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Bar Bulletin

July 26, 2017 • Volume 56, No. 30

Where the Ravens Fly, by Michael Rizzo Jr. (see page 3)

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2017

FREE CLE

4th ANNUAL VEHICLE FORFEITURE CONFERENCE FOR NEW MEXICO COMMUNITIES

6.0 CREDITS, INCLUDING 1 HOUR OF ETHICS

Deadline for Registration August 25, 2017

Photo Credit: Penny Martin

SEPTEMBER 13, 2017

SANTA FE, NEW MEXICO

SANTA FE COMMUNITY CONVENTION CENTER

Sweeney Ballroom A & B

Javier M. Gonzales
Mayor, City of Santa Fe

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

Susana Martinez
Governor, State of New Mexico

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Meetings

July

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

28
Immigration Law Section Board
Noon, State Bar Center

August

1
Health Law Section Board
9 a.m., teleconference

1
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court

2
Employment and Labor Law Section Board
Noon, State Bar Center

8
Appellate Practice Section Board
Noon, teleconference

9
Children's Law Section Board
Noon, Juvenile Justice Center

9
Taxation Section Board
11 a.m., teleconference

Workshops and Legal Clinics

July

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

August

2
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

2
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

4
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

11
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

16
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: Michael Rizzo Jr. works in several mediums. He started out in film photography and now works digitally and enjoys the freedom of Photoshop. He also creates serigraphs using some of those digital images and finds the rich colors of screen printing exciting to experiment with. For more information, contact Rizzo at rizzo_art@hotmail.com.

Notices

Court News

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 the Honorable Kevin R. Sweazea's retirement.

Seventh Judicial District Court
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 Applicants

Five applicants were received in the Judicial Selection Office as of 5 p.m., July 13 for the Judicial Vacancy in the 12th Judicial District Court due to the retirement of Judge Jerry H. Ritter effective Sept. 1. The 12th Judicial District Judicial Nominating Commission will meet on Aug. 3, at the Otero County Courthouse, 1000 New York Avenue, Alamogordo, NM 88310 to evaluate the applicants for this position. The names of the applicants in alphabetical order are: **Erinna Atkins**, **Steven Blankinship**, **James Newton**, **AnneMarie Cheroke Peterson** and **Matthew Wade**.

> ***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.

U.S. District Court, District of New Mexico
Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of part-time U.S. Magistrate Judge B. Paul Briones is due to expire on March 20, 2018. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new four-year term. The duties of a magistrate judge in this Court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the Court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Sept. 5.

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.

Board of Bar Commissioners
Meeting Agenda

8 a.m., July 27, Inn of the Mountain Gods (Mescalero E), Mescalero, N.M.

1. Approval of April 21, 2017 Meeting Minutes
2. Finance Committee Report
3. Financials
4. Executive Committee Report
5. Executive Session
6. Judges and Lawyers Assistance Program ABA Assessment
7. Compensation Survey
8. Legal Research Committee
9. 2018 Board Officer Nominations
10. Discussion Regarding Annual Meeting and CLE at Sea
11. Ethics Committee Mission Statement and Procedure
12. Client Protection Fund Annual Report
13. President Report
14. State Bar Newsletter
15. Bar Commissioner District and Division (SLD, YLD and PD) Reports
16. New Business

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.

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Address Changes

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

Supreme Court
Web: supremecourt.nmcourts.gov
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Web: www.nmbar.org
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199

UNM
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Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

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

Legal Education

July

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**
12.5 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, Arbitration and Other ADR Practices**
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
www.nmbar.org

11 **New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

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

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

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

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

August

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

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

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

September

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

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

8 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Add a Little Fiction to Your Legal Writing (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

9 **Ethical Implications of Section 327 of the Bankruptcy Code**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

14 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

18 **New Mexico Conference on the Link Between Animal Abuse and Human Violence**
11.7 G
Live Seminar, Albuquerque
Positive Links
www.thelinknm.com

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

19 **How to Make Your Client's Estate Plan Survive Bankruptcy**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Concealed Weapons and Self-Defense**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

21 **Controversial Issues Facing the Legal Profession (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Guardianship in New Mexico/The Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Transgender Law and Advocacy (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Ethics for Government Attorneys (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September 17, 2017

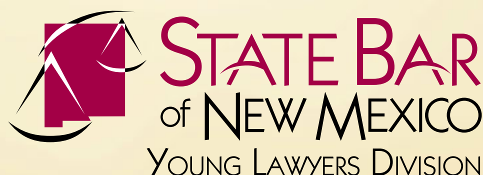
In the spirit of Constitution Day and to aid in the fulfillment of Public Law 108-447 Sec. 111 Division J - SEC. 111(b), the YLD organizes a public education program that provides participating New Mexico fifth-grade classes with U.S. Constitution booklets to keep and an educational lesson from a licensed New Mexico attorney.

Statewide attorney volunteers are needed for this program! Roughly hour-long educational lessons will take place during the week of Sept. 11–15 at elementary schools across New Mexico.

Please accept this offer to earn pro bono hours and connect with New Mexico's youth. Educator feedback reflects that this is a worthwhile program and an exciting and inspiring experience for students. More than 33,000 New Mexico students have been served during this program's lifetime.

For more information and to volunteer,
visit www.nmbar.org/ConstitutionDay

Deadline to participate is Aug. 18.



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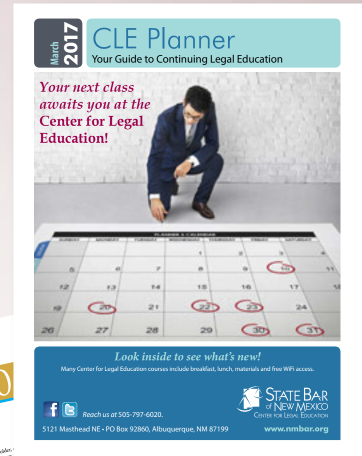

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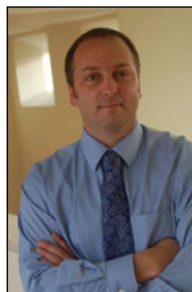
Hearsay

Allison Block-Chavez has been re-appointed by the BBC as the New Mexico Young Lawyer Delegate to the American Bar Association's House of Delegates. Block-Chavez's two-year term will commence Sept. 1. Block-Chavez practices at Aldridge, Hammar, Wexler & Bradley, PA. She serves on the board of the State Bar Young Lawyers Division and the Elder Law Section and as co-chair of the ABA YLD Real Property, Trust and Estate Committee.

David P. Buchholtz, an attorney with the Rodey Law Firm, was appointed by Santa Fe Mayor Javier Gonzales to chair a new Santa Fe Public Banking Task Force. The seven-member task force is charged with determining the necessary procedures, timelines and requirements to establish a chartered public bank.



Justin Miller has been newly promoted to partner at Bardacke Allison LLP. Miller received a dual degree in law and Latin American Studies from the University of New Mexico in 2005. He served as Gov. Bill Richardson's chief counsel, entered private practice in 2011 and joined Bardacke Allison LLP in 2015. Miller's practice focuses on commercial litigation in the areas of consumer protection, employment, and intellectual property.

In Memoriam

Alice Melissa (Lisa) Bozone, age 62, passed away unexpectedly on May 3. She was born in Albuquerque in November 1954. Bozone held a law degree from Oklahoma City University and recently retired from the New Mexico Public Defenders Office after 25 years of service. She is survived by her father, Jesse Bozone; sister, Becky Yeomans; husband, Paul Yeomans; nephews, Aidan Yeomans and Griffin Yeomans; great-niece, Brooklynn Yeomans and Brooklynn's mother, Cheri Armstrong; aunt and uncle, Robert and Fran Bernard; aunt, Nita Bozone and family; cousins, Linda and Norbert Sanchez and family; and Peter Boyles, her long time special friend and companion. Bozone was preceded in death by her mother, Janice Bozone and her nephew, Ryan Yeomans. Bozone was an avid animal lover and leaves behind her beloved dogs, Bo and Ginger Snap and her amazing cat, Woody.

Deborah Moll, age 71, passed away on June 8. She is predeceased by her parents, John and Betty Moll. She is survived by her partner, Mike Sterkel; sister, Christina; husband Jim Dengate; niece and nephews: Jesse Detmer and husband Dan, Ishmael and his wife Liana Foxvog, and Ethan Dengate; and her three grandnieces and one grandnephew. Moll received her B.A. from St. John's College in Annapolis, MD, and her J.D. from the University of Texas. She worked for the New Mexico Attorney General's Office, the Public Defender's Office and as general counsel for the N.M. General Services Department. Moll was recognized by *Who's Who in America*, 57th Edition, 2003. Moll was a talented photographer and an avid antique collector.

Editor's Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@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 July 14, 2017

UNPUBLISHED OPINIONS

No. 34647	1st Jud Dist Santa Fe CV-12-284, S & H DEVELOPMENT v J ORTEGA (affirm in part, reverse in part)	7/11/2017
No. 36042	2nd Jud Dist Bernalillo LR-15-41, STATE v L SKILES (affirm in part and remand)	7/11/2017
No. 36184	13th Jud Dist Cibola JQ-15-8, CYFD v MICHELLE N (reverse and remand)	7/11/2017
No. 36251	2nd Jud Dist Bernalillo CR-16-933, STATE v F RUSSELL (affirm)	7/11/2017
No. 36273	2nd Jud Dist Bernalillo CR-16-1474, STATE v D CASTLE (affirm)	7/11/2017
No. 34778	3rd Jud Dist Dona Ana CR-14-633, STATE v J MEDEZ (affirm)	7/12/2017
No. 35797	9th Jud Dist Curry CR-14-10, STATE v E GUTIERREZ (affirm)	7/12/2017
No. 36118	11th Jud Dist San Juan DM-08-355, T MULLINS v M PEREZ (reverse)	7/12/2017

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

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

Clerk's Certificate of Change to Inactive Status

Effective June 30, 2017:
James Frank Beckley
Beckley & Tann, PA
8500 Menaul Blvd. NE,
Suite A-400
Albuquerque, NM 87112
505-237-0064
505-237-9440 (fax)
jim@beckleylawfirm.com

Effective June 29, 2017:
Daniel K. Jensen
1452 E. 1300 S.
Provo, UT 84606
801-592-9599
dkjensen@byulaw.net

Effective July 1, 2017:
Jessica M. Nance
Mundt MacGregor LLP
271 Wyatt Way NE, Suite 106
Bainbridge Island, WA 98110
206-624-5950
206-624-5469 (fax)
jnance@mundtmac.com

Effective July 10, 2017:
Marit S. Tully
1107 La Poblana Rd. NW
Albuquerque, NM 87107
505-385-7863

In Memoriam

As of May 3, 2017:
Alice Melissa Bozone
2949 Santa Clara Avenue SE
Albuquerque, NM 87106

As of May 4, 2017:
Frederick H. Hennighausen
PO Box 1415
Roswell, NM 88202

As of June 8, 2017:
Deborah A. Moll
1800 San Felipe Circle
Santa Fe, NM 87505

Clerk's Certificate of Admission

On July 11, 2017:
Jeffrey Polk Eidsness
Bruno, Colin & Lowe, PC
1999 Broadway, Suite 4300
Denver, CO 80202
303-831-1099
303-831-1088 (fax)
jeidsness@brunolawyers.com

Clerk's Certificate of Reinstatement to Active Status

Effective June 27, 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 26, 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.

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-018

No. S-1-SC-36175 (filed May 11, 2017)

IN THE MATTER OF D. CHIPMAN VENIE

An Attorney Disbarred from
the Practice of Law Before the Courts
of the State of New Mexico

Jane Gagne
Albuquerque, New Mexico
for Disciplinary Board

D. Chipman Venie
Albuquerque, New Mexico
Respondent

Opinion

Edward L. Chávez, Justice

{1} Attorney D. Chipman Venie was permanently disbarred from the practice of law on January 18, 2017 for actions arising from his representation of three clients. *In re Venie*, No. S-1-SC-36175, amended order at 2 (N.M. Sup. Ct. Jan. 18, 2017) (nonprecedential). Venie counseled the first client, L.A., to bribe witnesses and offered to deliver the bribery payment to the witnesses. Venie also unnecessarily revealed confidential communications from L.A. in a fee dispute case between them, and made material misrepresentations to tribunals and the Disciplinary Board. In representing the second client, R.C., Venie converted money for his own use that was provided to him by R.C.'s parents for the sole purpose of posting a bond for R.C. With respect to the third client, A.C., Venie filed a lien against the property of A.C.'s mother to secure a fee owed to him by A.C.

{2} The disciplinary charges against Venie were addressed in two consolidated cases. The first is Disciplinary Board Case No. 04-2015-720 (Case 720) involving L.A. The second is Disciplinary Board Case No. 01-2016-737 (Case 737) involving both R.C.'s and A.C.'s cases. Each Disciplinary Board hearing committee entered findings of fact and conclusions of law, and recommended that Venie be disbarred. The cases were consolidated, and the Disciplinary Board panel adopted each hearing committee's findings of fact and concurred with their recommendation that Venie be disbarred.

{3} We review the factual findings for substantial evidence and the Disciplinary Board's legal conclusions and recommendations for discipline under a de novo standard of review. *See In re Bristol*, 2006-NMSC-041, ¶¶ 18, 26, 28, 140 N.M. 317, 142 P.3d 905 (per curiam). We hold that the findings of fact are supported by substantial evidence and that the recommendation of permanent disbarment is appropriate in this case. We have chosen to write an opinion in this case primarily to address Venie's defenses rather than to catalogue his myriad violations.

I. DISCUSSION

A. Case 720

{4} In Case 720, Venie raises two defenses that merit discussion. First, he asserts that the charge regarding counseling L.A. to bribe witnesses is barred by the four-year limitations period under Rule 17-303 NMRA (1994) because his alleged violations occurred on May 22, 2011 and the charges were not filed until September 9, 2015. Second, he contends that his disclosure of earlier confidential communications with L.A. in a fee dispute case was permissible to attack L.A.'s credibility and to illustrate the difficult issues he faced when representing him. We address these arguments in turn.

{5} The procedural history of Case 720 is relevant to our disposition of the limitations period issue. On April 20, 2015, the Disciplinary Board opened Case 720 and alleged that Venie had disclosed L.A.'s confidences in a public pleading filed in response to a lawsuit by L.A. L.A.'s lawsuit primarily related to a dispute about accounting of fees and property L.A. had provided as payment to Venie throughout Venie's representation of L.A. The original disciplinary complaint also alleged in the alternative that Venie had filed frivolous pleadings and made misrepresentations to both the district court and the Disciplinary Board.

{6} On September 9, 2015, disciplinary counsel amended the complaint to include a count asserting that Venie had counseled L.A. to bribe witnesses. The new charges were based on a May 22, 2011 recording between Venie and L.A., which disciplinary counsel obtained from Venie during discovery.

{7} Venie contends that the amended complaint is barred by the limitations period. Venie relies on the 1994 version of the limitations period under Rule 17-303, which stated:

> Except in cases involving theft or misappropriation, conviction of a crime, or a knowing act of concealment, no complaint against a person subject to these rules shall be considered by the board unless a written complaint is filed with or initiated by chief disciplinary counsel in accordance with these rules within four (4) years from the time the complainant knew or should have known the facts upon which the complaint is filed.

Venie argues that the limitations period ran on or about May 22, 2015, which was four years after May 22, 2011, when the conversation between him and L.A. occurred. Venie contends that the 2013 amendment to Rule 17-303, which eliminated the limitations period defense, does not apply retroactively to acts that occurred before the current rule's effective date of December 31, 2013.

{8} Contrary to Venie's assertions, none of the disciplinary charges against him are barred. Before the amendment, Rule 17-303 provided a limitations period, which is not strictly a statute of limitations, but even if we were to treat it as a rigid statute of limitations, the 2013 amendment to Rule 17-303 eliminating the limitations period nevertheless applies to Venie's conduct because Venie does not have a vested right in the application of the former limitations period. *See State v. Morales*, 2010-NMSC-026, ¶ 1, 148 N.M. 305, 236 P.3d 24 (noting that the abolishment or extension of a limitations period "cannot revive a previously time-barred prosecution," but "it can extend an unexpired limitation period because such extension does not impair vested rights acquired under prior law, require new obligations, impose new duties,

or affix new disabilities to past transactions"). For Venie to have a vested right in the 1994 limitations period, the facts giving rise to the disciplinary complaint would have had to occur at least four years before the 2013 amendment. *Grygorwicz v. Trujillo*, 2006-NMCA-089, ¶¶ 20-21,140 N.M. 129, 140 P.3d 550 (holding that an amendment providing an extension of the statute of limitations applied to conduct that occurred before the amendment was enacted because the cause of action was not time-barred by the preexisting law, and therefore the defendant had no vested right in a statute of limitations defense). Venie's conduct occurred on May 22, 2011, nineteen months before the effective date of the 2013 amendment to the limitations period. Accordingly, Venie had no vested right in a limitations period defense under the 1994 version of Rule 17-303, and therefore the amendment permissibly extended an unexpired limitation period. *Morales*, 2010-NMSC-026, ¶ 1; *Grygorwicz*, 2006-NMCA-089, ¶ 20. We conclude that the amendment abolishing the limitations period applies to Venie's conduct, and that the charges against Venie are not time-barred and can be properly reviewed by this Court. We now turn to the merits of Case 720.

1. Counseling his client to bribe witnesses

{9} Venie represented L.A. on felony charges which alleged that L.A. engaged in incest, criminal sexual contact, and criminal sexual penetration of his granddaughter (Granddaughter). Venie recorded a conversation he had with L.A. on May 22, 2011 during which they discussed confrontations L.A. had with his son (Son), who is Granddaughter's father, and Granddaughter, despite a court order prohibiting L.A. from having contact with Granddaughter and Son.

{10} The following excerpts from the transcript of the recorded May 22, 2011 conversation (emphasis added) provide sufficient evidence to support the allegations that Venie counseled L.A. to bribe witnesses and offered to assist him with delivering the bribe.

> Venie: But [Son] and myself are bending over backwards to try and save you . . . .

Page 2, lines 21-22

> Venie: If you don't lay off [Son], you're going to end up in prison, dying there, okay, and you're going to end up probably getting raped to death in prison, all right?

Page 2, line 25 to page 3, line 3

> Venie: [Son], right now, is in Arizona or on his way to Arizona, and in his hand is paperwork that could get me disbarred, okay? And he could get in serious trouble, as well. And—and [another witness who had told the police L.A. was having a sexual relationship with Granddaughter] could get in serious trouble, as well. All three of us have decided to put our lives at risk to save you, okay?

Page 3, lines 6-10

> Venie: If [Son] turns sideways on us, you're going to die in prison. If [Granddaughter] turns sideways on us, you're going to die in prison.

Page 3, lines 12-14

> Venie: *Maybe you should think—maybe you should think about paying them* [Son and Granddaughter] *both off, okay? Now, even me suggesting* (inaudible) *gets me disbarred. But you see how far I'm willing to go—*
>
> L.A.: I am paying them off.

Page 12, lines 2-6

> Venie: *Do you see how far I'm willing to go to help you? I'm willing to put my own livelihood, everything you see around here, on the line to help you.*

Page 12, lines 8-10

> Venie: [A]ll I know is if you don't kiss these people's ass and make them happy over the next year and a half or two while this case is pending, they're going to fucking fry you for it. Okay?

Page 15, lines 10-13

> Venie: You know, all these people, every one of them could sink your ass, and you're still antagonizing them. Please, stop doing that.

Page 16, lines 7-9

> Venie: *And what I'm—and what I'm telling you is—and I can't believe I'm saying this, but you might want to just pay* [Son and Granddaughter] *off, and that's it. I mean, you might want to start thinking about* (inaudible).

Page 39, lines 12-16

> Venie: *And* (inaudible)*—and if it's something you want to do, I can make that happen for you and you would never have to give it directly to them. I would do it, and then that would be that.*

Page 39, lines 19-22

{11} The above exchanges between Venie and L.A. support the conclusion that Venie violated Rule 16-102(D) NMRA, which states: "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." Venie's advice to L.A. that he should consider paying off his accusers and the State's primary witnesses against L.A. unequivocally demonstrated Venie's intent to convince his client to bribe witnesses. Not only did Venie repeat his advice to L.A., he offered to help carry out the bribery. Venie presciently told L.A. that by simply counseling L.A. to bribe witnesses he could be disbarred. This conduct alone justifies disbarring Venie from the practice of law.

2. Making misrepresentations to a tribunal

{12} Venie made material misrepresentations to tribunals during his representation of L.A. and at his disciplinary proceedings. Prior to the May 22, 2011 conversation, Venie prepared affidavits for Granddaughter, Son, and another witness based on their statements to Venie, in which they all claimed that L.A. was innocent of the crimes for which he was charged. During their May 22, 2011 conversation, Venie repeatedly acknowledged that L.A. had committed incest and L.A. confirmed his guilt.

{13} The following excerpts from Venie and L.A.'s May 22, 2011 conversation (emphasis added) provide insight into Venie's knowledge of L.A.'s crimes.

> Venie: *I know what you did, okay, and everybody knows what you did. And everybody's been acting like you didn't do it. And everyone's been lying and saying you didn't do it.*

Page 2, lines 14-17

> Venie: [Son]—this just kills me—[Son] can't even take his daughter to get counseling to try and deal with this because if that happens, that's going to hurt the legal case, all right? So [Son] is actually not giving [Granddaughter] the help she needs in order to help you, all right?

Page 3, lines 15-20

> Venie: *And, dude,* [Son]*'s lied,* [L.A.'s wife (Wife)] *lied,* [Granddaughter]*'s lied.* [Another witness]*'s getting a lie* [sic]. *Everyone's doing what you want them to do.*

Page 4, lines 12-14

> Venie: And I don't give a fuck how much money [Son] owes you, what he's done for you is priceless.

Okay? *He got his own daughter to lie to cover up your crime. He's lying to cover up your crime.* He's in Arizona right now, fucking twisting [another witness]'s arm to cover up your crimes.

Page 5, lines 2-6

Venie: If you—if it was my father, *I would not have done what* [Son] *had done. I would have probably shot your ass. Okay?*

Page 6, lines 12-14

Venie: And [Son] has not only done that, he's really standing up for you. Right now, as we sit here, he's on his way to Arizona—

L.A.: I know.

Venie: —to tie down the last part of the case.

Page 6, lines 16-21

L.A.: And I'm taking the full brunt of it over the head. *He tells me, "Well, you raped her." Well, no, it's far from the truth.*

Page 7, line 24 to page 8, line 1

L.A.: *She came to me naked.*

Page 8, line 3

Venie: —you understand that's wrong, right?

L.A.: *It's wrong. I was—I fucked up big time.*

Venie: So I don't care if she—that's not a defense. All right?

Page 8, lines 6-11

Venie: In fact, it's kind of disgusting to me. All right? So—but we're—that—that horse has already left the barn. We're talking about what everyone's doing now. *Okay? You did what you did. All right? I'm just trying to save you from dying in prison. Okay?*

Page 8, lines 13-18

Venie: I drafted up a statement for [other witness], and—in detail, killing the shit out of that case—and said, "Two copies, take it to Arizona, signed, notarized, fingerprinted, bring it back." That's what [Son] did.

Page 9, lines 14-17

Venie: But he's told me he's going to call me today when it's all signed.

Page 10, lines 4-5

L.A.: See, I begged him to—

Page 10, line 7

L.A.: —get it done about a month ago

Page 10, lines 9-10

Venie: I mean, they're investigating you back 40 years. You know that?

Page 10, lines 15-16

L.A.: None of this shit has never [sic] come up before, never happened before. This deal was a fluke. I take 100 percent of the blame for it. I should have known better.

Page 11, lines 7-10

L.A.: I can't say nothing to her because I can't afford to make her mad. She's milking it to the hilt to get what she wants, and I know it. And that's fine, but I can't give myself no defense because if I say anything, I piss her off. I say anything, I piss him off.

Page 11, lines 17-22

Venie: *—his daughter got banged by his father—*

L.A.: *Yeah.*

Venie: —and he's still standing up for his father.

L.A.: Yeah.

Venie: So that's pretty unusual, to say the least. Okay?

L.A.: Yeah.

Page 29, line 19 to page 30, line 2

L.A.: I promise you, there won't be—me and him ain't gonna have another bump. It's like I told [Wife], I said—you know, he told [Wife], he says, well, *I forced her. I says, "That's a lie. She came to me naked." I fucked up. But I did not go to her. She came to me.* I can't say that. I can't tell [Wife] that—

Page 40, line 23 to page 41, line 3

L.A.: And it's like—and it's like I told [Wife], I said, "You know, I'm in a—I'm against a rock." And all I can say is, "*I'm sorry. I wish it hadn't have happened.* But what do you want me to do?"

Page 41, lines 9-12

{14} After the May 22, 2011 conversation, Venie prepared another affidavit for Granddaughter on August 15, 2011, where she again claimed that she and L.A. had not had any sexual encounters. At L.A.'s criminal trial in October 2012, Granddaughter testified that L.A. had sexual contact with her, contrary to her affidavits. Venie then used the affidavits he had prepared for Granddaughter to impeach her at trial.

{15} Criminal defense attorneys are permitted to put the State to its burden of proof and do not share in the State's duty to present the truth in a criminal proceeding. *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part). Because a criminal defense attorney has a duty to represent his or her client whether or not the client is guilty, the attorney need not present any knowledge that he or she may have about the truth. *Id.* at 257. A defense attorney has the right to "cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying." *Id.* at 258. However, although attorneys should be encouraged to be zealous advocates, their duty to provide diligent representation to their clients "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." Rule 16-103 NMRA, Comm. cmt. 1.

{16} What is particularly disconcerting is that Venie could have impeached Granddaughter with her initial statement to the police when she denied that she had ever had sexual relations with L.A. Instead, he sought to corroborate Granddaughter's initial statement to the police with an affidavit that Venie drafted for her which he knew was perjured. Venie was permitted to hold the State to its burden of proving L.A.'s guilt beyond a reasonable doubt, but Venie's advocacy was flawed and "falls outside [the] protected behavior" of vigorously representing his client. *United States v. Thoreen*, 653 F.2d 1332, 1338-39 (9th Cir. 1981).

{17} Venie's pattern of introducing false statements to tribunals continued when he represented L.A. during related civil litigation. On January 7, 2014, L.A. was acquitted of incest, criminal sexual contact, and criminal sexual penetration. On March 28, 2014, Venie sued Granddaughter, Son, two other named individuals, and Does 1-10 (unnamed detectives and/or other employees) of the Bernalillo County Sheriff's Department on L.A.'s behalf, alleging wrongful arrest and prosecution. L.A. was served with interrogatories from Bernalillo County in which he was asked to disclose any times he had been "accused of rape, sexual assault and/or battery or sexual misconduct of any kind during [his] lifetime." Venie counseled L.A. to dismiss the case because truthful responses to the discovery requests would be detrimental to the merits of the case. L.A. agreed to dismiss the county defendants but refused to dismiss the lawsuit against Granddaughter, Son, and one other defendant.

{18} Venie's relationship with L.A. ultimately deteriorated. L.A. and Wife hired another attorney to obtain an accounting

of fees incurred and paid to Venie. L.A. and Wife also filed an application for a temporary restraining order and motion for preliminary injunction alleging that Venie was threatening them after the lawsuit was filed, and that Venie could potentially improperly dispose of funds and assets belonging to them. Venie failed to respond to the merits of the L.A. litigation, and instead focused on L.A.'s guilt, which Venie alleged he did not discover until after he had filed the civil lawsuit against L.A.'s accusers. Venie claimed that throughout his representation of L.A. in the criminal cases, L.A. had maintained his innocence.[1]

{19} Because the May 22, 2011 recording undeniably demonstrates Venie's knowledge of L.A.'s guilt, we conclude there is substantial evidence proving that Venie introduced multiple misrepresentations to a tribunal, and therefore Venie violated Rules 16-303(A)(1), (A)(3), and 16-301 NMRA. During the May 22, 2011 conversation, Venie stated that he knew what L.A. did; L.A. also acknowledged Venie's statement, referring to Son, that "his daughter got banged by his father." Nevertheless, Venie knowingly filed a false affidavit denying any knowledge of L.A.'s guilt, stating under oath that "[t]hroughout the pendency of the criminal cases, [L.A.] always told me he was innocent and that he did not [do] the things of which he was accused." Venie continued to deny knowledge of L.A.'s guilt during an underlying disciplinary proceeding, contrary to Rule 16-801(A) NMRA, which requires a lawyer in connection with a disciplinary matter to refrain from "knowingly mak[ing] a false statement of material fact."

{20} Under Rule 16-303, lawyers are expected to exhibit candor toward tribunals. Subsection (A)(1) provides: "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." In the same vein, Subsection (A)(3) states that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."

{21} Despite knowing that L.A. had committed incest, Venie filed a frivolous lawsuit on L.A.'s behalf alleging that L.A. had been falsely accused and prosecuted. Rule 16-301 states: "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." Venie did not have a good faith basis for bringing the lawsuit knowing that L.A. had admitted his incestuous conduct with Granddaughter.

{22} Venie's conduct also violated Rule 16-804(C) and (D) NMRA, which define professional misconduct, inter alia, as engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" and "conduct that is prejudicial to the administration of justice." *See In re Neal*, 2003-NMSC-032, ¶¶ 7, 9, 134 N.M. 594, 81 P.3d 47 (per curiam) (finding a violation of Rule 16-804(C) and (D) for making false statements of material fact to a tribunal when a suspended lawyer misrepresented his ability to represent a client in court). Venie had a duty to refrain from introducing any misrepresentations to a tribunal. As an officer of the court, Venie was obligated to be truthful to courts of law. *In re Stein*, 2008-NMSC-013, ¶ 35, 143 N.M. 462, 177 P.3d 513 (per curiam). "Candor and honesty are a lawyer's stock and trade. Truth is not a matter of convenience." *Id.* (internal quotation marks and citations omitted). Here, Venie failed to follow one of the most basic ethical requirements imposed upon attorneys. *See Thoreen*, 653 F.2d at 1339 (noting that scrupulous candor and truthfulness in representations of any matter before a court is a basic ethical requirement for attorneys).

3. Revealing client confidences

{23} In his response to L.A. and Wife's petition for an accounting, application for a temporary restraining order, and motion for a preliminary injunction, Venie stated that L.A. "is a child molester and fraud [who] enjoyed having sex with under-aged female relatives in his family (and other under-aged people), until he was finally caught and charged with multiple counts of incest." He also stated that L.A. "choked [Wife] and tried to kill a witness to cover up his multiple molestations, including one of the witnesses who directly saw him having sex with his granddaughter." Venie revealed that L.A. had told him he had engaged in "sexual intercourse with his grand-daughter, both by force and consensually." Venie also revealed that L.A. had told him "he had been having sex with multiple under-aged girls since at least 1966" and "he had sex with other under-aged female family members as well." Venie concluded his response by stating that L.A. and Wife "should not be able to obtain equitable relief in this court when they have behaved as child molesting frauds for fifty years . . . ."

{24} Rule 16-106(A) NMRA provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" under Rule 16-106(B), but even then a lawyer may only disclose such confidences "to the extent the lawyer reasonably believes necessary." We conclude that there is sufficient support to prove that Venie violated Rule 16-106(A).

{25} Venie contends that he was justified in revealing his client's confidences under Rule 16-106(B)(2), (3) and (5). We disagree. Subsection (B)(2) provides that an attorney can reveal client confidences to the extent necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Subsection (B)(3) provides that a lawyer may reveal confidences "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." In reviewing the context of the client's pleadings and Venie's perplexing response to them, it is evident that Venie disclosed the sensitive information for an improper purpose. Venie's response was not necessary to prevent L.A. from committing a crime or fraud that would result in injury to the financial interests or property of another.

{26} Furthermore, under Rule 16-106(B)(5), an attorney may reveal client confidences to the extent necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ." Regarding fee disputes, the only disclosures an attorney is permitted to make are those necessary "to prove the services rendered in an action to collect it." Rule 16-106, Comm. cmt. 13. In defending

[1] Although Venie claims that throughout his representation of L.A. he only knew about L.A.'s guilt of incest and not of criminal sexual penetration, the hearing committee and the Disciplinary Board panel permissibly rejected Venie's assertion, particularly since none of the pleadings in the civil case made this distinction.

himself against L.A. and Wife's lawsuit, Venie should have responded only with demonstrating the amount of work he had performed to prove that he had earned the fees he charged them. Venie's disclosure of L.A.'s guilt was neither relevant nor material in "a garden-variety fee dispute," as he referred to the lawsuit between him and L.A.

{27} By revealing client confidences for his own benefit, Venie "violated the sanctity of the confidential relationship existing between attorney and client." *Dixon v. State Bar of Cal.*, 653 P.2d 321, 328 (Cal. 1982) (in bank). The confidences that clients share with their attorneys must be vigorously protected as the attorney-client relationship cultivates the trust imperative to the attorney's efficient representation of the client. *In re Lichtenberg*, 1994-NMSC-034, ¶ 10, 117 N.M. 325, 871 P.2d 981 (per curiam). Venie not only disregarded any precautions he could have taken in disclosing L.A.'s confidences, such as in camera review, he also revealed those confidences in a public court document, which then were printed in the *Albuquerque Journal* in an article titled "Lawyer says his ex-client is a child molester." Venie's disclosures threaten to undermine the profession if clients believe they cannot trust their attorneys to keep their confidences.

B. Case 737

{28} In Case 737, Venie raises a baseless defense to justify converting third-party funds to pay attorney's fees he alleged that his clients owed to him. He asserts that he properly withheld third-party money as a retaining lien.

1. Claiming entitlement to third-party property in satisfaction of alleged client fees owed

{29} The parents of the second client (Parents) signed a retainer agreement with Venie and paid him a flat fee of $10,000 to represent R.C. on felony charges. R.C. did not sign this agreement. The retainer agreement that Parents signed, titled "Earned on Receipt True Retainer Agreement for Pre Trial Services," provided that the flat fee of $10,000 was earned upon receipt, was "*not dependent upon hours of professional services rendered by VENIE, whether the Client's case* [*was*] *prosecuted, whether any appearances* [*were*] *made, or the outcome of Client's criminal case*," and pertained to services up to the setting of a trial date in the case or "*pre-trial*" legal services.[2] (Emphasis in original.) The retainer agreement also contained the following provision:

> **REFUNDS**. . . . To the extent that Mr. Venie is relieved, the client or payors is [sic] entitled to a refund of any unearned fees. To the extent that Mr. Venie is relieved before completion of this matter FOR ANY REASON, all parties agree that Mr. Venie is entitled to *quantum meruit*, and that all parties stipulate that $450.00 an hour is Mr. Venie's hourly rate. All parties further stipulate and agree that Mr. Venie's hourly rate of $450.00 is reasonable. This means that the parties agree that if Mr. Venie is relieved for ANY REASON, he will be entitled to $450.00 per hour, plus costs as set forth below, for any and all work done, and any and all costs expended or incurred, in defense of the client.

There is no showing in the record that Venie explained the refunds provision to Parents or that Parents understood it.

{30} R.C.'s mother wired Venie $100,000 for payment of R.C.'s bond. Venie then deposited the check with the district court and posted R.C.'s bond. R.C.'s mother never authorized Venie to use the money for any purpose other than to post R.C.'s bond.

{31} During the course of Venie's representation of R.C., Venie hand-delivered a letter to R.C. in which he requested a total of $16,050 for 33.3 additional hours of pretrial services. In his letter, Venie identified work he anticipated performing and stated that "[t]his case has gone way beyond our initial contract and I need to be paid for the additional (and lengthy) work that has arisen since the start of the case." R.C., and not Parents, signed an agreement to the hourly charges and paid Venie $16,050.

{32} Ultimately R.C. terminated Venie's representation. R.C. then obtained new counsel, who intended to file a motion to dismiss the charges against R.C. based on speedy trial grounds. R.C. requested receipts from Venie delineating the amount of money that he and Parents had paid to Venie for his legal services to prove financial loss for the prejudice prong of his speedy trial motion to dismiss. Venie responded to R.C.'s request by stating that R.C. and Parents had paid a total of $26,750, which included the $10,000 flat fee plus $700 in taxes paid by Parents and the $16,050 paid by R.C. for 33.3 additional hours of work plus taxes, but made no mention of any additional fees owed. In addition, Venie did not provide further substantive legal services after he was terminated.

{33} R.C.'s motion to dismiss was granted, and his charges were dismissed with prejudice. R.C.'s mother then called Venie's office to request return of the $100,000 she had wired to Venie to post R.C.'s bond. Venie obtained the check for the $100,000 in bond money from the district court, which was made out in his name because he had posted the bond. He then mailed Parents a check for $10,829.30 along with a 35-page invoice claiming additional fees owed to him of $89,170.70 based on his reading of the refunds provision from the retainer agreement that had been signed by Parents. Of the $89,170.70 in additional fees, over $10,000 were allegedly incurred after Venie's services were terminated. The invoice also included charges for pretrial services that should have been covered by the original $10,000 flat fee. In a letter accompanying the invoice, Venie claimed that he was entitled to additional fees beyond the flat fee paid to him because he had been backing the efforts of R.C.'s new attorney all along.

{34} Venie was not entitled to R.C.'s mother's bond money. Based on his reading of the refunds provision of the retainer agreement, Venie unilaterally decided to charge Parents on an hourly basis above the flat fee they had already paid, allegedly according to quantum meruit principles. *See Castillo v. Arrieta*, 2016-NMCA-040, ¶ 17, 368 P.3d 1249 (observing that attorney-client fee agreements are not enforceable unless they are fully known to and understood by the client). However, Venie was entitled to quantum meruit only if he had performed services for which he had yet to be paid at the time his representation was terminated, which was not the case here. *See Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶ 49, 149 N.M. 74, 244 P.3d 342 (holding that an attorney who is discharged is only entitled to quantum meruit and cannot recover fees for services not rendered). Because R.C. fired Venie during the pretrial stage of his case, Venie did not provide services beyond those which were agreed upon under the retainer agreement.

{35} Furthermore, Venie entered into only one contract with Parents that was not signed by R.C., which was the true earned

[2]Although this opinion focuses on Venie's justifications for his misconduct rather than every rule violation, we emphasize that it is a violation of the Rules of Professional Conduct to consider a flat fee for future legal services earned upon receipt and to fail to place such a fee in trust until it is earned. *In re Yalkut*, 2008-NMSC-009, ¶ 26, 143 N.M. 387, 176 P.3d 1119 (per curiam).

on receipt retainer agreement for pretrial services. Parents satisfied this agreement upon payment of the $10,000 flat fee. Venie argued that he had established an hourly-based agreement with both Parents and R.C. when he billed R.C. an additional $16,050 for 33.3 hours of work, and that it was not a unilateral decision to charge R.C.'s mother above the flat fee on an hourly basis. However, the second agreement had been signed only by R.C. and not by Parents; therefore, Venie had no right to charge R.C.'s mother more than the $10,000 flat fee.

{36} Venie's actions constituted conversion. Conversion has been defined as "the unlawful exercise of dominion and control over property belonging to another in defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property, or a wrongful detention after demand has been made." *In re Yalkut*, 2008-NMSC-009, ¶ 25, 143 N.M. 387, 176 P.3d 1119 (per curiam) (internal quotation marks and citation omitted). Venie's actions precisely match the definition of conversion. He wrongfully exercised dominion and control of third-party funds by placing R.C.'s mother's bond money directly into his personal account instead of a trust account, contrary to Rule 16-115(A) and (E) NMRA, due to his failure to hold third-party funds separate from his own, particularly when there were multiple claims to the same funds. He also wrongfully detained the funds after demand was made, contrary to Rule 16-115(D), when he refused to return all of R.C.'s mother's bond money.

{37} During his representation of the third client, Venie again alleged entitlement to third-party property to satisfy client fees greater than those that were actually owed to him. Venie entered into a fee agreement with A.C. and his mother to represent A.C. in a criminal matter. The agreement signed by A.C. and his mother included a refunds provision similar to the one in Parents' flat fee agreement in R.C.'s case. According to the agreement, A.C. and his mother paid a flat fee retainer for pretrial services that was capped at $7,500.

{38} A.C. ultimately filed a disciplinary complaint against Venie, and Venie filed a motion to withdraw as his counsel. Thereafter, Venie sent letters to A.C. and his mother demanding an additional payment of $3,571.60 more than the flat fee which had already been paid to him, and threatened to sue them if he did not receive payment within ten days of the date of the letter. Venie also sent them an invoice which included charges for services that were paid for by the flat fee. Finally, Venie filed a claim of lien for $4,406.83 against A.C.'s mother's home to fulfill the alleged accrued fees and "for future charges which may accrue and become delinquent."

{39} Venie alleges that he rightfully withheld R.C.'s mother's $89,170.70 and the $4,406.83 claim against A.C.'s mother's home as "retaining liens" and relies on *Prichard v. Fulmer*, 1916-NMSC-046, ¶ 8, 22 N.M. 134, 159 P. 39 for the proposition that an attorney has a right to "retain papers or other property that might come into his possession, or money that he in the course of his professional employment had collected, until all his costs and charges against his client were paid." In *Prichard*, the discussion on retaining liens is scant because most of the analysis pertained to charging liens, a different type of lien attorneys may use. *See id.* ¶¶ 9-14 (analyzing use of charging liens at common law). However, in *Prichard*, *id.* ¶ 8, this Court cited to *Weed Sewing Mach. Co. v. Boutelle*, which further described retaining liens and explained the proposition on which Venie relies. 56 Vt. 570, 577-78 (Vt. 1882). A retaining lien gives an attorney the right to retain papers, documents, and money "*against his client, assignments, or attachments*, until the general balance due him for legal services is paid." *Id.* at 578 (emphasis added); *accord McKnight v. Rice, Hoppner, Brown & Brunner*, 678 P.2d 1330, 1335 (Alaska 1984) ("An attorney's lien can only attach to property of the client."). Retaining liens can only be used against *client* property or property that was once owned by the client but then assigned to someone else or is now another's attachment property. Here, Venie assessed liens against the property of third parties to which his clients never claimed ownership. In addition, Venie's actions do not meet the requirements of a charging lien, which only applies to funds recovered by the attorney's aid, such as a judgment or settlement, and not the private funds of a third party. *Id.* at 578.[3] Accordingly, Venie's contention that he was entitled to assert liens against third-party property to fulfill alleged client fees owed is completely erroneous.

II. CONCLUSION

{40} Venie's misconduct is indefensible and undoubtedly requires the most severe possible sanction.

{41} THEREFORE, IT IS ORDERED that effective January 18, 2017, D. Chipman Venie is permanently disbarred from the practice of law in New Mexico pursuant to Rule 17-206(A)(1) NMRA;

{42} IT IS FURTHER ORDERED that Venie shall comply with the requirements of Rule 17-212 NMRA regarding disbarred attorneys;

{43} IT IS FURTHER ORDERED that Venie shall reimburse and pay restitution to R.C.'s mother in the amount of $89,170.70, plus interest in the amount of fifteen percent (15%) per annum from July 3, 2015 until paid in full;

{44} IT IS FURTHER ORDERED that Venie shall be enjoined from suing his former clients R.C., A.C., and A.C.'s mother for fees to which he is not entitled;

{45} IT IS FURTHER ORDERED that Venie shall pay costs to the Disciplinary Board in the amount of $7,998.28 on or before February 18, 2017. Any unpaid balance thereafter shall accrue interest at the statutory rate of eight and three-fourths percent (8 ¾%) per annum until paid in full, and any amount unpaid may be reduced to a transcript of judgment.

{46} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

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

[3]Venie also erroneously relies on *McPherson v. Cox*, 96 U.S. 404 (1877) to justify these liens. In *McPherson*, an attorney rightfully asserted a lien against a bond he held as trustee for the benefit of his client. *Id.* at 420-21. The bond was issued as security for payment of land the client sold to third parties, which the attorney had helped recover in an equity suit for which he was hired. *Id.* at 414-15. The client had agreed to pay the attorney's fees she owed from the funds recovered from the sale of the land. *Id.* at 414. Therefore, in *McPherson*, the attorney was legally in possession of client funds, which the client had specifically agreed to use to pay the attorney's fees.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-042

No. 34,385 (filed February 6, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RAQUEL PERCIVAL,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BENJAMIN CHAVEZ, District Judge

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for Appellant

Opinion

James J. Wechsler, Judge

{1} Defendant Raquel Percival was convicted in metropolitan court for aggravated driving while under the influence of intoxicating liquor or drugs (aggravated DWI), contrary to NMSA 1978, Section 66-8-102 (2010, amended 2016), and careless driving, contrary to NMSA 1978, Section 66-8-114 (1978). She appealed to the district court and that court affirmed her convictions. As a basis for her appeal to this Court, Defendant argues, as she did in the district court, that the metropolitan court incompletely instructed the jury with respect to her duress defense. Defendant also argues that the metropolitan court's misreading of an instruction during its oral charge to the jury constituted fundamental error. We conclude that the jury instructions as given did not constitute either reversible or fundamental error. We therefore affirm Defendant's convictions.

BACKGROUND

{2} On February 16, 2012, at approximately 2:45 a.m., Albuquerque Police Department (APD) Officer Nicholas Sheill observed Defendant driving erratically on Eubank Boulevard in Albuquerque, New Mexico. He also observed that Defendant's license plate lamp was not functioning. He followed Defendant's vehicle for a short time and then conducted a traffic stop.

{3} After approaching Defendant's vehicle, Officer Sheill noted an odor of alcohol emanating from her person. He also observed that Defendant had bloodshot eyes and mildly slurred speech. Officer Sheill called for assistance, and APD Officer Charles Miller arrived to conduct a DWI investigation. As a result of this investigation, Officer Miller placed Defendant under arrest for aggravated DWI. She was also charged with careless driving and an equipment violation.

{4} At trial, Defendant did not deny that she was guilty of the charged offenses but instead claimed that certain circumstances required her to drive in violation of the law. Specifically, Defendant testified that: (1) she was visiting a male friend and that she planned to spend the night at his apartment; (2) she consumed alcohol at the apartment; (3) after she consumed alcohol, her friend invited another man to the apartment; (4) this person's behavior and comments made her feel uncomfortable and unsafe; and (5) fearing for her safety, she left the house while the two men were in the backyard. Officer Sheill stopped Defendant shortly after she left her friend's apartment.

{5} Defendant tendered jury instructions that imbedded the absence of duress as an essential element of aggravated DWI and careless driving. The metropolitan court refused Defendant's tendered instructions and instead gave, among others, UJI 14-4506 NMRA, UJI 14-4505 NMRA, and UJI 14-5130 NMRA.

{6} During its oral charge to the jury, the metropolitan court read each jury instruction. While reading UJI 14-5130, the metropolitan court misspoke; the result was an incorrect articulation of the State's burden of proof. Defendant did not object to this incorrect recitation of the instruction.

{7} Defendant was convicted on all charges. After the district court affirmed the convictions, Defendant filed this appeal.

STANDARD OF REVIEW AND PRESERVATION

{8} Appellate courts review a trial court's rejection of proposed jury instructions de novo, "because [the rejection] is closer to a determination of law than a determination of fact." *State v. Ellis*, 2008-NMSC-032, ¶ 14, 144 N.M. 253, 186 P.3d 245 (internal quotation marks and citation omitted). If the alleged error has been preserved, we review for reversible error. *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. If the alleged error has not been preserved, we review for fundamental error. *Id.* An allegation of error is generally preserved by "[t]he tender but refusal of an instruction[.]" *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 40, 134 N.M. 77, 73 P.3d 215. "A jury instruction which does not instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury is reversible error." *Ellis*, 2008-NMSC-032, ¶ 14 (internal quotation marks and citation omitted). Reversible error also occurs "if the jury is given two contradictory instructions, each of which is complete and unambiguous, . . . because it is impossible to tell if the error is cured by the correct instruction[.]" *State v. Parish*, 1994-NMSC-073, ¶ 4, 118 N.M. 39, 878 P.2d 988.

{9} Defendant tendered alternate jury instructions that the metropolitan court rejected. Defendant additionally argued that the uniform jury instructions, without modification, could result in juror confusion. Because Defendant sufficiently preserved this issue, we review for reversible error. With respect to the remaining and unpreserved issue raised by Defendant on appeal, we review for fundamental error. *See Benally*, 2001-NMSC-033, ¶ 16 ("[U]npreserved error in jury instructions is 'fundamental' when it remains uncorrected, thereby allowing juror confusion to persist.").

UNIFORM JURY INSTRUCTION 14-5130

{10} UJI 14-5130 instructs on the issue of duress, stating,

> Evidence has been presented that the defendant was forced to _______________ under threats.

If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear.

(Footnote omitted.) In 1996, our Supreme Court amended the use notes accompanying various justification-related uniform jury instructions to require that the absence of the relevant consideration be added as an essential element. *See* Supreme Court Order No. 96-8300 (Oct. 30, 1996) (amending the use notes to UJI 14-5101 to -5103 NMRA, UJI 14-5106 NMRA, UJI 14-5110 to -5111 NMRA, UJI 14-5120 NMRA, UJI 14-5132 NMRA, UJI 14-5170 to -5174 NMRA, UJI 14-5180 to -5184 NMRA). However, the use note accompanying UJI 14-5130 was not amended at that time and does not require that the metropolitan court add the absence of duress as an essential element of the charged offense. *Contra, e.g.*, UJI 14-5181 Use Note 1 ("If this instruction is given, add to the essential elements instruction for the offense charged, 'The defendant did not act in self defense.' ").

{11} An analytical distinction exists between duress and other justification-based defenses. *Compare State v. Rios*, 1999-NMCA-069, ¶ 12, 127 N.M. 334, 980 P.2d 1068 ("A defendant pleading duress is *not* attempting to disprove a requisite mental state. Defendants in that context are instead attempting to show that they ought to be excused from criminal liability because of the circumstances surrounding their intentional act." (citation omitted)), *with State v. Armijo*, 1999-NMCA-087, ¶ 14, 127 N.M. 594, 985 P.2d 764 ("[A] claim of self defense negates the element of unlawfulness[.]"), *and State v. Contreras*, 2007-NMCA-119, ¶ 15, 142 N.M. 518, 167 P.3d 966 ("Mistake of fact is a defense when it negates the existence of the mental state essential to the crime charged." (internal quotation marks and citation omitted)), *and State v. Brown*, 1996-NMSC-073, ¶ 21, 122 N.M. 724, 931 P.2d 69 ("Like mistake and mental illness, a state of intoxication may also negate a required offense element[.]"). This distinction—that duress excuses intentional conduct while the other justification-based defenses negate an essential element of the charged offense—supports the omission of UJI 14-5130 from Order No. 96-8300.[1] As a result, the metropolitan court did not err in refusing Defendant's tendered instructions unless the instructions given by the metropolitan court failed to "instruct the jury upon all questions of law essential for a conviction[,]" *Ellis*, 2008-NMSC-032, ¶ 14, or were facially erroneous, vague, or contradictory. *Parish*, 1994-NMSC-073, ¶ 4.

INTERPLAY BETWEEN THE CHARGED OFFENSES AND DURESS

Essential Elements

{12} To secure a conviction, the state must prove each of the essential elements of the charged offense. *State v. Osborne*, 1991-NMSC-032, ¶ 40, 111 N.M. 654, 808 P.2d 624. "When the jury is not instructed on the essential elements of the crime, it has not been instructed on the law applicable to the crime charged." *State v. Kendall*, 1977-NMCA-002, ¶ 24, 90 N.M. 236, 561 P.2d 935, *judgment reversed in part by Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464. The failure to instruct on all questions of law is reversible error. *Ellis*, 2008-NMSC-032, ¶ 14.

{13} Defendant argues that the metropolitan court's refusal to add the absence of duress as an essential element to the charged offenses amounts to a failure to instruct on all essential elements. The charges against Defendant included aggravated DWI and careless driving. In support of her argument, Defendant cites *Parish* for the proposition that "her duress claim put the element of unlawfulness factually at issue[.]"

{14} In *Parish*, the defendant was attacked by several people while walking in Taos, New Mexico. 1994-NMSC-073, ¶ 2. In response to this attack, the defendant shot and killed one of his attackers. *Id.* The defendant claimed that his actions were in self-defense, but the jury convicted him of voluntary manslaughter. *Id.* ¶ 3.

{15} The relevant statute defined "voluntary manslaughter" as "the *unlawful* killing of a human being without malice . . . upon a sudden quarrel or in the heat of passion." *Id.* ¶ 5 (omission in original); NMSA 1978, § 30-2-3 (1994). However, the jury instructions given by the district court did not instruct on the question of unlawfulness, which is "the element of [the charged offense] that is negated by self-defense." *Parish*, 1994-NMSC-073, ¶ 8. Because the instructions did not instruct the jury on an essential element of the charged offense, they were erroneous. *Id.* ¶ 13. *Parish*, however, does not analyze a duress defense and is therefore distinguishable from the present case.

{16} Our Supreme Court has adopted uniform jury instructions for both aggravated DWI and careless driving. UJI 14-4506; UJI 14-4505. These jury instructions outline the essential elements of each charge.

1. The defendant operated a motor vehicle;
2. Within three hours of driving, the defendant had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood;] [or] [two hundred ten liters of breath;] and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.
3. This happened in New Mexico, on or about the ___ day of __________, ___.

UJI 14-4506 (footnotes omitted).

1. The defendant operated a motor vehicle on a highway;
2. The defendant operated the motor vehicle in a careless, inattentive or imprudent manner without due regard for the width, grade, curves, corners, traffic, weather, road conditions and all other attendant circumstances;
3. This happened in New Mexico, on or about the ____ day of __________, ____.

UJI 14-4505 (footnotes omitted). The metropolitan court gave UJI 14-4506 and UJI 14-4505 in this case. A conviction for careless driving requires a finding of intent. *See* UJI 14-141 Use Note 1 ("This instruction must be used with every crime except for the relatively few crimes not requiring criminal intent or those crimes in which the intent is specified in the statute or instruction."). Therefore, UJI 14-4505 must be accompanied by UJI 14-141, which defines "general criminal intent." It is this general criminal intent that is negated by certain justification-based defenses. *See, e.g*, *State v. Gonzales*, 1971-NMCA-007, ¶ 25, 82 N.M. 388, 482 P.2d 252 ("Intoxication may be shown to negative the existence of the required intent."). As a strict liability crime, aggravated DWI does not require criminal intent. *State v. Gurule*, 2011-NMCA-042, ¶ 18, 149 N.M. 599, 252 P.3d 823.

[1]We are uncertain as to the rationale underlying the decision to include UJI 14-5132, which addresses a defendant's claim that the defendant escaped from prison as a result of duress, in Order No. 96-8300. We leave this question to our Supreme Court.

{17} As discussed above, duress and the other justification-based defenses are not functionally equivalent.[2] Duress does not negate an element of the charged offense but instead excuses intentional conduct. *Rios*, 1999-NMCA-069, ¶ 12. For this reason, including additional language addressing the absence of duress within UJI 14-4506 or UJI 14-4505 would not negate any of the essential elements required for a conviction of either offense, or the general criminal intent required for a conviction of careless driving. This rationale encompasses the element of unlawfulness raised by Defendant on appeal. Therefore, UJI 14-4506 and UJI 14-4505 as given sufficiently "instruct[ed] the jury upon all questions of law essential for a conviction[,]" when given in conjunction with UJI 14-5130. *Ellis*, 2008-NMSC-032, ¶ 14.

Facially Erroneous, Vague, or Contradictory Jury Instructions

{18} Because the instructions given instructed on all questions of law, they constitute reversible error only if they are facially erroneous, vague, or contradictory. *Parish*, 1994-NMSC-073, ¶ 4. A jury instruction is facially erroneous if it presents an incurable problem. *State v. Cabezuela*, 2011-NMSC-041, ¶ 21, 150 N.M. 654, 265 P.3d 705; *Parish*, 1994-NMSC-073, ¶ 4. A jury instruction is vague, or ambiguous, if it is subject to more than one interpretation. *Parish*, 1994-NMSC-073, ¶ 4. None of these conditions applies to the uniform jury instructions given in this case. Contradictory jury instructions constitute reversible error if each instruction "is complete and unambiguous . . . because it is impossible to tell if the error is cured by the correct instruction[,]" or if "a reasonable juror would have been confused or misdirected." *Id.* However, in determining whether jury instructions are contradictory, the "instructions must be considered as a whole[.]" *Id.* (internal quotation marks and citation omitted).

{19} UJI 14-4506 and UJI 14-4505 as given outline the essential elements required to convict Defendant of aggravated DWI and careless driving respectively. UJI 14-5130 as given outlines conditions under which Defendant's duress defense would (1) excuse her conduct and (2) require a finding of not guilty. *See* UJI 14-5130 ("If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty."). Intuitively, jurors need not consider a duress defense if they find that the state did not prove all of the elements of the underlying offenses beyond a reasonable doubt. *Cf. State v. James*, 1971-NMCA-156, ¶ 18, 83 N.M. 263, 490 P.2d 1236 (noting that an outright finding of not guilty by a jury negates the jury's need to analyze the defendant's insanity defense), *overruled in part by State v. Victorian*, 1973-NMSC-008, ¶ 12, 84 N.M. 491, 505 P.2d 436.

{20} For this reason, UJI 14-5130 does not contradict either UJI 14-4506 or UJI 14-4505. Instead, UJI 14-5130 is a necessary and complementary second step if a jury concludes that a defendant is guilty beyond a reasonable doubt of each essential element outlined in UJI 14-4506 or UJI 14-4505. This two-step process would not confuse a reasonable juror.

{21} In both her brief in chief and reply brief, Defendant makes reference to our Supreme Court's holding in *Parish*, which provides that "an erroneous instruction cannot be cured by a subsequent correct one[.]" 1994-NMSC-073, ¶ 4 (internal quotation marks and citation omitted). This rule requires, of course, that the instruction at issue actually be erroneous as a matter of law. Because the instructions given in this case are not facially erroneous, vague, or contradictory, they do not constitute reversible error.

ORAL CHARGE TO JURY

{22} Defendant additionally argues that the metropolitan court's misreading of UJI 14-5130 in its oral charge to the jury constitutes fundamental error. "[U]npreserved error in jury instructions is 'fundamental' [only] when it remains uncorrected[.]" *Benally*, 2001-NMSC-033, ¶ 16.

{23} The metropolitan court read each instruction aloud to the jury. While doing so, it misspoke, stating "[t]he burden is on the state to prove beyond a reasonable doubt that the defendant *acted* under such reasonable fear" instead of "[t]he burden is on the state to prove beyond a reasonable doubt that the defendant *did not act* under such reasonable fear." UJI 14-5130 (emphasis added). This misstatement could result in juror confusion as to the State's burden of proof.

{24} However, our review of the record leads us to believe that this error was corrected by the correct articulation of the State's burden in the written jury instructions. As noted by the metropolitan court prior to its oral recitation of the instructions to the jury, "You do not have to take notes on this, because this packet that I'm going to read from will actually be given to you to take back to the jury room."

{25} In *State v. Armendarez*, 1992-NMSC-012, ¶ 11, 113 N.M. 335, 825 P.2d 1245, the prosecutor erroneously recited the mens rea requirement in a first degree murder case. The defendant did not object at trial but argued fundamental error on appeal. *Id.* Our Supreme Court held that the written copies of jury instructions were sufficient to overcome any potential prejudice caused by the prosecutor's misstatement and noted that jurors are presumed to follow the written instructions. *Id.* ¶ 13; *see State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254 ("Juries are presumed to have followed the written instructions.").

{26} In a different context, this Court recently held that "the purpose of written jury instructions relates directly to the [limited] ability of jurors to remember oral instructions once they have retired to the jury room." *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 12, 370 P.3d 797. This purpose is consistent with other New Mexico cases requiring that written jury instructions be provided in order to "properly enunciate the law on the subject." *Territory v. Lopez*, 1884-NMSC-012, ¶ 10, 3 N.M. 156, 2 P. 364; *see State v. Greenlee*, 1928-NMSC-020, ¶ 27, 33 N.M. 449, 269 P. 331 ("Since 1880 it has evidently been the legislative policy that there should be an authoritative record to which the jurors might refer to avoid misapprehension or differences of opinion[.]").

{27} The metropolitan court's written instruction on duress, which was available during the jury's deliberations, correctly articulated the State's burden with respect to Defendant's claim of duress. We thus conclude that the metropolitan court's misstatement did not go "uncorrected" such that fundamental error occurred. *Benally*, 2001-NMSC-033, ¶ 16; *see, e.g.*, *People v. Prieto*, 66 P.3d 1123, 1142 (Cal. 2003) ("[T]he misreading of a jury instruction does not warrant reversal if the jury received the correct written instructions.").

CONCLUSION

{28} For the foregoing reasons, we affirm.

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

JAMES J. WECHSLER, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
M. MONICA ZAMORA, Judge

[2]Defendant's brief in chief and reply brief liken self-defense and duress by misquoting *Rios*, 1999-NMCA-069, ¶ 12. *Rios* does not equate self-defense and duress as implied by Defendant.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-043

No. 34,245 (filed February 13, 2017)

JUAN ANTONIO OCHOA BARRAZA,
Petitioner-Appellant,
v.
STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
STAN WHITAKER, District Judge

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Opinion

Michael E. Vigil, Judge

{1} The New Mexico Taxation and Revenue Department, Motor Vehicle Division (MVD), revoked Driver Juan Antonio Ochoa Barraza's license under the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015), and Driver appealed to the district court. Instead of hearing the case in its appellate capacity, the district court, on its own motion converted the case into a petition for writ of mandamus, arising under its original jurisdiction, and denied mandamus relief. We conclude that the district court erred in converting the appeal into a petition for writ of mandamus, and remand the case to the district court to decide the case as an appeal.

BACKGROUND

{2} Bernalillo County Sheriff's Deputy Jason Foster stopped Driver for failing to maintain a traffic lane. Upon seeing that Driver had bloodshot, watery eyes, and smelling the odor of an alcoholic beverage coming from the vehicle, Deputy Foster told Driver to exit the vehicle, whereupon he noted an odor of alcohol coming from Driver's person. Driver told Deputy Foster that he spoke Spanish, and Deputy Foster called for a Spanish-speaking deputy before giving Driver field sobriety tests. Deputy Jareno responded and translated the instructions given by Deputy Foster to Driver. Driver failed the field sobriety tests, and Deputy Foster arrested Driver for driving while under the influence of intoxicating liquor or drugs (DWI). NMSA 1978, § 66-8-102 (2010, amended 2016).

{3} Although Deputy Jareno was present, Deputy Foster read the implied consent advisory to Driver in English. Deputy Foster informed Driver that he was under arrest for DWI and that the Implied Consent Act required him to submit to a breath or blood test, or both, to determine the alcohol or drug content of his blood. Deputy Foster further informed Driver that if he took the test, he had a right to take an additional test of his choosing, together with the right to a reasonable opportunity to arrange for a physician, licensed nurse, laboratory technician or technologist employed by a hospital or physician to perform the additional test, the cost of which would be paid by the law enforcement agency. Deputy Foster then asked Driver if he agreed to a breath test, and Driver said, "No." Deputy Foster then advised Driver that if he refused, he would lose his driver's license for one year and that, if he was convicted, he could receive an enhanced sentence due to the refusal. Deputy Foster asked Driver, having that in mind, did he now agree to take the tests, and Driver again answered, "No."

{4} Deputy Foster issued Driver a notice of revocation of his driver's license for one year, and of his right to an administrative hearing before MVD to contest the revocation. Sections 66-8-111(B) and 66-8-111.1. Driver's request for an administrative hearing was granted. The notice of the hearing specified that one of the issues to be decided was whether Driver "refused to submit to requested breath and/or blood testing, after having been advised that failure to submit could result in revocation of [Driver's] privilege to drive[.]"

{5} A hearing was held before MVD hearing officer Jane Kircher pursuant to Section 66-8-112. After considering the testimony, Kircher set forth the evidence in detail to support her factual determination that Driver spoke English and understood the implied consent advisory given in English by Deputy Foster, including the consequences of refusing the requested tests. Kircher therefore rejected Driver's argument that the due process protected by Article II, Section 18 of the New Mexico Constitution and cases addressing the giving of *Miranda* warnings in Spanish to a Spanish-speaker required Deputy Foster to read or give the implied consent advisory to Driver in Spanish. Kircher found that Driver "refused to submit to a requested chemical test after he was properly advised that he would lose his privilege to drive if he refused the test[,]" and entered an order sustaining the revocation of Driver's license for one year. Driver was advised of his right to appeal and seek review of the revocation in the district court.

{6} Driver appealed MVD's revocation of his driver's license to the district court. *See* § 66-8-112(H); Rule 1-074(A) NMRA (setting forth the procedure for an appeal from an administrative agency to the district court "when there is a statutory right of review to the district court"). In his statement of issues on appeal, Driver argued that even if he spoke English at some level, there was no way to gauge his actual understanding of what Deputy Foster told him, and because Deputy Jareno was present and able to translate, the implied consent advisory should have been given to him in Spanish, his native language. Driver also argued that Deputy Foster's failure to give the implied consent advisory in Spanish violates the due process protected by Article II, Section 18 of the New Mexico Constitution. MVD responded that the evidence supported the hearing officer's finding that Driver understood English and the implied consent advisory.

{7} The district court recognized that the case before it was an appeal from MVD's decision revoking Driver's license. However, because the district court ruled that MVD had no jurisdiction to rule on Driver's due process argument, the district court also concluded it had no jurisdiction to decide the appeal. In making this determination, the district court referred to our decision in *Maso v. New Mexico Taxation & Revenue Dep't*, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, *affirmed*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. Without notice to the parties and on its own motion, the district court then construed the appeal as a petition for writ of mandamus, and, finding no basis to issue a writ of mandamus, denied relief. Driver appeals.

ANALYSIS

{8} This case requires us to determine whether the relevant portion of Section 66-8-112 grants authority to MVD to decide Driver's due process claim in an administrative hearing under the Implied Consent Act. This is a question of law that we review de novo. *See Schuster v. N. M. Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶ 9, 283 P.3d 288 (stating "[w]hether MVD must conclude that the arrest of a driver for DWI is constitutional before revoking a driver's license requires" that Section 66-8-112 be interpreted, and that 'statutory interpretation' presents a question of law that is reviewed de novo); *Martinez v. N.M. State Eng'r Office*, 2000-NMCA-074, ¶ 20, 129 N.M. 413, 9 P.3d 657 (stating that determining what issues may be decided by the state personnel board under the applicable statutory scheme presents a question of law). "When reviewing a statute, [appellate courts] must give effect to the Legislature's intent by first looking at the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Schuster*, 2012-NMSC-025, ¶ 9 (internal quotation marks and citation omitted).

{9} A person whose license is revoked under the Implied Consent Act may contest the revocation by requesting a hearing within ten days after receiving the notice of revocation. Section 66-8-112(B). Section 66-8-112(E) provides that the hearing "shall be limited" to consideration of five issues. *See id.* ("The hearing shall be limited to the issues: (1) whether the law enforcement officer had reasonable grounds to believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor or drugs; (2) whether the person was arrested; (3) whether this hearing is held no later than ninety days after notice of revocation; and either (4) whether: (a) the person refused to submit to a test upon request of the law enforcement officer; and (b) the law enforcement officer advised that the failure to submit to a test could result in revocation of the person's privilege to drive; or (5) whether: (a) the chemical test was administered pursuant to the provisions of the Implied Consent Act; and (b) the test results indicated an alcohol concentration in the person's blood or breath of eight one hundredths or more if the person is twenty-one years of age or older, four one hundredths or more if the person is driving a commercial motor vehicle or two one hundredths or more if the person is less than twenty-one years of age"). Sections 66-8-112(F) and (G) provide that the revocation may be sustained only if the hearing officer makes an affirmative finding as to each issue. A person adversely affected by a decision of MVD may then seek review in the district court. Section 66-8-112(H).

{10} As discussed above, the district court relied upon *Maso* in arriving at its ruling. In *Maso*, the driver conceded that he received the notice of revocation, but he failed to make a timely request for a hearing. 2004-NMCA-025, ¶ 1. MVD denied his request for a hearing. *Id.* ¶ 5; *see* § 66-8-112(B) ("Failure to request a hearing within ten days shall result in forfeiture of the person's right to a hearing."). The driver appealed to the district court asserting that, because the notice was in English, and he only understood Spanish, the notice did not comport with due process, and he should have been granted a hearing, notwithstanding his lack of timeliness. *Maso*, 2004-NMCA-025, ¶¶ 1, 6. The district court rejected the driver's due process argument, and this Court granted the driver's request for certiorari review of the district court decision. *Id.* ¶ 6. We concluded that, because Section 66-8-112(E) provides that the hearing "shall be limited" to the consideration of specific issues, and the driver's argument that due process required the notice of revocation to be given to him in Spanish is not included in those issues, MVD had no jurisdiction to consider the driver's argument. *Maso*, 2004-NMCA-025, ¶ 12.[1] We additionally concluded that because MVD had no jurisdiction to decide the issue raised by the driver, the district court had no appellate jurisdiction to decide the issue. *Id.* ¶ 13; *see Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 10, 91 N.M. 455, 575 P.2d 1340 (concluding that a district court has no jurisdiction to consider an issue on appeal from an administrative agency that decided the issue without jurisdiction to do so).

{11} However, we also noted in *Maso* that the district court had authority to consider the driver's due process argument under its original jurisdiction. 2004-NMCA-025, ¶ 14. Invoking logic and principles of judicial economy, we construed the driver's appeal to the district court as in the nature of a petition for writ of mandamus, and the appeal before us as an appeal from the denial of a petition for writ of mandamus. *Id.* ¶ 15. We then affirmed the district court on the merits, concluding that due process does not require that written notice of revocation be given to a Spanish-speaking driver in Spanish. *Id.* ¶¶ 18-21. On certiorari, our Supreme Court affirmed the merits of the due process issue without addressing any of the procedural or jurisdictional issues we had decided. *Maso*, 2004-NMSC-028, ¶¶ 9, 13-15.

{12} Driver and MVD both ask us to consider the applicability of *Schuster*, 2012-NMSC-025. One of the questions that must be affirmatively answered before MVD can revoke a driver's license under Section 66-8-112(E)(2) is whether "the person was arrested." *Id.* In *Schuster,* the issue before our Supreme Court was whether the Legislature intended a finding that a driver was "arrested" to include a finding that the driver's arrest was constitutional. 2012-NMSC-025, ¶ 15. Our Supreme Court answered the question in the affirmative, holding, "the plain meaning of the word 'arrest' means an arrest that complies with the protections of the Fourth Amendment to the United States Constitution, and Article II, Section 10 of the New Mexico Constitution." *Schuster*, 2012-NMSC-025, ¶ 18. It therefore concluded that "an arrest and the underlying police activity leading to the arrest, must be constitutional before a driver's license can be revoked under the Implied Consent

[1]We also note here that whether a driver requests a timely hearing is not included in the five issues that may be considered by a hearing officer under Sections 66-8-112(E) and (F).

Act." *Id*. The Court recognized that to conclude otherwise, that the Implied Consent Act allows an unconstitutional arrest to result in the revocation of a driver's license, would call into question the constitutionality of the Implied Consent Act. *Id*. ¶¶ 17-18.

{13} Referring to our decision in *Maso*, the driver in *Schuster* also argued that the district court must consider the constitutionality of an arrest under its original jurisdiction and not for substantial evidence under its appellate jurisdiction. *Schuster*, 2012-NMSC-025, ¶ 20. Our Supreme Court disagreed and held that because "MVD must rule on the constitutionality of an arrest" before revoking a driver's license under the Implied Consent Act, *Maso* was not controlling. *Schuster*, 2012-NMSC-025, ¶¶ 20, 22. Significantly, the Court noted that *Maso* "stands for the legal proposition that any constitutional challenge beyond MVD's scope of statutory review is brought for the first time in district court under its original jurisdiction." *Schuster*, 2012-NMSC-025, ¶ 21.

{14} Both parties argue that *Schuster* is controlling in this case, and we agree. Prior to revoking Driver's license, Kircher was required to affirmatively answer whether Driver "refused to submit to a test upon request" and whether Deputy Foster "advised that the failure to submit to a test could result in revocation of [Driver's] privilege to drive[.]" Section 66-8-112(E)(4)(a), (b). Driver specifically argued that because his primary language is Spanish, due process required that Deputy Foster give him the implied consent advisory in Spanish to ensure that Driver understood the advisory and validly refused to submit to the test.

{15} In *Schuster*, our Supreme Court concluded that MVD was both authorized and required to answer constitutional questions arising from the language of Section 66-8-112(E)(2). 2012-NMSC-025, ¶ 19. We see no need to depart from that rationale. A driver's license is an "important, protectible right," *Stevens v. N.M.Transp. Dep't*, 1987-NMCA-095, ¶ 12, 106 N.M. 198, 740 P.2d 1182, subject to due process protections. *Maso v. N.M. Taxation & Revenue Dep't*, 2004-NMSC-028, ¶ 10, 136 N.M. 161, 96 P.3d 286 ("Due process requires notice and an opportunity for a hearing before the State can suspend or revoke a person's driver's license."). It appears an open question whether due process requires that a non-English speaking driver fully understand the implications of his or her refusal to submit to a breath- or blood-alcohol test upon request. In accordance with *Schuster*, we conclude that MVD must answer this constitutional question in determining whether it can answer the questions posed by Section 66-8-112(E)(4) in the affirmative. Following MVD's ruling on the matter, the district court must, on appeal, hear and decide the question in its appellate capacity and not under its original jurisdiction. *Schuster*, 2012-NMSC-025, ¶ 22.

{16} Whether the district court is acting under its original jurisdiction in mandamus or its appellate capacity, it has very real consequences. When the district court sits in its appellate capacity, Section 66-8-112(H) directs that it is "to determine only whether reasonable grounds exist for revocation [of the driver's license] based on the record of the administrative proceeding." In its appellate capacity, the standard of review that the district court applies is: (1) whether MVD acted fraudulently, arbitrarily, or capriciously; (2) whether MVD's decision is supported by substantial evidence; (3) whether MVD's action is outside the scope of its authority; or (4) whether MVD's action was otherwise not in accordance with law. Rule 1-074(R). On the other hand, "[m]andamus lies only . . . where, on a given state of facts, [a] public officer has a clear legal duty to perform the act and there is no other plain, speedy, and adequate remedy in the ordinary course of the law." *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 11, 140 N.M. 168, 140 P.3d 1117. "The writ applies only to ministerial duties and it will not lie when the matter has been entrusted to the judgment or discretion of the public officer." *Id*. Thus, very different considerations and standards apply as to how a district court is to treat the law and facts before it, depending on whether the district court is acting in its appellate jurisdiction or in its original mandamus jurisdiction.

{17} There are also additional consequences. When the district court sits in its appellate capacity and issues a final order in a MVD driver's license revocation case such as this, there is no right to a further appeal in this Court. Rather, a timely petition for a writ of certiorari must be filed in this Court, which is granted or denied at the discretion of the Court. Rule 1-074(V); Rule 12-505 NMRA. Driver did not file a petition for certiorari, and even if we could consider Driver's docketing statement as such a petition, it was not timely, and we would not have jurisdiction. *See Bransford-Wakefield v. N.M. Taxation & Revenue Dep't*, 2012-NMCA-025, ¶¶ 9, 16, 18, 274 P.3d 122 (stating that "the timely filing of a petition for a writ of certiorari" within thirty days of the district court's final order to be reviewed "is a mandatory precondition" to our exercise of jurisdiction, and while a docketing statement can substitute for a petition for writ of certiorari, it must also be filed within thirty days of the order to be reviewed). On the other hand, when the district court acts under its original jurisdiction, an aggrieved party has a right to appeal to this Court by filing a timely notice of appeal in the district court and a timely docketing statement in this Court. Rule 12-202 NMRA; Rule 12-208 NMRA. In fact, due to the confusion caused by the district court's action, and whether Driver was required to file a petition for writ of certiorari or had properly filed a notice of appeal, we issued an order to show cause why this appeal should not be dismissed. *See Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (stating that an appellate court may raise a question of jurisdiction on its own motion, and lack of jurisdiction at any stage must be resolved before proceeding further). The parties' responses to the order to show cause provided us with valuable insights in disposing of this appeal.

{18} We therefore conclude that the district court erred in converting the administrative appeal before it into a petition for writ of mandamus arising under its original jurisdiction and that the order of the district court must therefore be reversed. We remand the case to the district court for consideration in its appellate capacity.

CONCLUSION

{19} The order of the district court is reversed, and the case is remanded to the district court for further proceedings in accordance with this opinion.

{20} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JONATHAN B. SUTIN, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-044

No. 34,845 (filed February 14, 2017)

STATE OF NEW MEXICO UNINSURED EMPLOYERS' FUND,
Petitioner-Appellant,
v.
GREG GALLEGOS, a/k/a GREG McCOOL, d/b/a MONSTER CONSTRUCTION & ROOFING,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VICTOR S. LOPEZ, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} The State of New Mexico Uninsured Employers' Fund (the UEF), administered by the Workers' Compensation Administration (WCA), appeals from the district court's refusal to reinstate the UEF's twice-dismissed petition for entry of judgment (the 2006 Petition)[1] against Respondent Greg Gallegos. The 2006 Petition was brought to enforce a supplementary compensation order issued by a Workers' Compensation Judge (WCJ) requiring that Respondent repay the UEF funds expended on Respondent's behalf for benefits owed to his injured employee. Both prior dismissals, the most recent of which was in 2008 (2008 Dismissal), were occasioned by the UEF's failure to diligently prosecute the 2006 Petition. We affirm and take this opportunity to clarify applicable law.

BACKGROUND

{2} In 2004 Respondent's employee (Worker) was injured on the job and filed a claim for benefits under the Workers' Compensation Act (the Act). The WCA determined that Worker was eligible for benefits but that Respondent did not have workers' compensation insurance coverage as required by state law. Mediation was held, of which Respondent was notified but failed to attend. Afterward, a recommended resolution was submitted to the WCA by the mediator. In it, the mediator advised that Respondent was in default with respect to Worker's claim and recommended that Worker receive retroactive compensation, as well as continuing medical care. Respondent received the recommended resolution via certified mail on December 28, 2004, yet lodged no objection to its contents.

{3} Because Respondent lacked workers' compensation insurance coverage, the UEF paid Worker's medical bills and indemnity payments. On February 18, 2005, the UEF sued Respondent, seeking reimbursement of all monies paid by the UEF related to Worker's 2004 claim. Following additional mediation conferences in April and June of 2005, which Respondent again failed to acknowledge or attend, a second recommended resolution was issued that specifically recommended that Respondent be required to reimburse the UEF $16,222.26.

{4} In November 2005 a WCJ held a hearing, of which Respondent was personally notified but did not attend. On November 21, 2005, the WCJ issued a supplementary compensation order finding Respondent in default and ordering Respondent to repay the UEF $16,222.26 in one lump sum by December 22, 2005, after which (and in the absence of payment by Respondent) the UEF was authorized to "proceed to the district court for an enforcement order."

{5} As authorized by and based on Respondent's failure to comply with the WCJ's order, the UEF filed the 2006 Petition on June 20, 2006. The 2006 Petition was brought under NMSA 1978, Section 52-5-10 (1990) and sought "entry of an executable judgment enforcing the [s]upplementary [c]ompensation [o]rder in the amount of $16,222.26, interest, attorney[] fees and costs, and . . . any other appropriate sanction[.]" Respondent filed a pro se answer on July 25, 2006, asserting that (1) he "was not notified of hearings . . . and was not able to contest any part of the case[,]" and (2) "[s]ome facts are questionable[.]"

{6} On March 13, 2007, the district court, acting sua sponte, dismissed the UEF's 2006 Petition for lack of prosecution because "no significant action [had] been taken in 180 or more days in connection with any and all pending claims[.]" The dismissal was without prejudice and informed the parties that either could move for reinstatement within thirty days. Fifteen days later, the UEF moved to reinstate the 2006 Petition, maintaining that the UEF experienced "some difficulty in finding . . . Respondent, but served him in June, 2006, at home; a copy of the service was sent to the [c]ourt, but apparently [was] lost." The UEF's motion to reinstate reiterated that its action was one "to enforce the judgment of the [WCA.]" The district court reinstated the 2006 Petition on March 29, 2007.

{7} On April 24, 2008, after another year had passed, in which the case again languished, a newly assigned district court judge once more dismissed the 2006 Petition for lack of prosecution. Again, dismissal was sua sponte, without prejudice, and permitted reinstatement to be sought within thirty days. This time, the UEF did not move to renew its collection effort against Respondent in district court.

{8} On February 9, 2015—nearly seven years later, and following an internal audit that revealed the UEF had never completed its collection action against Respondent—the UEF filed a motion to

[1]Because Respondent failed to file an answer brief or respond to this Court's ensuing Order to Show Cause, this case was submitted only on the UEF's brief in chief.

reinstate (the 2015 Motion to Reinstate) the 2006 Petition under Rule 1-041(E)(2) NMRA. In the motion, the UEF argued that it could demonstrate "good cause for reinstatement" and asserted that "the UEF is a state government entity which does not have a statute of limitations period by which it must file a reimbursement-related cause of action[.]"

{9} The UEF concurrently sought to amend the 2006 Petition, enumerating thirteen points that related to the WCA proceedings in 2004 and 2005 and also notifying the district court that Respondent had changed his name. Amendments to the 2006 Petition did not affect its primary mission: "entry of an executable judgment against Respondent[.]" Notably, both 2015 UEF pleadings were filed under the original 2006 docket number.

{10} Respondent filed a pro se answer to the UEF's 2015 Motion to Reinstate denying entirely any liability to the UEF. In his answer, Respondent stated: "[(1)] this case was dismissed in 2005-6[,]" and "[(2) Worker] fabricated with the help of his attorney all the substance of [this] case, all to establish employment. [Worker] was *not* an employee."

{11} The district court held a hearing on April 22, 2015, at which the UEF and Respondent appeared. That same day, the district court issued an order denying the UEF's 2015 Motion to Reinstate based upon the UEF's "tardiness" and "fail[ure] to comply with Rule 1-041(E)[.]"

{12} On May 7, 2015, the UEF filed a motion to reconsider pursuant to Rule 1-059(E) NMRA. In it, the UEF argued that: (1) " 'passage of time' [was] not an appropriate basis on which to deny reinstatement" and that " 'good cause' is the only relevant factor to apply"; (2) the district court was obligated to reinstate the UEF's 2006 Petition because Section 52-5-10(B) imposes a mandatory requirement that the district court enter a default judgment against Respondent; and (3) the district court's refusal to reinstate the 2006 Petition would "hinder the UEF's ability to carry forth and enforce the default judgment order of the WCA[,]" an outcome that would be "contrary to law, an abuse of discretion[,] and leads to absurd results." On May 13, 2015, again relying on Rule 1-041(E), or in the alternative the district court's "inherent power" to "dismiss a cause of action for failure of a plaintiff or petitioner to timely prosecute the matter[,]" and additionally because it found that the UEF had "shown no circumstances under Rule 1-060(B) [NMRA] . . . to justify re-opening[,]" the district court denied the UEF's motion to reconsider. The UEF timely appealed.

DISCUSSION

{13} On appeal, the UEF argues that the district court abused its discretion by denying the UEF's 2015 Motion to Reinstate the 2006 Petition. First, it asserts that "good cause" supported reinstatement of the 2006 Petition and that the district court, which denied the UEF's motion based on its "tardiness," failed to apply the correct standard of review. Second, the UEF relies on the Act's enforcement provision, Section 52-5-10(B), which mandates entry of judgment by the district court upon petition by the WCA director, as well as the absence of an applicable statute of limitations restricting the time within which the UEF may enforce an order of reimbursement issued by the WCA. We address each of the UEF's arguments in turn.

I. The District Court Did Not Abuse Its Discretion by Denying the UEF's 2015 Motion to Reinstate the 2006 Petition

{14} The UEF argues that the district court applied an incorrect standard in denying reinstatement of the 2006 Petition. According to the UEF, the district court's reliance on "tardiness" to deny the UEF's 2015 Motion to Reinstate was error and contrary to our precedent. It contends, instead, that "good cause" is the sole applicable determinative criteria. We disagree.

{15} We review a district court's answers to questions of law, including those that interpret Rules of Civil Procedure, de novo. *Bankers Trust Co. of Cal., N.S. v. Baca*, 2007-NMCA-019, ¶ 3, 141 N.M. 127, 151 P.3d 88. Regarding procedural rules, "we apply the same canons of construction as applied to statutes and, therefore, interpret the rules in accordance with their plain meaning." *Gilmore v. Duderstadt*, 1998-NMCA-086, ¶ 44, 125 N.M. 330, 961 P.2d 175. "We first look to the language of the rule." *Frederick v. Sun 1031, LLC*, 2012-NMCA-118, ¶ 17, 293 P.3d 934 (internal quotation marks and citation omitted). "If the rule is unambiguous, we give effect to its language and refrain from further interpretation." *Id.* (internal quotation marks and citation omitted). We review a district court's decision to dismiss a case for inactivity and its denial of a motion to reinstate for an abuse of discretion. *See Summit Elec. Supply Co. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, ¶¶ 6, 9, 148 N.M. 590, 241 P.3d 188.

{16} Rule 1-041(E)(2) provides, in pertinent part, that when an action is dismissed by the court sua sponte for lack of prosecution, "[*w*]*ithin thirty* . . . days after service of the order of dismissal, any party may move for reinstatement of the case. Upon good cause shown, the court shall reinstate the case[.]" (Emphasis added.) Our Supreme Court's application of this language instructs that the filing of a timely motion to reinstate—one submitted within thirty days of service of the order of dismissal—is a necessary predicate to a district court's examination of the merits of whether to reinstate the case under Rule 1-041(E)(2) for good cause shown. *See, e.g.*, *Meiboom v. Watson*, 2000-NMSC-004, ¶ 19, 128 N.M. 536, 994 P.2d 1154 (comparing Rule 1-041(E)(2) and Rule 1-060(B)(6) and explaining that "[a] party seeking reinstatement under Rule 1-041(E)(2) has thirty days to file a motion[,]" whereas Rule 1-060(B)(6) "has no specific time limitation and instead requires only that the motion be filed within a 'reasonable time' "). Consequently, motions to reinstate made outside of Rule 1-041(E)(2)'s thirty-day window are not within the purview of Rule 1-041(E)(2) and must, therefore, rely on an alternative mechanism of procedure such as Rule 1-060(B).[2]

{17} In arguing that "tardiness" on its part is an invalid consideration and that "good cause" is the only barometer by which a district court need resolve such motions to reinstate, the UEF writes out the threshold thirty-day requirement contained within Rule 1-041(E)(2). It effectively invites us to misconstrue Rule 1-041(E)(2) to permit reinstatement of a case dismissed for lack of prosecution "[w]ithin thirty . . . days" *or* for "good cause shown[.]" But that is

[2]In some cases, district courts have discretion to extend time limits contained in the Rules of Civil Procedure even after the time limit has expired. *See* Rule 1-006(B)(1)(b) NMRA ("When an act may or must be done within a specified time, the court may . . . extend the time on motion made after the time . . . has expired if the party failed to act because of excusable neglect."); *see also H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 20, 143 N.M. 404, 176 P.3d 1136 (explaining that "Rule 1-006(B) gives the district court the discretion to extend the time for a party to act under the Rules of Civil Procedure"). In this case, no such extension was sought by the UEF.

not what the rule says. Rather, its plainly articulated requirements of both a timely motion to reinstate *and* a showing of good cause regarding the period of inactivity are judicially promulgated mandates by which we must abide. *See Frederick*, 2012-NMCA-118, ¶ 17 (explaining that "[i]f the rule is unambiguous, we give effect to its language and refrain from further interpretation" (internal quotation marks and citation omitted)). As *Meiboom* recognizes, to garner a "good cause" analysis under the rule, a party must pre-conditionally file its timely motion to reinstate. 2000-NMSC-004, ¶ 19 (discussing *Wershaw v. Dimas*, 1996-NMCA-118, 122 N.M. 592, 929 P.2d 984, a Rule 1-041(E)(2) case, and emphasizing that it was "relevant that *Wershaw* involved a motion timely filed within the thirty-day limit"). Failure to comply with the thirty-day filing deadline may result in the district court losing jurisdiction over the matter altogether. *See Meiboom*, 2000-NMSC-004, ¶ 16 n.1 (explaining that "if the statute of limitations had expired and the moving party filed outside the thirty-day time limit, relief under Rule 1-041(E)(2) would be denied and the district court would lack jurisdiction to reinstate the case"). Rule 1-041(E)(2) provides no mechanism by which a stand-alone "good cause" analysis may justify reinstatement beyond expiration of the thirty-day reinstatement window. *See Summit Elec. Supply Co.*, 2010-NMCA-086, ¶ 7 (explaining that when a district court "dismisses a case on its own motion following a 180-day period of inactivity[,]" reinstatement should be granted if "good cause is shown for the [180-day period of] inactivity"). A party may move by right to reinstate within thirty days of dismissal. But whether the motion will be granted depends on the existence of the moving party's good cause justification for failing to prosecute its cause of action during the 180 days preceding dismissal. *See id.*; Rule 1-041(E)(2).

{18} The UEF's reliance on cases[3] in which good-cause reinstatement was permitted on motions filed beyond the thirty-day limit is misplaced. This Court has not, as the UEF contends, "reversed trial courts' denials of motions to reinstate regardless of the passage of time[.]" While this Court reversed the district court's denial of the plaintiff's motion to reinstate in *Vigil v. Thriftway Marketing Corp.* despite the fact that the plaintiff's motion was made three months after dismissal, we did so because the WCA, which had jurisdiction over the case and had issued the dismissal, "had failed to send copies of the dismissal order to the parties." 1994-NMCA-009, ¶¶ 5, 20, 117 N.M. 176, 870 P.2d 138. We explained that "the fact that the order of dismissal was not mailed to [the plaintiff] until August means that [the plaintiff] had until September to file his motion to reinstate the case." *Id.* ¶ 13. The plaintiff indeed moved to reinstate within thirty days of receiving his copy of the dismissal, as required by Rule 1-041(E)(2). *Vigil*, 1994-NMCA-009, ¶ 6. Although this Court spoke to a district court's need to balance case flow and efficiency alongside the goal of deciding cases on their merits, *id.* ¶ 17, *Vigil* does not stand for the proposition that the passage of time is an inappropriate consideration in denying reinstatement as the UEF urges. And here, the UEF claims no absence of notice of the 2008 dismissal order.

{19} *Summit Elec. Supply Co.* is equally distinguishable. There, the district court's order "closing" the plaintiffs' case provided that "[n]o reopen fee shall be required if the movant seeks reinstatement within sixty days after termination of the bankruptcy stay." 2010-NMCA-086, ¶¶ 3, 7 (internal quotation marks omitted). The plaintiffs complied with the deadline set by the district court and moved to reinstate just nine days after the bankruptcy proceedings concluded. *Id.* ¶¶ 4, 8. The district court denied the plaintiffs' Rule 1-041(E)(2) motion to reinstate,[4] and we reversed. *Summit Elec. Supply Co.*, 2010-NMCA-086, ¶¶ 8-9, 16. Part of our determination that the plaintiffs had demonstrated good cause for reinstatement rested on the fact that they had so moved "within nine days of conclusion of the bankruptcy proceedings[,]" which we held satisfied the "ready, willing, and able" prong of the good-cause standard. *Id.* ¶ 8. The UEF's claim that "*Summit* is especially instructive in showing that passage of time is never a consideration in reviewing a motion to reinstate and absolutely never a basis on which to deny a motion to reinstate" mischaracterizes that case.

{20} The next case the UEF misconstrues is *Kinder Morgan CO_2 Co. v. New Mexico Taxation & Revenue Dep't*, 2009-NMCA-019, 145 N.M. 579, 203 P.3d 110. There, this Court affirmed the district court's decision to vacate its Rule 1-041(E)(2) dismissal and reinstate a case under Rule 1-060(B)(1)[5] based on excusable neglect. *Kinder Morgan CO_2 Co.*, 2009-NMCA-019, ¶¶ 8, 48. We explained that the plaintiff's counsel "received notice of [the] thirty-day Rule 1-041(E)(2) deadline but failed to enter a reminder in the firm's calendaring system. Having missed the deadline for reinstatement, [the plaintiff] filed a Rule 1-060(B)(1) motion for relief[,]" approximately two months after the dismissal. *Kinder Morgan CO_2 Co.*, 2009-NMCA-019, ¶ 7. If anything, *Kinder Morgan CO_2 Co.* reinforces our understanding of Rule 1-041(E)(2)'s thirty-day limit for filing a motion to reconsider and does nothing to further the UEF's argument that the district court erred by denying its 2015 Motion to Reinstate based on tardiness.

{21} In denying the UEF's 2015 Motion to Reinstate, the district court calculated that "2,555 days (six years)" had passed since issuance of the 2008 dismissal order. The district court found that the UEF "did *not* file a motion to reinstate within 180 [sic] days [as] mandated by Rule 1-041 following entry of the [c]ourt's April 24, 2008 [dismissal order]." Thus the district court concluded that "[a]s a result of [the UEF's] tardiness, the . . . motion failed to comply with Rule 1-041(E), and is therefore not well-taken."

[3]We only address the formal opinions the UEF relies on because unpublished memorandum opinions are not controlling authority, and we need not distinguish non-precedential cases. *See State v. Gonzales*, 1990-NMCA-040, ¶ 48, 110 N.M. 218, 794 P.2d 361, *aff'd by Gonzales v. State*, 1991-NMSC-015, 111 N.M. 363, 805 P.2d 630.

[4]The district court also granted the defendant's motion to dismiss with prejudice under Rule 1-041(E)(1), which we also held to be reversible error. *Summit Elec. Supply Co.*, 2010-NMCA-086, ¶¶ 10-14.

[5]Rule 1-060(B) provides a mechanism for seeking relief from a judgment or order in six categories of cases: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) voided judgments; (5) where a prior judgment has been satisfied, released, discharged, or reversed or otherwise vacated; and (6) for "any other reason justifying relief from the operation of the judgment[.]" There are different time limits and standards that apply depending on which of the six reasons is relied upon for seeking the reopening or reconsideration of a judgment or order. *See* Rule 1-060(B)(6). As explained in Subsection (B)(6), a motion made under Rule 1-060(B)(1), as in *Kinder Morgan CO_2 Co.*, must be made within one year after the judgment, order, or proceeding was entered or taken.

{22} Without ever addressing the thirty-day limit contained in the rule itself, the UEF harps on the fact that the district court mistakenly stated that the time for moving to reinstate was 180 days rather than thirty days. We agree with the UEF that the district court referred to the wrong time frame and should have found that the UEF had failed to reinstate within thirty, rather than 180, days per the rule. *See* Rule 1-041(E)(2). The district court appears to have conflated the 180-day period referred to in Rule 1-041(E)(2), which, as the UEF describes it, is "simply the 'triggering' mechanism for the court to . . . dismiss without prejudice on its own accord[,]" with the thirty-day period within which reinstatement may be sought following dismissal. However, the UEF fails to explain how the district court's inadvertent mistake, as we see it, either means that the district court applied the wrong standard or that the error somehow transformed its decision into an abuse of discretion, as the UEF argues. The district court simply stated the wrong time limit within which a party must exercise its right to move to reinstate. Our analysis and the result would be no different had the district court properly stated that the UEF did not file its motion within thirty days of dismissal.

{23} Under the circumstances of this case, there is no basis upon which we can conclude that the district court abused its discretion by denying the UEF's 2015 Motion to Reinstate the 2006 Petition that had been dismissed nearly seven years earlier.

II. The District Court's Denial of the UEF's 2015 Motion to Reinstate Its 2006 Petition Was Not Contrary to Law and Does Not Preclude the Possibility of a New Petition Under Section 52-5-10(B)

{24} Having established that the district court acted within its discretion when it denied the UEF's Rule 1-041(E)(2) motion, we next address the UEF's contention that the district court misapplied Section 52-5-10(B), which, the UEF argues, compelled reinstatement of the 2006 Petition.

A. Section 52-5-10(B) Did Not Compel the District Court to Grant the UEF's Rule 1-041(E)(2) Motion to Reinstate Its 2006 Petition

{25} The UEF argues that the district court's denials must be analyzed "within the context of Section 52-5-10 of the Act" and that the district court erred when it "failed to follow the mandatory directives" of that statute. We disagree.

{26} We review issues of law, including statutory interpretation, de novo. *Trinosky v. Johnstone*, 2011-NMCA-045, ¶ 11, 149 N.M. 605, 252 P.3d 829. "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Id.* (internal quotation marks and citation omitted). We begin by examining "the plain language of the statute, giving the words their ordinary meaning[.]" *N.M. Indus. Energy Consumers v. N.M. Pub. Reg. Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. "When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Trinosky*, 2011-NMCA-045, ¶ 11 (alteration, internal quotation marks, and citation omitted). "[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of the Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted).

{27} Section 52-5-10 establishes the process by which a prevailing party may enforce a workers' compensation order—either for compensation owed directly to a worker or reimbursement of compensation paid by the UEF—when the employer is determined to have defaulted. To enforce the administrative judgment, the aggrieved party that has attained a workers' compensation order may petition the district court for an entry of judgment. *See* § 52-5-10(B); *see also* § 52-5-10(C) ("Proceedings to enforce a compensation order or decision shall not be instituted other than as provided by the [Act.]"). Section 52-5-10(B) directs that the district court "shall enter judgment against the person in default[.]" It also prohibits the district court from imposing filing fees and reviewing or supplementing the WCJ's findings and conclusions, except to impose sanctions. *Id.*

{28} By combining the statute's mandatory and prohibitory language, it is clear to us that the Legislature intended to largely relegate the district court to an administrative role when applying Section 52-5-10(B). Thus, we do not disagree with the UEF that "when presented with a petition for entry of a default judgment[,]" the district court is limited to (1) accepting the WCJ's supplementary compensation order as valid, and (2) entering judgment against the person in default.[6] *See* § 52-5-10(B). However, it is also clear from the plain language of Section 52-5-10(B) that an existing petition for entry of judgment by the WCA director is a necessary precondition without which the district court is not under Section 52-5-10(B)'s mandatory directive to enter judgment. The question, then, is whether the UEF met this necessary pre-condition and whether such a petition was properly before the district court when it considered the 2015 Motion to Reinstate. If not, our inquiry ends because the statute's mandatory directive in this regard would not have been followed.

{29} As this Court has explained, "[w]hen a case is dismissed without prejudice for failure to prosecute, the dismissal operates to leave the parties as if no action has been brought at all." *Foster v. Sun Healthcare Grp., Inc.*, 2012-NMCA-072, ¶ 25, 284 P.3d 389. In order to bring a dismissed action back before the district court, a party must first do one of two things. One option is to revive the prior action pursuant to an applicable rule, such as Rule 1-041(E)(2), *see Bankers Trust Co. of Cal. v. Baca*, 2007-NMCA-019, ¶ 6 (explaining that "[a]n action that is dismissed without prejudice under Rule 1-041(E)(2) cannot proceed except by leave of the court granted for good cause shown on a motion for reinstatement"[7]), or Rule 1-060(B), *see Kinder Morgan CO_2 Co.*, 2009-NMCA-019, ¶ 7 (illustrating that, under certain circumstances, Rule 1-060(B)(1) may provide an alternative path to reinstatement where a party has failed to timely file a Rule 1-041(E)(2) motion to reinstate). *See also Meiboom*, 2000-NMSC-004, ¶¶ 13, 19 (noting that Rule 1-060(B)(6) provides courts with "equitable powers to grant relief from final judgment" and "requires only that the motion be filed within a 'reasonable time' "). Alternatively, a party may file a new cause of action if the statute of limitations has not run. *See Bankers Trust Co. of Cal.*, 2007-NMCA-019, ¶ 8 (explaining that a

[6]We note that while the UEF argues that the district court is limited to these two actions, it apparently has never challenged the district court's ability to dismiss sua sponte under Rule 1-041(E)(2), either in this case or in others.

[7]As discussed above, such a motion for reinstatement must be timely filed in order to proceed to a good-cause analysis.

party whose cause of action is dismissed for failure to prosecute is not precluded from "instituting a second action with a new complaint, as long as the applicable statute of limitations has not run").

{30} Here, when the 2006 Petition was dismissed for failure to prosecute in 2008, it left the UEF as if no petition had ever been filed. *See Foster*, 2012-NMCA-072, ¶ 25. When the UEF filed the 2015 Motion to Reinstate and an amended petition under the 2006 Petition's docket number, this did not combine to revive the 2006 Petition. To the contrary, in the absence of an order reinstating the 2006 Petition or the submission of an altogether new petition by the UEF, no petition was pending before the district court to which Section 52-5-10(B) applied. *See Bankers Trust Co. of Cal.*, 2007-NMCA-019, ¶¶ 6, 8. For the reasons already discussed, that effort was properly determined to be unsuccessful by the district court. And once the district court rightly denied the 2015 Motion to Reinstate by application of Rule 1-041(E)(2), the piggybacked amended petition was in essence rendered a nullity on which the district court could not act.

{31} The UEF's argument that Section 52-5-10(B) mandated reinstatement of the 2006 Petition under Rule 1-041(E)(2) fails because it puts the cart before the horse. The UEF itself acknowledged the pre-condition of a valid petition when it argued at the hearing on the 2015 Motion to Reinstate that it was "ready, willing, and able to proceed to make collection efforts. We just need the prerequisite of, one, this case being reinstated . . . and then, two, an entry of a default judgment." But there is nothing in Section 52-5-10(B) that compels or permits the district court to ignore applicable Rules of Civil Procedure, and the UEF's suggestion that Section 52-5-10(B) trumps Rule 1-041(E)(2), requiring the district court to grant the UEF's 2015 Motion to Reinstate, is incorrect. *See, e.g.*, *Maples v. State*, 1990-NMSC-042, ¶¶ 8-10, 110 N.M. 34, 791 P.2d 788 (resolving a conflict between Rule 12-601 NMRA and NMSA 1978, Section 52-5-8(A) (1989), related to the time limit for appealing a workers' compensation decision and explaining that when vested with jurisdiction, "it is inherently within the power of the court to set its own [applicable] time limitations" and holding that the rule prevailed over the statute); *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 19, 63 N.M. 156, 315 P.2d 223 (explaining that a "statutory regulation must preserve to the court sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions").

{32} Because Section 52-5-10(B) does not create a categorical right to an entry of judgment but rather gives the WCA the right to petition for an entry of judgment, *see* § 52-5-10(B) (providing that the WCA director "*may* . . . petition" the district court (emphasis added)), its mandate to the district court remains dormant unless and until that right is exercised in a manner that comports with requirements of civil procedure. Here, the UEF opted to employ, it turns out erroneously, Rule 1-041(E)(2) to seek resuscitation of its long-dismissed 2006 Petition. Given that failure of the 2015 Motion to Reinstate meant that no pending petition existed on which the district court could act, it did not err in not following Section 52-5-10(B)'s mandatory directives.

B. There Is Nothing to Prevent the UEF From Filing a New Petition for Entry of Judgment With the District Court

{33} The UEF argues that the district court's refusal to reinstate its 2006 Petition will "enable and empower [Respondent] to escape entirely his statutorily required and judicially ordered obligation to reimburse [the] UEF." This, the UEF urges, "is a decision contrary to law which will lead to absurd results if allowed to stand." We agree with the UEF that it would be an absurd result and contrary to law—specifically Section 52-5-10(B)—if the district court's decision resulted in the UEF being barred from pursuing reimbursement from Respondent in accordance with the supplementary compensation order. However, we disagree with the UEF's stated belief that it lacks an alternative remedy to pursue enforcement of the supplementary compensation order.

{34} Only three things could bar the UEF from filing a new petition for an entry of judgment and seeking to enforce its right to reimbursement: (1) a statute of limitations, (2) a provision within Section 52-5-10(B) limiting the time in which such a petition could be brought, or (3) a prior dismissal *with* prejudice, which would have functioned as an adjudication on the merits and have res judicata effect.

{35} Regarding the first, the UEF correctly states that it—as a state entity—is not subject to a statute of limitations for bringing an action to enforce the supplementary compensation order. Our Supreme Court explained in *Directors of Insane Asylum of New Mexico v. Boyd*, 1932-NMSC-053, ¶ 10, 37 N.M. 36, 17 P.2d 358, that "[s]tatutes of limitation ordinarily do not run against the state." In reaching this conclusion, the *Boyd* Court reasoned that the loss of a claim by the state "would fall on all of the people of the state" and held that the state's asylum—"an agency of the state"—could seek reimbursement of funds it expended for the care of one of its "nonindigent patients." *Id.* ¶¶ 7, 10-11. Our Supreme Court has also made clear that "the general rule [is] that statutes of limitations do not run against the state unless the statute expressly includes the state or does so by clear implications[.]" *Bd. of Educ. v. Standhardt*, 1969-NMSC-118, ¶ 27, 80 N.M. 543, 458 P.2d 795. Here, there is no statute of limitations that expressly includes state entities such as the UEF or does so by clear implication.

{36} Next, Section 52-5-10(B) imposes no time limit within which the UEF must petition the district court for an entry of judgment. It simply provides that, after a supplementary compensation order has been made by a WCJ, the WCA "director *may* . . . petition [the] district court solely for the purposes of entry of judgment upon the supplementary compensation order[.]" *Id.* (emphasis added). The supplementary compensation order in this case, which provides that if reimbursement was not "paid . . . by December 22, 2005 . . .[,] the UEF *may* proceed to the district court for an enforcement order[,]" reinforces the open-ended nature of the WCA's ability to petition the district court. The UEF brings to our attention a list of examples of other recent actions the UEF has brought in district court to have judgment entered against non-compliant employers. One of those examples—*NMUEF v. Foster*, D-202-CV-2013-06385 (N.M. 2nd Jud. D., July 7, 2014) (order of default judgment)—illustrates this point. In that case, the supplementary compensation order was filed on August 27, 2008, and the WCA did not petition the district court for entry of judgment until August 6, 2013, nearly five years later. The district court, after dismissing the case for lack of prosecution and then reinstating it on the UEF's motion to reinstate, filed an order of default judgment in 2014. Thus, the UEF's five-year delay in petitioning the district court for an entry of judgment did not affect its right under Section 52-5-10 to file its petition.

{37} Lastly, given that the district court's dismissal was without prejudice, the UEF

is not barred by res judicata from refiling its claim against Respondent. We surmise that the UEF's mistaken perception that the district court's refusal to reinstate its case acts as a bar to any remedy by the UEF may stem from its misconception about whether its claim was dismissed with or without prejudice. The UEF states that the district court's orders denying its 2015 Motion to Reinstate and its motion to reconsider "fail to specify whether the dismissal is with or without prejudice." However, we note that the district court's orders from which the UEF is appealing simply denied the UEF's motions, and its order denying the 2015 Motion to Reinstate specifically ordered that "the present complaint shall . . . remain DISMISSED." We understand and conclude the district court intended this to refer to the district court's 2008 dismissal order, which was clearly a dismissal "without prejudice."

{38} We note as well that Rule 1-041(E)(2) itself limits a district court to dismissing without prejudice. *See id*. ("[T]he court on its own motion . . . may dismiss *without prejudice*[.]" (emphasis added.)) Our Supreme Court has explained that dismissal under Rule 1-041(E) "[does] not destroy [a] plaintiff's rights but only [takes] from him a remedy." *Briesmeister v. Medina*, 1966-NMSC-157, ¶ 5, 76 N.M. 606, 417 P.2d 208; *see also Smith v. Walcott*, 1973-NMSC-074, ¶ 15, 85 N.M. 351, 512 P.2d 679 ("[A]n order of dismissal entered sua sponte by the trial court [does] not constitute an adjudication upon the merits. Hence, the doctrine of res judicata is not applicable[.]"); *Foster*, 2012-NMCA-072, ¶ 25 ("When a case is dismissed without prejudice for failure to prosecute, the dismissal operates to leave the parties as if no action has been brought at all. After a case is so dismissed, a plaintiff may file a new action . . . and the first suit has no bearing on the later action." (citation omitted)).

{39} Because there is neither an applicable statute of limitations nor a time limit contained in Section 52-5-10(B), and because dismissal of the UEF's 2006 Petition was without prejudice, we conclude that there is nothing to prevent the UEF from filing a new petition for entry of judgment against Respondent. Our conclusion is in accord with the underlying purpose of the Act. This Court explained in *Mieras v. Dyncorp*, "[t]he general objective underlying the enactment of workers' compensation legislation is to ensure that the industry carry the burden of compensating injuries suffered by workers in the course of employment." 1996-NMCA-095, ¶ 30, 122 N.M. 401, 925 P.2d 518 (internal quotation marks and citation omitted). Additionally, "[worker]'s compensation benefits were enacted to prevent . . . [workers] from becoming dependent upon the public welfare." *Wylie Corp. v. Mowrer*, 1986-NMSC-075, ¶ 5, 104 N.M. 751, 726 P.2d 1381; *see also Boyd*, 1932-NMSC-053, ¶ 10 (holding that a statute of limitations could not be enforced against a state agency because the cost of the lost claim "would fall on all of the people of the state").

CONCLUSION

{40} We hold that the district court did not abuse its discretion in denying the UEF's 2015 Motion to Reinstate its 2006 Petition. While the UEF's renewed commitment to its statutory obligation to seek reimbursement from non-compliant employers is laudable, *see* NMSA 1978, § 52-1-9.1(G) (2004), we cannot overlook or excuse the UEF's historically lackadaisical approach in this case and its reluctance to acknowledge the rule that "[t]he duty rests upon the claimant at every stage of the proceeding to use diligence to expedite [its] case." *Pettine v. Rogers*, 1958-NMSC-025, ¶ 6, 63 N.M. 457, 321 P.2d 638. Our ruling today requires adherence to our Rules of Civil Procedure, which are not advisory, but in a manner also consistent with the Legislature's mandate to the UEF and the district court to hold non-compliant employers accountable.

{41} We affirm.

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

J. MILES HANISEE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
STEPHEN G. FRENCH, Judge

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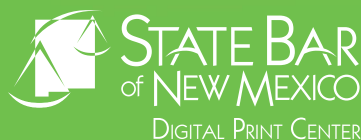

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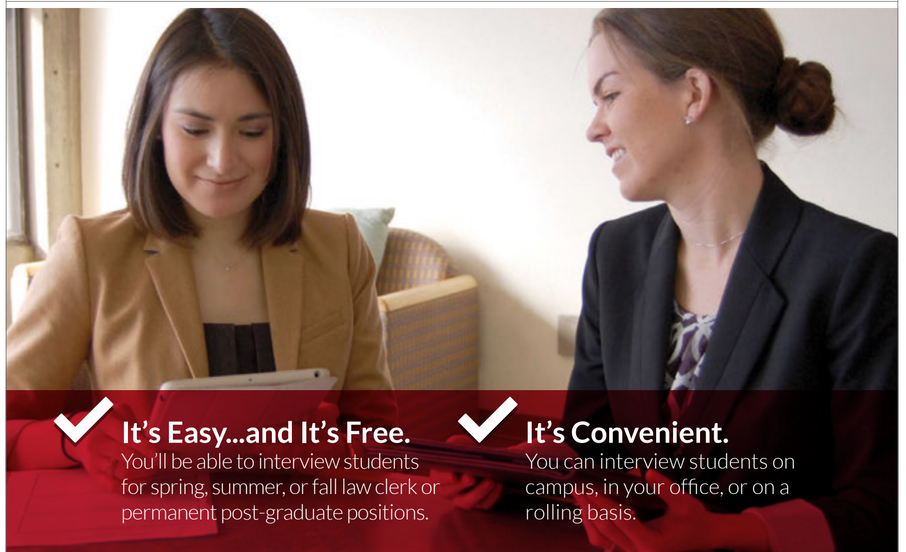

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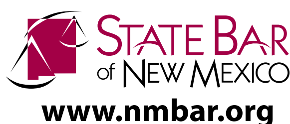

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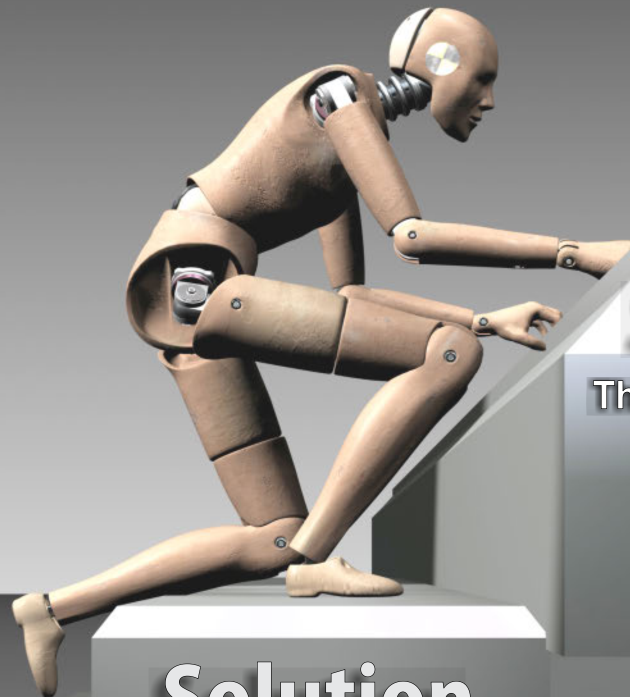

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