY (affirm in part, reverse in part and remand)	6/29/2017
No. 34648	11th Jud Dist San Juan CR-14-620, STATE v A COLE (affirm)	6/29/2017
No. 34708	8th Jud Dist Colfax CR-13-123, STATE v E GONZALES (affirm)	6/29/2017
No. 35291	5th Jud Dist Eddy CR-15-72, STATE v M SANCHEZ (affirm)	6/29/2017
No. 35801	2nd Jud Dist Bernalillo CR-11-5386, STATE v A RAEL (affirm)	6/29/2017
No. 35878	2nd Jud Dist Bernalillo LR-16-1, STATE v K CABRAL (affirm)	6/29/2017
No. 36183	8th Jud Dist Taos CV-13-405, US BANK v B PRICE (affirm in part, reverse in part and remand)	6/29/2017
No. 34148	13th Jud Dist Valencia CR-12-492, STATE v Z GREEN (reverse and remand)	6/30/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

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Dated June 23, 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 28, 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
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
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 andindictment	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

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	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
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

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

Rules of Appellate Procedure

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	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

Opinion Number: 2017-NMSC-014

No. S-1-SC-35407 (filed March 9, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
DESIREE LINARES,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
JAMES WAYLON COUNTS, District Judge

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BENNETT BAUR
Chief Public Defender
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for Appellee

Opinion

Judith K. Nakamura, Justice

{1} A court-appointed psychologist evaluated Defendant, Desiree Linares, and recommended that she be found incompetent to stand trial due to mental retardation.[1] *See* NMSA 1978, § 31-9-1.6 (1999). The State doubted the court-appointed psychologist's testing methodology and conclusions and requested an opportunity to conduct an independent evaluation utilizing its own expert. The district court granted this request, but because Linares had filed a speedy-trial motion and the proceedings had been fraught with needless and unexplained delay, the district court allowed the court-appointed psychologist to attend and observe the State's independent evaluation to ensure the issue of Linares's mental retardation was quickly resolved. The State insisted that this was unacceptable and unlawful and declined to conduct the evaluation because the court-appointed psychologist would be present. Ultimately, the district court accepted the court-appointed psychologist's recommendations and found Linares incompetent due to mental retardation. Linares was civilly committed to the New Mexico Department of Health (DOH) and the criminal proceedings against her were dismissed.

{2} In this direct appeal, the State contends that the district court abused its discretion and effectively denied it an opportunity for an "independent" evaluation by permitting the court-appointed psychologist to attend the second, independent evaluation which ultimately did not occur. The State also argues that the district court abused its discretion in concluding that Linares is incompetent to stand trial. Lastly, the State asserts that the procedural requirements of Section 31-9-1.6(B) and (C), which specify the procedures a district court must follow when committing a defendant to involuntary civil confinement, were not followed. We find no error in the proceedings below and affirm.

I. BACKGROUND

{3} Linares and Alexis Shields resided together as the foster children of Evelyn Miranda. In June 2011, Linares and Shields devised a plan to run away from Miranda's home. The children intended to place a piece of cloth soaked in nail polish remover over Miranda's mouth and nose rendering her unconscious, tie her down with electrical cords, steal her vehicle, and drive away. The children's ill-conceived plan went dreadfully awry. Miranda struggled with the children when they attempted to hold the cloth over her mouth. Linares restrained Miranda as Shields smothered Miranda with a pillow and suffocated her. The children fled in Miranda's vehicle but were later apprehended by the authorities.

{4} Linares was indicted in June 2011 in the Twelfth Judicial District Court and charged as a serious youthful offender with first-degree (willful and deliberate) murder and (alternatively) first-degree felony murder.[2] Linares was also charged with a host of other lesser offenses.[3] Shortly after the indictment was filed, Linares filed a demand for speedy trial.

{5} In the months following the indictment, Linares filed several unopposed motions to continue trial, and trial was postponed and reset several times. At the end of May 2012—nearly a year after Linares was indicted—Linares again sought a continuance, this time indicating that the parties required additional time to negotiate a plea. The court granted the motion and set an August 24, 2012, plea deadline.

{6} The plea the parties negotiated required Linares to plead no-contest to first-degree (willful and deliberate) murder and to the other lesser charges for which she was indicted and to testify against Shields. In return, the State agreed to not seek adult

[1]We are aware that it is no longer acceptable to describe individuals with developmental disabilities as "mentally retarded." This now-defunct phrase is part and parcel of a rhetoric that dehumanized and delegitimized valuable members of our society. Sadly, our statutes continue to utilize this troubling convention. As our duty in this case is to determine whether or not the law as set out by statute was followed, we must use descriptive phrases we find unsettling. We encourage our Legislature to amend the statutes applicable to the developmentally disabled and replace any terms that have pejorative or derogatory connotations with suitable and respectful alternatives.

[2]The predicate offense underlying the felony-murder charge was unlawful taking of a motor vehicle.

[3]The lesser offenses charged included conspiracy to commit first-degree murder, conspiracy to commit felony-murder, kidnapping, conspiracy to commit kidnapping, unlawful taking of a motor vehicle, conspiracy to commit unlawful taking of a motor vehicle, larceny, and tampering with evidence.

sanctions against Linares but to commit her to the care of the Children, Youth and Families Department until the age of 21.

{7} The parties agreed that a predisposition study and report addressing Linares's amenability to treatment would be beneficial and Linares asked the court, citing NMSA 1978, § 32A-2-17 (2005), to order the Children, Youth and Families Department to prepare a pre-disposition report. In August 2012, the court ordered Linares to undergo a predispositional diagnostic evaluation and Dr. Susan Cave was appointed by the court to conduct that evaluation.

{8} Dr. Cave completed her evaluation on December 5, 2012, and concluded that Linares's intelligence quotient (IQ) is 68 and that she is mildly mentally retarded. Despite this conclusion, Dr. Cave determined that Linares was "minimally competent to proceed at sentencing."

{9} The court held a change of plea hearing on December 13, 2012, to review the terms of the plea agreement the parties reached and to confirm that Linares understood the terms of the agreement and was entering into it voluntarily. At that hearing, the court asked both counsel why the case had been delayed so long, noted that plea negotiations had been ongoing for some time, and pointed out that trial had been set for the previous summer. No adequate explanation for the delay was forthcoming from either party.

{10} On December 28, 2012, Linares withdrew her plea. Contrary to the parties' agreement, the district court was required by law to impose adult sanctions. *See generally State v. Jones*, 2010-NMSC-012, ¶ 17, 148 N.M. 1, 229 P.3d 474 (explaining that a serious youthful offender convicted of first-degree murder "*must* receive an adult sentence."). Trial was once more rescheduled, this time for March 2013.

{11} In late January 2013, Linares moved for a hearing on mental retardation. One day after filing that motion, Linares moved to dismiss the case, which had been pending for nineteen months, on speedy-trial grounds.

{12} An amended superseding grand jury indictment was filed in February 2013. The first-degree (willful deliberate) murder charge was dropped. Linares was charged with two alternative counts of felony murder[4] and several lesser offenses.[5]

{13} At the end of February 2013, the district court entered a sua sponte order vacating the March 2013 trial setting. The court determined that Linares's possible incompetency precluded any further proceedings.

{14} In June 2013, the State filed a motion to compel an independent evaluation of Linares's alleged mental retardation on the grounds that Dr. Cave's December 5, 2012, report contained problematic internal inconsistencies. The State emphasized that Dr. Cave's conclusion that Linares is mentally retarded, and thus, incompetent, could not be reconciled with Dr. Cave's conclusion that Linares was competent to enter into a plea. The State also emphasized that Dr. Cave submitted an additional report on May 13, 2013, in which she withdrew her initial conclusion that Linares was ever competent.[6] This subsequent report, the State argued, was further evidence that Dr. Cave's conclusions were suspect.

{15} A hearing on the State's motion for an independent evaluation was held on March 14, 2014. At that hearing, the State called Dr. Noah Kaufman, a neuropsychologist, as a witness and elicited testimony from him that called into question both the methodology underlying Dr. Cave's assessment of Linares's IQ and Dr. Cave's determination that Linares is mildly mentally retarded.

{16} At the end of the hearing, the court agreed that the State's concerns about the reliability of Dr. Cave's evaluation were legitimate and further concluded that the State should have an opportunity to perform an independent assessment of Linares's mental faculties. But growing concern about the delay that had plagued the proceedings prompted the court to grant defense counsel's request that Dr. Cave be permitted to attend the State's independent evaluation. The court made clear, however, that Dr. Cave could not participate or interfere with the State's evaluation in any way.

{17} At the end of March 2014, the State filed a motion to prohibit Dr. Cave from attending its independent evaluation. At the motion hearing, Dr. Kaufman insisted that the rules of professional conduct governing psychologists precluded him from conducting a neuropsychological examination where a third-party observer would be present. The district court was unpersuaded and affirmed its earlier ruling that Dr. Cave could attend and observe the independent evaluation. The court made clear that its decision to permit Dr. Cave to attend was motivated by the court's desire to avoid any further delay in the proceedings and to ensure that the issue of Linares's mental retardation was resolved as efficiently and as quickly as possible. The State stood firm and indicated that it would not conduct the evaluation if Dr. Cave would be present. The court also stood firm and entered an order quashing its previous order permitting the independent evaluation.

{18} A final hearing to decide whether or not Linares is mentally retarded was held on September 11, 2014. Dr. Cave was present and testified, consistent with her reports, that Linares's IQ is 68 and that she is mentally retarded as that term is defined in Section 31-9-1.6(E). The State called yet another psychologist, Dr. Edward Siegel, as a witness. Like Dr. Kaufman, Dr. Siegel attempted to discredit and undermine Dr. Cave's conclusions by highlighting the alleged inadequacies of her evaluation methods and by pointing out several inconsistencies throughout her reports. At the conclusion of the hearing, the court advised the parties that it would pronounce its ruling by written order.

{19} In an order dated October 2, 2014, the court found that Linares's IQ is 68 and concluded that Linares is mentally retarded as defined by Section 31-9-1.6(E). The court also found that there was not a substantial probability that Linares would become competent to proceed in a criminal or youthful-offender case within a reasonable time and that, because Linares was accused of first-degree murder,[7] she poses a likelihood of harm to others. Finally, the court ordered that Linares was to remain

[4]Kidnapping and robbery served as the alternative predicate felonies.

[5]The lesser charges included kidnapping, conspiracy to commit kidnapping, robbery, conspiracy to commit robbery, and tampering with evidence.

[6]Dr. Cave's May 13, 2013, report was not made part of the record proper.

[7]The district court's order states that Linares "is charged with First Degree Murder (Willful and Deliberate) or, in the alternative, Felony Murder . . . ." The amended superseding grand jury indictment did not charge Linares with first-degree willful and deliberate murder. As noted, the amended grand jury indictment included only two alternative counts of first-degree felony murder.

in the custody of the Lincoln County Detention Center pending commencement of civil commitment proceedings.

{20} The civil commitment proceedings were conducted in the Thirteenth Judicial District Court. In the petition initiating those proceedings filed by the DOH on January 27, 2015, the DOH averred that Linares is a danger to herself and others and recommended that the court commit Linares to the DOH for a period of habilitation. The Thirteenth Judicial District Court agreed with the DOH's findings and accepted the recommendation to civilly commit Linares to the DOH.

{21} On June 11, 2015, the State filed a direct appeal with this Court under NMSA 1978, Section 39-3-3(B) (1972), and *State v. Smallwood*, 2007-NMSC-005, 141 N.M. 178, 152 P.3d 821. Our jurisdiction over this matter is not contested.

II. DISCUSSION

{22} As previously noted, the State makes three arguments on appeal. We review each argument in turn.

A. The District Court's Decision to Permit Dr. Cave to Attend the State's Independent Evaluation Was Not an Abuse of Discretion and Did Not "Effectively Deny" the State an Opportunity for an Independent Evaluation

{23} The State first argues that the district court abused its discretion in permitting Dr. Cave to attend the State's independent evaluation. As the ensuing discussion makes clear, this argument requires us to review the district court's discretionary determination. *See State v. Garcia*, 2000-NMCA-014, ¶ 28, 128 N.M. 721, 998 P.2d 186 (reviewing the district court's denial of the state's request for a second competency evaluation for abuse of discretion); *State v. Lopez*, 1978-NMSC-060, ¶ 3, 91 N.M. 779, 581 P.2d 872 (observing that we review the district court's ruling as to a defendant's competency to stand trial for abuse of discretion).

{24} "Where an abuse of discretion is claimed by appellant, appellant bears a heavy burden, in view of the long-standing rule that the reviewing court will not overturn the action of the trial court absent a patent abuse of manifest error in the exercise of discretion." *Spingola v. Spingola*, 1978-NMSC-045, ¶ 19, 91 N.M. 737, 580 P.2d 958. "An abuse of discretion occurs when a ruling is against logic and is clearly untenable or not justified by reason." *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72 (internal quotation marks and citation omitted). We view the evidence in the light most favorable to the district court's decision, resolve all conflicts and indulge all permissible inferences to uphold that decision, and disregard all evidence and inferences to the contrary. *See Lopez*, 1978-NMSC-060, ¶¶ 6-7.

{25} "Section 31-9-1.6 articulates the procedure for determining whether a defendant is incompetent to stand trial as a result of mental retardation . . . ." *State v. Flores*, 2004-NMSC-021, ¶ 10, 135 N.M. 759, 93 P.3d 1264. Section 31-9-1.6(A) provides that "[u]pon motion of the defense requesting a ruling, the court shall hold a hearing to determine whether the defendant has mental retardation as defined in Subsection E of this section." Section 31-9-1.6(E) and our case law make clear that an "intelligence quotient of seventy or below establishes a presumption of mental retardation." *Flores*, 2004-NMSC-021, ¶ 10 (citing Section 31-9-1.6(E)).

{26} The varying provisions within Section 31-9-1.6 do not give the district court any specific procedural guidance as to how it is to resolve issues related to a defendant's mental condition. The statute is silent as to when the defendant may move for such an evaluation, whether the court might independently arrange for an evaluation during the proceedings if it develops concerns about a defendant's mental condition, who must pay for the evaluation, or the time frame that governs once it is determined that an evaluation of the defendant's mental condition is necessary. The procedural rules that govern these issues are found in NMSA 1978, Section 43-1-1 (1999) and Rule 5-602 NMRA. The State points to Rule 5-602(C) and case law construing this provision as support for its claim that permitting Dr. Cave to attend the independent evaluation was an abuse of discretion.

{27} Rule 5-602(C) provides that "[u]pon motion and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule." Looking to the plain text of Rule 5-602(C), the Court of Appeals has observed that it "provides an appropriate procedure for any request, be it initial or subsequent, for court-ordered mental evaluations of a criminal defendant." *Garcia*, 2000-NMCA-014, ¶ 26. The Court noted, however, that the rule neither permits nor prohibits additional evaluations. *Id.* Accordingly, the Court concluded that a district court's decision to order a second evaluation is entirely discretionary. *Id.* ¶ 28. We agree with this conclusion.

{28} The unexplained delay that plagued Linares's case as well as the specter of Linares's speedy-trial motion weighed heavily on the district court's assessment of the arguments presented at the March 14, 2014, hearing, the hearing at which the court determined that the State would be allowed an independent evaluation and that Dr. Cave could attend that evaluation. Defense counsel initially suggested, at that hearing, that the issue of Linares's mental retardation would be most expeditiously resolved if the State's independent evaluation was limited only to an assessment of Linares's IQ. The court disagreed, expressed concern that any half-measures would only give rise to the possibility for further delays, and concluded that it was most prudent to give the State a full opportunity to completely address and resolve the issue of Linares's retardation. Defense counsel then inquired whether Dr. Cave could attend the State's evaluation and suggested that this alternative would also do much to ensure that the proceedings were expedited. Counsel explained that, if Dr. Cave was satisfied with the procedures used during the independent evaluation, there would be no need for any further evaluations and no further delays. The court emphasized that its interest was to ensure a speedy resolution of the issue and asked the State whether it had any opinion on the matter. The State responded that it was not amenable to defense counsel's suggestion.

{29} In the end, the court permitted Dr. Cave to attend the evaluation because the efficient administration of justice demanded this result. The court made it abundantly clear that its decision to permit Dr. Cave to attend was predicated on the fact that there had been unnecessary delay and the attorneys had not been diligent in seeing the case brought to a timely resolution. The court informed the State that, if Dr. Kaufman felt he could not conduct the evaluation with Dr. Cave present, the court was inclined to quash the order granting the independent evaluation. The State declined to conduct the evaluation and the court quashed its previous order.

{30} It is apparent that the court was willing to permit Dr. Cave to attend the State's evaluation because Linares's speedy-trial claim loomed, there had been unnecessary delay, and allowing Dr. Cave to attend would put her in the best position to testify and comment about the tests conducted at

the independent evaluation and how those tests were scored. Putting Dr. Cave in this position ensured that, if there was any future disagreement between the parties about the merits of the State's testing methodology, those issues could be addressed and resolved quickly. We recognize that permitting observers to attend psychological evaluations is undesirable, but this does not outweigh the district court's reasonable concerns about delay.

{31} The district court permitted Dr. Cave to attend the State's independent evaluation so as to ensure the swift administration of justice and balance the competing interests of the parties. The court's decision was not, as the State contends, arbitrary, illogical, or without justification. The court's determination was an acceptable and understandable exercise of its discretionary authority in light of the unique difficulties presented in this case.

B. The Trial Court Did Not Abuse Its Discretion in Finding Linares Incompetent to Stand Trial

{32} The State next argues that the district court abused its discretion in concluding that Linares is incompetent to stand trial due to mental retardation. The State points out that Dr. Cave initially reported that Linares was competent to enter into a plea and proceed at sentencing and further notes that some portions of Dr. Cave's reports and testimony support the conclusion that Linares is competent to stand trial. The standard of review applied to this argument is the same as that applied to the arguments in the immediately preceding section of discussion.

{33} A defendant may be incompetent to stand trial due to mental retardation; however, mental retardation, in and of itself, is not conclusive evidence that a defendant is incompetent. *See* 21 Am. Jur. 2d *Criminal Law* § 86 (2016) (footnote omitted) ("Although mental retardation in and of itself is generally insufficient to give rise to a finding of incompetence to stand trial, a defendant may be incompetent based on retardation if the condition is so severe as to render him or her incapable of functioning in critical areas."); *see also* 27 Am. Jur. *Trials* 1 (Originally published in 1980) (footnotes omitted) ("[N]ot all forms of . . . mental retardation . . . make one incompetent to stand trial. In all cases, the pivotal question to be answered is to what degree does the . . . disability affect the defendant's memory and intellectual abilities, which are crucial to the construction and presentation of his defense.") (internal quotation marks omitted); ABA Standards for Criminal Justice 7-4.1(c) *Mental Incompetence to Stand Trial; Rules and Definitions* (Am. Bar Ass'n 1989) ("A finding of mental incompetence to stand trial may arise from . . . mental retardation or other developmental disability . . . so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.").

{34} A person is competent to stand trial when he or she has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[,]" "a rational as well as factual understanding of the proceedings against him[,]" and "the capacity to assist in his own defense and to comprehend the reasons for punishment."[8] *State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131 (internal quotation marks and citations omitted). Linares's mental retardation may factor into this analysis—and may factor heavily—but the mere fact that she is mentally retarded does not, in and of itself, resolve the question of her competency.

{35} The district court concluded that Linares's IQ is 68, that she has mental retardation, that the State did not overcome the presumption that an accused with an IQ below 70 has mental retardation, and, therefore, that Linares is "not competent to stand trial due to mental retardation." At first blush, the court appears to have done precisely what is impermissible: conclude that Linares is incompetent *solely because* she is mentally retarded. Careful review of the testimony proffered at Linares's September 11, 2014, hearing on mental retardation reveals that this is not so. The court also heard evidence bearing directly on the faculties, identified in *Rotherham*, a defendant must possess to be deemed competent and the extent to which Linares possessed these faculties.

{36} Dr. Cave repeatedly emphasized that she had concerns about Linares proceeding to trial in light of her low IQ and limited intellectual functioning. Dr. Cave reported that Linares performed very poorly on a portion of one test that focuses on "understanding case events." When asked what function a jury serves, Linares replied that the jury was there to "give answers for the other side." When asked what role the prosecutor played at trial, Linares replied that the prosecutor was there to tell her (Linares's) side of the story. Dr. Cave also expressed doubt that Linares would be able to assist defense counsel as Linares could not recall critical events associated with her case. Crucially, Dr. Cave stated that Linares exhibited no signs of malingering.

{37} Dr. Cave also testified that her determination that Linares is incompetent was in part premised on the fact that Linares was facing first-degree murder charges. Dr. Cave did not expound upon why the nature and severity of the charges against Linares factored into her competency assessment, but it seems apparent that Dr. Cave was concerned that a young woman of very limited intellectual functioning with a fundamentally flawed conception of basic legal concepts would not and could not understand the full possible consequences of a first-degree murder conviction nor why, if convicted, she might be required to spend the rest of her foreseeable life in prison.

{38} The evidence adduced at the mental retardation hearing supports the conclusion that Linares is incapable of consulting with her attorney with a reasonable degree of rational understanding, that she holds a fundamentally incoherent view of the nature of the proceedings that were to be brought against her, and that she would not comprehend the reasons for punishment if she were convicted. Accordingly, substantial evidence supports the district court's determination that Linares is incompetent.

[8]The Court of Appeals in *State v. Gutierrez*, 2015-NMCA-082, ¶ 9, 355 P.3d 93 and the uniform jury instructions district courts must issue when the evidence raises a reasonable doubt as to the defendant's competency, UJI 14-5104 NMRA, utilize a different formulation of the conditions necessary for a defendant to be deemed competent. It is unclear where this divergent standard originated or why it originated, and it is equally unclear whether this divergent standard (though worded differently) is substantively distinct from the standard articulated in *Rotherham*. It is clear, however, that the existence of this divergent standard gives rise to the possibility for needless confusion. For instance, the State cites the Court of Appeals formulation in *Gutierrez* while Linares cites to this Court's formulation in *Rotherham*. The parties do not, however, make any arguments for one or the other standard; they simply state the divergent standards as if both are correct. We adhere to the formulation articulated in *Rotherham* as that case remains controlling precedent.

The court did not abuse its discretion in so concluding.

{39} While it is true, as the State points out, that the record reflects that Dr. Cave initially concluded that Linares was competent and that there is evidence in the record that Linares did understand the nature of the charges against her, we cannot say that the court abused its discretion when it ultimately rejected the conclusion that Linares is competent. Our inquiry is limited only to whether substantial evidence supports the conclusion the court reached. *See State v. Nelson*, 1981-NMSC-100, ¶ 15, 96 N.M. 654, 634 P.2d 676 ("The evidence presented to the court was conflicting, and we cannot hold as a matter of law that the trial judge abused his discretion in finding that the defendant was competent.").

C. The DOH Did Conduct a Dangerousness Evaluation Prior to the Commencement of Civil Commitment Proceedings

{40} The State's final argument concerns the procedural requirements mandated by Section 31-9-1.6(B) and (C). The State contends that these provisions required the "trial court" to obtain a dangerousness evaluation of Linares from the DOH before civil commitment proceedings commenced. The State claims that this was not done. As a preliminary matter, we note that the State's argument that the "trial court" failed in some capacity presents us with a difficulty as this claim ignores the fact that while the competency proceedings were conducted in the Twelfth Judicial District Court the civil commitment proceedings were conducted in the Thirteenth Judicial District Court. The State's reference to a "trial court" does not adequately identify which of the two courts involved in the proceedings below allegedly erred. In any case, and as we explain in the discussion that follows, our review of the statutes and the proceedings below convince us that the State's argument fails.

{41} The State's argument requires us to construe Section 31-9-1.6(B) and (C) and to determine whether the proceedings in district court conformed to the requirements of these provisions. To the extent we engage in statutory construction, our review is de novo. *State v. Trujillo*, 2009-NMSC-012, ¶ 9, 146 N.M. 14, 206 P.3d 125.

{42} Section 31-9-1.6(B) provides as follows:

> If the court finds by a preponderance of the evidence that the defendant has mental retardation and that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, then no later than sixty days from notification to the secretary of health or his designee of the court's findings the [DOH] shall perform an evaluation to determine whether the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others.

Section 31-9-1.6(C) then provides that:

> If the [DOH] evaluation results in a finding that the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others, within sixty days of the [DOH's] evaluation the [DOH] shall commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978 if the defendant was charged with murder in the first degree . . . in the initial proceedings, and the court presiding over the initial proceedings shall enter a finding that the respondent presents a likelihood of harm to others.

We shall not attempt to fully explicate the procedural requirements of these provisions and focus instead only on the requirements germane to the State's argument. We agree with the State that these provisions require the DOH to perform a dangerousness evaluation before civil commitment proceedings are commenced. *See State v. Gutierrez*, 2015-NMCA-082, ¶ 47, 355 P.3d 93 ("Once a defendant is found to have mental retardation, the statute requires a [DOH] evaluation regarding whether the defendant poses a serious threat of harm to himself or others. If the [DOH] finds that the defendant is dangerous, then Section 43-1-1 civil commitment proceedings must be commenced."). We disagree, however, that this requirement was not met in this case.

{43} On October 2, 2014, the Twelfth Judicial District Court entered an order finding that Linares is incompetent due to mental retardation, that there was not a substantial probability that Linares would become competent within a reasonable period of time not to exceed nine months, and that Linares is a danger to others. In that same order, the court directed the DOH to commence civil commitment proceedings under Section 43-1-1, but the court made clear that until the DOH commenced those proceedings, Linares would remain in the custody of the Lincoln County Detention Center.

{44} On January 27, 2015, the DOH filed a petition with the Thirteenth Judicial District Court for the involuntary commitment of Linares under Section 43-1-1. The DOH's petition states that Linares's "developmental disability creates an imminent likelihood of serious harm to herself or others." The petition further indicates that Dr. John Gatling was prepared to testify on behalf of the DOH at the anticipated hearing on civil commitment.

{45} On February 12, 2015, the Thirteenth Judicial District Court held a hearing and determined that Linares "presents an imminent likelihood of serious harm to herself or others[,]" and that civil commitment was in Linares's best interests and constituted the "least drastic means." *See* § 43-1-13(G). Accordingly, the Thirteenth Judicial District Court committed Linares to the DOH under Section 43-1-13 for a period of habilitation not to exceed six months.

{46} The State's contention that the "trial court" erred in some respect by initiating civil commitment proceedings without first obtaining the requisite dangerousness evaluation from the DOH is unavailing. When the Thirteenth Judicial District Court committed Linares to the DOH on February 12, 2015, it did so only after the DOH evaluated Linares and concluded that she was a danger to herself and others and after the court presiding over the initial proceedings—the Twelfth Judicial District Court—found that Linares was a danger to others. To the extent Section 31-9-1.6(B) and (C) require dangerousness determinations, these proceedings complied with the mandates of these provisions. As the State presents no other challenge to the procedure or merits of the civil commitment proceedings, we dedicate no further scrutiny to the subject. *See In re Doe*, 1982-NMSC-099, ¶¶ 2-3, 98 N.M. 540, 650 P.2d 824 (observing that we do not address arguments not raised on appeal).

III. CONCLUSION

{47} For the foregoing reasons, we reject the State's arguments and affirm.

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

JUDITH K. NAKAMURA, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-015

No. S-1-SC-35214 (filed March 13, 2017)

KIMBERLY MONTAÑO,
Plaintiff-Respondent,
v.
ELDO FREZZA, M.D.,
Defendant-Petitioner,
and
LOVELACE INSURANCE COMPANY, a Domestic For-Profit Corporation,
Defendant.
and
No. S-1-SC-35297
KIMBERLY MONTAÑO,
Plaintiff-Petitioner,
v.
ELDO FREZZA, M.D.,
Defendant-Respondent,
and
LOVELACE INSURANCE COMPANY, a Domestic For-Profit Corporation,
Defendant.

ORIGINAL PROCEEDING ON CERTIORARI
C. SHANNON BACON, District Judge

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Opinion

Edward L. Chávez, Justice

{1} Can a New Mexico resident who has been injured by the negligence of a state-employed Texas surgeon name that surgeon as a defendant in a New Mexico lawsuit when Texas sovereign immunity laws would require that the lawsuit be dismissed? The answer to this question implicates principles of interstate comity, an issue that we have previously examined in *Sam v. Sam*, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761. *Sam* set forth guidelines for a court to assess when determining whether and to what extent it should recognize another state's sovereign immunity as a matter of comity. We initially presume that comity should be extended because cooperation and respect between states is important. However, this presumption is overcome and a New Mexico court need not fully extend comity if the sister state's law offends New Mexico public policy. In this case, we apply the Texas provision requiring that the case against the surgeon be dismissed because doing so does not contravene any strong countervailing New Mexico public policy.

I. BACKGROUND

{2} The background facts are taken from the complaint because when reviewing a motion to dismiss, we must "accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency." *N.M. Pub. Sch. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342.

{3} Kimberly Montaño, a New Mexico resident, sought bariatric surgery for her obesity in early 2004. At that time Eldo Frezza, M.D. was the only doctor from whom Montaño could receive that surgery and still be covered by her insurer. Montaño believed that she needed the procedure and that she could not afford it without medical insurance coverage.

{4} Dr. Frezza was employed as a bariatric surgeon and professor and served as chief of bariatric surgery at Texas Tech University Health Sciences Center (Texas Tech Hospital) in Lubbock, Texas from June 2003 to August 2008. Texas Tech Hospital is a governmental unit of the State of Texas. *See United States v. Tex. Tech Univ.*, 171 F.3d 279, 289 n.14 (5th Cir. 1999) ("The Eleventh Amendment cloaks Texas Tech University and Texas Tech University Health Sciences Center with sovereign immunity as state institutions."). The parties

do not dispute that Dr. Frezza was acting within the scope of his employment at Texas Tech Hospital when he provided care to Montaño.

{5} On February 3, 2004, Dr. Frezza performed laparoscopic gastric bypass surgery on Montaño at Texas Tech Hospital. Montaño began to suffer from abdominal pain at some unspecified time following the procedure. She returned to see Dr. Frezza several times. He told her that some discomfort was normal and assured her that everything was ok. Montaño was also admitted to various medical centers on multiple occasions for severe abdominal pain.

{6} Six years after the surgery was performed, Montaño was admitted to Covenant Health System in Lubbock, Texas, where Dr. David Syn performed an esophagogastroduodenoscopy to determine the cause of her pain. Dr. Syn determined that the 2004 surgery performed by Dr. Frezza had left a tangled network of sutures in Montaño's gastric pouch and down the jejunal limb, which Dr. Syn diagnosed as the cause of her constant severe abdominal pain. Dr. Syn then performed a revision of the gastric bypass procedure that had been performed by Dr. Frezza.

{7} In October 2011, Montaño filed a medical malpractice complaint in New Mexico naming Dr. Frezza as a defendant. Montaño alleged three separate causes of action against Dr. Frezza, claiming that he committed medical negligence and misled her regarding the risks of the procedure and the cause of her pain.

{8} Dr. Frezza filed a motion to dismiss Montaño's complaint under Rule 1-012(B)(6) NMRA for failure to state a claim upon which relief could be granted.[1] Dr. Frezza argued, in part, that the district court should (1) recognize and apply the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001 to -.109 (1985, as amended through 2015) (TTCA) under principles of comity, and (2) dismiss the suit because Texas law prohibits suits against individual governmental employees and requires courts to dismiss such suits unless the plaintiff substitutes the governmental employer of the employee within thirty days of the motion. TTCA § 101.106(f).

{9} The district court declined to extend comity and denied Dr. Frezza's motion to dismiss, finding that it would violate New Mexico public policy to apply Texas law to Montaño's claims. The Court of Appeals affirmed on this issue. *Montaño v. Frezza*, 2015-NMCA-069, ¶¶ 39, 41-42, 352 P.3d 666.

{10} Montaño and Dr. Frezza each petitioned this Court for a writ of certiorari. Dr. Frezza asked us to review whether Texas law should be applied to this case under either New Mexico choice of law rules or comity. In turn, Montaño asked that we review the scope of the Court of Appeals' application of New Mexico law. We granted both petitions.[2] *Montaño v. Frezza*, 2015-NMCERT-006.

II. COMITY

{11} This case implicates Texas' sovereign immunity, and therefore it might be resolved through principles of comity. Comity is a doctrine under which a sovereign state chooses to recognize and apply the law of another sovereign state. *Sam*, 2006-NMSC-022, ¶ 8. The United States Supreme Court has long referred to a broad presumption of comity between the states that reflects states' unique relationship within the federal system. *See Nevada v. Hall*, 440 U.S. 410, 425 (1979) ("In the past, this Court has presumed that the States intended to adopt policies of broad comity toward one another."); *see also Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1839) ("The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations.").

{12} We have held that comity should be extended unless doing so would undermine New Mexico's own public policy. *Sam*, 2006-NMSC-022, ¶ 21; *see also Hall*, 440 U.S. at 422 ("[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."). The law of the sister state must not only contravene New Mexico public policy, but be "sufficiently offensive" to that policy "to outweigh the principles of comity." *Sam*, 2006-NMSC-022, ¶ 19; *see also Leszinske v. Poole*, 1990-NMCA-088, ¶¶ 20-35, 110 N.M. 663, 798 P.2d 1049 (concluding that New Mexico's public policy of prohibiting a marriage between an uncle and a niece did not outweigh the principles of comity towards a foreign sovereign and the desirability of uniform recognition of marriages).

{13} Therefore, public policy lies at the heart of our comity analysis. We have previously recognized that "it is the particular domain of the legislature, as the voice of the people, to make public policy," and courts should interpret public policy "with the understanding that any misperception of the public mind [by courts] may be corrected shortly by the legislature." *Torres v. State*, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386. As a result, we approach the comity analysis with a healthy respect for our Legislature's role as "[t]he predominant voice behind the declaration of [New Mexico] public policy" and with careful attention to legislative enactments embodying our state's policy choices. *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 8, 140 N.M. 16, 139 P.3d 176.

{14} *Sam* is the seminal New Mexico case with respect to the comity issues presented here. To determine whether it was appropriate to extend comity and fully enforce another state's sovereign immunity provisions in that case, we examined four factors: "(1) whether the forum state would enjoy similar immunity under similar circumstances, (2) whether the state sued has or is likely to extend immunity to other states, (3) whether the forum state has a strong interest in litigating the case, and (4) whether extending immunity would prevent forum shopping." 2006-NMSC-022, ¶ 22 (citations omitted). These factors are guidelines that assist courts in answering the ultimate question of whether extending comity would violate New Mexico public policy. *See id.*

A. Standard of Review

{15} We apply a mixed standard of review to questions of comity. *Id.* ¶ 9. While a district court's decision to extend comity in a given case is subject to de novo review, we also analyze any fact-intensive aspects of the district court's comity analysis under a more deferential abuse of discretion standard. *Id.* ¶ 12. We agree with Dr. Frezza that the district court's refusal to apply Texas law under principles of comity in this case was not fact-intensive, but instead

[1]Dr. Frezza also filed a separate motion to dismiss, claiming that the district court lacked personal jurisdiction, an issue which is not before us.

[2]Because our comity analysis resolves this case, we do not address the other issues raised by the parties.

focused on comparing the public policies of Texas and New Mexico as expressed in each state's tort claims act. Because public policy questions "require[] us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," we review public policy determinations de novo. *State v. Attaway*, 1994-NMSC-011, ¶ 6, 117 N.M. 141, 870 P.2d 103 (internal quotation marks and citations omitted), *holding modified on other grounds by State v. Lopez*, 2005-NMSC-018, ¶¶ 17-18, 138 N.M. 9, 116 P.3d 80; *see also Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 6, 129 N.M. 698, 12 P.3d 960 (stating that "matters of public policy with broad precedential value" are properly subject to de novo review (internal quotation marks and citations omitted)). We now explain the factors set forth in *Sam* and apply them to this case.

B. The First *Sam* Factor: Comparing the Immunity Provisions of Each State

{16} Under the first *Sam* factor, we consider "whether the forum state would enjoy similar immunity under similar circumstances." 2006-NMSC-022, ¶ 22. We make this determination by examining whether "a similar action brought against a New Mexico entity or government employee would be barred" under the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015) (NMTCA). *Sam*, 2006-NMSC-022, ¶¶ 22-23; *see also Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003) (concluding that a state may rely on the contours of its own sovereign immunity from suit as a benchmark for its comity analysis). If we determine that a similar action would not be barred under the NMTCA, then we must look to the other three *Sam* factors and consider the public policy implications of extending comity in this case. Thus, the first *Sam* factor serves as a threshold inquiry because if the result would not be different under New Mexico law, then it would not offend New Mexico public policy to apply the other state's law, and there is no need to examine the other *Sam* factors.

{17} Further, the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, requires us to recognize the sovereign immunity of other states to the extent that sovereign immunity has been retained by this state under our law. *See Franchise Tax Bd. of Cal. v. Hyatt*, ___ U.S. ___, ___, 136 S. Ct. 1277, 1282-83 (2016). Otherwise we would be espousing an impermissible "special and discriminatory rule[]" reflecting a "policy of hostility to the public Acts of a sister State." *Id.* (internal quotation marks and citations omitted). Therefore we must, at a minimum, recognize any immunity retained by Texas under the TTCA that is not inconsistent with the immunity retained by New Mexico under the NMTCA.

{18} Dr. Frezza's motion to dismiss raised TTCA Section 101.106(f) as the only basis for dismissing Montaño's suit. TTCA Section 101.106(f) clarifies that a suit filed against a governmental employee "based on conduct within the general scope of that employee's employment . . . is considered to be against the employee in the employee's official capacity only." *See also* TTCA § 101.026 (stating that a governmental employee's individual immunity from a tort claim is not affected by the TTCA). Further, on the employee's motion, the suit against the employee must be dismissed within thirty days unless the plaintiff amends his or her pleadings to dismiss the employee and name the governmental unit as a substitute defendant. TTCA § 101.106(f).

{19} Montaño has not disputed that Dr. Frezza was acting within the scope of his employment when he provided care to her. Montaño did not amend her pleadings within thirty days of January 13, 2012, when Dr. Frezza filed his motion to dismiss. Because TTCA Section 101.106(f) applies to this case, Texas courts would have dismissed the suit against Dr. Frezza. *See Franka v. Velasquez*, 332 S.W.3d 367, 385 (Tex. 2011) (dismissing a suit under TTCA Section 101.106(f) that was brought against state-employed physicians, even regarding claims for which the governmental unit had not waived its immunity).

{20} Applying New Mexico law to this case would not require the dismissal of Dr. Frezza as a defendant. Under the NMTCA, if Dr. Frezza were employed by a New Mexico governmental employer, Montaño's suit against Dr. Frezza could proceed because individual governmental employees can be named as defendants. *See* § 41-4-2(A) (establishing that "governmental entities and public employees" can be held liable within the limitations set forth by the NMTCA); § 41-4-10 (stating that health care providers can be liable under the NMTCA for injuries caused by negligence in the provision of health care services). Because immunity under New Mexico law would not be similar under similar circumstances, we must examine the other *Sam* factors to determine whether the application of Texas law in this case would offend New Mexico public policy.

C. The Second *Sam* Factor: Gauging Past Cooperation Between the States

{21} Under the second *Sam* factor, we determine whether Texas "has or is likely to extend immunity to other states." 2006-NMSC-022, ¶ 22. This factor requires us to assess the degree of reciprocity and cooperation between Texas and other states, New Mexico in particular. *Cf. Hilton v. Guyot*, 159 U.S. 113, 210 (1895) (noting the lack of reciprocity indicated by France's refusal to recognize foreign judgments as a factor weighing against extending comity to a judgment from a French court). In the absence of any indication that Texas has refused to grant immunity to New Mexico or any other state under circumstances that are similar to this case, we assume that Texas would extend comity to New Mexico to encourage future cooperation and reciprocity between our states. *See Sam*, 2006-NMSC-022, ¶ 24.

{22} Several recent cases indicate that Texas has acted in a spirit of reciprocity and cooperation toward New Mexico and other states in similar circumstances. First, in *New Mexico State University v. Winfrey*, a Texas plaintiff brought a claim alleging negligent operation of a weather balloon against New Mexico State University and a university employee. 2011 WL 3557239, at *1 (Tex. App., Aug. 11, 2011).[3] The *Winfrey* court compared the jurisdiction and venue provisions of the NMTCA and the TTCA and determined that the provisions were similar, such that enforcement of the NMTCA venue provision through comity would not violate Texas public policy. *Id.* at *2. The court then applied the NMTCA provision and dismissed the suit for lack of jurisdiction. *Id.* at *3-4; *see also New Mexico v. Caudle*, 108 S.W.3d 319, 320-22 (Tex. App. 2002) (declining to determine the constitutionality of a New Mexico statute under principles of comity).

{23} Second, Texas appellate courts have previously extended comity and applied tort claims provisions from other jurisdictions that differed from the TTCA's provisions.

[3]Although *Winfrey* was a memorandum opinion, we treat *Winfrey* as precedential authority because memorandum opinions in civil cases issued after 2003 have precedential value in Texas. *See* Tex. R. App. Proc. 47.2(c), cmt. (2008).

For instance, in *Greenwell v. Davis*, the Texas Court of Appeals extended sovereign immunity to an Arkansas city by applying Arkansas law to a tort action arising from a car accident in the border city of Texarkana, Texas. 180 S.W.3d 287, 290, 296-99 (Tex. App. 2005). Arkansas law capped liability to the extent that the governmental unit was covered by liability insurance, while Texas law capped liability for personal injuries at $250,000. *Id.* at 291-92. If Arkansas law had applied in that case, the plaintiff's remedy would have been capped at $20,000, which was less than one-tenth of the cap under Texas law. *Id.* at 292. The court acknowledged this substantial difference in potential recoveries, but nonetheless held that it would not offend Texas public policy to apply the Arkansas immunity provision. *Id.* at 298; *see also Hawsey v. La. Dep't of Soc. Servs.*, 934 S.W.2d 723, 726-27 (Tex. App. 1996) (applying under comity a mandatory venue provision for suits against the sovereign under Louisiana law that differed from the Texas venue provision).

{24} Montaño does not cite a single Texas authority suggesting that Texas has been uncooperative with New Mexico or other states under circumstances similar to this case. Instead, she invites us to analyze this factor by considering only whether Texas would extend comity in situations where it would be contrary to Texas public policy to do so. We decline Montaño's invitation because the primary concern of the second *Sam* factor is the existing history of cooperation and mutuality, or lack thereof, between Texas and other states, which her proposed approach would not address. *See* 2006-NMSC-022, ¶ 19 ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." (internal quotation marks and citations omitted)); *see also K.D.F. v. Rex*, 878 S.W.2d 589, 593 (Tex. 1994) ("Comity is a doctrine grounded in cooperation and mutuality."). Because there is no indication that Texas has adopted an uncooperative attitude towards other states, we conclude that there is no public policy problem with extending comity to Texas under this factor.

D. The Third *Sam* Factor: Balancing the States' Interests

{25} Under the third *Sam* factor, we consider whether New Mexico has a strong interest in litigating this case under New Mexico law by comparing the policy interests of New Mexico and Texas. *See* 2006-NMSC-022, ¶¶ 22, 26. If New Mexico has a stronger interest in the case, then it may violate our public policy to defer to Texas' laws. However, if the interests of Texas are greater than New Mexico's, extending comity would not violate our public policy. The dissent contends that our analysis of the third *Sam* factor should be guided by the United States Supreme Court's decision to abandon a balancing approach. Dissenting op. ¶ 41. We decline to do so because the United States Supreme Court's abandonment of the balancing approach applies only to that Court's analysis of whether a state's choice-of-law decision complies with the Full Faith and Credit Clause. Our comity analysis is a broader inquiry meant to honor principles of interstate harmony and a "spirit of cooperation" between states. *Sam*, 2006-NMSC-022, ¶ 19 (internal quotation marks and citation omitted). Here the district court held that "the State of New Mexico has equal or greater interest in litigating this matter than does the State of Texas." We disagree.

{26} Texas has a strong public policy interest in applying uniform standards of liability and immunity to the conduct of state-employed physicians who provide medical care at state-run facilities. New Mexico courts have recognized an analogous public policy interest with respect to this state's governmental employees. In *Wittkowski v. State*, the Court of Appeals held that New Mexico public policy required the application of New Mexico law to a suit alleging various breaches of duty by officials of the New Mexico State Police and the New Mexico Department of Corrections that allegedly caused the shooting of a liquor store employee in Colorado. 1985-NMCA-066, ¶¶ 3-5, 8, 103 N.M. 526, 710 P.2d 93, *overruled on other grounds by Silva v. State*, 1987-NMSC-107, ¶ 15, 106 N.M. 472, 745 P.2d 380. The *Wittkowski* Court reasoned that because New Mexico had established the standard of care governing the conduct of police officers and correctional officials through the NMTCA and decisional law, New Mexico had a strong public policy interest in determining "the existence of duties and immunities on the part of New Mexico officials" sued for torts allegedly committed within the scope of their employment. 1985-NMCA-066, ¶ 8. Otherwise, uniformity in the law would be jeopardized because identical conduct by New Mexico officials could be deemed "actionable if the final act occurred in one state but not actionable if it occurred in another." *Id.* In *Torres*, we adopted the *Wittkowski* Court's description of New Mexico's strong public policy interest for applying New Mexico law to tort actions against governmental officials for alleged acts or omissions occurring in New Mexico. *Torres*, 1995-NMSC-025, ¶ 14. We held in *Torres* that New Mexico law applied to a suit alleging breaches of duty by the Albuquerque Police Department relating to police conduct in New Mexico that allegedly caused two shootings in California. *Id.* ¶¶ 7, 14.

{27} The Court of Appeals later examined similar policy concerns with respect to medical negligence claims. In *Zavala v. El Paso County Hospital District*, a young girl's family brought suit alleging medical malpractice and wrongful death by two Texas doctors and a Texas state-run hospital where she had been transferred. 2007-NMCA-149, ¶¶ 1-3, 143 N.M. 36, 172 P.3d 173. Although the Court of Appeals in *Zavala* did not need to apply a comity analysis, *id.* ¶ 40, the Court of Appeals examined the competing policy interests of New Mexico and Texas in adjudicating that case, *id.* ¶¶ 30-35, and determined that Texas had a "substantially stronger sovereignty interest" in resolving the case because the hospital was "not only located in Texas but it [was] also an entity of the government of the State of Texas," *id.* ¶ 34. An almost identical policy interest is at stake in this case because Montaño's lawsuit against Dr. Frezza relates to his conduct as a Texas state employee practicing medicine at a Texas state hospital.[4]

{28} Further, although our analysis under the first *Sam* factor revealed that this lawsuit could be brought under the NMTCA but not the TTCA, we are not convinced that the relevant distinctions between the laws indicate any material differences in public policy between the two states. Under both the NMTCA and the TTCA, a governmental employee will not bear the cost of defending or paying damages for a lawsuit arising from negligence committed by that employee

[4]We are unpersuaded by Montaño's attempt to distinguish the present case from *Zavala* by claiming that the plaintiffs in that case "made their own free decision to seek medical care in Texas" and that the circumstances of this case did not involve a similarly voluntary decision by Montaño to subject herself to surgery in Texas.

within the scope of his or her duties. Texas has chosen to forbid a lawsuit naming an individual employee, but it still holds the governmental employer liable for its employee's negligence. TTCA §§ 101.106(f), 101.021. New Mexico instead allows a governmental employee to be named in a lawsuit, but it requires the governmental employer to provide a defense and pay damages for the negligence of both current and former employees. *See* NMTCA § 41-4-4(B)(1), (C)-(D), (G)-(H).

{29} The two laws have a similar effect. Both provisions are intended to place on the governmental employer the responsibility for defending and ultimately paying for lawsuits arising from alleged negligence by governmental employees acting within the scope of their duties. TTCA Section 101.106(f) is essentially an indemnity provision because it requires the State of Texas to defend against and pay for any negligence claims against governmental employees acting within the general scope of their employment. The TTCA achieves this goal of indemnity by mandating that the governmental entity be named in the suit as the real party in interest. The TTCA does not contain any other indemnity provision. The NMTCA likewise expresses the same policy with respect to defense and indemnification of suits against employees acting within the scope of their duties, with the exception that the NMTCA allows an employee to be named as a nominal defendant despite the governmental unit being the real party in interest. *See Teco Invs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-055, ¶ 12, 125 N.M. 103, 957 P.2d 532 (concluding that when a party has agreed to indemnify another from the liability upon which an action is grounded, the indemnifying party is the real party in interest). Thus, although the laws achieve the same ends through divergent means, we cannot say that the purpose or effect of TTCA Section 101.106(f) differs materially from the policies requiring defense and indemnity of public employees in the NMTCA. *See Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 201 (N.Y. 1918) (Cardozo, J.) ("Our own scheme of legislation may be different. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.").

{30} Montaño contends that Texas law should not bar her claims against Dr. Frezza if TTCA Section 101.106(f) is really just an indemnity provision similar to provisions in the NMTCA because the State of Texas has already provided a defense for Dr. Frezza. She argues that "Texas could disregard the nominal distinction of having an employee be the named defendant" by not enforcing the TTCA provision. However, that decision ultimately rests with the State of Texas and not this Court. The TTCA represents how the Texas Legislature has chosen to protect that state's employees and preserve their immunity from suit. Importantly, we cannot say that this choice represents a policy inimical to the NMTCA's policies.

{31} Access to cross-border health care for individuals living in rural parts of New Mexico is an additional consideration that tempers New Mexico's interest in applying its law to this case. Numerous amici have informed this Court about the relative shortage of doctors, particularly specialists, in certain rural areas of New Mexico and the important role that state-operated health care facilities in Texas play in filling those gaps in care for many residents of the southern and eastern portions of our state. Could failing to extend comity to Texas in this case diminish the availability of important medical services to those New Mexico residents? The record before us here is inadequate, and the arguments are too speculative, for us to draw any definitive conclusions. However, we do not consider it overly speculative to conclude that extending comity to Texas in this case will positively serve New Mexico's public policy interests by encouraging the continuing cooperation of Texas and New Mexico in maintaining cross-border care networks. *See Tarango v. Pastrana*, 1980-NMCA-110, ¶ 13, 94 N.M. 727, 616 P.2d 440 (noting that the public interest in maintaining access to cross-border medical services is promoted by applying the law where such services were rendered); *see also Wright v. Yackley*, 459 F.2d 287, 290 (9th Cir. 1972) ("Medical services in particular should not be proscribed by the doctor's concerns as to where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it."); *Simmons v. State*, 670 P.2d 1372, 1385-86 (Mont. 1983) ("Principles of comity, as well as due process, require that we not subject Oregon to the possibility of lawsuits in every state served by its medical testing facilities. To do otherwise could conceivably jeopardize the availability of this service.").

{32} New Mexico's interest in applying New Mexico law to this case derives from our public policy of "providing compensation or access to the courts to residents of the state." *Sam*, 2006-NMSC-022, ¶ 26. For example, the purpose of the New Mexico Medical Malpractice Act, NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2015), is to "promote the health and welfare of the people of New Mexico," *see* § 41-5-2, by ensuring that individuals receive adequate compensation for injuries caused by medical negligence, *see* §§ 41-5-1 to -29. Additionally, the NMTCA is designed to circumvent "the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity," § 41-4-2(A), and seeks to hold accountable governmental employees, including physicians, for negligent acts that cause injury, § 41-4-10. These concerns are not negligible. However, as we clarified in *Sam*, the interest in providing redress to injured New Mexico citizens under our law is "tempered by the concept of comity" and the NMTCA's public policy goal of limiting the manner in which claims can be brought against the government. 2006-NMSC-022, ¶ 25; *see also* § 41-4-2(A) ("[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable *within the limitations* of the [NMTCA]." (emphasis added)).

{33} Further, the New Mexico public policy interests identified in *Sam* have limited application here. *Sam* involved alleged negligence by a New Mexico resident that caused an accident in New Mexico which harmed another New Mexico resident. 2006-NMSC-022, ¶ 2. Arizona's interest in the case was ancillary to the allegedly negligent conduct at the core of that case—the defendant happened to be an Arizona state employee driving an Arizona-owned vehicle in his official capacity at the time of the accident. *See id.*; *see also Ramsden v. Illinois*, 695 S.W.2d 457, 459 (Mo. 1985) (en banc) ("Illinois did not enter Missouri to conduct an activity, but merely cooperated in a national program to make psychology internships available. . . . The only interest Missouri has in this controversy is the fact that [the plaintiff] lived here when he filed suit."); *cf. Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 731 (N.Y. 1980) (explaining that the extension of comity was not warranted where the financial transactions at issue in that case were "centered" in the forum state). Accordingly, in *Sam* we determined that it was appropriate to recognize Arizona's immunity in a more limited fashion consistent with

the contours of New Mexico's own policy choices after weighing New Mexico's interests in providing redress to our citizens and regulating negligent conduct within our borders against Arizona's sole interest of protecting its sovereign immunity. *See* 2006-NMSC-022, ¶ 27. By contrast, this case, much like *Wittkowski*, *Torres*, and *Zavala*, turns upon a Texas state employee's acts or omissions that were alleged to have occurred entirely within Texas. Thus, Texas has a comparatively strong interest in determining the duties and immunities of that employee and applying a uniform standard of liability to identical conduct by Texas employees performing their duties in Texas. *See Torres*, 1995-NMSC-025, ¶ 14; *see also Wittkowski*, 1985-NMCA-066, ¶ 8; *In re Estate of Gilmore v. Gilmore*, 1997-NMCA-103, ¶ 19, 124 N.M. 119, 946 P.2d 1130 ("The determining factor [in *Torres*] was that the police officers involved were New Mexico officers acting in New Mexico, so that New Mexico had a particular interest in the standard of conduct imposed on the officers.").

{34} Our analysis of this factor does not reveal a strong public policy rationale for denying comity to Texas. The substantial public policy interests in applying Texas law to this case are not outweighed by New Mexico's interest in providing a forum for New Mexicans who seek redress for medical negligence.

E. The Fourth *Sam* Factor: Assessing the Risk of Forum Shopping

{35} Under the fourth *Sam* factor, we measure the degree to which extending immunity to Dr. Frezza in this case under the contours of Texas law would prevent forum shopping. *See* 2006-NMSC-022, ¶ 22. Montaño argues that our analysis of the fourth factor should only examine whether an individual plaintiff has engaged in improper forum shopping by attempting to bring suit in New Mexico despite having no basis for doing so. We pause to clarify that there is no indication that Montaño is engaged in the sort of improper forum shopping that she describes. However, our inquiry under this factor does not focus on whether a specific plaintiff is forum shopping, but is instead aimed at whether plaintiffs in general would be encouraged to bring claims in New Mexico that could not otherwise be brought in Texas. *See id.* ¶ 28; *see also Newberry v. Ga. Dep't of Indus. & Trade*, 336 S.E.2d 464, 465 (S.C. 1985) (concluding that failing to recognize Georgia's immunity to the extent prescribed under Georgia law would lead to forum shopping because "[a]lthough suit in tort could not be brought in Georgia, a plaintiff could circumvent Georgia's immunity by bringing suit in this State"). It is self-evident that this factor will always favor extending comity to some extent because uniform application of laws across the states will eliminate the incentive for plaintiffs to bring a cause of action in one state and not another. It is therefore only a question of degree. *See, e.g.*, *Sam*, 2006-NMSC-022, ¶ 28 (concluding that applying a statute of limitations consistent with the NMTCA rather than Arizona law would "prevent forum shopping to some degree" but "not completely eliminate [it]").

{36} With these considerations in mind, we conclude that failing to extend any immunity to Texas in this case could encourage forum shopping by allowing plaintiffs to name Texas state employees in lawsuits in New Mexico when plaintiffs could not do so in Texas. Thus, extending comity to Texas by dismissing Dr. Frezza from this suit under the TTCA would prevent forum shopping to some degree by promoting the uniform application of Texas' waiver of sovereign immunity.

III. CONCLUSION

{37} We have not identified a strong public policy weighing against the presumption of comity in this case. Accordingly, we extend comity to Texas and apply TTCA Section 101.106(f). We reverse the Court of Appeals and the district court. The district court shall dismiss Montaño's suit without prejudice because Montaño failed to amend her pleadings and name the proper party within thirty days of Dr. Frezza's motion to dismiss.

{38} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
JUDITH K. NAKAMURA, Justice
LINDA M. VANZI, Judge
Sitting by designation
BARBARA J. VIGIL, Justice, concurring in part and dissenting in part

VIGIL, Justice (concurring in part and dissenting in part).

{39} I agree with the majority's analysis of three out of the four factors of *Sam*, 2006-NMSC-022, ¶ 22. I write separately to address the third factor, "whether the *forum state* has a strong interest in litigating the case." *Id.* (emphasis added). New Mexico has a strong interest in enabling its residents to recover for medical negligence, particularly those who have limited options. Because my analysis of the third factor leads me to a different result for this case, I respectfully dissent.

I. COMITY AND THE THIRD FACTOR OF *SAM*

{40} The majority's analysis of the interests of Texas under the third factor of *Sam* departs from the central question of whether extending comity would undermine *New Mexico* policy. *Id.* ¶ 21 ("Only if doing so would undermine New Mexico's own public policy will comity not be extended."). The third factor requires us to analyze the interests of New Mexico, not the state to be extended comity. *See id.* ¶ 22.

{41} I cannot join the majority's expansion of the third factor into a balancing test between the interests of New Mexico and its sister state, Texas. *See* maj. op. ¶ 25 ("[I]f the interests of Texas are greater than New Mexico's, extending comity would not violate our public policy."). Though the United States Supreme Court historically used a balancing-of-interests approach to resolve similar conflicts of law, it has since abandoned this approach. *See Hyatt*, 538 U.S. at 496 ("[W]e abandoned the balancing-of-interests approach . . . . We thus have held that a State need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." (internal quotation marks and citations omitted)). The majority returns to the balancing approach by weighing the interests of Texas against the interests of New Mexico and goes so far as to suggest that failing to extend comity will tread upon the sovereignty of Texas. *See Hyatt*, ___ U.S. at ___, 136 S. Ct. at 1283 (quoting *Hyatt*, 538 U.S. at 496) ("[W]e need not, and do not, intend to return to a complex 'balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause.' "). *See* maj. op. ¶ 27. The third factor does not require us to determine whether the interests of Texas are greater than New Mexico's, maj. op. ¶ 25, but rather whether extending comity would serve the interests of New Mexico. *Sam*, 2006-NMSC-022, ¶¶ 21, 22.

{42} The majority's analysis of the third factor begins with the conclusion that Texas has a strong interest in applying uniform standards of liability and immunity to the conduct of state employees. Maj. op. ¶ 26. While I agree with the majority that Texas could claim an interest in litigating the case, comity requires no such inquiry. *See Hyatt*, 538 U.S. at

495-96 (abandoning the balancing approach). Moreover, the majority's reliance on *Wittkowski* and *Torres* is misplaced. *See Wittkowski*, 1985-NMCA-066, ¶ 8 (holding that "[p]ublic policy dictates that [the forum state] determine the existence of duties and immunities on the part of [the forum state's] officials"); *see also Torres*, 1995-NMSC-025, ¶ 14 (holding that New Mexico law should govern the duties of New Mexico law enforcement personnel). Neither of those cases addresses the central question of the comity analysis: whether applying the sister state's law would undermine New Mexico policy. *Sam*, 2006-NMSC-022, ¶ 21. For the purposes of deciding whether to extend comity, the strongest source of New Mexico policy is our legislation itself. *See Hyatt*, 538 U.S. at 499 ("The Nevada Supreme Court sensitively applied principles of comity . . . relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.").

{43} Our analysis of the third factor cannot begin with the conclusion that Texas sovereignty is at stake. *See* maj. op. ¶¶ 26-27. *Cf. Zavala*, 2007-NMCA-149, ¶ 34 (describing Texas's sovereignty interest as a basis for withholding personal jurisdiction over a Texas hospital). Suits against sister states "necessarily implicate[] the power and authority of both sovereigns." *Hyatt*, 538 U.S. at 498 (internal quotation marks and citation omitted); *see also Hall*, 440 U.S. at 416, 426-27 (holding that precluding a forum state from applying its own laws "would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union").

{44} In sum, the majority's balancing approach departs from the central question in *Sam*: whether extending comity would undermine New Mexico's interests. 2006-NMSC-022, ¶ 21. Such an approach erodes the sovereignty of New Mexico and the authority of the New Mexico Legislature. *See Hall*, 440 U.S. at 426-27; *Hyatt*, 538 U.S. at 494-95. The proper focus of the third factor is New Mexico's interests. *Sam*, 2006-NMSC-022, ¶¶ 21-22.

II. NEW MEXICO'S INTERESTS IN LITIGATING THE CASE

{45} To determine whether New Mexico has a strong interest in litigating the case, we must begin with the presumption that extending comity will not violate New Mexico public policy. *Id.* ¶ 16; *see, e.g.*, *Leszinske*, 1990-NMCA-088, ¶ 35 (holding, despite New Mexico's public policy against incest, that it was not error for the district court to recognize a marriage between an uncle and his niece). Then, we must examine the sister state's law to see whether it "offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity." *Sam*, 2006-NMSC-022, ¶ 21 (internal quotation marks and citation omitted). The best estimation of New Mexico's interests in litigating the case are the policies identified by the New Mexico Legislature. *See Hartford Ins. Co.*, 2006-NMSC-033, ¶ 8 (describing public policy as the "particular domain of the [L]egislature" (internal quotation marks and citation omitted)). This requires a comparison of the relevant provisions of the TTCA with the policies embodied in the NMTCA. *See Estate of Gilmore*, 1997-NMCA-103, ¶ 30 ("[I]n assessing a state's interest in the application of the law, we cannot assume that the state is result-oriented. We presume that a state is not interested in the most favorable result for its residents, but only that each state wants the 'just' result for its residents, with justness measured by the laws of that state.").

{46} The NMTCA and the TTCA are both limited waivers of sovereign immunity. *See* TTCA § 101.025(a) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter."); *see also* § 41-4-2(A) ("[G]overnmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act."). Both statutes balance the competing policy goals of limiting government liability and compensating those who are injured by government employees. *Frezza*, 2015-NMCA-069, ¶¶ 33-34. In light of these shared objectives, not every aspect of the TTCA will be incompatible with the NMTCA. However, when "[a] comparison of the NMTCA and the TTCA reveals that the balance struck by the New Mexico Legislature is substantively different from that struck by Texas legislators," *Frezza*, 2015-NMCA-069, ¶ 34, New Mexico has a strong interest in litigating the case. *See Hyatt*, ___ U.S. at ___, 136 S. Ct. at 1281 (stating that a state is not required "to substitute for its own statute . . . the statute of another State reflecting a conflicting and opposed policy." (internal quotation marks and citation omitted)).

{47} New Mexico has a strong interest in applying its own waiver of sovereign immunity, which is significantly broader than that of Texas. *See* § 41-4-10; *see also* TTCA § 101.021. In *Hyatt*, the United States Supreme Court affirmed the Nevada Supreme Court's decision to apply Nevada's broader waiver of immunity to an intentional tort claim against California. 538 U.S. at 494-95; *see id.* at 494 (holding that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it [was] claimed, [had] injured one of its citizens within its borders"). The New Mexico Legislature has chosen to waive immunity for the negligence of public employees acting within the scope of their duties of providing health services. Section 41-4-10. In contrast, in the medical malpractice context, the Texas waiver applies only in cases where the harm was caused by the misuse of tangible personal property. *See* TTCA § 101.021(2); *see also Tex. Tech. Univ. Health Sci. Ctr. v. Jackson*, 354 S.W.3d 879, 884 (Tex. App. 2011) ("A plaintiff must show that the tangible personal property was the instrumentality of harm." (citations omitted)). The Texas waiver does not extend to claims alleging lack of informed consent, *Kamel v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 333 S.W.3d 676, 686 (Tex. App. 2010), or errors in medical judgment. *See Miers v. Tex. A & M Univ. Sys. Health Sci. Ctr.*, 311 S.W.3d 577, 579-80 (Tex. App. 2009) (holding that a dentist's negligent decision to pull teeth did not fall under the waiver because he correctly used the instruments to remove them). Applying the TTCA's more limited waiver would undermine New Mexico's strong policy of waiving immunity for the negligence of public employees. *See Sam*, 2006-NMSC-022, ¶ 21.

{48} Likewise, New Mexico has a strong interest in applying its own notice provisions, which are more lenient than those of Texas. *See* § 41-4-16(A); *see also* TTCA § 101.101(a), (c). Texas requires the plaintiff to give notice of the claim no later than six months after the date of the incident giving rise to the claim. *See* TTCA § 101.101(a). While the NMTCA requires the plaintiff to give notice of the suit within ninety days and is technically stricter on its face, *see* § 41-4-16(A), the statutory period is tolled until the plaintiff knows or with reasonable diligence should have known of the injury and its cause. *Maestas v. Zager*, 2007-NMSC-003, ¶ 22, 141 N.M. 154, 152 P.3d 141. By contrast, the "discovery rule" does not apply to the TTCA. *See Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 842-43, 847-48 (Tex. App. 2011). Texas's

notice requirement has a harsher effect than New Mexico's. *See id.* The harsher notice requirement is sufficiently offensive to New Mexico public policy to overcome the presumption of comity. *See Sam*, 2006-NMSC-022, ¶ 27 (declining to recognize Arizona's harsher statute of limitations).

{49} I agree with the majority that there is no material difference between the TTCA's prohibition of suits against individual employees and the NMTCA, which permits suits against an individual but requires the government to defend and pay damages for the individual's negligence. *Compare* TTCA § 101.026 ("To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter."), *and* TTCA § 101.102(b) ("The pleadings of the suit must name as defendant the governmental unit against which liability is to be established."), *with* Section 41-4-4(B)(1) (requiring the governmental entity to provide a defense, including costs and attorneys fees, for any tort committed by an employee acting within the scope of duty). I would therefore recognize these provisions in the spirit of comity. However, I would decline to extend comity to the harsh procedural mechanism at issue in this case. *See* TTCA § 101.106(f). TTCA Section 101.106(f) dictates mandatory dismissal, on the employee's motion, of a suit filed against the individual employee unless the plaintiff amends the pleading within thirty days. There is no similar provision in the NMTCA, and applying the Texas provision would frustrate New Mexico's strong interest in providing compensation and access to the courts to the residents of our state. *See Sam*, 2006-NMSC-022, ¶ 26. This concern is heightened given the lack of options Ms. Montaño had to pursue surgery in New Mexico. Applying TTCA § 101.106(f) undermines New Mexico's policy in this case.

{50} I would decline to extend comity to those provisions of the TTCA which undermine New Mexico policy. *See Sam*, 2006-NMSC-022, ¶ 21. Instead, I would recognize Texas law to the extent consistent with the NMTCA. *Cf. Hyatt*, ___ U.S. at ___, 136 S. Ct. at 1282-83 (holding that Nevada adopted an unconstitutional policy of hostility toward the sister state when it awarded damages inconsistent with the general principles of Nevada immunity law).

III. OTHER POLICY CONSIDERATIONS

{51} I agree with the majority that maintaining access to Texas medical facilities is of utmost importance to New Mexicans who, like Ms. Montaño, depend on Texas providers for medical treatment. Maj. op. ¶ 31. However, without evidence of the potential impact that declining to extend comity would have on New Mexicans' access to care, I cannot conclude that it would be contrary to public policy to apply the very laws enacted to protect New Mexicans who are victims of medical negligence.

{52} Other courts have distinguished the interest in ensuring redress for medical malpractice from the interest in maintaining the availability of medical services. *See Simmons*, 670 P.2d at 1383-84. In *Simmons*, the Supreme Court of Montana declined to exercise jurisdiction over an Oregon state medical laboratory as a matter of comity. *Id.* at 1386. As in this case, the state laboratory was performing a regional medical service within its own boundaries and the two states had a shared interest in medical testing technology. *Id.* at 1385-86. The Court held that declining to extend comity could conceivably jeopardize the availability of interstate medical testing. *Id.* However, the Court declined to extend its holding to cases involving medical malpractice, recognizing that "[j]ustice undeniably would be defeated if the refusal to assert jurisdiction would insulate Oregon from any malpractice claims." *Id.* at 1384. By this reasoning, the interest in access to care does not overcome New Mexico's interests in litigating the case.

IV. CONCLUSION

{53} Comity does not demand that the forum state abandon its important interests in favor of the sister state's. *See Sam*, 2006-NMSC-022, ¶ 16 ("[I]n order to refuse to honor the laws of another state, a forum state only needs to declare that the other state's law would violate its own legitimate public policy."). Rather, it encourages the forum state to accommodate any competing interests without abdicating its own. The majority's deference to the interests of Texas shifts the comity analysis away from the overarching issue of whether extending comity would undermine New Mexico public policy. *Id.* ¶ 21. When extending comity would undermine the policy embodied in the NMTCA, *see id.* ¶ 21, New Mexico has a strong interest in litigating the case.

{54} For these reasons, I respectfully dissent in part.

BARBARA J. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-016

No. S-1-SC-34775 (filed March 30, 2017)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
TREVOR MERHEGE,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
DREW D. TATUM, District Judge

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for Petitioner

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for Respondent

Opinion

Edward L. Chávez, Justice

{1} At approximately 3:40 a.m., with a police officer in pursuit, Defendant Trevor Merhege ran through the front yard of a private residence that was enclosed by a three foot high wall. He became entangled on a chain link fence as he attempted to jump over an adjoining fence into the back yard of the residence. He was convicted of criminal trespass. Because the property was not posted, the State was required to prove that Merhege knew that he was not permitted to enter the property. Merhege contended that there was insufficient evidence to support this knowledge requirement. The Court of Appeals agreed and reversed his conviction, concluding that because the property's driveway was not posted with a "no trespassing" sign and the property owner gave no other explicit warnings not to enter, Merhege and the public at large were presumptively granted permission to enter the property. *State v. Merhege*, 2016-NMCA-059, ¶¶ 12, 14-15, 376 P.3d 867. We reverse the Court of Appeals and reinstate Merhege's conviction for criminal trespass because the wall surrounding the property's front yard, the purpose of his entry, and the time of his entry provided sufficient circumstantial evidence for the jury to find that Merhege knew that he did not have consent to enter the property.

BACKGROUND

{2} On September 3, 2011, Portales Police Officer Adam Lem was patrolling in his vehicle at around 3:40 a.m. when he saw two individuals out walking. Officer Lem wished to speak with them, so he stepped out of his vehicle and "hollered at them." According to Officer Lem, the individuals looked back at him and then took off running. He pursued. They cut across the front yard of a residence at 901 South Main Street. One of the individuals then climbed onto a chain link fence and boosted himself over a wooden fence dividing the front yard from the back yard. Merhege, who was the second person, attempted the same maneuver but caught his shoelace on the chain link fence.

{3} The residence at 901 South Main is located on the corner of Main Street and East 9th Street. Officer Lem testified that a three foot high brick wall ran along the border of the property on both streets and enclosed the front yard of the residence.[1] Officer Lem also noted that there was an area where the public could enter the front yard and access a sidewalk that went up to the front door. There were no signs or postings at the property that would indicate that trespassing was forbidden or that members of the public were not permitted to enter the property.

{4} The other side of the front yard of 901 South Main was bordered by a chain link fence which met with a slightly higher wooden fence that divided the front yard from the back yard. Officer Lem testified that the chain link fence appeared to be a dividing fence between 901 South Main and a neighboring property and did not enclose anything. The chain link fence did not go all the way to the road or otherwise obstruct access from the street to the property. The area between the two fences was where Officer Lem arrested Merhege for resisting, evading, or obstructing an officer, a charge that was later amended to criminal trespass.

{5} Gary Watkins lived at 901 South Main on the night of the incident. He was not aware that Merhege had entered his property until the police informed him around three weeks later. Watkins had never met Merhege.

{6} The State chose to pursue a criminal trespass charge against Merhege, and a jury convicted him. The Court of Appeals reversed his conviction, reasoning that the evidence presented at trial was insufficient to establish the elements of criminal trespass. *Merhege*, 2016-NMCA-059, ¶¶ 9-16. The Court of Appeals stated that "[t]he determinative question is whether we can presume, as a legal matter, that the general public, including Defendant, had permission to enter upon Watkins' unposted land or whether such entry constitutes a violation of [the criminal trespass statute]." *Id.* ¶ 11. The Court of Appeals then opined that "[t]he fact that the statute specifically refers to the posting of the property at all vehicular access entry ways as being sufficient evidence that the public does not have consent to enter suggests that the lack of such posting reveals that the public *does* have consent to enter." *Id.* ¶ 15. We granted certiorari to resolve only the narrow issue of "[w]hether, as a matter of law, the general public is presumptively granted permission to enter upon unposted lands." *State v. Merhege*, 2016-NMCERT-___ (June 1, 2016). We conclude that as a matter of law the general public is not presumptively granted permission to enter upon unposted lands, but instead permission to enter unposted lands depends on the circumstances of the individual's entry.

[1]Although the actual size of the wall was disputed before the Court of Appeals, Merhege concedes, for purposes of this appeal, that the wall was three feet high.

DISCUSSION

{7} New Mexico law provides different standards for criminal trespass on private land depending on whether the land has been properly posted with "no trespassing" signs. To satisfy New Mexico's posting requirements, a person lawfully in possession of private property must post conspicuous notices (1) parallel to and along the exterior boundaries of the property; (2) at each access point, including roadways; and (3) every 500 feet along the exterior boundaries of the property if it is not fenced. NMSA 1978, § 30-14-6(A) (1979); *see also* § 30-14-6(B) (defining requirements for posted notices). If private land has been properly posted, a person commits criminal trespass when he or she enters or remains upon the property without written permission from an owner or person in control of the property. NMSA 1978, § 30-14-1(A) (1995); *see also Holcomb v. Rodriguez*, 2016-NMCA-075, ¶ 23, 387 P.3d 286 (holding "that Section 30-14-6 sets out a standard by which a property may be deemed 'posted' " for purposes of determining whether an intruder can be prosecuted under Section 30-14-1(A)). If private land is not properly posted under the statutory requirements (unposted land), as in this case, then a person can only commit criminal trespass by entering or remaining upon the property "knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof." Section 30-14-1(B). With respect to unposted land, New Mexico law also specifies that "[n]otice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts, by the posting of the property at all vehicular access entry ways." *Id.* Thus, we must determine whether posting at vehicular access entry ways is the only manner of providing constructive notice under the statute.

{8} Current New Mexico criminal trespass standards evolved in a piecemeal fashion over several decades. However, it has been a longstanding requirement that a person know that consent to enter or remain has been denied or withdrawn for that person to be guilty of criminal trespass. *See* 1963 N.M. Laws, ch. 303, § 14-1 (setting forth the mens rea element). The knowledge requirement, and the statutory crime of criminal trespass more generally, predates the Property Posting Act, New Mexico's first posting statute. *See* 1969 N.M. Laws, ch. 195 (enacting Property Posting Act). In 1979, posting requirements were incorporated into the criminal trespass statute and the Property Posting Act ceased to exist as a separate provision. 1979 N.M. Laws, ch. 186, §§ 3-4. Early versions of New Mexico's criminal trespass statute also required that a defendant enter the property with "malicious intent," a requirement that was removed in 1981, 1981 N.M. Laws, ch. 34, § 1, thereby expanding the conduct criminalized under the statute to include non-malicious entries. The requirement that an intruder on private posted land possess written permission was later added to the criminal trespass statute in 1991. 1991 N.M. Laws, ch. 58, § 1. The second sentence of Section 30-14-1(B), which asserts that posting at all vehicular access entry ways is sufficient notice of no consent to enter unposted land, was added to the provision in 1995. 1995 N.M. Laws, ch. 164, § 1. The intent of this added language was likely to provide some definitive method for possessors of smaller plots of land to "post" their property and warn the public against intrusions where the formalities of posting, such as posting every 500 feet along the boundary of the property, are impracticable. However, there is no indication that the Legislature intended that posting at all vehicular access entry ways be the *exclusive* method of providing notice to members of the general public that they are not permitted to enter the unposted property. *See Holcomb*, 2016-NMCA-075, ¶ 21 (interpreting the statute's posting requirements "to indicate the Legislature's intent to establish a standard by which the public may be placed on direct notice that unauthorized entry upon posted land is disallowed and will be subjected to legal consequences, *not an intent to exempt from liability all unauthorized entries onto private property that has not been posted.*" (emphasis added)).

{9} Because we cannot ascertain any legislative intent to make posting at vehicular access entry ways the sole manner of giving notice that consent to enter unposted property has been denied for purposes of criminal trespass, we reject the Court of Appeals' statement below that "[t]he fact that the statute specifically refers to the posting of the property at all vehicular access entry ways as being sufficient evidence that the public does not have consent to enter suggests that the lack of such posting reveals that the public *does* have consent to enter." *Merhege*, 2016-NMCA-059, ¶ 15. No such presumption applies under Section 30-14-1(B).

{10} There is no evidence that Watkins' property was posted in any manner, and Watkins had never met or spoken with Merhege. Therefore, our remaining inquiry is whether there was sufficient circumstantial evidence for the jury to conclude that Merhege knew that he was not permitted to enter 901 South Main at the moment that he entered the property. New Mexico's Uniform Jury Instructions provide that when land is unposted, the knowledge element of criminal trespass requires a finding beyond a reasonable doubt that "[t]he defendant knew or should have known that permission to enter [the land] . . . had been [denied]." UJI 14-1402 NMRA.[2] There are two different ways to prove the knowledge element of criminal trespass of unposted land. First, under the statute a defendant's knowledge of no permission to enter land is presumed when vehicle access entry ways are posted. Section 30-14-1(B). Second, the knowledge element may also be established through a sufficient quantity of direct or circumstantial evidence. *State v. Duran*, 1998-NMCA-153, ¶ 34, 126 N.M. 60, 966 P.2d 768, *abrogated on other grounds by State v. Laguna*, 1999-NMCA-152, ¶ 23, 128 N.M. 345, 992 P.2d 896. For instance, in *Duran* there was sufficient evidence to sustain a criminal trespass conviction based on the defendant's repeated intrusions onto the property and flights from the property when police arrived, coupled with a warning by the property's occupant to " 'stop bothering her.' " 1998-NMCA-153, ¶ 34; *see also State v. McCormack*, 1984-NMCA-042, ¶¶ 6-8, 11-15, 101 N.M. 349, 682 P.2d 742 (sustaining a criminal trespass conviction against a journalist because the area was posted with signs, warnings were given that there would be no exceptions, and trespassers received verbal warnings as they crossed a barricade, despite the journalist's belief that the warnings did not apply to members of the press).

[2]This case does not provide us with an opportunity to examine the propriety of the model instruction because Merhege does not challenge the "knew or should have known" language in the model jury instruction, nor does he argue that the statutory mens rea of "knowing" requires actual knowledge. *Cf. Tanberg v. Sholtis*, 401 F.3d 1151, 1158 n.3 (10th Cir. 2005) (interpreting Section 30-14-1(B) to require "actual knowledge").

{11} In a substantial evidence review, our analysis is limited to "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. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. In so doing, we accord deference to the jury's verdict by "view[ing] the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *Id.* Further, we do not reweigh the evidence, substitute our judgment for the jury's judgment, or otherwise interfere with other functions that quintessentially belong to the jury. *State v. Trujillo*, 2002-NMSC-005, ¶ 28, 131 N.M. 709, 42 P.3d 814. Applying this deferential standard of review, we conclude that the totality of the evidence presented to the jury was sufficient to support the jury's conclusion that Merhege knew he was not permitted to enter 901 South Main.

{12} First, the fencing around 901 South Main provided circumstantial evidence that unauthorized entries on the property were not permitted. The jury heard testimony that a three foot high brick wall enclosed the front of the property. The jurors could have reasonably determined that the wall communicated to members of the public that they did not have permission to enter the front yard of 901 South Main by any route other than the path to the front door. Indeed, other New Mexico statutes relating to criminal trespass assume that fencing alone provides sufficient notice to the public that there is no consent to enter land. *See* § 30-14-6(A) (imposing requirement to post property every 500 feet along its border only when the property is not fenced along its border); NMSA 1978, § 30-14-1.1(C) (1983) (criminalizing any entry upon land by a vehicle off of established roadways or apparent ways of access "when such lands are fenced in any manner"); *see also State v. Foulenfont*, 1995-NMCA-028, ¶ 12, 119 N.M. 788, 895 P.2d 1329 ("Where the unauthorized entry merely consists of climbing over a fence, businesses and other open property are protected under our criminal trespass statute.").

{13} Citing to various out-of-state authorities, Merhege urges us to hold that the three foot high wall in this case was insufficient as a matter of law to provide notice of no consent to enter because, according to Merhege, it was not obviously designed to exclude intruders. We decline to adopt this approach because, unlike the statutes from other jurisdictions cited by Merhege, New Mexico's Legislature has not limited the notice function of fencing to those fences which are manifestly designed to exclude intruders, and instead prescribes a more flexible test in which jurors are free to draw their own conclusions with respect to whether a defendant knew that she or he had no consent to enter land based on the notice provided by the fence in question. Section 30-14-1(B). This flexible approach to the knowledge element allows the definition of criminal trespass to comport with the community norms that prevail among jurors.

{14} Second, the jury could have also reasonably considered the time of night at which Merhege entered 901 South Main and his purpose in entering the property in determining whether he knew that he did not have permission to enter at that time and for that purpose. Merhege entered the yard at around 3:40 a.m. for the purpose of evading a pursuer. The jurors could have reasonably concluded that Merhege knew he did not have permission to enter the property in this manner because his entry did not comport with social norms in the community. *See Florida v. Jardines*, __ U.S. __, __, 133 S. Ct. 1409, 1415-16 (2013) (discussing how "background social norms" determine whether a would-be trespasser enters land with an implied license to conduct certain activities in a certain manner, such as door-to-door sales). Likewise, the jury's finding that Merhege knew that he did not have permission to enter 901 South Main was supported by the fact that the intrusion here occurred in the dead of the night. *See State v. Cada*, 923 P.2d 469, 478 (Idaho Ct. App. 1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm.").

CONCLUSION

{15} Because there was substantial evidence to support Merhege's conviction for criminal trespass, we reverse the Court of Appeals and order the district court to reinstate his conviction.

{16} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PETRA JIMENEZ MAES, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice

Certiorari Denied, March 9, 2017, No. S-1-SC-36300

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-040

No. 34,277 (filed February 14, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTINE IMPERIAL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRETT R. LOVELESS, District Judge

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Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

James J. Wechsler, Judge

{1} Defendant Christine Imperial was convicted of three counts of forgery, contrary to NMSA 1978, Section 30-16-10 (2006), and three counts of identity theft, contrary to NMSA 1978, Section 30-16-24.1 (2009). On appeal, Defendant raises two primary claims: (1) that the district court erred in admitting certain testimony and evidence related to the transactions at issue in the case and (2) that the district court erred in admitting surveillance videos from Wal-Mart's security system. Because we conclude that the district court's rulings were not erroneous, we affirm.

BACKGROUND

{2} In September 2010, Albuquerque Police Department Detective Tyrone Chambers began investigating allegations of check fraud at a Wal-Mart in Albuquerque, New Mexico. As part of his investigation, Detective Chambers contacted Certegy, a company that performs check verification for retail businesses, including Wal-Mart. Certegy fraud investigator Christopher Jacobson provided Detective Chambers with information related to certain allegedly fraudulent transactions, which Detective Chambers incorporated into his investigation. This information included the dates, times, check numbers, account numbers, routing numbers, social security numbers, names, and store locations associated with the allegedly fraudulent transactions.

{3} After isolating certain transactions suspected to involve Defendant, Detective Chambers contacted the Wal-Mart located on Wyoming Boulevard in northeast Albuquerque to request surveillance videos taken at the store's money center. Detective Chambers provided dates and times of the allegedly fraudulent transactions to Wal-Mart's loss prevention department. He received surveillance videos depicting transactions on August 27, 2010, August 28, 2010, and September 6, 2010. Detective Chambers identified Defendant in these surveillance videos by reference to a photograph in a police database. Each surveillance video showed Defendant present a check to a Wal-Mart employee. In each instance, the employee attempted to process the transaction and returned the check to Defendant. Each surveillance video also contained a computer-generated graphic indicating the date and time of the transaction.

{4} Defendant was indicted for forgery and identity theft in December 2010. On May 3, 2011, the State filed a witness list that included Jacobson. On June 25, 2013, the State filed an amended witness list that again included Jacobson.

{5} In October 2013, the State provided discovery to defense counsel that included Detective Chambers' police report. Detective Chambers' police report contained a thirty-six page spreadsheet created by Jacobson that detailed numerous allegedly fraudulent transactions involving Defendant and other individuals. At trial, defense counsel acknowledged not "understand[ing] the significance" of the spreadsheet.

{6} On March 17, 2014, the State filed a second amended witness list noticing "Christopher Jacobson/designee, c/o Certegy Check Systems." One week later, Defendant filed a motion for a continuance based on a general lack of preparedness for trial. The district court denied this motion.

{7} Defendant did not subpoena Jacobson to a pre-trial interview. Nor did Defendant respond to requests for dates for pre-trial interviews. At some unknown date after the March 26, 2014 scheduling conference, Jacobson determined that he would be unavailable to appear at the trial setting. Jacobson did not appear for his scheduled interview on April 4, 2014.

{8} Due to Jacobson's unavailability, the State substituted another Certegy fraud investigator, Michael Baracz, as a witness the week before trial. The State noticed a pre-trial interview with Baracz and conducted this interview by telephone on April 14, 2014. Defense counsel declined to interview this "new witness[]." During this interview, Baracz informed the State that he had generated a new spreadsheet depicting only transactions appearing to involve Defendant. The State sent this spreadsheet to defense counsel by email the next day.

{9} On the first day of the trial, April 16, 2014, Defendant filed a motion in limine to exclude: (1) Baracz as a witness, (2) the spreadsheet Baracz generated, and (3) surveillance videos from Wal-Mart. The district court ruled that Baracz was a records custodian and did not need to be specifically disclosed. The district court also stated that Defendant could interview Baracz prior to his scheduled testimony the next day.

{10} Outside the presence of the jury, Baracz testified as to Certegy's role in verifying checks for Wal-Mart, including a step-by-step description of a transaction and the process by which transactional data is generated. Baracz also testified that

he did not consult the spreadsheet originally generated by Jacobson but instead generated a new spreadsheet depicting only transactions appearing to involve Defendant. Baracz's spreadsheet did not contain any new information not included in Jacobson's spreadsheet. This spreadsheet was introduced as State's Exhibit Three and contained thirty-seven transaction records. Baracz also provided a second spreadsheet, State's Exhibit One, which was a redacted version of State's Exhibit Three and contained only six transaction records. Over objection, the district court admitted State's Exhibits One and Three (the Exhibits), ruling that: (1) the information in the spreadsheets "was provided to counsel for the defense in the initial discovery," (2) the transaction records are business records under Rule 11-803(6) NMRA, and (3) the transaction records are non-testimonial. Only State's Exhibit One was published to the jury.

{11} Baracz's testimony before the jury centered on the process Certegy undertakes to verify a transaction originating at a Wal-Mart money center. As part of this testimony, Baracz discussed the origin, the data storage process, and the meaning of the data included in the Exhibits.

{12} Wal-Mart Asset Protection Associate Kesha Pendleton also testified as a foundational witness outside the presence of the jury. The purpose of her testimony was to authenticate the surveillance videos obtained by Detective Chambers. Pendleton testified that (1) the transactions depicted on the surveillance videos at issue occurred at the money center inside the Wal-Mart at which she is employed, (2) the surveillance system operates twenty-four hours a day and cannot be manipulated by local employees, (3) the same surveillance system has been in place for at least five years, (4) the surveillance system allows local employees to download surveillance videos taken at specific dates and times, and (5) the computer-generated graphic indicating the date and time is programmed remotely. Following foundational testimony by Pendleton and Detective Chambers, the district court received the surveillance videos in evidence over Defendant's objection.

{13} Defendant was convicted on three counts of forgery and three counts of identity theft. This appeal resulted.

ADMISSIBILITY OF EVIDENCE

{14} The district court allowed the testimony of Baracz as a records custodian and received in evidence the Exhibits as business records under Rule 11-803(6). On appeal, Defendant argues that this ruling was erroneous, both under our rules of evidence and as a violation of Defendant's right to confront witnesses against her. Defendant also argues that insufficient evidence supported the authentication of, and chain of custody related to, the Wal-Mart surveillance videos. We review a district court's admission of evidence for an abuse of discretion. *State v. Cofer*, 2011-NMCA-085, ¶ 7, 150 N.M. 483, 261 P.3d 1115. A court abuses its discretion when its "ruling is clearly against the logic and effect of the facts and circumstances of the case." *Id.* (internal quotation marks and citation omitted).

Alleged Discovery Violations

{15} Defendant argues that the late disclosure of Baracz and the Exhibits (1) constituted a violation of Defendant's right to confront witnesses against her and (2) should have resulted in sanctions for discovery violations. A Confrontation Clause violation occurs when a defendant is unable to confront testimony against the defendant. *See State v. Ortega*, 2014-NMSC-017, ¶ 18, 327 P.3d 1076 ("This clause bars the admission of out-of-court statements that are both testimonial and offered to prove the truth of the matter asserted, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." (alteration, omission, internal quotation marks, and citation omitted)). Baracz testified at trial and was cross-examined by Defendant. We therefore address Defendant's arguments on appeal in the context of our rules of criminal procedure—specifically Rule 5-501 NMRA (2007) and Rule 5-505 NMRA.

{16} Rule 5-501(A)(5) provides that "the state shall disclose . . . a written list . . . of all witnesses which the prosecutor intends to call at the trial[.]" Rule 5-505(A) creates an ongoing duty to "promptly give written notice to the other party or the party's attorney of the existence of the additional material or witnesses." However, to justify sanctions for the late disclosure of witnesses or documents, a defendant must demonstrate that he or she "was prejudiced by the untimely disclosure." *State v. Duarte*, 2007-NMCA-012, ¶¶ 15, 19, 140 N.M. 930, 149 P.3d 1027 (internal quotation marks and citation omitted). "[P]rejudice does not accrue unless the evidence is material and the disclosure is so late that it undermines the defendant's preparation for trial." *State v. Harper*, 2011-NMSC-044, ¶ 20, 150 N.M. 745, 266 P.3d 25. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Duarte*, 2007-NMCA-012, ¶ 15 (internal quotation marks and citation omitted). "Prejudice must be more than speculative; the party claiming prejudice must prove prejudice—it is not enough to simply assert prejudice." *Harper*, 2011-NMSC-044, ¶ 16.

{17} With respect to the late disclosure of Baracz, Baracz and Jacobson were functionally equivalent for purposes of determining the evidentiary significance of the discovery materials. *See, e.g.*, *Parks v. State*, 348 S.E.2d 481, 482 (Ga. Ct. App. 1986) ("No harm is shown to have resulted from the substitution of one records custodian for another[.]"). Both are fraud investigators for Certegy. Both conducted database searches for transactions appearing to involve Defendant. Neither was in a position to offer substantive testimony that Defendant herself had violated or attempted to violate the law. Jacobson appeared on various iterations of the State's witness list for years and was never subpoenaed for an interview by Defendant. Under these circumstances, the substitution of one records custodian for another does not constitute a late disclosure that "undermines the defendant's preparation for trial." *Harper*, 2011-NMSC-044, ¶ 20. Baracz's spreadsheet did not contain any new information not included in Jacobson's spreadsheet. Furthermore, Defendant was not deprived of the opportunity to conduct an interview. Baracz was first made available for a telephonic interview on April 14, 2014, and Defendant declined to participate. Defendant then interviewed Baracz on the morning of April 17, 2014. We cannot discern, and Defendant does not specifically assert in her appellate briefing, how the timing of her interview with Baracz prejudiced her defense. *See id.* ¶¶ 22, 24 (holding that the defendant did not demonstrate prejudice when he had the opportunity to interview late-disclosed witnesses prior to trial); *State v. McDaniel*, 2004-NMCA-022, ¶ 14, 135 N.M. 84, 84 P.3d 701 (holding that prejudice is demonstrated by a showing that the defendant's "cross-examination would have been improved by an earlier disclosure or [that the defendant] would have prepared differently for trial"). The key question—left unanswered in Defendant's briefing—is how Defendant would have prepared for

trial differently in light of the substitute witness.

{18} With respect to the Exhibits, Defendant was in possession of all the information contained in them far in advance of trial. The reformatting of previously disclosed discovery materials for trial purposes does not constitute a new, and therefore late, disclosure. *Cf. Harper*, 2011-NMSC-044, ¶ 20 ("[W]hen . . . the defendant has knowledge of the contents of the unproduced evidence, [a] determination of prejudice is more elusive."). Nor does the redaction of irrelevant information from the initially provided discovery materials result in prejudice to Defendant's defense. Defendant claims that an alternate presentation of the data "stood to affect . . . trial counsel's cross-examination." The redaction of irrelevant information, however, would, if anything, simplify Defendant's cross-examination of Baracz if, as contended in her briefing, she "was prepared to cross-examine a witness from the same company who had compiled a separate exhibit."

{19} Defendant additionally argues, citing *Harper*, that the district court erred by failing to consider lesser sanctions after denying her motion to exclude Baracz and the Exhibits. However, our review of Defendant's briefing and the record proper does not indicate that Defendant argued for lesser sanctions at trial. To preserve an issue for appeal, a party must allege error and invoke a ruling from the district court. *State v. Lucero*, 1993-NMSC-064, ¶ 11, 116 N.M. 450, 863 P.2d 1071. In the absence of preservation, we decline to consider the appropriateness of lesser sanctions.

{20} Defendant has not demonstrated that she was prejudiced by the district court's admission of Baracz and the Exhibits. As a result, we find no abuse of discretion in these evidentiary rulings.

Alleged Hearsay Evidence

{21} Defendant further argues that the Exhibits constitute inadmissible hearsay. We review a district court's application of exceptions to the rule against hearsay for an abuse of discretion. *State v. Benavidez*, 1999-NMSC-041, ¶ 4, 128 N.M. 261, 992 P.2d 274. Hearsay is an out-of-court statement offered for the truth of the matter asserted and is inadmissible at trial except as allowed by exclusions or enumerated exceptions. *State v. Largo*, 2012-NMSC-015, ¶ 24, 278 P.3d 532; Rule 11-801(C) NMRA (defining "hearsay" as "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement"). Rule 11-803(6) is such an exception and provides for the admission of:

> A record of an act, event, condition, opinion, or diagnosis if
> (a) the record was made at or near the time by—or from information transmitted by—someone with knowledge,
> (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
> (c) making the record was a regular practice of that activity, and
> (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12) NMRA or with a statute permitting certification.

Rule 11-803(6) is commonly referred to as the "business records exception." *Cofer*, 2011-NMCA-085, ¶ 9. At issue in this case is whether instantaneously recorded data related to retail transactions, which are later compiled for utilization in criminal investigations and at trial, fall within the Rule 11-803(6) requirements for admissibility.

{22} The Exhibits are distillations of data related to literally millions of transactions conducted at Wal-Mart money centers around the country. The data contained within the Exhibits were recorded in real time, thus satisfying the requirement of Rule 11-803(6)(a), and were kept for every Wal-Mart money center transaction in the regular course of business, thus satisfying the requirements of Rule 11-803(6)(b) and (c).

{23} Defendant argues that, because the Exhibits were "assembled" as part of the case against her, they cannot be admitted into evidence under the business record exception. We disagree.

{24} In *State ex rel. Electric Supply Co. v. Kitchens Constructions, Inc.*, our Supreme Court conducted a similar analysis and held that the computer-generated records at issue were admissible. In that case, the plaintiff sued for recovery of $61,124.53—the value of materials provided to a subcontractor on a state construction project. 1988-NMSC-013, ¶ 1, 106 N.M. 753, 750 P.2d 114. At trial, the plaintiff introduced "unpaid computerized invoices" for materials provided to subcontractors as evidence of the amount due. *Id.* ¶ 3. The defendant argued that the plaintiff's invoices were inadmissible "because the invoices were produced especially for this litigation[.]" *Id.* ¶ 4. In finding the invoices admissible, our Supreme Court held,

> [U]nder Rule 803[,] computer data compilations may be construed as business records themselves, and they should be treated as any other record of regularly conducted activity. Although a computer printout . . . is made after completion of all regular dealings with a party, the printout is admissible if its contents were stored and compiled at the time of the underlying transactions.

Id. ¶ 10 (citation omitted).

{25} *Kitchens* is closely analogous to this case. Certegy vets each attempt to cash a check at a Wal-Mart money center in real time. It instantaneously stores a record of each transaction in a database and retains it for a minimum of seven years. As a result, each line of data, which is "stored and compiled at the time of the underlying transactions[,]" is its own individual business record and is admissible under Rule 11-803(6). *Kitchens*, 1988-NMSC-013, ¶ 10. That the data are not instantaneously compiled into a form that is convenient for evidentiary purposes is of no consequence. The rules of evidence allow for the compilation of otherwise admissible business records for the purpose of prosecution or civil litigation. *See, e.g.*, *United States v. Keck*, 643 F.3d 789, 797 (10th Cir. 2011) ("In the context of electronically-stored data, the business record is the datum itself, not the format in which it is printed out for trial or other purposes.").

{26} Because each line of data contained within the Exhibits constitutes an admissible business record under Rule 11-803(6), the district court's admission did not constitute an abuse of discretion. Given this conclusion, we decline to explore Defendant's argument that the Exhibits are instead summaries subject to the requirements of Rule 11-1006 NMRA.

Authentication of Evidence

{27} The Wal-Mart surveillance videos included computer-generated graphics indicating the date and time of the transactions. Defendant argues that Pendleton's testimony did not sufficiently describe the process by which the date and time stamps are generated and that, therefore, the surveillance videos were not properly authenticated.

{28} Evidence is properly authenticated by the production of foundational evidence "sufficient to support a finding that the item is what the proponent claims it is." Rule 11-901(A) NMRA. With respect to the question of authentication, the computer-generated graphics indicating the date and time of the transactions are not subject to greater scrutiny than the other content observed in the surveillance video.

{29} In *State v. Henderson*, this Court articulated a low bar for authentication of photographic evidence created through automated processes. 1983-NMCA-094, 100 N.M. 260, 669 P.2d 736. Such photographic evidence is admissible under the "silent witness" theory, which requires that the evidence be authenticated by the testimony of "a witness with knowledge . . . that the thing is what it purports to be." *Id.* ¶¶ 8, 11.

{30} In *Henderson*, the defendant conducted a transaction at an automated teller machine on the same date as the alleged crime. *Id.* ¶ 7. The automated teller machine was programmed to "make[] written records of all transactions, and . . . take[] a picture of the person making the transaction." *Id.* At trial, the state introduced a photograph of the defendant taken by the automated teller machine. *Id.* ¶ 12. The purpose of this evidence was to establish, consistent with other physical evidence, that the defendant was wearing certain clothing on the date of the alleged crime. *Id.* ¶ 7. A foundational witness testified as to the film developing procedure "and that she had requested that the film for August 9, 1982 at 10:22 a.m. be developed."[1] *Id.* ¶ 12. This Court concluded that such testimony was sufficient to authenticate the photograph under Rule 11-901. *Id.* ¶ 11.

{31} Similar testimony was offered in this case. Pendleton testified that (1) the images on the surveillance video were from the Wal-Mart location at which she works, (2) the date and time information is programmed remotely, (3) local employees do not have the ability to manipulate that information, and (4) she is able to download surveillance video from specific dates and times for up to ninety days. Additionally, Detective Chambers testified that the surveillance video was downloaded in response to his request for recordings of specific dates and times.

{32} Certainly, with respect to the location and presence of Defendant, the State offered sufficient evidence to authenticate the surveillance video under Rule 11-901. With respect to the computer-generated graphics indicating the date and time, "[b]asic computer operations relied on in the ordinary course of business are admitted without an elaborate showing of accuracy." 2 Broun, *McCormick on Evidence*, § 227 (7th ed. 2013); *see also United States v. Rembert*, 863 F.2d 1023, 1028 (D.C. Cir. 1988) (holding that "circumstantial evidence . . . as to the occurrences at the ATM machines, . . . coupled with the internal indicia of date, place, and event depicted in the evidence itself" was sufficient to authenticate photographic evidence). As Pendleton's testimony indicated, Wal-Mart's surveillance system operates continuously in the ordinary course of business.

{33} Detective Chambers requested that Wal-Mart loss prevention officers provide segments of surveillance video for certain dates and times based upon the information contained in the spreadsheet created by Jacobson. The segments of surveillance video for the requested times showed Defendant attempting transactions. These attempts were unsuccessful. That the dates and times requested by Detective Chambers overlap with Defendant's attempted transactions is strong circumstantial evidence that the computer-generated graphics indicating date and time are accurate. Furthermore, neither the record proper nor Defendant's appellate briefing suggest that the surveillance videos, including the computer-generated graphics indicating date and time, were materially altered or incorrect in any way.

{34} We decline, in the absence of a specific challenge to the accuracy of such information, to require higher requirements for authentication of surveillance video containing computer-generated graphics indicating the date and time simply because such graphics could theoretically be manipulated. *Cf., e.g.*, *People v. Goldsmith*, 326 P.3d 239, 248 (Cal. 2014) ("We decline to require a greater showing of authentication for the admissibility of digital images merely because in theory they can be manipulated."). Because the record evidence satisfies the authentication requirements of Rule 11-901, the district court's admission of the surveillance video did not constitute an abuse of discretion.

Chain of Custody

{35} Defendant's final evidentiary argument relates to the chain of custody of the Wal-Mart surveillance video. Defendant bases this argument upon her contention that no witness testified that the surveillance video "had not been tampered with." However, as this Court has previously held, "[t]he [s]tate is not required to establish the chain of custody in sufficient detail to exclude all possibility of tampering." *State v. Peters*, 1997-NMCA-084, ¶ 26, 123 N.M. 667, 944 P.2d 896.

{36} "Questions concerning a possible gap in the chain of custody affect[] the weight of the evidence, not its admissibility." *Id.* There is no abuse of discretion when, as here, a preponderance of the evidence shows that the evidence at issue is what the proponent purports it to be. *Id.*

CONFRONTATION OF WITNESSES

{37} As discussed above, a criminal defendant is entitled to confront testimony against him or her. *Ortega*, 2014-NMSC-017, ¶ 18. Defendant argues that the surveillance video's computer-generated graphics indicating the date and time are testimonial in nature. Certainly, if the computer-generated graphics are testimonial, Defendant would have certain confrontation rights. "Claimed violations of the Sixth Amendment right to confrontation are reviewed de novo." *State v. Tollardo*, 2012-NMSC-008, ¶ 15, 275 P.3d 110.

{38} A defendant's confrontation rights extend to the "testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had . . . prior opportunity for cross-examination." *State v. Gurule*, 2013-NMSC-025, ¶ 33, 303 P.3d 838 (internal quotation marks and citation omitted). A statement is testimonial if its primary purpose "is to establish or prove past events potentially relevant to later criminal prosecution." *State v. Navarette*, 2013-NMSC-003, ¶ 8, 294 P.3d 435 (internal quotation marks and citation omitted). "When the 'primary purpose' of a statement is not to create a record for trial," the Confrontation Clause is not implicated. *Bullcoming v. New Mexico*, 564 U.S. 647, 669 (2011) (Sotomayor, J., concurring in part) (internal quotation marks and citation omitted).

[1]Though it is unclear from the opinion, we assume that the requested date and time were connected to the written record of the defendant's transaction.

{39} Business records, including the surveillance videos at issue in this case, usually are not testimonial. *See Crawford v. Washington*, 541 U.S. 36, 56 (2004) ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."). Defendant, however, argued at trial that the Wal-Mart surveillance system functions "purely for prosecution purposes." She reiterates this argument on appeal. We disagree.

{40} Scholarly articles on this topic indicate numerous non-prosecutorial purposes for surveillance systems in a retail environment. *See, e.g.*, Robert D. Bickel et al., *Seeing Past Privacy: Will the Development and Application of CCTV and Other Video Security Technology Compromise an Essential Constitutional Right in a Democracy, or Will the Courts Strike a Proper Balance?*, 33 Stetson L. Rev. 299, 305 (2003) ("Cameras are also increasingly used in the workplace to monitor employee productivity, to deter theft, and to enhance workplace security. In addition, cameras are now common in retail establishments to assist in loss prevention and customer safety." (footnote omitted)); Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. Cal. Interdisc. L.J. 295, 302 (1999) ("A large number of companies and businesses use hidden cameras to monitor employee productivity, to deter theft and fraud, or to ensure safety in the workplace. Retailers have used video surveillance in their loss-prevention programs for a number of years." (footnote omitted)); Alexandra Fiore & Matthew Weinick, Note, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 Hofstra Lab. & Emp. L.J. 525, 527 (2008) ("Employers use surveillance to monitor productivity, and to protect property and workers' safety."). The arguments of defense counsel are "not to be regarded as evidence." *Miera v. Territory*, 1905-NMSC-022, ¶ 17, 13 N.M. 192, 81 P. 586. Despite inferences to be drawn from the above cited articles, Defendant has not directed this Court to any evidence establishing that the primary purpose of Wal-Mart's surveillance system is to "create a record for trial." *Bullcoming*, 564 U.S. at 669. In the absence of such evidence, we decline to conclude that the surveillance videos at issue are testimonial such as to implicate the Confrontation Clause.

CONCLUSION

{41} For the foregoing reasons, we affirm Defendant's convictions.

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

JAMES J. WECHSLER, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
M. MONICA ZAMORA, Judge

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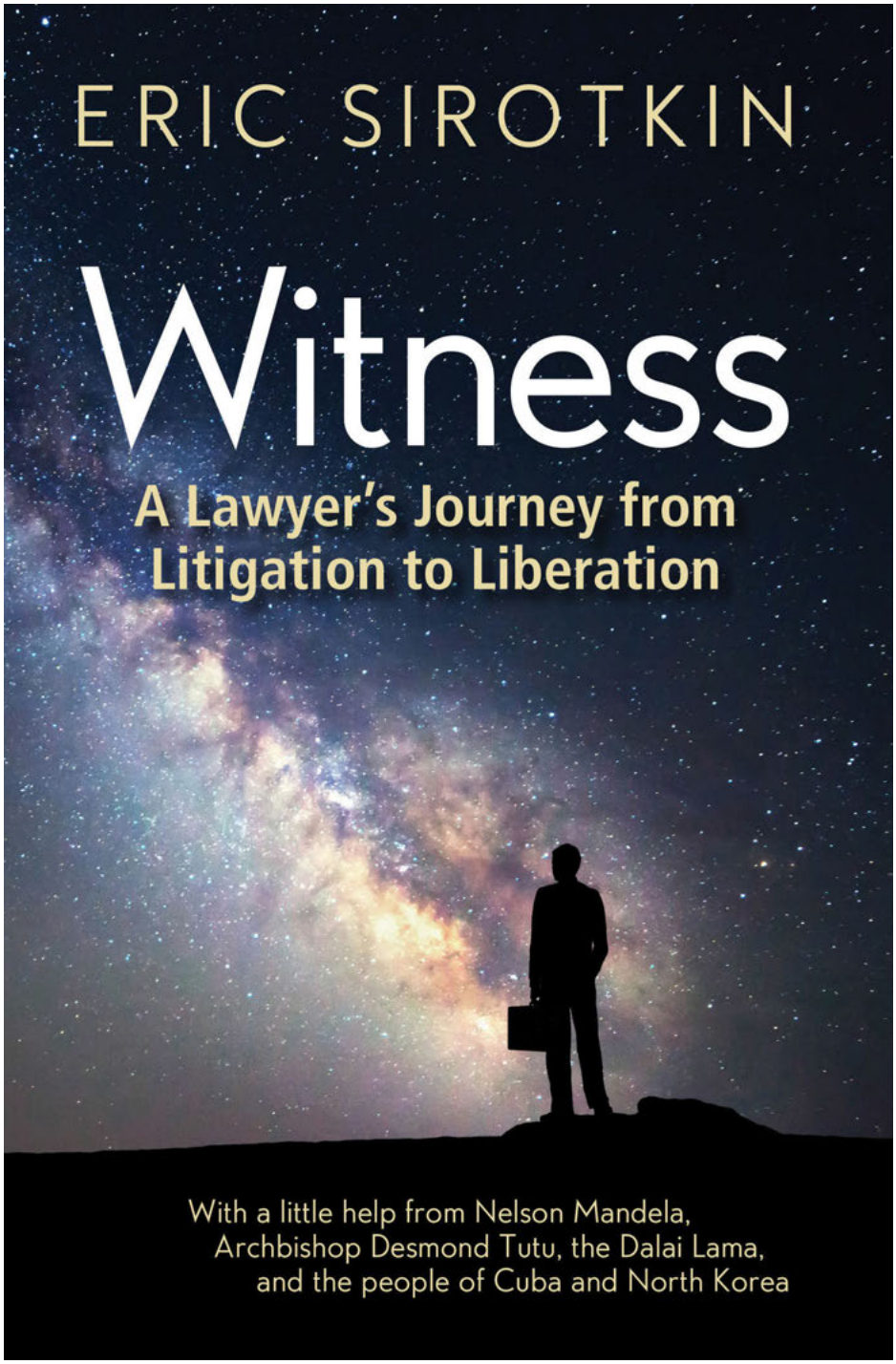
Eric Sirotkin is an internationally renowned human rights lawyer, mediator, and educator. He practices plaintiff's civil rights, employment law and life in Albuquerque, New Mexico.



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