Official Publication of the State Bar of New Mexico

Bar Bulletin

July 19, 2017 • Volume 56, No. 29

Timing, by Christopher Owen Nelson (see page 3) Waxlander Gallery, Santa Fe

Inside This Issue

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July 19, 2017, Vol. 56, No. 29

Table of Contents

Meetings

July

19
Real Property, Trust and Estate Section Board
Noon, State Bar Center

21
Criminal Law Section Board
Noon, 800 Lomas NW, Ste 100, Albuquerque

21
Family Law Section Board
9 a.m., teleconference

21
Indian Law Section Board
Noon, State Bar Center

25
Intellectual Property Law Section Board
Noon, Lewis Roca Rothgerber Christie, Albuquerque

26
Natural Resources, Energy and Environmental Law Section Board
Noon, Teleconference

28
Immigration Law Section Board
Noon, State Bar Center

Workshops and Legal Clinics

July

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

20
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m.,
Munson Senior Center, Las Cruces,
1-800-876-6657

19
Family Law Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

26
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

About Cover Image and Artist: Christopher Owen Nelson's work has been strongly focused in the greater southwestern region. As a Colorado native, he studied fine arts at Rocky Mountain College of Art and Design. He combines elements of his skills like painting, construction and song writing to tell his story. Recently, Nelson's achievements in the arts have been featured in several national publications including: *Western Art Collector, Luxe Interiors and Design*, *Western Art and Architecture*, *Santa Fean* magazine and *American Art Collector*. To view more of his work, visit www.chrisnelsonfineart.com.

Notices

Court News

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.

Seventh Judicial District Court

Governor Appoints Judge Shannon Murdock

Governor Susana Martinez appointed Shannon Murdock to the Seventh Judicial District Court, filling the vacancy created by Honorable Kevin R. Sweazea's retirement.

Reassignment of Cases Due to Judge Sweazea's Retirement

Due to the retirement of Judge Kevin R. Sweazea, Judge Shannon Murdock is assigned to the cases previously assigned to Judge Sweazea. Pursuant to NMRA 1-088.1, parties who have not yet exercised a peremptory excusal will have until Aug. 23 to excuse the successor judge.

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 voluntarily exchange information and work on a plan for discovery as early as possible.

State Bar News

Attorney Support Groups

- 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#.
- Aug. 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

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.

Committee on Women and the Legal Profession

Professor David J. Stout Honored with Justice Minzner Award

Join the Committee on Women and the Legal Profession in presenting the 2016 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Professor David Stout for his outstanding advocacy for women, in particular women in the legal profession. The award reception will be held from 5:30–7:30 p.m., Aug. 24, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Co-chairs Quiana Salazar-King at salazar-king@law.unm.edu or Laura Castille at lcastille@cuddymccarthy.com.

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.

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.

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From the Lawyers Professional Liability and Insurance Committee

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

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

The retroactive date and coverage includes all periods of time during which the insured was continuously covered under a prior malpractice insurance policy.

Lawyer's Professional Liability policies are now always "claims made" policies. A "claims made" policy covers the insured for all claims made and reported during the policy period, no matter when the alleged malpractice occurred. In contrast, an "occurrence" policy covers the insured for any claim, no matter when asserted, arising from alleged malpractice "occurring" within the policy period. If there was "occurrence" coverage in place, there is theoretically coverage for any alleged malpractice occurring during that policy period, forever. However, LPL "occurrence" coverage is simply not available.

Nevertheless, "claims made" coverage should theoretically protect an insured lawyer for any claim asserted while the "claims made" policy is in effect. There is a catch, however. Most LPL policies also have a "retroactive" or "prior acts" date, which excludes coverage for alleged malpractice occurring before the "retroactive" or "prior acts" date. For many lawyers, the "prior acts" date is not an issue. As long as a lawyer has been continuously insured throughout his or her career, the prior acts date will likely go back years, even to the date the lawyer started to practice law. However, if there has been a break in coverage—a period of even a few weeks or months in which the lawyer let his or her insurance lapse—the "prior acts" date on any new policy will likely be the date when insurance was reinstated. Anything occurring during or prior to the break in coverage will be excluded from coverage.

In addition, if a lawyer or law firm is "non-renewed" by an insurer, then even when coverage is obtained from a new carrier the "prior acts" date on the new policy could be the starting date for the new policy. In that circumstance, "claims made" coverage amounts to almost no coverage at all, at least at the beginning, because there is only coverage for alleged malpractice occurring since the new policy went into effect. Over time, as the "prior acts" date recedes into the past, the protection provided by the "claims made" policy increases, notwithstanding the "prior acts" date.

Every lawyer should read his or her LPL policy, especially the declarations page, to be sure the information is correct and the lawyer knows what coverage is in place, for whom, the policy period, etc. This review should include identifying the policy's "retroactive" date. It will likely be different for different lawyers insured under the policy. And especially when purchasing new coverage, either after a break in coverage or when changing insurers for whatever reason, the lawyer simply must determine the proposed "retroactive" date before purchasing the policy. Although there may be no ability to negotiate with the insurer for a better "retroactive" date, that possibility should be explored before agreeing to coverage that amounts, at least initially, to almost no coverage at all.

Entrepreneurs *in* Community Lawyering

A Program of the New Mexico State Bar Foundation

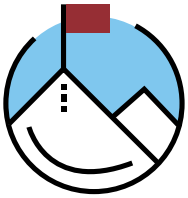
The New Mexico State Bar Foundation's legal incubator, Entrepreneurs in Community Lawyering (ECL), opened its doors in October of 2016. Eight months later, ECL is fully operational with two highly motivated participating lawyers and a full slate of applications for the October of 2017 spaces. ECL is extremely fortunate to have the support and guidance of a stellar Steering Committee, the Board of Bar Commissioners and many members of the public and private bar, all of whom have been extraordinarily generous with their ideas, time and expertise.

The concept of legal incubators—sheltered environments where new lawyers passionate about serving moderate-income clients learn how to set up and run sustainable law practices—is relatively new. Endorsed by the American Bar Association, the concept has gained acceptance and credibility throughout the nation since the first legal incubator opened in 2007. Ten years later, new legal incubators are opening around the country at an astonishing rate. There are now 62 programs in 30 states. Operated by law schools, bar associations, legal aid organizations and as non-profits, legal incubators share the common goal of assisting new lawyers acquire the skills they need to launch successful and sustainable practices, which increase access to legal services to moderate-income people. Ideally, incubator graduates will continue providing affordable legal services after leaving their incubator programs. The ABA Standing Committee on the Delivery of Legal Services has a sub-section dedicated to legal incubators that includes a current list of incubator programs on its website. If you are interested in learning more, Google "American Bar Association Lawyer Incubators."

ECL is a small incubator. It has the capacity to accept a maximum of six lawyers. This makes the program highly competitive. All lawyers licensed to practice in New Mexico with zero to five years of practice experience are eligible to apply for admission. New lawyers who are thinking of applying should be self-confident self-starters with a strong entrepreneurial spirit. Applicants must provide a letter of interest, résumé, business plan and three letters of reference. Applications are accepted throughout the year but eligible lawyers will be accepted into the program only

Participants Receive

- Hands-on legal training
- Training in law practice management
- Help establishing alternative billing models
- Subsidized office space/ equipment
- Access to client referral programs
- Networking opportunities
- Free CLE, bar dues, mentorship fees
- Free legal research tools, forms bank
- A year of free case management and legal research tools



Program Goals

- Assist new lawyers who want to become successful solo practitioners
- Contribute to the provision of affordable legal services for moderate -income New Mexicans
- Expand legal services in rural areas of New Mexico

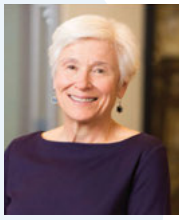
Who can apply?

- Licensed attorneys with up to five (5) years of practice.
- Visit www.nmbar.org/ECL to review the Application, Program Description and most current version of the Participant Agreement.

in October and April, as openings become available. Recent law school graduates are eligible, regardless of where they attended law school, as long as they have a New Mexico license. All applicants must demonstrate the desire to serve the legal needs of moderate-income New Mexicans. Strong preference is given to lawyers interested in expanding their practices to include rural areas of New Mexico. If you are interested in learning more about the ECL application process, visit the State Bar website and go to ECL under the dropdown for Member Services.

Lawyers accepted into ECL (participants) must obtain professional liability insurance and open their own trust and operating accounts. Participants receive training in how to set up and run a solo law practice. They receive subsidized office space, law practice workshops, hands-on mentoring and training by ECL's program director, a year of free case management services through Clio and free legal research through New Mexico One Source and Lexis. Participants receive assistance in designing their law firm business materials, including letterhead and business cards. These materials are then provided to them free of charge through the State Bar Digital Print Center. Participants have free access to State Bar conference rooms for meeting clients, and the use of the State Bar's office equipment. While Pprticipants are in ECL their State Bar licensing fees are waived and they receive access to all State Bar CLE courses at no charge. In addition, if a participant enters ECL as a newly licensed attorney required to complete the Bridge the Gap Mentorship program, the fees for this program are also waived.

ECL is not organized or run as a law firm. Rather, it is a group of independent solo practitioners developing their own individual practices, with assistance. The ECL program director is not the participants' supervising attorney but rather a coach for general practice issues, ethics and professionalism. The program director provides help developing networking opportunities and linking participants to experienced practitioners in areas of law where participants hope to develop their practices. Participants are responsible for finding their own clients and managing their own client files and billing systems. When they enter ECL, participants are encouraged to obtain training through one of several non-profit legal services organizations, which may be able to offer contract work when training is completed. Participants are introduced to alternative billing methods and unbundled service options, including limited scope representation. Participants are encouraged to focus their practices in the specific areas of law most needed by the moderate income population (125% to 400% of the federal poverty level). These areas include family law, business law for small businesses, guardianships, probate and simple estate planning.



Ruth Pregenzer

Program Director, Entrepreneurs in Community Lawyering

505-797-6077, rpregenzer@nmbar.org

Ruth Pregenzer took an of-counsel position with her law firm, Pregenzer, Baysinger, Wideman & Sale, PC, to become ECL's first program director. Primarily a civil litigator, for several years she has focused her practice in the area of fiduciary litigation. She has 30 years of experience practicing law in New Mexico and is admitted to practice in New Mexico, the U. S. District Court of New Mexico, the U. S. Court of Appeals for the Tenth Circuit and the U. S. Supreme Court.

Ruth believes that new lawyers, regardless of where they find themselves, need significant training and support after law school if they are to become competent and well-qualified legal professionals. Ruth hopes through the State Bar to develop ways to make such training more available, both for ECL's participants and for all new lawyers entering practice without training support. Ruth invites experienced members of the New Mexico Bar to contact her if they are interested in offering some of their valuable time and expertise to mentor in substantive areas of the law, brainstorm training ideas and develop practical training workshops that will help new practitioners learn the skills they need to become successful lawyers. Even if you are training your future competition, this is an opportunity for you to elevate the level of practice in your field and throughout the State Bar.

Current ECL Participants are Joseph Torrez and Ryan Baughman.

Joseph Torrez

Joseph Fredrick Torrez Law, LLC

505-750-2404, josephtorrez44@gmail.com

Joe is a native New Mexican. Born and raised in Artesia, he hopes someday to extend his practice to his home town to provide much needed legal services there. As a young adult, Joe gained practical business experience as the plant supervisor of Select Milk Products in Dexter, N.M. He then moved to Albuquerque and worked as a paralegal for Advocacy, Inc., a non-profit agency helping low-income New Mexicans, while completing his education and attending the University of New Mexico School of Law. Joe has continued his interest in business and during law school he completed his M.B.A. Joe graduated from law school in December 2016. He was admitted to the State Bar of New Mexico and was accepted into ECL in April 2017. Joe immediately took the steps necessary to open his own firm, Joseph Fredrick Torrez Law, LLC. Joe is bilingual in Spanish and English

(and has a working knowledge of Mandarin Chinese). He offers fluency in Spanish to his clients which is a much needed resource for New Mexico's legal community. Joe entered ECL with a contract to perform legal services for Advocacy, Inc., and hopes to develop a practice that focuses on probate, real estate, business law for small businesses and estate planning.

Ryan Baughman

The Law Office of Ryan D. Baughman,
505-675-0732, ryan@nmlawoffice.com

Ryan is also a native New Mexican. A May 2016 graduate of the University of New Mexico School of Law, Ryan grew up in Grants and attended Grants High School before relocating to Las Cruces in 2007 to attend New Mexico State University, where he received a Bachelor of Arts in Psychology. Ryan entered law school in 2013 after working for several Albuquerque law firms. During law school, Ryan focused his attention on courtroom advocacy, prosecuting cases in Bernalillo County Metropolitan Court through the DWI and Domestic Violence Prosecution-in-Practice Program. He prosecuted dozens of criminal cases and was first chair in 12 criminal trials in Metropolitan Court. After graduation, Ryan worked as a law clerk assisting attorneys in the areas of creditor's rights and general civil litigation. Ryan was admitted to the State Bar of New Mexico and ECL in April 2017, and immediately opened The Law Office of Ryan D. Baughman. Ryan has a strong entrepreneurial spirit. He intends to focus his practice primarily in the areas of family law and consumer protection. Because of his on-going interest in litigation, Ryan hopes eventually to include personal injury and criminal defense work in his repertoire of legal specialties.

Steering Committee Members

- **Josh Allison** (Attorney, Sheehan & Sheehan, PA; Member, Board of Bar Commissioners)
- **Richard Bosson** (New Mexico Supreme Court Justice, retired)
- **Jack Brant** (Attorney, Law Office of Jack Brant PC)
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- **Veronica Dorato** (Attorney, Dorato & Weems Law Firm LLC)
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- **Dorene Kuffer** (Attorney, Law Office of Dorene A. Kuffer PC)
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- **Ruth Pregenzer** (Program Director, Entrepreneurs in Community Lawyering, State Bar Foundation)
- **Stormy Ralstin** (Director of Legal Services, State Bar Foundation)
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- **Richard Spinello** (Acting Executive Director, State Bar of New Mexico)
- **Linda M. Vanzi** (Chief Judge, Court of Appeals)
- **Julie Vargas** (Judge, Court of Appeals)

Legal Education

July

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**
12.0 total CLE credits (with possible 8.0 EP)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

3 **Ethical Approach Towards Mediation, Litigation and Arbitration**
2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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
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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

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

Notice of Correction
Please note this corrected listing from the July 12 *Bar Bulletin*:

PUBLISHED OPINIONS

No. 34680	3rd Jud Dist Dona Ana DV-12-619, S BEST v C MARINO (affirm in part, reverse in part)	6/29/2017

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Dated June 29, 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 July 19 , 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

Rules Governing Admission to the Bar

15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017

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.

In the Supreme Court of the State of New Mexico

June 30, 2017

No. 17-8300-006

In the Matter of the Amendment of Rule 16-102 NMRA of the Rules of Professional Conduct

Order

WHEREAS, this matter came on for consideration by the Court to amend Rule 16-102 NMRA of the Rules of Professional Conduct, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rule 16-102 NMRA are APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective August 1, 2017**; and

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

IT IS SO ORDERED.

WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 30th day of June, 2017.

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

Rules of Professional Conduct

16-102. Scope of representation and allocation of authority between client and lawyer.

A. **Client's decisions.** Subject to Paragraphs C and D of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 16104 NMRA of the Rules of Professional Conduct, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

B. **Representation not endorsement of client's views.** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

C. **Limitation of representation.** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

D. **Course of conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. A lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[As amended, effective March 15, 2001; as amended by Supreme Court Order No. 088300029, effective November 3, 2008.]

Committee commentary. —
Allocation of Authority between Client and Lawyer

[1] Paragraph A confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in Paragraph A, such as whether to settle a civil matter, must also be made by the client. See Rule 16104(A)(1) NMRA [~~of the Rules of Professional Conduct~~] for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 16104(A)(2) NMRA [~~of the Rules of Professional Conduct~~] and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding [~~such~~] questions [~~as~~] about the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how [~~such~~] the disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If [~~such~~] the efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 16116(B)(4) NMRA [~~of the Rules of Professional Conduct~~]. Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 16116(A)(3) NMRA.

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 16104 NMRA [~~of the Rules of Professional Conduct~~], a lawyer may rely on [~~such an~~] the advance authorization. The client may, however, revoke [~~such~~] that authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions

is to be guided by reference to Rule 16114 NMRA [~~of the Rules of Professional Conduct~~].

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. [~~Such~~] The limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 16101 NMRA [~~of the Rules of Professional Conduct~~].

[8] With regard to Paragraph C, limitations on the scope of representation may include drafting specific, discrete pleadings or other documents to be used in the course of representation without taking on the responsibility for drafting all documents needed to carry the representation to completion. For example, a lawyer may be retained by a client during the course of an appeal for the sole purpose of drafting a specific document, such as a docketing statement, memorandum in opposition, or brief. A lawyer who agrees to prepare a discrete document under a limited representation agreement must competently prepare [~~such a~~] that document and fully advise the client with respect to that document, which includes informing the client of any significant problems that may be associated with the limited representation arrangement. However, by agreeing to prepare a specific, discrete document the lawyer does not also assume the responsibility for taking later actions or preparing subsequent documents that may be necessary to continue to pursue the representation. While limitations on the scope of representation are permitted under this rule, the lawyer must explain the benefits and risks of such an arrangement and obtain the client's informed consent to the limited representation. Upon expiration of the limited representation arrangement, the lawyer should advise the client of any impending deadlines, pending tasks, or other consequences flowing from the termination of the limited representation. See Rule 16303 NMRA.

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 16101, 16108, and 16506 NMRA [~~of the Rules of Professional Conduct~~].

[10] A lawyer providing limitedscope representation shall explain that other lawyers may communicate directly with the client, without the permission of the lawyer and outside the presence of the lawyer. The lawyer shall explain that the client may limit or halt communications with the other lawyer with notice, preferably in writing. The lawyer should explain the risks of communicating with another lawyer. The lawyer is not required to participate in communications outside the scope of the limited representation, even if the client requests such participation.

Criminal, Fraudulent, and Prohibited Transactions

[11] Paragraph D prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. As an illustration, a lawyer may counsel or assist a client regarding conduct expressly permitted by the Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 to -7, and may assist a client in conduct that the lawyer reasonably believes is permitted by the Act. When that advice or assistance is given, the lawyer shall counsel the client about the potential legal consequences, under federal and other applicable law, of the client's proposed course of conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[12] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 16116(A) NMRA [~~of the Rules of Professional Conduct~~]. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See Rule 16401 NMRA [~~of the Rules of Professional Conduct~~].

[13] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[14] Paragraph D applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph D does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of Paragraph D recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[15] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 16104(A)(5) NMRA [~~of the Rules of Professional Conduct~~].

[Adopted by Supreme Court Order No. 088300029, effective November 3, 2008; as amended by Supreme Court Order No. 158300007, effective December 31, 2015; as amended by Supreme Court Order No. 17-8300-006, effective August 1, 2017.]

In the Supreme Court of the State of New Mexico

June 30, 2017

No. 17-8300-007

In the Matter of the Amendment of Rules 15-301.1 and 15-301.2 NMRA of the Rules Governing Admission to the Bar

Order

WHEREAS, this matter came on for consideration by the Court to amend Rules 15-301.1 and 15-301.2 NMRA of the Rules Governing Admission to the Bar, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORwDERED that the amendments to Rules 15-301.1 and 15-301.2 NMRA are APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall **be effective for applications pending or filed on or after August 1, 2017**; and

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

IT IS SO ORDERED.

WITNESS, Honorable Judith K. Nakamura,
Chief Justice of the Supreme Court of the
State of New Mexico, and the seal of said
Court this 30th day of June, 2017.

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

Bar Admission Rules

15-301.1. Public employee limited license.

A. **Definitions.** As used in this rule[:]

(1) "public employee" means any officer, employee, or servant of a governmental entity, excluding independent contractors;

(2) "governmental entity" means [~~the~~] any state agency or any local public body as defined in Subparagraphs (3) and (4) of this paragraph;

(3) "local public body" means all political subdivisions of this state and their agencies, instrumentalities, and institutions;

(4) "state agency" means any of the branches, agencies, departments, boards, instrumentalities, or institutions of the [~~state~~] State of New Mexico.

B. **Eligibility.** Upon application, the clerk of the Supreme Court may issue a limited [~~nonrenewable one (1) year~~] license to an attorney who[:]

(1) is admitted to practice law in another state, territory, or protectorate of the United States or the District of Columbia;

(2) is [~~in good standing to practice law in each state~~] not under disciplinary disbarment or suspension in any jurisdiction in which the attorney is licensed; [~~and~~]

(3) has not resigned from the bar of such other jurisdiction while under disciplinary suspension or while under disciplinary proceedings;

(4) is not the subject of current or pending disciplinary proceedings in any other jurisdiction; and

(5) satisfies the limited license requirements set forth in this rule.

C. **Application procedure.** An applicant for a limited license to represent public defender clients or any governmental entity in this state shall file with the clerk of the Supreme Court an application for limited license which shall be accompanied by the following:

(1) a certificate of admission to practice and good standing from each [~~state~~] jurisdiction in which the applicant [~~is licensed~~] currently has an active license to practice law and proof of compliance with [~~Subparagraphs (1) and (2) of Paragraph B of~~] Rule 15103(B)(1) and (2) NMRA;

(2) a letter from the head of the governmental entity [~~which~~] that has employed the applicant certifying employment with that governmental entity;

(3) a certificate signed by the applicant stating that the applicant has

(a) read and is familiar with the New Mexico Rules of Professional Conduct, the Creed of Professionalism of the State Bar of New Mexico, and rules of the Supreme Court of New Mexico and the New Mexico statutes relating to the conduct of attorneys; and

(b) applied for a character and fitness investigation with the New Mexico Board of Bar Examiners in conformance with Rules 15104(A) and (C) and 15301 NMRA; and

(4) a docket fee in the amount of one hundred twentyfive dollars ($125.00) payable to the New Mexico Supreme Court and [~~disciplinary fee in the amount of one hundred fifty dollars ($150.00) payable to the Disciplinary Board~~] two hundred fifty dollars ($250.00) payable to the New Mexico Board of Bar Examiners for a character and fitness investigation, with all fees and costs associated with an application for limited license being nonrefundable.

[~~All fees and costs associated with an application for limited license are not refundable.~~]

D. **License; issuance and revocation.**

(1) If an applicant for a limited license to represent public defender clients or a governmental entity complies with the provisions of this rule, the clerk of the Supreme Court may issue a limited[~~, one (1) year~~] license to represent public defender clients or practice law as an employee of a governmental entity. [~~This license shall not be renewed.~~]

(2) A limited license issued [~~pursuant to~~] under this rule only permits the limited licensee to practice law in New Mexico as a public employee representing public defender clients or a governmental entity.

(3) The clerk of the Supreme Court shall revoke the limited license of any person found in violation of [~~these rules,~~] this

rule or any other rule approved by the Supreme Court[~~or any state or federal law~~] regulating the licensing or conduct of attorneys or if, after notice from the Board of Bar Examiners, the Supreme Court revokes the limited license based on the Board's character and fitness investigation. Upon revocation of a limited license, the [~~applicant~~] limited licensee shall not appear in any court in this [~~State~~] state as an attorney[;].

E. **Suspension for failure to cooperate.**

(1) *Petition for suspension for failure to cooperate.* The Board of Bar Examiners may file a petition for suspension of the limited license with the Supreme Court alleging that the attorney has not filed an application for a character and fitness investigation, has not responded to requests for information, has not appeared for a scheduled hearing, or has not produced records or documents requested by the Board of Bar Examiners and has not interposed a goodfaith objection to producing the records or documents. The petition shall be supported by an affidavit setting forth sufficient facts to demonstrate the efforts undertaken by the Board to obtain the attorney's cooperation and compliance. A copy of the petition shall be served on the respondentattorney.

(2) *Response to the petition.* If the respondentattorney fails to file a response in opposition to the petition within fourteen (14) days after service of the petition, the Supreme Court may enter an order suspending the attorney's limited license to practice law until further order of the Supreme Court. The attorney's response shall set forth facts showing that the attorney has complied with the requests or the reasons why the attorney has not complied, and the attorney may request a hearing.

(3) *Supreme Court action.* Upon consideration of a petition for suspension and the attorney's response, if any, the Supreme Court may suspend the attorney's limited license to practice law for an indefinite period pending further order of the Supreme Court, deny the petition, or issue any other appropriate orders. If a response to the petition is filed and the attorney requests a hearing on the petition, the Supreme Court may conduct a hearing or it may refer the matter to the Board for an expedited evidentiary hearing under Rule 15301(C) NMRA. The Board's findings of fact and recommendations shall be sent directly to the Supreme Court within seven (7) days after receipt of the parties' proposed findings and conclusions if requested by the Board.

(4) *Reinstatement.* An attorney suspended under this paragraph may apply to the Supreme Court for reinstatement upon proof of compliance with the requests of the Board of Bar Examiners as alleged in the petition, or as otherwise ordered by the Court. A copy of the application must be delivered to the Board, who may file a response to the application within two (2) business days after being served with a copy of the application. The Supreme Court may summarily reinstate an attorney suspended under the provisions of this paragraph upon proof of compliance with the requests of the Board.

F. **Expiration.** [~~An attorney who is issued a limited license to represent public defender clients or practice law as an employee of a governmental entity shall take the next New Mexico bar examination for which the applicant is eligible.~~]

(1) A limited license issued [~~pursuant to~~] under this rule shall expire upon the occurrence of any of the earliest of the following events:

(a) [~~(1) the expiration of one (1) year from the date of issuance by the New Mexico Supreme Court;~~

~~(2) notification that the applicant has failed the New Mexico bar exam;~~

~~(3)~~] termination of employment with the governmental entity unless the provisions of Subparagraph (G)(5) of this rule are followed; or

[~~(4) failure of the limited licensee to take the next bar examination for which the limited licensee is eligible; or~~

~~(5)~~] (b) admission to the New Mexico Bar upon

(i) passing the bar examination[;];

(ii) Uniform Bar Examination admission under Rule 15-202 NMRA; or

(iii) admission on motion under Rule 15-107 NMRA[; ~~or~~].

(2) The head of the governmental entity that employed the attorney shall notify the Clerk of the Supreme Court when the attorney is no longer employed by the governmental entity.

[~~(6)~~](3) [~~once~~] When a limited license expires or is revoked, an attorney who resides or maintains a legal residence in this [~~State~~] state shall not be admitted to the practice of law for a particular case under the pro hac vice rules approved by [~~this~~] the Supreme Court.

[~~F~~]G. **Limited licensee status.** [~~An attorney granted a limited license pursuant to this rule shall not be a member of the state bar but shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline. Licensees shall pay the annual disciplinary fee as part of the application process.~~]

(1) An applicant granted a limited license under this rule shall be a member of the State Bar of New Mexico and shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline.

(2) Licensees under this rule shall pay the annual state bar membership fee of one hundered twenty-five dollars ($125.00).

(3) The annual disciplinary fee assessment under Rule 17-203(A) NMRA is waived.

(4) Licensees under this rule shall comply with the Rules for Minimum Continuing Legal Education.

(5) To avoid the expiration of a limited license under Subparagraph (F)(1)(a) of this rule, an applicant who terminates employment with one governmental entity and accepts employment with another governmental entity must serve written notice on the clerk of the Supreme Court of the applicant's change in employment, and the employer must also comply with Subparagraph (C)(2) of this rule.

[Approved, effective June 13, 2000; as amended effective February 28, 2002; October 24, 2003; March 29, 2004; as amended by Supreme Court Order 05830010, effective September 1, 2005; as amended by Supreme Court Order 17-8300-007, effective August 1, 2017.]

Bar Admission Rules

15301.2. Legal services provider limited law license.

A. **Definitions.** As used in this rule, the following definitions apply:

(1) "applicant" means an attorney who meets the eligibility requirements set forth in Paragraph B of this rule and who completes the application process in Paragraph C of this rule;

(2) "qualified legal services provider" means a not for profit legal services organization whose primary purpose is to provide legal services to low income clients or a legal department within a nonprofit organization that employs at least one (1) lawyer fulltime to provide legal services to low income clients; and

(a) is an organization described in Section 501(c)(3)

Aug.–Dec. 2017

CLE Planner

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10th Annual Legal Service Providers Conference: Fighting Multi-Generational Poverty in New Mexico

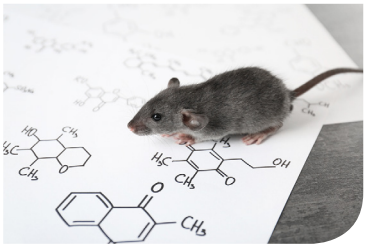
10.0 G 2.0 EP

Thursday, Aug. 17, 2017 • 9 a.m.–4:05 p.m.
Friday, Aug. 18, 2017 • 9 a.m.–4:40 p.m.

$165 Standard Fee

For too many years, New Mexico has been ranked second highest in the overall poverty rate of any state in the U.S. (behind only Mississippi). While this statistic is frightening, there is another of even greater concern: New Mexico ranks highest in the poverty rate for children. The fight to end children's poverty cannot succeed unless the legal and economic problems of the entire family are addressed. With the reality of cuts to public spending, advocates fighting childhood poverty are challenged to do more with less, making imperative the need for creative and collaborative efforts.

This training is designed to help legal aid staff, pro bono attorneys and other public interest advocates better understand how to spot, respond to and find co-counsel or other expert help for common issues likely to keep a family with children trapped in poverty. In this training, you will also learn about resources and collaborative means which can minimize the impact of poverty and ensure that children in our state are benefitting from every resource our communities can offer. Whether you represent children, parents, grandparents or even great-grandparents, this training will include topics that impact the financial security and well-being of all low-income New Mexico families.



The Law and Bioethics of Using Animals in Research

6.2 G

Thursday, Aug. 31, 2017 • 9 a.m.–4:45 p.m.
Co-sponsor: Animal Law Section

$209 Early bird fee (registration must be received by July 31)
$249 State Bar of New Mexico Animal Law Section members, government and legal services attorneys, and Paralegal Division Members
$279 Standard and Webcast Fee

This CLE will address the complex and often controversial regulatory framework that governs the use of animals in biomedical research and toxicity testing. The class will also explore the ethics of using animals in research as well as reviewing litigation and policy developments in this quickly evolving field.

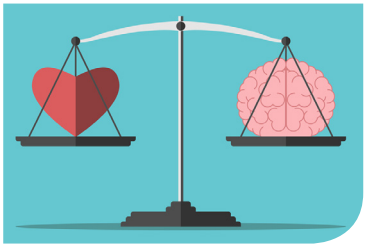
A Little Planning Now, A Lot Less Panic Later—Practical Succession Planning for Lawyers

2.0 EP

Friday, Sept. 8, 2017 • 9–11 a.m.

$89 Government and legal services attorneys, and Paralegal Division members
$109 Standard Fee
$125 Webcast Fee

This program is your opportunity to move from "best intentions" to having a viable succession plan and tangible procedures for a temporary transition. Participants will explore their options, review pertinent issues and resources and leave the workshop with adoptable forms and a clear implementation plan.



Uncovering and Navigating Blind Spots Before They Become Land Mines

2.0 EP

Monday, Oct. 2, 2017 • 9 a.m.–11 a.m.

$75 Early bird fee (registration must be received by Aug. 31)
$89 Government and legal services attorneys, and Paralegal Division members
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and exempt from federal income taxes under Section 501(a) of the Internal Revenue Code of 1986 or corresponding provisions of federal income tax laws from time to time in effect;

(b) is registered with the New Mexico Attorney General Registry of Charitable Organizations in compliance with the New Mexico Charitable Solicitations Act; and[;]

(c) is recommended by the New Mexico Commission on Access to Justice.

B. **Eligibility.** Upon application, the clerk of the Supreme Court may issue a legal services limited license to represent legal services clients through a qualified legal services provider to an attorney who meets the following conditions:

(1) is an inactive member of the State Bar of New Mexico or an active or inactive member of the bar in another state, territory, or protectorate of the United States of America or the District of Columbia at the time of submitting an application under this rule;

(2) is [~~in good standing in each jurisdiction in which the attorney is licensed~~] not under disciplinary disbarment or suspension in any jurisdiction in which the attorney is licensed; [~~and~~]

(3) has not resigned from the bar of such other jurisdiction while under disciplinary suspension or while under disciplinary proceedings;

(4) is not the subject of current or pending disciplinary proceedings in any other jurisdiction; and

([~~3~~]5) satisfies the legal services limited license requirements set forth in this rule[~~; and~~

~~(4) supplies a sworn statement that the applicant has not been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five (5) years; provided, however, that complaints against the applicant shall not be considered disciplinary actions~~].

C. **Application procedure.** An applicant for a legal services limited license to represent legal services clients through a qualified legal services provider shall file with the clerk of the Supreme Court an application for a legal services limited license. The application shall be accompanied by the following:

(1) a certificate of admission to practice and good standing from each [~~state~~] jurisdiction in which the applicant [~~is licensed~~] currently has an active license to practice law or in the case of an inactive attorney a certificate showing that attorney's inactive status;

(2) a letter from the director of the qualified legal services provider that employs the applicant certifying the applicant's employment, whether for monetary compensation or otherwise;

(3) a certificate signed by the applicant stating that the applicant has

(a) read and is familiar with the New Mexico Rules of Professional Conduct, other New Mexico Supreme Court rules and New Mexico statutes relating to the conduct of attorneys, and the Creed of Professionalism of the State Bar of New Mexico; and

(b) applied for a character and fitness investigation with the New Mexico Board of Bar Examiners in conformance with Rules 15104(A) and (C) and 15301 NMRA;

(4) a docket fee in the amount of one hundred twentyfive dollars ($125.00) payable to the New Mexico Supreme Court[~~; and~~

~~(5) a state bar membership fee of one hundred dollars ($100.00) payable to the State Bar of New Mexico, consisting of a state bar services fee of fifty dollars ($50.00) and a disciplinary fee of fifty dollars ($50.00) in lieu of the fee required by Rule 17203 NMRA. All~~] and two hundred fifty dollars ($250.00) payable to the New Mexico Board of Bar Examiners for a character and fitness investigation, with all fees and costs associated with an application for a legal services limited license [~~are not~~] being nonrefundable.

D. **License; issuance and revocation.**

(1) If an applicant for a legal services limited license to represent legal services clients through a qualified legal services provider complies with the provisions of this rule, the clerk of the Supreme Court may issue a legal services limited license.

(2) A legal services limited license issued under this rule permits the applicant to practice law in New Mexico only as an attorney representing legal services clients through a qualified legal services provider.

(3) The clerk of the Supreme Court shall revoke the legal services limited license of any person found in violation of this rule or any other rules approved by the Supreme Court regulating the licensing and conduct of attorneys or if, after notice from the Board of Bar Examiners, the Supreme Court revokes the limited license based on the Board's character and fitness investigation. Upon revocation of a legal services limited license, the [~~applicant~~] limited licensee shall not represent any legal services client [~~nor~~] or appear before any court of the State of New Mexico representing any legal services client.

E. **Suspension for failure to cooperate.**

(1) *Petition for suspension for failure to cooperate.* The Board of Bar Examiners may file a petition for suspension of the limited license with the Supreme Court alleging that the attorney has not filed an application for a character and fitness investigation, has not responded to requests for information, has not appeared for a scheduled hearing, or has not produced records or documents requested by the Board of Bar Examiners and has not interposed a goodfaith objection to producing the records or documents. The petition shall be supported by an affidavit setting forth sufficient facts to demonstrate the efforts undertaken by the Board to obtain the attorney's cooperation and compliance. A copy of the petition shall be served on the respondentattorney.

(2) *Response to the petition.* If the respondentattorney fails to file a response in opposition to the petition within fourteen (14) days after service of the petition, the Supreme Court may enter an order suspending the attorney's limited license to practice law until further order of the Supreme Court. The attorney's response shall set forth facts showing that the attorney has complied with the requests or the reasons why the attorney has not complied, and the attorney may request a hearing.

(3) *Supreme Court action.* Upon consideration of a petition for suspension and the attorney's response, if any, the Supreme Court may suspend the attorney's limited license to practice law for an indefinite period pending further order of the Supreme Court, deny the petition, or issue any other appropriate orders. If a response to the petition is filed and the attorney requests a hearing on the petition, the Supreme Court may conduct a hearing or it may refer the matter to the Board for an expedited evidentiary hearing under Rule 15301(C) NMRA. The Board's findings of fact and recommendations shall be sent directly to the Supreme Court within seven (7) days after receipt of the parties' proposed findings and conclusions if requested by the Board.

(4) *Reinstatement.* An attorney suspended under this paragraph may apply to the Supreme Court for reinstatement upon proof of compliance with the requests of the Board of Bar Examiners as alleged in the petition, or as otherwise ordered by the Court. A copy of the application must be delivered to the Board,

who may file a response to the application within two (2) business days after being served with a copy of the application. The Supreme Court may summarily reinstate an attorney suspended under the provisions of this paragraph upon proof of compliance with the requests of the Board.

F. **Expiration.** The director of the qualified legal services provider that employed the attorney shall notify the clerk of the Supreme Court when the attorney is no longer employed by the qualified legal services provider. A legal services limited license shall expire upon the occurrence of any of the earliest of the following events:

(1) termination of employment with a qualified legal services provider unless the provisions of Subparagraph (G)(5) of this rule are followed;

(2) admission to the New Mexico Bar upon

(a) passing the bar examination;

(b) Uniform Bar Examination admission under Rule 15-202 NMRA; or

(c) admission on motion under Rule 15-107 NMRA; or

(3) [~~denial of admission to the New Mexico Bar;~~

~~(4) failure to maintain membership in good standing in at least one state bar in which the applicant is a member;~~

~~(5)~~] reinstatement under Rule 15302 NMRA of an inactive member of the State Bar of New Mexico[~~; or~~

~~(6) failure to pay the annual state bar membership fee or meet minimum legal education requirements under Paragraph F of this rule~~].

[~~F~~]G. **Legal services limited licensee status.**

(1) An applicant granted a legal services limited license under this rule shall be a member of the state bar and shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline.

(2) Licensees under this rule shall pay [~~a reduced~~] the annual state bar membership fee of [~~one hundred dollars ($100.00), consisting of a state bar services fee of fifty dollars ($50.00) and a disciplinary fee of fifty dollars ($50.00) in lieu of the fee required by Rule 17203 NMRA~~] one hundred twenty-five dollars ($125.00).

(3) The annual disciplinary fee assessment under Rule 17-203(A) NMRA is waived.

(4) Licensees under this rule shall comply with the Rules for Minimum Continuing Legal Education.

(5) To avoid the expiration of a limited license under Subparagraph (F)(1) of this rule, an applicant who terminates employment with one qualified legal services provider and accepts employment with another qualified legal services provider must serve written notice on the clerk of the Supreme Court of the applicant's change in employment, and the employer must also comply with Subparagraph (C)(2) of this rule.

[Adopted by Supreme Court Order No. 088300024, effective August 29, 2008; as amended by Supreme Court Order No. 098300001, effective January 14, 2009; by Supreme Court Order No. 118300048, effective January 1, 2012; as amended by Supreme Court Order No. 138300012, effective May 14, 2013; as amended by Supreme Court Order 17-8300-007, effective August 1, 2017.]

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-017

No. S-1-SC-34830 (filed April 27, 2017)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
ASHLEY LE MIER,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
DONNA J. MOWRER, District Judge

BENNETT J. BAUR
Chief Public Defender
B. DOUGLAS WOOD III
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

HECTOR H. BALDERAS
Attorney General
JACQUELINE ROSE MEDINA
Assistant Attorney General
Albuquerque, New Mexico
for Respondent

Opinion

Judith K. Nakamura, Justice

{1} In this case, we clarify the circumstances under which a court may permissibly exclude a witness as a discovery sanction. The district court issued clear, unambiguous, and reasonable discovery orders to ensure that the parties would be prepared to try Defendant Ashley Le Mier's case in a timely fashion. The State failed to comply with these orders, and the district court excluded one of the State's essential witnesses as a sanction. The State could not proceed to trial without the witness and appealed. The Court of Appeals held that *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, precluded imposition of the sanction imposed and, thus, that the district court abused its discretion. *State v. Le Mier*, No. 33,493, mem. op. ¶¶ 1, 8-9 (N.M. Ct. App. July 22, 2014) (non-precedential). We disagree. *Harper* poses no obstacle to the sanction imposed. The district court's order was an appropriate exercise of its discretionary authority. The Court of Appeals is reversed.

I.

{2} Le Mier unsuccessfully attempted to smuggle illegal substances into the Roosevelt County Detention Center (RCDC) by concealing them within a body cavity. The contraband was discovered during a strip search, Le Mier was charged with three minor criminal offenses, she was arraigned on June 18, 2012, and pled not guilty. Trial was initially set for mid-January 2013 but was postponed and rescheduled three times: once early in the proceedings to allow Le Mier's initial counsel time to prepare, once midway through the proceedings to allow Le Mier's substitute counsel time to prepare, and once near the end of the proceedings because the State could not locate all of its witnesses.

{3} The discovery phase of the proceedings lasted eighteen months. During this time, the State filed five different witness lists. Initially, eleven witnesses were enumerated, then twelve, and finally nine. Sergeant Divine Alcanzo—the corrections officer who supervised the strip search during which the contraband was discovered—appeared on all five witness lists.

{4} Le Mier's substitute counsel, Margaret Strickland, entered her appearance in June 2013, a year after Le Mier's arraignment. At that time, the State had filed its second witness list, and Strickland made good faith efforts to contact the witnesses enumerated on that witness list. Strickland could not, however, reach several of the witnesses at the addresses provided—including Alcanzo, whose address was listed as the RCDC. Strickland alerted the court to her difficulties at the hearing on her motion to continue trial in August 2013.

{5} At that hearing, the State assured the court that it would provide Strickland correct addresses for all witnesses. And as to Alcanzo, the State acknowledged that she no longer worked at the RCDC, no longer resided in New Mexico, and promised to provide Strickland her correct address. The record is silent as to when, precisely, the State learned these facts about Alcanzo. Three times prior to the motion hearing, the State represented that Alcanzo could be reached at the RCDC. In any case, the court granted Strickland's motion to continue and reset trial for October 2013.

{6} Shortly after the hearing, the court entered a written order directing the State to file an updated witness list with correct addresses for all witnesses and provided a date by which this was to be accomplished. The State filed a third witness list by the date specified by the court. The third witness list gave an Amarillo, Texas address for Alcanzo. But as before, Strickland could not reach Alcanzo at that address despite her good faith efforts and similarly could not reach several other witnesses enumerated in the third witness list at the addresses provided by the State.

{7} Strickland again alerted the court to the difficulties she was having locating and communicating with the State's witnesses by filing a motion to exclude witnesses and by alerting the court to the problem at a September 2013 pretrial conference. The court remained optimistic that the parties could settle the witness address issues and instructed them to meet and work towards some resolution.

{8} A short time after the pretrial conference, the State filed a fourth witness list, which gave yet another Amarillo, Texas address for Alcanzo. Once again, Strickland was unable to reach Alcanzo at that address despite her good faith efforts and was also unable to reach several other witnesses enumerated in the State's fourth witness list at the addresses provided.

{9} In early October 2013, only a few days after the State filed its fourth witness list, the court held a hearing on Strickland's motion to exclude. At that hearing, the State acknowledged that it too had not been able to contact or communicate with most of the witnesses whom Strickland had been unable to contact. With this concession, the district court became aware that the State had made insufficient efforts to confirm the accuracy of the addresses provided, and had done this despite the fact that the court had ordered the State to provide Strickland correct addresses for all witnesses. The court informed the State that it was unfair to require Strickland

to track down and communicate with witnesses the State had not itself located and who might not even testify at trial. Hoping to finally put the witness address issues to rest, the court once again ordered the State to provide Strickland correct addresses for all witnesses and again specified a date by which this was to be completed. The court took the additional step of requiring the State to facilitate a telephone conversation between Strickland and Alcanzo. The court gave clear and explicit instructions: "if you find [Alcanzo], provide a telephonic interview with Ms. Strickland for her . . . . In other words, if you get her on the phone, you contact Ms. Strickland so that Ms. Strickland can have a telephone conference at the same time, okay?" The State confirmed that it understood the court's instructions and its obligations. The court concluded the hearing by informing the parties that it would reserve ruling on Strickland's motion to exclude witnesses up to the morning of trial. These rulings were memorialized in a written order filed shortly after the hearing.

{10} Less than a week after the hearing on the motion to exclude, the State filed its fifth witness list. And roughly two weeks later, at docket call in mid-October 2013, the State claimed that it still had difficulty locating witnesses, including Alcanzo, and requested a trial continuance. The State also had not yet facilitated the phone conversation between Strickland and Alcanzo and explained to the district court that it understood that it was required to facilitate the phone conversation *only if* it could locate Alcanzo. The court informed the State that its understanding was mistaken and bluntly instructed the State that it had to locate any witnesses it intended to call at trial and proceed with its case. Nevertheless, the court granted the State's continuance request, but did so only because it was the first continuance the State requested and because Le Mier had already been granted two continuances. Trial was reset for December 30, 2013, but the court made clear that trial would not be postponed further.

{11} A status conference was held in early December 2013, and at the outset of the conference the court emphasized that the December 30, 2013, trial setting was "firm." The State informed the court that it had finally confirmed Alcanzo's address and promised that it would facilitate the phone conversation between Strickland and Alcanzo right away. The State did not follow through on its promise. Rather, it e-mailed Alcanzo's phone number to Strickland several days after the status conference. Strickland's office staff called that number several times, left messages, but received no response. At some point, an unknown female caller telephoned Strickland's office but refused to identify herself, uttered expletives, and promptly terminated the phone call.

{12} Ten days before the final trial setting, Strickland filed an amended motion to exclude witnesses. In that motion, she protested that the State still had neither facilitated the phone conversation between her and Alcanzo nor provided accurate addresses for all witnesses. Accordingly, she requested that Alcanzo and the two other witnesses with whom she had not had any contact be excluded from testifying at trial.

{13} A final hearing on Strickland's motion and amended motion to exclude witnesses was conducted on December 23, 2013, one week before what both parties knew was the final trial setting. The court asked the State why it still had not facilitated the phone conversation between Strickland and Alcanzo, and this time the State replied that it believed it had complied with the court's order to facilitate the communication by providing Strickland with Alcanzo's phone number. With respect to the two other witnesses, the State informed the court that it too had not been in touch with one of those witnesses and agreed not to call that individual at trial. And as to the other witness, the State indicated that it had a phone number where he could be reached.

{14} Plainly frustrated, the court considered requiring the State to procure Alcanzo that very afternoon so that Strickland could interview her, but discussion with Strickland proved that this was not a viable option. Accordingly, the court granted Le Mier's request to exclude Alcanzo. The court also excluded one of the other two witnesses whom Strickland had been unable to reach. In a subsequently filed written order, the court concluded that the State had been culpable in failing to comply with the court's discovery orders, the State's failure to comply with the court's orders prejudiced Le Mier, and no lesser sanctions were available.

II.

{15} In *Harper*, we embraced a pragmatic approach to guide courts in assessing whether the sanction of witness exclusion is appropriate. 2011-NMSC-044, ¶ 15. *Harper* instructs our courts to assess (1) the culpability of the offending party, (2) the prejudice to the adversely affected party, and (3) the availability of lesser sanctions. *Id.* The present case and others like it persuade us that our intentions in *Harper* have not been understood. *See State v. Ramos*, No. 33,969, mem. op. ¶ 7 (N.M. Ct. App. Feb. 11, 2015) (non-precedential) (agreeing that the state's refusal to file a mandatory response to a dispositive pleading was both "troubling" and "inappropriate," but nevertheless reversing the district court's decision to dismiss the charges against the defendant on grounds that *Harper* permits such a sanction only where the state's conduct is tantamount to a willful refusal to participate in discovery such that the defendant is deprived of her ability to present a defense); *State v. Maldonado*, No. 33,403, mem. op. ¶¶ 1-4 (N.M. Ct. App. Nov. 18, 2014) (non-precedential) (reversing the district court's decision to exclude three state witnesses who failed to appear at their designated witness interviews and, thus, were not interviewed within the time frame required by the district court's scheduling order on grounds that *Harper* permits exclusion of witnesses only where the defendant's access to all evidence is precluded by the state's "intransigence").

{16} *Harper* did not establish a rigid and mechanical analytic framework. Nor did *Harper* embrace standards so rigorous that courts may impose witness exclusion only in response to discovery violations that are egregious, blatant, and an affront to their authority. Such a framework and such limitations would be unworkable in light of the fact that our courts' authority to exclude witnesses is discretionary, *Mathis v. State*, 1991-NMSC-091, ¶ 13, 112 N.M. 744, 819 P.2d 1302, and courts must be able to avail themselves of, and impose, meaningful sanctions where discovery orders are not obeyed and a party's conduct injects needless delay into the proceedings. *See State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148.

{17} As a reviewing court, we cannot attempt to precisely delineate how trial courts are to exercise their discretionary authority in the varied cases over which they must preside. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988) ("[A] comprehensive set of standards to guide the exercise of discretion in every possible case" is "neither necessary nor appropriate."). Similarly, we cannot second-guess our courts' determinations as to how their discretionary authority is best exercised. *See United States v. Frasch*, 818 F.2d 631, 633-34 (7th Cir. 1987) (observing that the task of a reviewing court considering a trial court's discretionary determination "is not to second-guess the decision, but only to ensure that the trial court made a principled exercise of its discretion."). As an appellate court, we necessarily operate with imperfect information about the proceedings we

review, and our assessment of the propriety of the decision to impose or not to impose witness exclusion must reflect this reality. *See United States v. Harrington*, 490 F.2d 487, 497 (2d Cir. 1973) (Friendly, J., dissenting) ("[T]he majority has yielded to the temptation of second-guessing, in the peace and quiet of appellate chambers, the reasoned action of an experienced [trial] judge . . . .").

{18} More critically, trial courts shoulder the significant and important responsibility of ensuring the efficient administration of justice in the matters over which they preside, and it is our obligation to support them in fulfilling this responsibility. The judiciary, like the other co-equal branches of our state government, ultimately serves the people of New Mexico. No one is well-served—not defendants, not victims, not prosecutors, not courts, and certainly not the citizens of New Mexico—by a system of justice where cases needlessly languish in some obscure netherworld because one or both of the parties lack the will or capacity to comply with basic discovery deadlines, and courts are either reluctant to impose meaningful sanctions because they fear the prospect of reversal on appeal or have not taken sufficient responsibility for ensuring the swift and efficient administration of justice. The truth of this assertion is borne out quite plainly by the failed record of those jurisdictions where a culture of delay has been permitted to flourish. *See, e.g.*, William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. Times, Apr. 13, 2013, http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html (last visited March 10, 2017). The old adage "justice delayed is justice denied" is well-worn because it is true.

{19} Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration. *See Baca*, 1995-NMSC-033, ¶ 11 (recognizing that district courts "have inherent power to impose a variety of sanctions . . . to regulate their docket, promote judicial efficiency, and . . . command the obedience of litigants and their attorneys . . . . " (internal quotation marks and citations omitted)); *see also State v. Stills*, 1998-NMSC-009, ¶¶ 43-44, 125 N.M. 66, 957 P.2d 51 (affirming the district court's decision to preclude witness testimony as a sanction for defense counsel's "delay tactics" and to ensure the "integrity of the judicial system, and [the] efficient administration of justice"); 5 Wayne R. LaFave et al., *Criminal Procedure* § 20.6(b), at 596-97 (4th ed. 2015) (observing that some jurisdictions allow district courts to utilize the power of exclusion to compel compliance with the rules of discovery). *Harper* in no way circumscribed our courts' authority to exercise this power, and we now expressly authorize our courts to utilize witness exclusion to proactively manage their dockets, achieve efficiency, and ensure that judicial resources—which are greatly limited—are not wasted.

{20} Courts must evaluate the considerations identified in *Harper*—culpability, prejudice, and lesser sanctions—when deciding whether to exclude a witness and must explain their decision to exclude or not to exclude a witness within the framework articulated in *Harper*, but it is not the case that witness exclusion is justified only if all of the *Harper* considerations weigh in favor of exclusion. As one court explained, "[o]n occasion the district court may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced." *See United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988). What is embodied in this observation is a view we have always embraced: Whether it is proper to exclude a witness is not a simple choice easily resolved by reference to some basic judicial arithmetic. The question requires our courts to navigate an array of concerns and to exercise their discretionary power with practical wisdom and due care. *See State v. Guerra*, 2012-NMSC-014, ¶ 33, 278 P.3d 1031 ("The decision to exclude evidence calls on judicial discretion to weigh all the circumstances . . . .").

{21} When exercising their discretionary power, our courts must be ever mindful of the fact that witness exclusion is a severe sanction and one that should be utilized as a sanction of last resort. *See Harper*, 2011-NMSC-044, ¶ 21. Witness exclusion may harm the community's interest by detrimentally affecting the prosecution's ability to see an offender brought to justice and, conversely, can thwart the accused's opportunity to demonstrate innocence. *See* 5 LaFave, *supra*, § 20.6(b), at 594 (observing that the exclusion of the prosecution's evidence adversely affects "the interests of the community, the party represented by the prosecutor"); 22A C.J.S. *Criminal Procedure and Rights of the Accused* § 465, at 210 (2016) ("[E]xclusion of exculpatory evidence implicates the defendant's constitutional right to defend himself or herself."). For these reasons, our courts do not possess unfettered discretionary authority to impose witness exclusion; but, nor is that discretion so limited that it amounts to no discretion at all.

{22} In sum, we merely reiterate what was true well before *Harper*: Trial courts possess broad discretionary authority to decide what sanction to impose when a discovery order is violated. *See, e.g.*, *State v. Johnson*, 1977-NMCA-109, ¶ 4, 91 N.M. 148, 571 P.2d 415. The propriety of a trial court's decision to exclude or not to exclude witnesses is reviewed for abuse of discretion. *Guerra*, 2012-NMSC-014, ¶ 23. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted). In reviewing the district court's decision, this Court views the evidence—and all inferences to be drawn from the evidence—in the light most favorable to the district court's decision. *Mathis*, 1991-NMSC-091, ¶ 13.

III.

{23} In this case, a basic discovery rule was flagrantly violated: "Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment . . . the state shall disclose or make available to the defendant: . . . a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial . . . ." Rule 5-501(A)(5) NMRA. This rule would have little or no practical value if it were not true that it requires the state to provide *correct* witness addresses. *See State v. Orona*, 1979-NMSC-011, ¶ 6, 92 N.M. 450, 589 P.2d 1041 ("[T]he purpose of [requiring the state to provide the defendant a witness list is] to assist defense counsel in the preparation of a defense by providing the opportunity to interview the government's witnesses."), *holding limited on other grounds by State v. Jojola*, 2006-NMSC-048, ¶¶ 5, 12, 140 N.M. 660, 146 P.3d 305. It is understandable that in certain circumstances locating a witness's correct address may take more time than the rule allows. This is precisely what happened in the present case and the district court was appropriately lenient. Nevertheless, a threshold was crossed. Despite repeated orders, the State failed to provide correct witness addresses—for Alcanzo and other witnesses—throughout nearly the entirety of the eighteen-month discovery period. The State also failed to facilitate the phone call between Strickland and Alcanzo as ordered. When considering Strickland's amended motion to exclude, the district court appropriately evaluated the State's culpability, whether the State's conduct gave rise

to prejudice, and whether excluding Alcanzo was the least severe sanction appropriate under the facts and circumstances of this case.

{24} The district court did not abuse its discretion in finding the State culpable. Parties must obey discovery orders. *See State v. Layne*, 2008-NMCA-103, ¶ 13, 144 N.M. 574, 189 P.3d 707 (quoting *State v. Doe*, 1978-NMCA-124, ¶ 8, 92 N.M. 354, 588 P.2d 555) ("[U]pon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances.") (alteration in original) (internal quotation marks omitted)). Our system of justice would be neither orderly nor efficient if this were not true. The court repeatedly ordered the State to provide Strickland correct witness addresses and the State repeatedly failed to comply. This is sufficiently culpable conduct to justify exclusion. While here the violations were multiple, a single violation of a discovery order may suffice to support a finding of culpability. Moreover, the court's orders were clear and unambiguous, and the violation of clear and unambiguous orders is only further proof of culpable conduct. *Cf. Harper*, 2011-NMSC-044, ¶¶ 7, 27-28 (taking into consideration the fact that the district court's order, as well as the court's commentary at hearings, was vague in reversing the district court's decision to preclude witness testimony).

{25} Similarly, we find no abuse of discretion in the district court's conclusion that the State's failure to comply with the court's discovery orders gave rise to prejudice. When a court orders a party to provide discovery within a given time frame, failure to comply with that order causes prejudice both to the opposing party and to the court. Le Mier was prejudiced in two ways. The court had to reset trial as a consequence of the State's inability to locate its witnesses and provide Strickland correct witness addresses, and this prejudiced Le Mier by needlessly delaying her proverbial "day in court." In addition, the State's conduct forced Strickland into an unenviable position she quite understandably wished to avoid. Trial was imminent and Strickland had not yet communicated with Alcanzo (an essential witness) and other named State witnesses. These circumstances subjected Strickland to the possibility of trial by surprise and, thus, prejudiced Le Mier. *See McCarty v. State*, 1988-NMSC-079, ¶ 14, 107 N.M. 651, 763 P.2d 360 ("[T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." (internal quotation marks and citation omitted)); *see also Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006) ("[T]he chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush.").

{26} The district court was also prejudiced in two ways. The State's inability to provide Strickland correct witness addresses required the court to dedicate its time and resources to a needless and wasteful cause: ensuring compliance with basic discovery rules and orders. Courts need not suffer nor tolerate a party's inability to comply with rules and orders but must instead ensure that the party's non-compliance does not result in the waste of judicial resources. Here, the court's time was wasted, and this is prejudicial. Additionally, the State's dilatory conduct disrupted the court's docket in that the State's inability to locate its witnesses necessitated continuing and resetting trial. This is no minor inconvenience. When courts cordon off dates for particular parties and proceedings, they necessarily commit to not hearing other equally important matters involving other parties. When a party accepts a setting only to later abandon it for no meritorious reason, other parties and the justice system as a whole suffers. This is precisely what happened here, and this gave rise to prejudice.

{27} Lastly, we are persuaded that witness exclusion was the least severe sanction in light of the circumstances of this case. We reach this conclusion for the following three reasons. First, the district court was not obligated to consider every conceivable lesser sanction before imposing witness exclusion. To require this would be to significantly impinge upon and curtail the court's broad discretionary authority to fashion appropriate sanctions for discovery violations. *See State v. Martinez*, 1998-NMCA-022, ¶ 8, 124 N.M. 721, 954 P.2d 1198 (observing that the district court possesses a "breadth of discretion" to fashion sanctions). Rather, the court was only required to fashion the least severe sanction that best fit the situation *and* which accomplished the desired result. *Id.*

{28} Second, the court gave the State multiple and varying opportunities to cure its discovery violations and imposed exclusion only after progressive sanctions failed to produce the desired effect. From the time she first entered her appearance, Strickland repeatedly asked for correct addresses for all witnesses including Alcanzo. The court ordered the State—twice by written order and numerous times orally at hearings—to provide correct addresses for all witnesses. Yet, the State did not comply with these orders and did not provide Strickland with Alcanzo's correct address until late in the proceedings. As discovery dragged on and it became clear to the court that the State was having difficulty identifying Alcanzo's correct address, the court quite sensibly pursued an alternative strategy and ordered the State to facilitate a phone conversation between Strickland and Alcanzo. The State also did not comply with this order. Additionally, the court granted the State's continuance request and rescheduled trial to permit the State more time to locate Alcanzo and other witnesses. These facts demonstrate that the court gave the State ample opportunity to comply with reasonable and clear orders and imposed exclusion only after implementing progressively more stringent requirements that were designed to bring the State into compliance. Progressive sanctions may be impractical or infeasible in some cases. But when they are imposed, evidence of their utilization most certainly bears on whether a court imposed the least severe sanction appropriate given the circumstances presented.

{29} Third, we are persuaded that, by electing to exclude Alcanzo, the district court responded to the specific violation at issue with a sanction tailored to fit that violation. Moreover, the sanction imposed simultaneously ensured that the court's authority to efficiently administer the law and ensure compliance with its orders was vindicated. We reiterate that our courts need not stand idly by and tolerate dilatory conduct by the parties. Rather, our courts are encouraged to ensure the timely adjudication of cases, to proactively manage their dockets, and to utilize appropriate sanctions to vindicate the public's interest in the swift administration of justice. It is clear that the district court was effectuating these very interests when it excluded Alcanzo and we will not second-guess the court's judgment that exclusion was the most effective and least severe way to achieve the desired ends.

IV.

{30} The district court did not abuse its discretion in excluding Alcanzo from testifying at Le Mier's trial. The Court of Appeals' opinion is reversed, and the district court's order excluding Alcanzo is affirmed. The matter is remanded to the district court for proceedings consistent with this opinion.

{31} 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 Court of Appeals

Opinion Number: 2017-NMCA-041

No. 34,410 (filed February 2, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
AARON A. RAMOS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
JERRY H. RITTER JR., District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} Defendant Aaron A. Ramos was convicted of possession of a controlled substance (methamphetamine) and was found not guilty of battery on a household member. Defendant makes two arguments on appeal: (1) that the police violated his constitutional right to be free from unreasonable searches and seizures when they entered his home without a warrant and without authority to do so, and (2) that the district court erred when it failed to grant Defendant's motion to sever the charges and hold separate trials for the battery on a household member charge and the possession of methamphetamine charge. We hold that the police improperly entered Defendant's home without a warrant because no valid exception to the warrant requirement applied. We further hold that the evidence seized should have been suppressed, and we therefore reverse the district court's order denying Defendant's motion to suppress. Because Defendant was acquitted on the battery against a household member charge, his severance-related arguments are moot.

BACKGROUND

{2} In March 2013 Defendant was charged with battery against a household member, contrary to NMSA 1978, Section 30-3-15 (2008), and possession of drug paraphernalia,[1] contrary to NMSA 1978, Section 30-31-25.1(A) (2001), following an alleged domestic violence incident that occurred on March 7, 2013. In May 2013 he was also charged with possession of a controlled substance, contrary to NMSA 1978, Section 30-31-23(E) (2011), which similarly arose after law enforcement responded to the incident on March 7, 2013. The cases were ultimately joined in August 2013, and the State re-filed its criminal information to reflect the consolidated charges.

{3} Defendant filed a motion to suppress evidence found in his apartment after police responded on March 7, 2013, on the ground that "[t]he search of Defendant's apartment and subsequent seizure of alleged controlled substance was without a warrant, without exigency, and without lawful right of access to the premises." During the hearing on the motion to suppress, relevant testimony was elicited from Brittney Priddy, the alleged victim in the domestic dispute; Officer Tillman Freeman, a patrol officer with the Ruidoso Police Department; and Sergeant Mike Weaver, also with the Ruidoso Police Department.

{4} Ms. Priddy testified that she and Defendant had dated in the past. She also testified that she told the officers that "there was a possibility" that Defendant was the biological father of Ms. Priddy's daughter. On March 7, 2013, Ms. Priddy called the police, and the police responded to her location at a condominium complex on Carrizo Canyon in Ruidoso, New Mexico. When asked by the State where she lived on March 7, 2013, Ms. Priddy testified that she "stayed" with her dad but that she had been staying with Defendant for three to four days at his apartment, sharing the only bedroom. She was not on Defendant's lease agreement nor did she pay any rent. Defendant had asked her on March 6 to pay money for staying there.

{5} Ms. Priddy further testified that, when staying with Defendant, she would gain access to the apartment either with Defendant, or she would just enter when the door was unlocked. She never had her own key but sometimes Defendant would hand her his keys. Defendant did not restrict Ms. Priddy's access to any areas of the apartment when she was inside. Ms. Priddy indicated that during her stay, she had kept some of her clothes and some of her daughter's clothes at the residence. She testified that she had tried to leave the night before and had put her and her daughter's clothing into a box but ended up staying the night.

{6} Ms. Priddy also testified that after the alleged altercation with Defendant on March 7, 2013, she ended up outside of the residence and called the police. She testified that when the police arrived Defendant was not present. Ms. Priddy, who was unable to access the residence, asked the police for help in getting her things out of the apartment. Ms. Priddy told the officers that she did not live there and was not on the lease, but had been staying there. At that point, according to her testimony, the police gained access to the residence, which was on the second story, and brought Ms. Priddy her box of clothes while she waited downstairs.

{7} Sergeant Weaver received a call for service on March 7, 2013, in reference to 900 Carrizo Canyon regarding a "violent domestic." He was the first officer to arrive to the scene. Upon arrival, Sergeant Weaver made contact with Ms. Priddy and asked her if she needed to get any items out of the residence. He apparently asked her this question because she did not have anything with her and "anybody would probably need some personal clothing or toiletry-type items." Sergeant Weaver asked Ms. Priddy if anyone was inside of the residence, to which she responded,

[1]The possession of drug paraphernalia charge was dismissed prior to trial.

no.[2] When asked whether she had a key, Ms. Priddy said that everything was inside.[3] Sergeant Weaver testified that Ms. Priddy had said that she had been staying at the apartment, and Sergeant Weaver was aware that Ms. Priddy and Defendant had some sort of relationship based on previous incidents. Sergeant Weaver noted that the door was locked and testified that he got a key from the maintenance man at the apartment complex.

{8} Sergeant Weaver did not "specifically recall" whether he or Ms. Priddy opened the door, but he believed that he did because "there was a concern that there could possibly be somebody inside the apartment." Based on that concern, Sergeant Weaver cleared the residence with Officer Freeman. After the officers cleared the residence, Ms. Priddy gathered her clothes and some children's clothes and put them in a box. According to Sergeant Weaver, it took Ms. Priddy "not even maybe thirty seconds" to gather her items. Sergeant Weaver also testified that after clearing the apartment, while he and Ms. Priddy were downstairs, he noticed a vehicle, matching the description of the vehicle Ms. Priddy had told him Defendant was in, pull into a large parking lot "across the way." Sergeant Weaver also testified that he was told that Ms. Priddy had been staying at the apartment for two days at the time of the incident.

{9} Officer Freeman also testified that on March 7, 2013, he received a call to 900 Carrizo Canyon regarding a "violent domestic in progress." Ms. Priddy asked Officer Freeman to assist her in obtaining her belongings. According to Officer Freeman, Ms. Priddy stated that her personal belongings and her child's belongings were in the apartment. She told Officer Freeman that she had been staying there recently. After Sergeant Weaver had obtained a key from a maintenance man, the officers entered the apartment. Before the officers entered, they asked Ms. Priddy whether anyone was in the apartment, and she stated that she did not know because she was asleep and was unsure if someone had entered prior to her waking up. The officers were also told, prior to entering, that a firearm was possibly obtained by Defendant. Upon entering the apartment, the officers cleared the residence to ensure the safety of the officers and Ms. Priddy. In clearing the residence, the officers looked in places where a person could be located or hiding. Officer Freeman was also told by Ms. Priddy that Defendant had "possibly left in a white SUV [and] possibly had a . . . firearm . . . with him."

{10} Officer Freeman testified that, after clearing the residence, Sergeant Weaver stood with Ms. Priddy while she obtained her and her child's property.[4] At that point, Officer Freeman saw, in plain view, what he believed to be drug paraphernalia on a coffee table in the living room of the apartment. He saw these items after clearing the apartment. He photographed the items, and the items were ultimately seized.

{11} Officer Freeman testified that the purpose of entering the apartment was so that Ms. Priddy could obtain her property. Officer Freeman acknowledged that Ms. Priddy had told him that drug paraphernalia could be present in the apartment but stated that the paraphernalia was not the officers' priority when entering the apartment. When asked whether he made any attempts to determine if Ms. Priddy's access to the residence was lawful, Officer Freeman stated that he learned that Ms. Priddy and Defendant had a relationship and that she had been staying at the residence recently with her child. When asked whether he had consent to enter the residence, Officer Freeman stated that he had consent from Ms. Priddy.

{12} After the hearing on the motion to suppress, the district court denied Defendant's motion. In its order, the court found, in relevant part:

> 1. It was reasonable for officers to believe that [Ms.] Priddy had authority to enter the residence located at 900 Carrizo Canyon, Apartment 235 to retrieve her personal items.
>
> 2. The Officers['] conduct in assisting Ms. Priddy to retrieve her items was reasonable and consistent with their duties under the Family Violence Protection Act. [NMSA 1978,] §§ 40-13-1 to -12 [(1987, as amended through 2016)]; *see also State v. Almanzar*, 2014-NMSC-001, ¶¶ 19-20, [316] P.3d 183.
>
> 3. Officer Freeman and Sergeant Weaver were acting pursuant to their duties as community caretakers. "The community caretaker exception recognizes that warrants, probable cause, and reasonable suspicion are not required when police are engaged in activities that are unrelated to crime-solving." *State v. Ryon*, 2005-NMSC-005, ¶ 24, 137 N.M. 174, 108 P.3d 1032. When Officer Freeman and Sergeant Weaver entered the residence, they were no[t] engaged in activities related to crime-solving.
>
> 4. It was reasonable for officers to conduct a limited, protective search of the residence to determine whether any other individuals were present that could pose a danger to both the officers and Ms. Priddy.

{13} The day before trial, Defendant filed a motion to reconsider his motion to suppress. Defendant argued that the State failed to prove actual common authority and that apparent authority was insufficient. The court denied the motion to reconsider.

DISCUSSION

A. Standard of Review

{14} We quote the standard of review in its entirety from *State v. Hernandez*, 2016-NMCA-008, ¶ 10, 364 P.3d 313, *cert. denied*, 2015-NMCERT-012, 370 P.3d 472.

> When we review an appeal from a determination on a motion to suppress in a criminal case, we look at the totality of circumstances. We view the facts in a light most favorable to the prevailing party. At the same time, if the district court makes findings of fact, and if any finding

[2]Although Sergeant Weaver testified that Ms. Priddy said no one was inside, he later testified that when he approached the apartment, there was concern that there could possibly be someone "or Mr. Ramos" inside of the residence. There is nothing in the record to indicate that Sergeant Weaver specifically asked whether Defendant was in the apartment.

[3]Sergeant Weaver apparently took Ms. Priddy's statement that "everything was inside" to mean that her key was inside, although Ms. Priddy never said she had a key.

[4]The officers' testimony that Ms. Priddy collected her property from the apartment is inconsistent with Ms. Priddy's testimony that the officers entered the apartment and brought her the box of clothes while she waited downstairs. Despite the factual discrepancy, neither party highlighted the divergent testimony on appeal.

> is attacked for lack of substantial evidence, we will review the finding under a substantial evidence standard of review. If the finding is supported by substantial evidence, we will defer to the court's finding. Once the operative facts are ascertained, we review the constitutional reasonableness of the actions of law enforcement. A constitutional reasonableness analysis engages a process of evaluating both fact and law and is appropriately labeled a mixed question of fact and law. Despite the fact that our review requires determinations of what the operative facts are, because the process involves evaluative judgments in regard to reasonableness, we review the district court's determination de novo.

(Citations omitted.)

{15} The United States and New Mexico Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.M. Const. art. II, § 10. "The touchstone of search and seizure analysis is whether a person has a constitutionally recognized expectation of privacy." *State v. Ryan*, 2006-NMCA-044, ¶ 19, 139 N.M. 354, 132 P.3d 1040 (internal quotation marks and citation omitted). "Among the areas afforded the greatest protection by these constitutional provisions is a person's home." *State v. Monteleone*, 2005-NMCA-129, ¶ 9, 138 N.M. 544, 123 P.3d 777. Therefore, a warrantless entry and search of a home are "presumptively unreasonable, subject only to a few specific, narrowly defined exceptions." *Ryon*, 2005-NMSC-005, ¶ 23; *Monteleone*, 2005-NMCA-129, ¶ 10 ("[A]bsent an exception to the warrant requirement, the officers' entry into [the d]efendant's apartment was a violation of his constitutional rights under both the United States and New Mexico Constitutions."); *State v. Diaz*, 1996-NMCA-104, ¶ 8, 122 N.M. 384, 925 P.2d 4 ("A search and seizure conducted without a warrant is unreasonable unless it is shown to fall within one of the exceptions to the warrant requirement."). "The [prosecution] has a heavy burden when it seeks to sustain a warrantless search." *Diaz*, 1996-NMCA-104, ¶ 8.

{16} Defendant argues that the consent exception to the warrant requirement does not apply because Ms. Priddy did not have the requisite authority to consent to entry and search of the apartment. The State disagrees, arguing that Ms. Priddy did have the authority to consent. According to Defendant, neither the Family Violence Protection Act (FVPA) nor the community caretaker doctrine permits a warrantless entry in this case. Defendant also argues that a protective sweep was not justified. The State argues that the entry and search were reasonable under the FVPA and under the protective sweep rule, and thus a warrant was not required. We address the possible application of exceptions to the warrant requirement articulated by the parties.

B. Consent

{17} "A valid consensual search has been acknowledged as an exception to the warrant requirement." *Id.* ¶ 9. For consent to be valid, the party giving consent must have actual authority to do so and not merely apparent authority. *State v. Wright*, 1995-NMCA-016, ¶¶ 18-20, 119 N.M. 559, 893 P.2d 455 (holding that, under the New Mexico Constitution, the relevant inquiry is not whether officers reasonably believed that authority to consent to enter existed, but rather whether the consenting party actually had authority to consent). Our appellate courts have recognized that a third party can validly consent to a search of an apartment, however, that individual must have "common authority over the premises." *State v. Walker*, 1998-NMCA-117, ¶ 8, 125 N.M. 603, 964 P.2d 164; *see Diaz*, 1996-NMCA-104, ¶ 9. "[C]ommon authority refers to the mutual use of the property by persons generally having joint access or control of the property for most purposes." *Walker*, 1998-NMCA-117, ¶ 8. "A sufficient relationship may be established by the following: (1) a right to occupy the premises, (2) unrestricted access to the premises, and (3) storage of property on the premises." *Ryan*, 2006-NMCA-044, ¶ 29. The cases primarily relied upon by the parties, *Wright*, 1995-NMCA-016, *Diaz*, 1996-NMCA-104, and *Walker*, 1998-NMCA-117, are instructive.

{18} In *Wright*, two police officers approached a residence after receiving a tip that illegal drugs had been delivered to the residence and were being divided up for sale. 1995-NMCA-016, ¶ 3. When the two officers neared the front door, but before they had an opportunity to knock, a woman opened the door and said, "Hi." *Id.* At the time, neither officer knew who owned the residence but they asked the woman if they could come inside and talk. *Id.* The woman gave no verbal response but opened the door wider and stepped back inside the residence. *Id.* Once inside, one of the officers indicated that he became concerned about his safety because there were several vehicles outside of the residence, and yet, the only person they had encountered was the woman who answered the door. *Id.* ¶ 4. The woman was asked if anyone else was in the residence, to which she responded that only she and her children were in the residence. *Id.* After the woman showed the officers that the children were asleep in a bedroom, one of the officers noticed a light coming from under a door of a different bedroom and asked if anyone was in that room. *Id.* The woman said she did not think so. *Id.* When asked if he could look in the room, the woman responded, " 'Oh, it's not my place, but go ahead.' " *Id.* When one of the officers "started to open the door . . . it was immediately closed from inside." *Id.* The officers reopened the door and discovered the defendant, her boyfriend, and what appeared to be drug paraphernalia. *Id.* ¶¶ 1, 4-5. The defendant and her boyfriend were placed under arrest, and cocaine was found on the defendant. *Id.* ¶ 5. The officers also found paraphernalia in the boyfriend's van that was parked outside of the residence. *Id.*

{19} The prosecution argued in *Wright* that although the woman who answered the door did not have actual authority to grant consent to the officers' warrantless entry and search, apparent authority was sufficient. *Id.* ¶ 16. This Court disagreed and held that reliance on the officers' subjective belief that the woman had apparent authority to give consent ran counter to the New Mexico Constitution. *Id.* ¶ 19. The Court therefore held that "it was unreasonable for the officers . . . to rely on the consent of [the woman] for the search of the closed bedroom occupied by [the defendant]" and concluded that "where the [prosecution] relies upon consent to justify a warrantless search of a residence, there is no 'apparent authority' exception under Article II, Section 10 of the New Mexico Constitution." *Id.* ¶ 20.

{20} In *Diaz*, this Court considered whether a homeowner-father could consent to the search of his adult son's bedroom. 1996-NMCA-104, ¶¶ 1, 4. In *Diaz*, law enforcement approached the father's residence after receiving a tip from a confidential informant that there was marijuana at the residence. *Id.* ¶ 2. Upon their arrival, the agents met the defendant-son in front of the father's residence and explained that they intended to secure

the premises until a search warrant could be obtained. *Id.* ¶¶ 2-3. The defendant waited outside of the residence while the agents spoke with the father inside. *Id.* ¶ 3. The father apparently signed a consent to search form, and the agents proceeded to search the residence without a warrant. *Id.* ¶¶ 4-5. The father told the agents that he lived in the residence with his two sons: the defendant, who was twenty-nine, and another son who periodically stayed there. *Id.* ¶ 4. The father stated that he owned the residence, paid all the bills, and the sons did not pay rent. *Id.* Based on the father's consent, the agents searched the defendant's bedroom that did not have a door but which had a blanket hanging from the top of the door frame. *Id.* ¶ 5. The agents ultimately found marijuana. *Id.* At no time did the agents ask the defendant for consent to search his bedroom, despite the fact that the defendant was waiting in the front yard. *Id.* ¶ 4.

{21} The *Diaz* Court ultimately held that the district court was correct to suppress evidence discovered during the warrantless search because the prosecution failed to show that the father "had both joint access for most purposes and mutual use of [the d]efendant's room." *Id.* ¶¶ 1, 15. The Court held that the defendant "had far greater access and control and a superior privacy interest" in the bedroom. *Id.* ¶ 16. The Court also relied upon *Wright*'s rejection of the apparent-authority standard and held that the prosecution's argument that the agents had "no reason to doubt" the father's authority was insufficient because "under Article II, Section 10 of the New Mexico Constitution, the [prosecution] was required to show the actual authority of [the father] for his third-party consent to be valid." *Diaz*, 1996-NMCA-104, ¶¶ 17-18.

{22} In *Walker*, this Court considered whether an alleged victim had common authority to provide consent to search the apartment she shared with the defendant. 1998-NMCA-117, ¶¶ 1-2, 8. In *Walker*, the alleged victim had been living with the defendant for approximately six years. *Id.* ¶ 2. With the exception of about one month, a year prior to the events in question, the victim had been living for approximately one and one-half years at the specific apartment that was ultimately searched. *Id.* The victim ate there, slept there, kept all of her personal belongings there, and had complete access to the apartment. *Id.* At one time she had a key to the apartment, but had lost it. *Id.* According to the victim, "during the latter period of her cohabitation with [the d]efendant, . . . he physically assaulted her and he prevented her from freely leaving the apartment." *Id.* ¶ 3. At some point, she was able to escape and rode her bicycle to the hospital. *Id.* ¶ 4. At the hospital, security personnel contacted the police, and the victim ultimately returned to the apartment with the police. *Id.* At that time, the victim signed a consent form authorizing the police officers to search the apartment. *Id.*

{23} In holding that the victim had common authority over the apartment, this Court noted that the victim "had lived there for approximately one and one-half years, her personal belongings were in various locations throughout the apartment, and she had access to all rooms in the apartment." *Id.* ¶ 9. The Court held that neither the fact that the victim did not have a key at the time she gave consent, nor the fact that she ultimately fled the apartment, divested her of common authority over the apartment. *Id.* ¶¶ 1, 10, 13. Because the victim "possessed the requisite relationship to the apartment to allow her to consent to its search[,]" this Court reversed the trial court's order of suppression. *Id.* ¶¶ 13, 15.

{24} Defendant argues that the district court erred in denying his motion to suppress because Ms. Priddy did not possess actual common authority to consent to an entry and search of Defendant's apartment. Defendant argues that Ms. Priddy did not have common authority because he did not give her unrestricted access to his apartment, and she was simply a houseguest for two to four days. Defendant notes that Ms. Priddy did not have her own key to the apartment and highlights testimony from Ms. Priddy that she did not live at Defendant's apartment, but rather had only been staying there for a few days. He also highlights that, at the suppression hearing, Ms. Priddy could not remember Defendant's address. Defendant compares and analogizes this case to *Wright*, arguing that his reasonable expectation of privacy was intruded upon when the officers acted on apparent authority and not actual authority. Defendant also argues that, as in *Diaz*, the evidence should be suppressed because Defendant had a superior privacy interest in his apartment. Defendant contrasts the facts in this case to those in *Walker*, arguing that Ms. Priddy was staying at the apartment for a significantly shorter period than the victim in *Walker*. He also argues that, unlike the victim in *Walker*, who had possessions throughout the apartment, Ms. Priddy had all of her items stored in a box in the hallway.

{25} The State responds that Ms. Priddy had common authority and a sufficient relationship to the apartment, such that she was able to consent to the officers' entry. The State argues that Ms. Priddy had unrestricted access to all areas of the apartment, that she and Defendant shared a key and bedroom, and that Ms. Priddy's daughter, of whom Defendant was possibly the father, lived with them part of the time when they were at the apartment. The State also argues that Ms. Priddy kept essential belongings in the apartment for herself and her daughter. The State attempts to contrast the facts in this case to the facts in *Diaz* by arguing that the son in *Diaz* had a superior privacy interest, while Defendant in this case had no such interest. The State also compares the present case to *Walker* and argues that, as in *Walker*, Defendant could have no reasonable expectation that Ms. Priddy would not return accompanied by the police or to retrieve her belongings. Finally, the State points to language in *Wright* that "strongly suggested that 'five to ten minutes' in a bedroom [was] sufficient for a co-occupant to consent to a search."

{26} We agree with Defendant that, under our case law, Ms. Priddy did not have actual common authority over the apartment. Ms. Priddy had been staying at the apartment for two to four days, unlike the alleged victim in *Walker* who had been living at the apartment for one and one-half years. Unlike the alleged victim in *Walker*, who apparently had a key but lost it, Ms. Priddy testified that she never had a key and that she entered only when Defendant let her in, when Defendant gave her his key, or when the door was unlocked. Ms. Priddy testified that she told the officers that she was staying at the apartment but that she did not live there. Although Ms. Priddy was permitted to move freely about the one-bedroom apartment when she was in the apartment and kept some clothing at the apartment during the few days that she stayed there, those facts are insufficient on their own and in light of the other facts in this case to establish common authority. This case is more comparable to *Diaz*, where this Court held that the consenting party did not have the requisite authority to consent because Defendant had "far greater access and control and a superior privacy interest" in the apartment. 1996-NMCA-104, ¶ 16.

{27} We agree with Defendant that the district court's finding that "[i]t was rea-

sonable for officers to believe that [Ms.] Priddy had authority to enter [the apartment]" signifies or indicates apparent authority, which does not fall within a recognized exception to the warrant requirement in New Mexico. This Court in *Wright* specifically rejected apparent authority as the standard, where the prosecution argued that evidence should not be suppressed because "the officers reasonably believed that [the individual giving consent] possessed common authority over the premises." 1995-NMCA-016, ¶¶ 17, 19; *see also Diaz*, 1996-NMCA-104, ¶ 17 (restating the holding in *Wright* that "when the police are relying upon the consent of a third party to conduct a warrantless search of another's premises, the third party must have actual, not apparent, authority to grant that consent"). The district court in this case did not determine that Ms. Priddy had actual authority to consent to the entry and search. Under *Wright*, the reasonableness of the officers' belief that Ms. Priddy had authority to consent was insufficient and cannot form a proper basis for warrantless entry and search because, as a matter of law, "where the [prosecution] relies upon consent to justify a warrantless search of a residence, there is no 'apparent authority' exception under Article II, Section 10 of the New Mexico Constitution." *Wright*, 1995-NMCA-016, ¶ 20.

C. Protective Sweep Rule, Community Caretaker Doctrine, and the FVPA

{28} Before getting into the parties' arguments and the relevant law as to the remaining exceptions, we begin by noting that the State's argument as to which exception (or combination of exceptions) to the warrant requirement applies is unclear. When arguing before the district court, it appears that the State intended to assert that the warrantless search was valid because the community caretaker exception applied, and the FVPA somehow tapped into that exception. However, on appeal, the State seems to suggest that the FVPA creates a new exception to the warrant requirement. Additionally, the State seems to contend on appeal that the warrantless entry was acceptable because it was part of a protective sweep that was properly conducted given that the officers were acting in a community caretaker capacity and/or pursuant to the FVPA.

1. Protective Sweep Rule

{29} In New Mexico, under limited circumstances, a warrantless search, and arguably entry, may be permissible under the protective sweep rule. *See State v. Valdez*, 1990-NMCA-134, ¶ 8, 111 N.M. 438, 806 P.2d 578 (indicating that the United States Supreme Court recognized the "protective sweep rule" as an exception to the warrant requirement and stating that the rule is recognized in New Mexico); *see also State v. Jacobs*, 2000-NMSC-026, ¶¶ 33, 36-38, 129 N.M. 448, 10 P.3d 127 (upholding a warrantless entry into and search of the defendant's home as part of a protective sweep). A protective sweep is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *State v. Trudelle*, 2007-NMCA-066, ¶ 21, 142 N.M. 18, 162 P.3d 173 (internal quotation marks and citation omitted). "A protective sweep may be undertaken if the searching officers possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrants the officer in believing that the area swept harbored an individual posing a danger to the officer or others. However, a protective sweep is only allowed incident to a lawful arrest." *Id.* (alterations, emphasis, internal quotation marks, and citations omitted); *Valdez*, 1990-NMCA-134, ¶ 9.

{30} Defendant argues that a protective sweep was not justified in this case because there was no reasonable belief of a danger in the apartment and because the officers were not acting pursuant to an arrest. He further argues that the officers knew that Defendant had left the apartment and argues that relying on some highly remote possibility that someone may have come into the apartment while Ms. Priddy was napping was unreasonable.

{31} The State responds that a protective sweep of the premises was reasonable because the officers "had no way of knowing who was in the [apartment] or what weapons might be there[,]" relying on *Jacobs*, 2000-NMSC-026, ¶ 38. The State contends that the officers were told that someone may have entered the residence while Ms. Priddy was asleep and that Defendant had purchased a firearm. Thus, the State concludes, the officers reasonably believed that a security sweep of the premises was required for their and Ms. Priddy's safety.

{32} Here, there was no valid protective sweep because the sweep was not done incident to a lawful arrest. No one was arrested at the scene of the alleged domestic violence incident. Also, the officers did not articulate facts that would justify a protective sweep. Ms. Priddy's response that she could not be sure that someone had not entered the apartment while she was sleeping did not constitute specific and articulable facts that reasonably warranted the officers' belief that the apartment harbored an individual posing a danger to the officers or to Ms. Priddy. *See Trudelle*, 2007-NMCA-066, ¶ 21. Although Sergeant Weaver testified that there was concern that "somebody" or Defendant could be in the apartment, that statement was contradicted by Ms. Priddy, who testified that Defendant was not at the apartment and had left by the time the officers arrived, as well as by Officer Freeman, who testified that Ms. Priddy said Defendant had "possibly left in a white SUV[.]" To allow a sweep on the facts as argued by the State in this case would inappropriately expand the protective sweep rule. Defendant, having left the scene, and potentially having possession of a firearm, did not reasonably support the officers' belief that the apartment harbored an individual posing a danger.

2. The FVPA and Community Caretaker Doctrine

{33} Defendant next argues that the FVPA did not allow the officers to enter his residence without a warrant. He argues that the officers did not determine that the clothing Ms. Priddy sought was necessary for her immediate needs as required by the FVPA. *See* § 40-13-7(B)(3). He also argues that, under the FVPA, the officers were obligated to determine whether Ms. Priddy had lawful authority to enter the apartment in order to assist her in retrieving items from inside. Finally, Defendant argues that the district court's reliance on the community caretaker exception was in error because law enforcement is only permitted to enter a person's residence without consent or a warrant if there is a strong sense of emergency that requires the immediate need for assistance for the protection of life or property.

{34} The State responds by relying on the plain language of the FVPA, which places an affirmative duty on law enforcement to assist and protect victims of domestic violence. It argues that leaving Ms. Priddy to "fend for herself" outside of the apartment would have exposed her to the very real danger of additional violence. The State argues that Ms. Priddy was determined to retrieve her belongings, and the only way to separate her from Defendant was to remove her from the vicinity of the residence. The State contends that to ensure that Ms. Priddy would not return, it was necessary to retrieve her belongings.

{35} Insofar as the State is attempting to argue that the FVPA creates a new exception to the warrant requirement, we are unconvinced. According to the FVPA, "[a] person who allegedly has been a victim of domestic abuse may request the assistance of a local law enforcement agency." Section 40-13-7(A). "A local law enforcement officer responding to the request for assistance shall be required to take whatever steps are reasonably necessary to protect the victim from further domestic abuse, including . . . upon the request of the victim, accompanying the victim to the victim's residence to obtain the victim's clothing and personal effects required for immediate needs and the clothing and personal effects of any children then in the care of the victim[.]" Section 40-13-7(B)(3). Despite the State's position that the officers in this case were allowed to enter Defendant's apartment without a warrant because of the duty to take reasonable steps to protect a domestic violence victim as articulated in the FVPA, the plain language of the FVPA does not authorize or even suggest that it can be used to justify a warrantless entry into a residence. The FVPA indicates that law enforcement may *accompany* a victim *to* the victim's residence. *Id.* The FVPA does not state that law enforcement officers have carte blanche to enter a private residence without a warrant.

{36} As to the State's attempt to piggyback the FVPA onto the community caretaker exception, we again are unconvinced. In *Ryon*, our Supreme Court clarified the scope of the community caretaker exception in New Mexico. 2005-NMSC-005, ¶ 1. "The community caretaker exception recognizes that warrants, probable cause, and reasonable suspicion are not required when police are engaged in activities that are unrelated to crime-solving." *Id.* ¶ 24. The *Ryon* Court noted that there are actually three distinct doctrines that have emerged within the exception: the emergency aid doctrine, the automobile impoundment and inventory doctrine, and the community caretaking doctrine. *Id.* ¶ 25. "The emergency [aid] doctrine applies to . . . warrantless intrusions into personal residences[, while t]he . . . community caretaker . . . doctrine deals primarily with warrantless searches and seizures of automobiles[.]" *Id.* ¶ 26 (internal quotation marks and citations omitted). According to *Ryon*, "[s]ince the privacy expectation is strongest in the home[,] only a genuine emergency will justify entering and searching a home without a warrant and without consent[.]" *Id.*; *see Trudelle*, 2007-NMCA-066, ¶ 35 ("Our Supreme Court has stated that, when police conduct a warrantless search of a home in their community caretaking capacity, the search must be analyzed under the emergency assistance branch of the community caretaker exception."). "To justify the warrantless intrusion into a private residence under the emergency assistance doctrine, officers must have credible and specific information that a victim is very likely to be located at a particular place and in need of immediate aid to avoid great bodily harm or death." *Ryon*, 2005-NMSC-005, ¶ 42.

{37} In this case, the district court improperly relied on the general community caretaker doctrine that deals primarily with warrantless searches and seizures of automobiles. *See id.* ¶ 26. That the FVPA contemplates law enforcement assistance to protect a victim of domestic violence from further abuse when retrieving items from inside the victim's residence does not circumvent the requirement that only a genuine emergency will justify entering and searching a residence without a warrant and without consent. *See id.* In this case, there are no allegations and there is no evidence in the record of an emergency inside the residence that necessitated entry under the emergency aid doctrine. By all accounts, the officers did not enter Defendant's apartment to assist someone in need of immediate aid to avoid great bodily harm or death. Because *Ryon* holds that only a genuine emergency will justify entering and searching a home without a warrant and without consent and because there was no indication of an emergency inside the apartment justifying a warrantless entry, the community caretaker exception does not apply.

CONCLUSION

{38} For the foregoing reasons, the district court erroneously denied Defendant's motion to suppress, and the district court's order denying Defendant's motion to suppress is reversed. This matter is remanded for further proceedings consistent with this opinion.

{39} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
J. MILES HANISEE, Judge

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