Official Publication of the State Bar of New Mexico

Bar Bulletin

August 16, 2017 • Volume 56, No. 33

Peacock, by Janine Wilson (see page 3)

Inside This Issue

New Mexico Lawyer

Changing Times—Challenges that Face Today's Public Lawyer

New Mexico State Bar Foundation

Golf Classic

Grab your clubs and get your golf team together!

The State Bar Foundation invites you to participate in the 1st Annual Golf Classic Tournament.

All proceeds benefit the New Mexico State Bar Foundation.

TANOAN
COUNTRY CLUB

- Contests for men and women
- Networking opportunities
- Lunch provided
- Awards dinner to follow tournament

Date: Oct. 16

Where: Tanoan Country Club
10801 Academy Rd NE
Albuquerque, NM 87111

Lunch: noon–1:30 p.m.

Time: 1:30 p.m. shotgun start
Registration opens at noon.

Awards dinner to follow tournament

STATE BAR of NEW MEXICO FOUNDATION

For more information, contact Stephanie at
505-797-6007 • swagner@nmbar.org

For registration and more details, visit www.nmbar.org/GolfClassic.

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
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23
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Immigration Law Section Board
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August

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

23
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

September

6
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

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

8
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Janine Wilson is attracted to repeating shapes and patterns and how they interact with each other. Strong color and design are evident in her art, whether it is acrylic, watercolor or photography. She has studied with several nationally known painters and is a member of Rainbow Artists, the Yucca Branch of the National League of American Pen Women and is a signature member of the New Mexico Watercolor Society. For more information about Wilson's art, email janineabq@gmail.com

Notices

Court News

First Judicial District Court

Notice of Division II Pro Tem Assignment

The First Judicial District, Division II announces that Sarah M. Singleton has been appointed by the Chief Justice as judge pro tem for cases assigned to Division II, which assignment will last from Judge Singleton's retirement until a new judge takes office or Nov. 29, 2017, whichever comes first. During this time, Judge Singleton will continue to review proposed orders and motions that are submitted and will generally preside over Division II. Continue to send motion packages, proposed orders and correspondence concerning Division II cases to sfeddiv2proposedtxt@nmcourts.gov. The Division II telephone number will remain 505-455-8160.

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy Domestic (DM/DV) exhibits filed with the Court for cases for the years of 1993 to the end of 2012, including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Sept. 29. Parties with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717 from 10 a.m.-2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released IN THEIR ENTIRETY. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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.

Professionalism Tip

With respect to the courts and other tribunals:

In civil matters, I will stipulate to facts when there is no genuine dispute.

12th Judicial District Court

Judicial Vacancy Nominees

The Twelfth Judicial District Court Nominating Commission convened on Aug. 3 in Alamogordo and completed its evaluation of the five applicants for the vacancy on the 12th Judicial District Court. The Commission recommends the following three applicants (in alphabetical order) to Gov. Susana Martinez: **Erinna Atkins**, **Steven Blankinship** and **AnneMarie Cheroke Peterson.**

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.

Retirement of Judge William P. Lynch

Judge William P. Lynch will retire this fall after 22 years of service as a state district judge and federal magistrate judge. Join members of the Court at noon, Aug. 18, in the Hondo Courtroom, on the fourth floor of the U.S. Courthouse, 333 Lomas Blvd. NW, to celebrate his retirement.

State Bar News

Attorney Support Groups

- Aug. 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Sept. 11, 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#.
- Oct. 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. Group will not meet in September due to the Labor Day holiday.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Business Law Section

2017 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year award, to be presented on Nov. 15 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 2. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include David Buchholz, Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

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

Notice to Attorneys: Electronic Filing Coming to the New Mexico Court of Appeals

Beginning Aug. 21, 2017, electronic filing and service will be mandatory for all new and pending cases in the Court of Appeals through the same Odyssey File and Serve system used in state district courts and New Mexico Supreme Court. Unlike in the district courts, electronic filing and service will be available in the Court of Appeals at no charge. Payment of the $125 docket fee, however, is still required and cannot be accepted through the File and Serve system at this time. Accordingly, for those cases initiated in the Court of Appeals through the File and Serve system for which a docket fee is due, payment must be made by check made payable to the New Mexico Court of Appeals and received by the Court Clerk's Office no later than five days after the case is accepted for filing.

See Rule 12-307.2(C) NMRA. The Court of Appeals will be offering in-person and online training sessions in August and September for any attorney who is not already registered and familiar with the File and Serve system. Additional details will be posted on the Court of Appeals' website.

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.

Immigration Law Section

Support of N.M. Faith Coalition for Immigrant Justice Fundraiser

The Immigration Law Section invites members of the legal community to support NMFCIJ's major fundraiser benefitting New Mexico's immigrant and refugee families and individuals. The fundraiser will take place from 11 a.m.-2 p.m., Aug. 26, at the Hotel Andaluz in Albuquerque and will have a hosted lunch, cash bar and silent auction. Visit www.nmfcij-event.org/ to purchase tickets, to view silent auction items, and to learn more about the work of NMFCIJ. Contact nmfcijfundraiser@gmail.com for more information.

RFP for Audit and Tax Services

The State Bar of New Mexico and New Mexico State Bar Foundation are seeking proposals from qualified CPA firms to provide financial statement audit and tax preparation services for the two organizations. The term sought is an annual engagement starting with the fiscal year ended Dec. 31, 2017, with up to five annual renewal options (FY 2018 – 2022). The complete request for proposal can be found on the State Bar's website at www.nmbar.org by selecting the "Financial Information" option from the "About Us" menu. The deadline for submission of proposals is 4 p.m. MST, Friday, Sept. 1, 2017.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with Joel Jacobsen, *Journal Business Outlook* columnist and retired assistant attorney general, will present on current legal-business topics in New Mexico and (inter)nationally on Sept. 12. Following Jacobsen's presentation, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last 50 years and the effects (if any) on American and international law on Oct. 17. On Nov. 21, the newly appointed U.S. Attorney will identify special issues that he or she will emphasize his or her tenure. And on Jan. 16, Nancy Hollander, internationally-respected defense attorney, will address constitutional developments in criminal law under the last four presidents, including Guantanamo and terrorism issues. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

New Mexico Lawyers and Judges Assistance Program

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24-Hour Helpline

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Judges 888-502-1289

www.nmbar.org/JLAP

UNM

Law Library

Hours Through Aug. 20

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

New Mexico Criminal Defense Lawyers Association

Las Cruces Evidence CLE

Get the breakdown on rules of evidence in state and federal court, finding electronic evidence on your own and knowing when to hire an expert and an update on Crawford hearsay and impeachment all at the New Mexico Criminal Defense Lawyers Association's "Evidence: The Latest in How to Find it, Use it, and Admit it" (6.2 G) CLE on Aug. 25 in Las Cruces. Following the CLE, NMCDLA members and their friends and families are invited to our annual Las Cruces membership party and auction. Visit nmcdla.org to join NMCDLA and register for the seminar today.

New Mexico Defense Lawyers Association

2017 Award Winners

The New Mexico Defense Lawyers Association is pleased to announce that W. Mark Mowery has been selected as the 2017 Outstanding Civil Defense Lawyer of the Year and Justin D. Goodman as the 2017 Young Lawyer of the Year. The awards will be presented at the NMDLA Annual

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Legal Education

August

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

21 Enlisting Tribal Governments in Public Lands Management
1.0 G
Live Seminar, Santa Fe
First Judicial District Bar Association
505-827-2913

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

25 Evidence: The Latest in How to Find It, Use It, and Admit It
6.2 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

25 Annual Guardianship Symposium
4.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Guardianship Association
www.nmgaresourcecenter.org

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

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

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

September

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

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

8 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

15 28th Annual Appellate Practice Institute
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

September

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, 2.0 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

21 **Structured Settlements in Claims Negotiations**
1.0 G
Live Seminar, Albuquerque
National Structured Settlements Trade Association
202-289-4004

22 **2017 Tax Sympmosium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How Jurors View Mistakes and Conflicts**
1.5 EP
Live Seminar, Santa Fe
Attorneys Liability Assurance Society
www.alas.com

23 **Half-Day Mixed Bag CLE**
3.0 G
Live Seminar, Albuquerque
State Bar of New Mexico Paralegal Division
505-203-9057

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**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Evolution of Indian Laws and Indian Lawyers**
4.5 G, 2.0 EP
Live Seminar, Isleta
American Indian Law Center
www.ailc-inc.org

October

2 **Uncovering and Navigating Blind Spots Before They Become Land Mines**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Bankruptcy Law: The New Chapter 13 Plan**
3.1 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Deposition Practice in Federal Practice (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Ethics, Disqualification and Sanctions in Litigation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Basic Practical Regulatory Training for the Electric Industry**
27.0 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu

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Meeting Awards Luncheon on Sept. 29 at the Hotel Chaco, Albuquerque. For reservation information, see www.nmdla.org or call 505-797-6021.

New Mexico Workers' Compensation Administration

New Judge Reassignment

Effective Aug. 28, all pending and administratively closed cases before the New Mexico Workers' Compensation Administration previously assigned to Judge David Skinner will be reassigned to newly appointed Judge Tony Couture. Parties who have not yet exercised their right to challenge or excuse will have 10 days from Aug. 28, to challenge or excuse Judge Couture pursuant to N.M.A.C. Rule 11.4.4.13. Questions about case assignments should be directed to WCA Clerk of the Court Heather Jordan at 505-841-6028.

Oliver Seth American Inn of Court

2017 Meeting Season

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September to May. The meetings always address a pertinent topic and conclude with dinner. Lawyers who reside/practice in Northern New Mexico and want to enhance skills and meet some pretty good lawyers should send a letter of interest to: Honorable Paul J. Kelly, Jr., U.S. Court of Appeals - Tenth Circuit, Post Office Box 10113, Santa Fe, New Mexico 87504-6113.

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

From the Lawyers Professional Liability and Insurance Committee

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

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

The Retroactive Date For Your LPL Policy

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

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

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

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

YOU'RE INVITED

The State Bar of New Mexico
and the Young Lawyers Division
invite you to attend the annual

STATE BAR OPEN HOUSE

to mix and mingle with members
of the legal community and to welcome
newly admitted lawyers to the profession.

THURSDAY, SEPT. 14 • 5:30-7:30 p.m.
State Bar of New Mexico
5121 Masthead NE in Albuquerque

Join us for food, beverages, State Bar Center tours, exhibitor booths and for your chance to win a Premium Professional Development Package worth up to 15.0 CLE credits and other door prizes!

Please R.S.V.P. you and your guest(s) by visiting
www.nmbar.org/OpenHouse.

STATE BAR of NEW MEXICO

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 August 4, 2017

PUBLISHED OPINIONS

No. 34518	2nd Jud Dist Bernalillo LR-12-67, STATE v J FARISH (affirm)	7/31/2017
No. 34655	1st Jud Dist Santa Fe CV-12-512, BLUE CANYON v. D JEVNE (reverse and remand)	8/2/2017

UNPUBLISHED OPINIONS

No. 35052	12th Jud Dist Lincoln CR-11-141, STATE v M KEATON (reverse and remand)	8/1/2017
No. 35665	1st Jud Dist Santa Fe DV-16-219, C TAVIO v S TENORIO (affirm)	8/1/2017
No. 36105	2nd Jud Dist Bernalillo LR-15-35, STATE v I NORMAN (affirm)	8/1/2017
No. 36129	11th Jud Dist San Juan CR-15-936, STATE v K CURTIS (affirm)	8/2/2017
No. 35092	2nd Jud Dist Bernalillo CR-12-5700, STATE v R GUTIERREZ (affirm)	8/3/2017

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

Dated July 28, 2017

Clerk's Certificate of Address And/or Telephone Changes

Joseph Aguilar
James E. Polk, Attorney and Counselor at Law
417 N. 12th Street
Corsicana, TX 75110
903-874-8297
214-742-7212 (fax)

Mark Bierdz
Law Offices of the Public Defender
505 Marquette Avenue NW, Suite 120
Albuquerque, NM 87102
505-369-3600
mark.bierdz@lopdnm.us

Ann M. Conway
Sheehan & Sheehan, PA
PO Box 271
6001 Indian School Rd. NE, Suite 400 (87110)
Albuquerque, NM 87103
505-247-0411
505-842-8890 (fax)
amc@sheehansheehan.com

Jeffery Scott Dennis
Jenner & Block LLP
1099 New York Avenue NW
Washington, DC 20001
202-637-6349
jdennis@jenner.com

Benjamin F. Feuchter
Hinkle Shanor LLP
7601 Jefferson Street NE, Suite 180
Albuquerque, NM 87109
505-858-8320
505-858-8321 (fax)
bfeuchter@hinklelawfirm.com

Eric Guerrero
Glasheen, Valles & Inderman
4300 San Mateo Blvd. NE, Suite B150
Albuquerque, NM 87110
505-767-7016
505-240-6740 (fax)
eric.guerrero@glasheenlaw.com

Curtis G. Hayes
Office of the City Attorney
PO Box 1270
110 W. Aztec Avenue
Gallup, NM 87301
505-863-1270

Kristofer C. Knutson
Law Offices of the Public Defender
506 S. Main Street, Suite 700
Las Cruces, NM 88001
575-541-3193
kristofer.knutson@lopdnm.us

Abby M. Lewis
1420 Carlisle Blvd. NE, Suite 208
Albuquerque, NM 87110
505-881-4475
505-248-1234 (fax)
abby@inaccord.pro

R. Eric Loman
Foster, Rieder & Jackson, PC
PO Box 1607
201 Third Street NW, Suite 1500 (87102)
Albuquerque, NM 87103
505-767-0577
505-242-9944 (fax)
eric@frjlaw.com

Ashley Sonoe MacKenzie
The MacKenzie Law Office, LLC
337 N. Alameda Blvd., Suite 3
Las Cruces, NM 88005
575-323-9869
575-993-5341 (fax)
ashley@mackenzie.law

Max Justin Minzner
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
202-639-6035
mminzner@jenner.com

Scott L. Mullins2017
Ungar Law Office LLC
805 S.W. Broadway, Suite 2440
Portland, OR 97205
503-419-3019
scott@ungarlawoffice.com

Clara Ann Padilla-Silver
Atencio Law Office
6312 Montano Road NW, Suite A
Albuquerque, NM 87120
505-839-9111
505-839-0888 (fax)
clara@atenciolawpc.com

Louise Pocock
851 S. Cherry Road
Rock Hill, SC 29732
505-974-3646
louise.pocock@gmail.com

Joseph Duane Popplewell
Popplewell Law Firm, PLLC
195 River Vista Place, Suite 305
Twin Falls, ID 83301
208-358-2396
joe@popplewelllaw.com

Alfred Quintana
N.M. Board of Nursing
6301 Indian School Rd. NE, Suite 710
Albuquerque, NM 87110
505-841-8340
505-841-8347 (fax)
alfred.quintana@state.nm.us

William Scott Rode
220 Adams Street SE, Suite B
Albuquerque, NM 87108
505-890-9056
scott835.rode@michaelarmstronglaw.com

Sheryl Lynn Saavedra
Little, Gilman-Tepper & Batley, PA
PO Box 26717
500 Marquette Ave. NW, Suite 1310 (87102)
Albuquerque, NM 87125
505-246-0500
505-246-9953 (fax)
ssaavedra@lgtfamilylaw.com

Leslie Gayle Schaar
Office of the County Attorney
102 Grant Avenue
Santa Fe, NM 87501
505-986-6279
505-986-6362 (fax)
lschaar@santafecountynm.gov

Courtney A. Schumacher
Allen, Shepherd, Lewis & Syra, PA
PO Box 94750
4801 Lang Avenue NE, Suite 200 (87109)
Albuquerque, NM 87199
505-341-0110
505-341-3434 (fax)
cschumacher@allenlawnm.com

Lucy Higgins Sinkular
Atkinson & Kelsey, PA
PO Box 3070
2155 Louisiana Blvd. NE, Suite 2000 (87110)
Albuquerque, NM 87190
505-883-3070
505-889-3111 (fax)
lhs@atkinsonkelsey.com

Mary H. Smith
526 Aliso Drive NE
Albuquerque, NM 87108
505-255-9199
maryhenrie@msn.com

Lara C. Sundermann
McBride, Scicchitano & Leacox, PA
2155 Louisiana Blvd. NE, Suite 220
Albuquerque, NM 87110
505-338-6945
505-338-6949 (fax)
lsundermann@williammcbride.com

Joe M. Tenorio
Tenorio Law Offices, PA
7720 San Augustine Street NW
Albuquerque, NM 87120
505-228-4823
joe@tenoriolawoffices.com

Leslie M. Thompson
Montano Thompson LLC
4401 Lomas Blvd. NE
Albuquerque, NM 87110
505-227-7591
lmontanothompson@gmail.com

Kelley Leigh Thurston
Davis Miles McGuire Gardner
320 Gold Avenue SW,
Suite 1111
Albuquerque, NM 87102
505-948-5050
505-243-6448 (fax)
kthurston@davismiles.com

Tanya Trujillo
1129 Birch Falls Drive
Bellingham, WA 98229
818-389-2288
ttcava@gmail.com

Jeffery Bennett Waddell
Utah Air National Guard
765 N. 2200 W.
Salt Lake City, UT 84116
801-245-2255
jeffery.b.waddell.mil@mail.mil

Susan G. White
N.M. Children, Youth &
Families Department
750 Morris Road
Los Lunas, NM 87031
505-866-2300
505-866-2320 (fax)
susan.white@state.nm.us

Barbara J. Buck
Barbara J. Buck LLC
PO Box 37170
Albuquerque, NM 87176
505-842-5551
buckbea@earthlink.net

Nicole Marie Charlebois
The Charlebois Law Firm, LLC
150 Washington Avenue
#201-220
Santa Fe, NM 87501
nicole@ncharlebois.com

Ruth Davey
PO Box 310
Los Alamos, NM 87544
ruth.davey@azbar.org

Mario Franke
Dickinson Wright PLLC
221 N. Kansas Street, Suite 2000
El Paso, TX 79901
915-541-9334
844-670-6009 (fax)
mfranke@dickinson-wright.
com

Stephen H. Greetham
Chickasaw Nation
4001 N. Lincoln Blvd.
Oklahoma City, OK 73105
580-272-5236
580-272-2077 (fax)
stephen.greetham@chickasaw.
net

Michael H. Gritzbaugh
Unit 64900, Box 15
APO, AE 09839-4900
mgritzbaugh@yahoo.com

Michael F. Hacker
505 Marquette Avenue NW,
Suite 1840
Albuquerque, NM 87102
505-247-2222
505-243-6528 (fax)
nmbklawyer@yahoo.com

John E. Heer III
Laflin, Pick & Heer, PA
PO Box 3260
8500 Menaul Blvd. NE,
Suite B-262 (87112)
Albuquerque, NM 87190
505-883-0679
505-883-5834 (fax)
jheer@laflin.com

Eric Lewis Laurence
Law Offices of Eric L. Laurence
8100 Wyoming Blvd. NE,
Suite M4, PMB #467
Albuquerque, NM 87113
505-508-2502
505-288-3620 (fax)
elaurence@rplex.net

Brandt P. Milstein
Milstein Law Office
1123 Spruce Street
Boulder, CO 80302
303-440-8780
303-957-5754 (fax)
brandt@milsteinlawoffice.com

Philip James Montoya
1122 Central Avenue SW,
Suite 3
Albuquerque, NM 87102
505-244-1152
505-717-1794 (fax)
pmontoya@swcp.com

Julia A. Mullen
1923 Captains Point
Sanford, NC 27332

Stevie Dion Nichols
c/o Michael Gritzbaugh
Unit 64900, Box 15
APO, AE 09839-4900
stevie.nichols@gmail.com

R. Walton Weaver
Herrmann & Weaver Law
Office
801 S. Fillmore Street, Suite 710
Amarillo, TX 79101
806-372-9258
806-372-8444 (fax)
waltlawoffice@gmail.com

LeeAnn Elizabeth Werbelow
Maestas Development Group
6801 Jefferson Street NE,
Suite 300
Albuquerque, NM 87109
505-338-9884
505-878-0002 (fax)
leeann@mdgrealestate.com

Elizabeth Williams
1111 Tenth Street
Alamogordo, NM 88310

Mark A. Basham
Law Offices of
Mark A. Basham, LLC
2205 Miguel Chavez Road,
Suite A
Santa Fe, NM 87505
505-988-4575
505-214-5563 (fax)
mbasham@
lawoffices-markbasham.com

Elizabeth Geary Hill
Law Office of Elizabeth G.
Hill, PC
8008 Slide Road, Suite 33
Lubbock, TX 79424
806-744-3232
806-771-2008 (fax)
elizabeth@eghlawoffice.com

Bevin C. Owens
600 Central Avenue SE,
Suite M
Albuquerque, NM 87102
505-220-9401
bevinowens@gmail.com

Kelsea Elaine Raether
Hobbs, Straus, Dean &
Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282 Ext. 3306
kraether@hobbsstraus.com

Brian T. Ray
Law Office of Brian T. Ray LLC
PO Box 53339
Albuquerque, NM 87153
505-633-5561
505-214-5310 (fax)
brian.ray@raylawabq.com

Robyn Anne Simms
PO Box 532
Ranchos de Taos, NM 87557
575-770-1538
robynannesimms@gmail.com

Lisa Sullivan
Santa Fe Public Schools
610 Alta Vista
Santa Fe, NM 87505
505-467-2000
abclisaxyz@gmail.com

Recent Rule-Making Activity

As Updated by 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

Effective August 16, 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

15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

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

Disciplinary Rules

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

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

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

In the Supreme Court of the State of New Mexico

August 4, 2017

No. 17-8300-008

In the Matter of the Amendment of Rules 15-104 and 15-105 NMRA of the Rules Governing Admission to the Bar

Order

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Board of Bar Examiners to amend Rules 15-104 and 15-105 NMRA of the Rules Governing Admission to the Bar, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 15-104 and 15-105 NMRA are APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective for applications pending or filed on or after August 4, 2017**; and

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

IT IS SO ORDERED.
WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of August, 2017.

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

Bar Admission Rules

15-104. Application.

A. **Form of application.** All applications shall be under oath on forms provided by the Board of Bar Examiners, shall contain the information relating to the applicant's qualifications and eligibility as may be required by the board, and shall include applicant's age, residence, addresses for at least the five (5) years immediately preceding the date of application, citizenship, occupations, general and legal background, and information as to the applicant's background and moral character. The Supreme Court may revoke the license of any attorney at any time upon satisfactory showing that the license was obtained by false representations, fraud, or deceit.

B. **Filing requirements.** Applications for admission to the State Bar of New Mexico shall be submitted in duplicate on forms prescribed by the Board of Bar Examiners from time to time. Applications shall be filed with the board at its executive offices. Applications to take the bar examination shall be filed as follows:

(1) The filing deadline for the February bar examination is September 20th immediately preceding the examination and the filing deadline for the July bar examination is January 20th immediately preceding the examination.

(2) Applicants seeking a reexamination must file by [~~January~~] December 10th for the February bar examination and [~~June~~] May 10th for the July bar examination. No application for reexamination shall be accepted after the applicable deadline.

(3) No application will be accepted after the applicable filing date set forth in this rule except upon payment of any additional late fees as required by these rules.

C. **Documents needed.** The following documents shall be furnished with the application:

(1) a copy of the Federal Bureau of Investigation identification record of the applicant and a copy of the New Mexico Department of Public Safety identification record of the applicant;

(2) a credit report from one (1) of the three (3) major credit reporting agencies printed within thirty (30) days of submission of the application for admission; the credit report shall be included with the application for admission;

(3) a properly authenticated transcript (sent from the law school) evidencing graduation with a juris doctor or bachelor of laws and letters degree from a law school formally accredited by the American Bar Association along with a completed law school certification on a form prescribed by the board; except that if the applicant is not a graduate of an accredited law school, the applicant shall transmit with the application

(a) a certificate of admission in another state;

(b) three (3) certificates vouching for the applicant's good moral character by members of the bar of the other state; and

(c) one (1) or more certificates by a judge or judges of the highest court of original jurisdiction in the other state, or the clerk thereof, to the effect that the applicant has been actively engaged in the actual practice of law in that state for at least four (4) years prior to the date of the certificate, and further that applicant is in good standing in the bar of the state and has not been disbarred, been placed under disciplinary suspension, or resigned from the bar while under disciplinary investigation, is not the subject of any pending disciplinary proceedings in the state, or if the applicant has been suspended or disbarred, that the applicant has been duly reinstated. Certificates of admission from other states may be sent directly to the board under separate cover. All of those papers will be returned to the applicant in due course. Other documents submitted will be returned to the applicant, if requested, upon approval by the chair or vice chair of the board; and

(4) character and fitness statements from three (3) licensed attorneys in good standing in any jurisdiction in the United States, who are familiar with the applicant's qualifications, certifying that the applicant is a person of good moral character and physically and mentally qualified for admission to the State Bar of New Mexico.

[As amended, effective November 14, 1988; effective November 1, 1994; November 17, 1999 for bar examinations after January 1, 2001; April 9, 2002; as amended by Supreme Court Order No. 088300028, "effective for the February 2009 bar examination"; as amended by Supreme Court Order No. 138300012, effective May 14, 2013; as amended by Supreme Court Order No. 158300018, effective November 1, 2015; as amended by Supreme Court Order No. 168300004, effective immediately for applications for the February 2017 bar examination and thereafter; as amended by Supreme Court Order 17-8300-008, effective for applications pending or filed on or after August 4, 2017.]

Bar Admission Rules

15-105. Application fees.

A. **Fees.** Every applicant shall pay the fees as prescribed by the Board of Bar Examiners from time to time. The following fees are fixed, until changed by the board, for applicants seeking admission by examination:

(1) five hundred dollars ($500.00) for applicants whose graduation from law school is less than one (1) year prior to filing the application;

(2) a reduced fee of one hundred dollars ($100.00) for applicants who apply to repeat the examination within one (1) year after the first unsuccessful examination result. If the applicant does not successfully complete the examination within the first year, the applicant shall pay the full applicable application fee for all subsequent reexaminations; an additional fee may also be required by the board to update the investigative report;

(3) reasonable additional costs to be determined by the board, in connection with any investigations or hearings. Such costs shall include, but not be limited to, board attorney fees, court reporter fees, medical evaluations, and any other fees for services to complete the investigation and hearing. Payment of such fees shall be a prerequisite for admission or for consideration of subsequent reapplications. In all cases, the applicant shall bear the applicant's own costs associated with the application, investigation, and hearing;

(4) one thousand dollars ($1,000.00) for all other applicants;

(5) late filing fees shall be assessed as follows:

(a) two hundred dollars ($200.00) if an application is received and filed on or before November 2 immediately preceding the February bar exam and April 2 immediately preceding the July bar exam; and

(b) five hundred dollars ($500.00) if an application is received and filed on or before [~~January~~] December 2 immediately preceding the February bar exam and [~~June~~] May 2 immediately preceding the July bar exam. No applications for firsttime applicants will be accepted after these dates.

B. **Remittance of fees.** All remittances for fees shall be made payable to the New Mexico Board of Bar Examiners, shall be deposited to an account designated as New Mexico Board of Bar Examiners general fund, and shall be disbursed by order of the board in carrying out the functions, duties, and powers vested in said board. Application fees and costs are not refundable and will be applied toward the expenses of the board, including appropriate investigation by the National Conference of Bar Examiners.

C. **Budget.** The board shall submit on or before January 1 of each year a proposed budget to the Supreme Court.

D. **Audit.** The board shall likewise, on or before March 1 of each year, submit to the Supreme Court an accounting and audit of all funds received and disbursed during the prior calendar year. Such audit shall be performed by an auditor to be selected by the Supreme Court.

E. **Compensation.** Members of the board shall receive mileage and per diem at the same rate as provided for public officials and employees of the state and any other compensation for service to the board as approved by the Supreme Court.

[As amended, effective August 21, 1987; November 14, 1988; December 15, 1993; November 1, 1994; April 23, 2001; August 23, 2002; December 12, 2003; as amended, by Supreme Court Order No. 058300010, effective September 1, 2005; by Supreme Court Order No. 078300009, effective April 17, 2007; as amended by Supreme Court Order No. 138300012, effective May 14, 2013; as amended by Supreme Court Order No. 138300048, effective December 6, 2013, for applications for the July 2014 bar examination and subsequent bar examinations; as amended by Supreme Court Order No. 148300001, effective June 1, 2015; as amended by Supreme Court Order 17-8300-008, effective for applications pending or filed on or after August 4, 2017.]

In the Supreme Court of the State of New Mexico

August 4, 2017

No. 17-8300-009

In the Matter of the Amendment of Rule 12-307.2 NMRA of the Rules of Appellate Procedure

Order

WHEREAS, this matter came on for consideration by the Court upon its own motion to implement electronic filing and service in certain proceedings in the Court of Appeals through amendments to Rule 12-307.2 NMRA of the Rules of Appellate Procedure, and the Court being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the amendment of Rule 12-307.2 is APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective for all cases pending or filed on or after August 21, 2017**; and

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

IT IS SO ORDERED.
WITNESS, Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of August, 2017.

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

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Rules of Appellate Procedure

12-307.2. Electronic service and filing of papers.

A. **Definitions.** As used in these rules

(1) "electronic transmission" means email or other transfer of data from computer to computer other than by facsimile transmission;

(2) "document" includes the electronic representation of pleadings and other papers but does not include a record proper filed under Rule 12-209 NMRA, a transcript filed under Rule 12-211 NMRA, or an exhibit filed under Rule 12-212 NMRA; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by attorneys to file and serve documents by electronic transmission in Supreme Court or Court of Appeals proceedings.

B. **Filing by electronic transmission authorized[~~ in the Supreme Court only~~]; mandatory registration for attorneys.**

(1) In any proceeding in the Supreme Court or Court of Appeals, the filing of documents by electronic transmission through the EFS is mandatory for any party represented by an attorney, which includes attorneys who represent themselves.[~~ The filing of documents by electronic transmission in the Court of Appeals is not currently authorized.~~]

(2) Selfrepresented parties are prohibited from filing documents by electronic transmission and shall continue to file documents through the other methods authorized by the Rules of Appellate Procedure.

(3) Parties represented by attorneys shall file documents by electronic transmission even if another party to the action is selfrepresented or is exempt from electronic filing under Paragraph M of this rule.

(4) Unless exempted under Paragraph M of this rule, for any case pending or filed in the Supreme Court or Court of Appeals on or after the effective date of this rule, the following attorneys shall register with the EFS and add service contacts for those parties that they represent in cases governed by this rule:

(a) any attorney required to file documents by electronic transmission under this rule; and

(b) any attorney who is deemed to have entered an appearance under Rule 12-302(B) NMRA and who has not withdrawn in accordance with Rule 12-302(C) NMRA.

(5) Every registered attorney shall provide a valid, working, and regularly checked email address for the EFS. The Court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Filing fees; no fees charged for use of the EFS; non-electronic payment of docket fees required; dismissal for untimely payment of docket fee.**

(1) Except for the payment of any docket fee required under the Rules of Appellate Procedure, no other fees shall be charged for the filing or service of documents by electronic transmission through the EFS.

(2) Payments currently cannot be accepted by the Supreme Court or Court of Appeals through the EFS or by other electronic payment methods.

(3) Notwithstanding any other provision in these rules requiring the payment of a docket fee at the time a document is filed, any docket fee required under the Rules of Appellate Procedure for initiating a case in the Supreme Court or Court of Appeals through the EFS shall be paid by check no later than five (5) days after the attorney is notified through the EFS that the case has been accepted for filing.

(4) A check for payment of a docket fee under this paragraph shall include a notation providing the docket number of the case to which the payment applies.

(5) Failure to timely pay the docket fee as required under Subparagraph (3) of this paragraph may, on the Court's own motion, result in the dismissal of the case without prejudice to a timely motion for reinstatement filed under Subparagraph (6) of this paragraph.

(6) A motion for reinstatement of any case dismissed without prejudice under Subparagraph (5) of this paragraph may be filed within fifteen (15) days after the date of the dismissal order

provided that payment of the docket fee is delivered to the Court clerk on or before the date that the motion for reinstatement is submitted for filing through the EFS.

(7) A motion for reinstatement may be granted on a showing of good cause, and any proceeding reinstated under the provisions of this subparagraph shall be deemed initiated on the date that the proceeding was originally filed.

D. **Service by electronic transmission.**

(1) Any document required to be served by Rule 12307(B) NMRA may be served on a party or attorney by electronic transmission of the document if

(a) the attorney for the party to be served has registered with the EFS under this rule or Rule 1-005.2 NMRA;

(b) the party or attorney has agreed to be served with documents by email; or

(c) the party or attorney has listed an email address on a paper filed with the Court.

(2) Documents filed by electronic transmission through the EFS may be served by an attorney through the EFS or may be served through other methods authorized by this rule, Rule 12307 NMRA, or Rule 12307.1 NMRA.

(3) Electronic service is accomplished when the transmission of the document is completed. If within two (2) days after service by electronic transmission, a party served by electronic transmission notifies the sender of the electronic transmission that the document cannot be read, the document shall be served by any other method authorized by Rule 12307 NMRA as designated by the party to be served.

(4) Proof of service by a party or attorney shall be in the form of written acknowledgment of service by the person served, certificate of the attorney making service, or affidavit of any other person and shall state the following:

(a) the name of the person who sent the document;

(b) the date of service and email address of the sender and recipients; and

(c) a statement that the document was served by electronic transmission and that the transmission was successful.

(5) The Court shall serve all written court orders and notices on the parties unless otherwise ordered by the Court. The Court may file documents before serving them on the parties. The Court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule or Rule 1-005.2 NMRA and to any other party or attorney who has agreed to receive documents by electronic transmission or who has listed an email address on a document filed with the Court. For documents served by the Court, proof of service shall be in the form of a certificate of the Court clerk, which shall state the date of service and identify the parties served but need not indicate the method of service. For purposes of Rule 12308(B) NMRA, documents served by the Court shall be deemed served by mail, regardless of the actual manner of service, unless the Court clerk's certificate of service unambiguously states otherwise.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the Court it will be considered filed on the immediately preceding business day of the Court. For any questions of timeliness, the time and date registered by the Court's computer will be determinative. For purposes of filing by electronic transmission only, notwithstanding rejection of an attempted filing through the EFS or its placement into an error queue for additional processing, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting any filing deadline.

G. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 12302 NMRA. Attorneys filing by electronic transmission thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

(3) All documents filed by electronic transmission that are signed by the Court shall be scanned or otherwise electronically produced so that the original signature is shown.

H. **Format of documents; protected personal identifier information; EFS user guide**. All documents filed by electronic transmission shall be formatted in accordance with the Rules of Appellate Procedure and shall comply with all procedures for protected personal identifier information under Rule 12314 NMRA. The Court may make available a user guide on its website to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the Court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a self-represented party files a paper document with the Court, the Court clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The Court clerk shall retain such paper documents as long as required by applicable statutes and Court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The Court clerk's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph F of this rule;

(3) the document title;

(4) the name of the EFS service provider;

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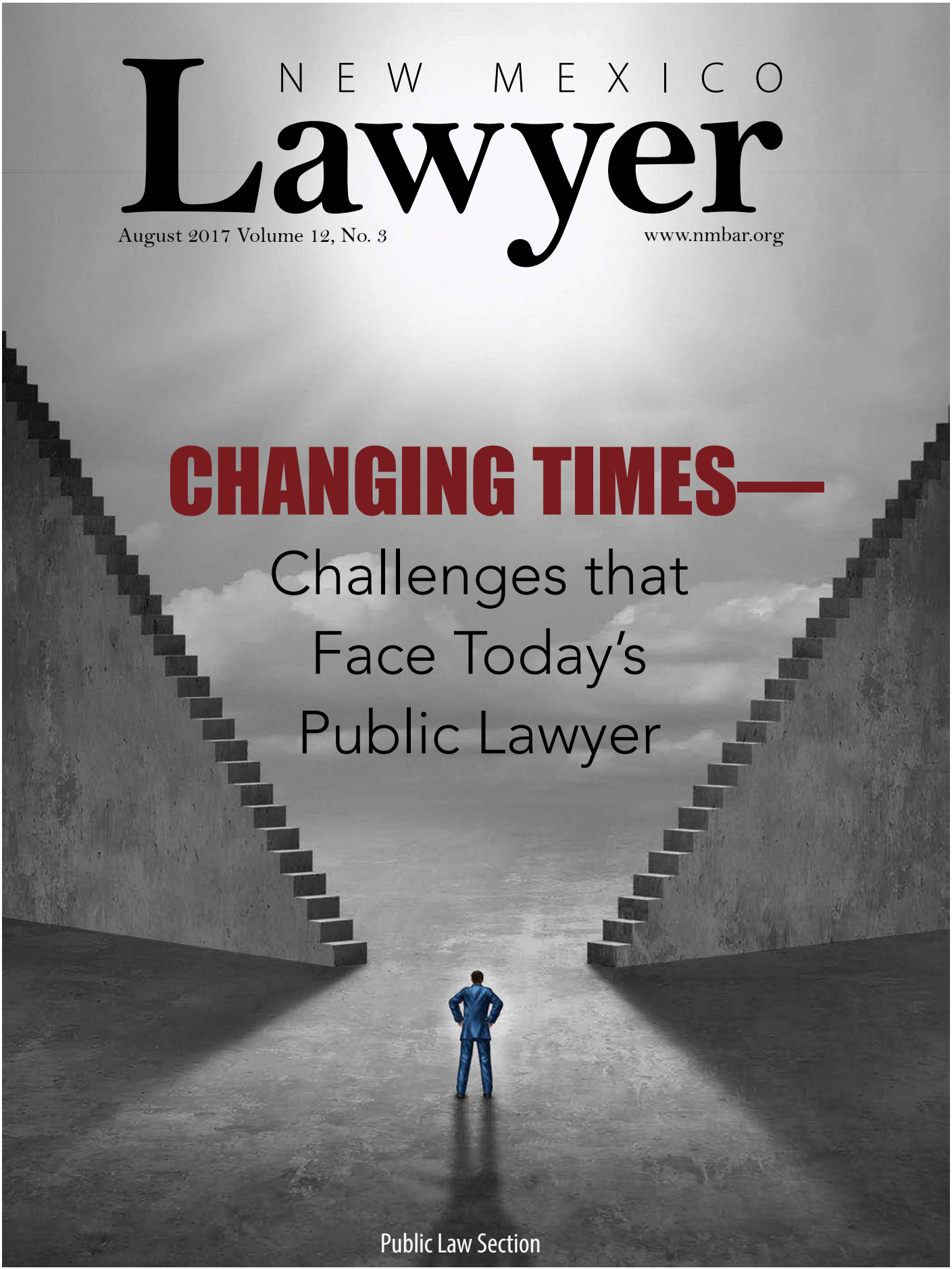

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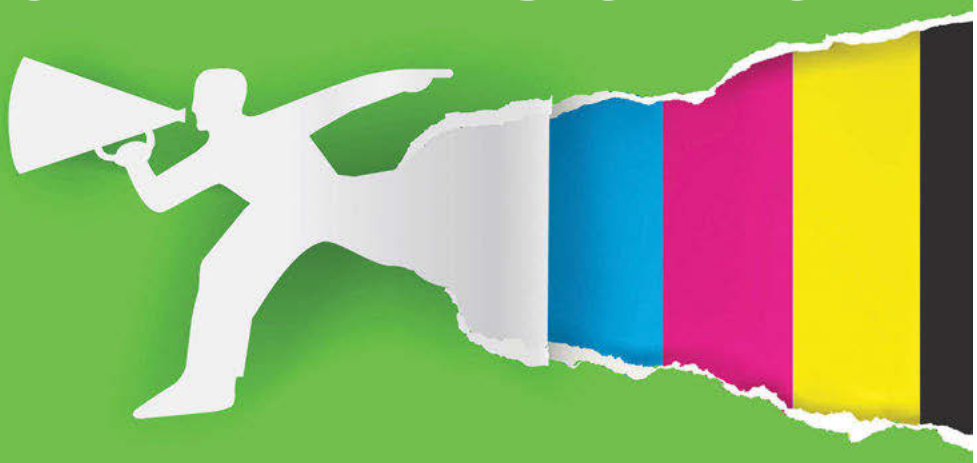

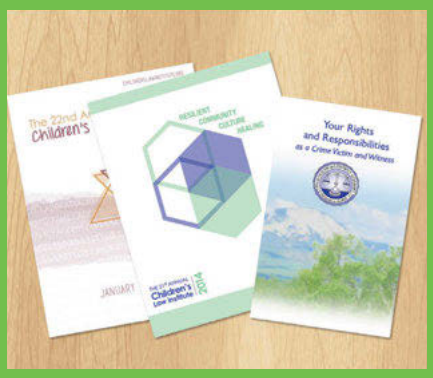

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Soldiering On In an Era of AUSTERITY

By Sean Cunniff

Although "austerity" is a concept often used to describe economic policies a sea away, New Mexico, with an economy mired in prolonged stagnation, and in an era of shrinking government, has become very much accustomed to the reality of austerity. Austerity has, front and center, increased pressure on public lawyers and decreased access to low-cost legal services.

Austerity—a term often used but perhaps not completely understood—contemplates reductions in government spending to offset declining outputs in the private sector economy. The concept seems relatively intuitive on the surface: as the private economy contracts and government revenues correspondingly decline, government belt-tightening ensues. The government cuts its budget to adapt to fiscal reality, mirroring the economic impacts felt by citizens at work and home. These budgetary cuts result in reductions in government spending, meaning the government contracts in some form and the economic benefits of government spending diminish. While these cuts to government spending serve the outwardly sensible purpose of keeping the government's books balanced, those same cuts can have the ironic effect of exasperating economic suffering and stagnation.

Austerity has presented a host of challenges for New Mexico. Public lawyers have been on the front lines, confronting these challenges head on. Whether it means undertaking an especially burdensome caseload for an assistant district attorney or public defender, or navigating prolonged vacancies in attorney or support staff positions, public lawyers are among the cast of hardworking public servants keeping New Mexico on track during this difficult period. With optimism growing with respect to the state's budgetary fortunes, perhaps the time to reinvest in the state's public law system merits serious consideration.

Austerity has presented a host of challenges for New Mexico. Public lawyers have been on the front lines, confronting these challenges head on.

One need look no further than the New Deal era to understand the benefits of government spending in stabilizing the economy and spurring private-sector growth. The massive public works and other spending components of the New Deal were direct responses to the Great Depression. By comparison, when austerity reaches extreme levels, as it has in Greece, the economic peril can border on existential.

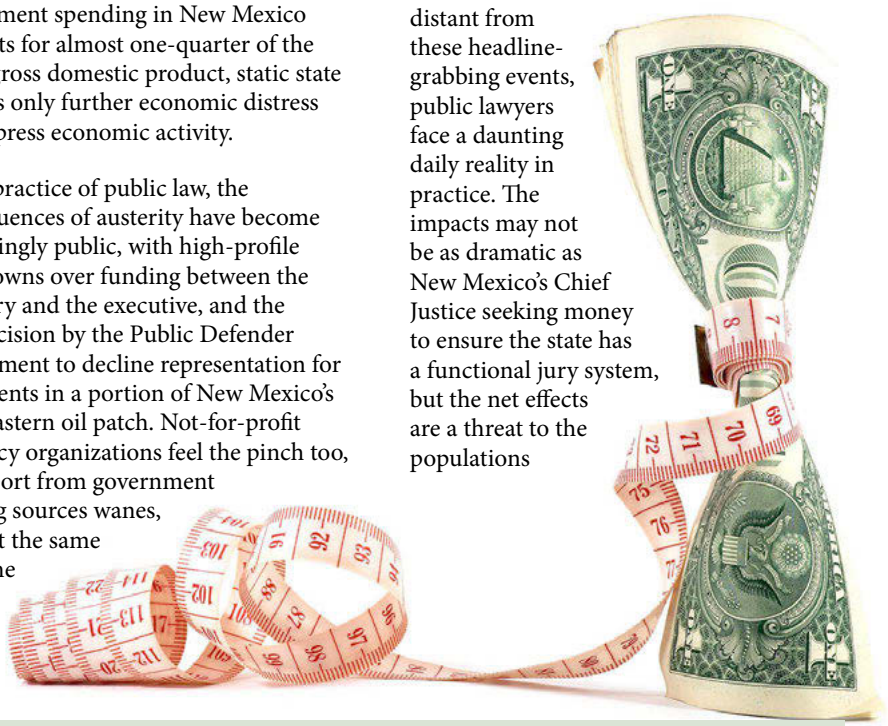
In New Mexico, a struggling state economy and stagnating state revenues have caused a prolonged period of belt-tightening for policymakers in Santa Fe. Because government spending in New Mexico accounts for almost one-quarter of the state's gross domestic product, static state budgets only further economic distress and depress economic activity.

In the practice of public law, the consequences of austerity have become increasingly public, with high-profile showdowns over funding between the judiciary and the executive, and the dire decision by the Public Defender Department to decline representation for new clients in a portion of New Mexico's southeastern oil patch. Not-for-profit advocacy organizations feel the pinch too, as support from government funding sources wanes, while at the same time, the strain of a stagnant economy spikes demand for their services.

In the area around Hobbs, where the Public Defender Department took its stand, these converging forces are readily apparent. Tethered to the current downturn in the region's "boom and bust" energy extraction industry, crime in the area has been on the rise. At the same time, the department's employees are overworked because of the state's ongoing budgetary difficulties. For some indigent New Mexicans, a public defender is the only means to secure their basic constitutional right to a lawyer.

The New Mexico Supreme Court's request for emergency funding made to the Board of Finance likewise implicates foundational aspects of our judicial system, with the Chief Justice seeking an emergency infusion of $600,000 in emergency funding to maintain a functioning jury system and avoid staff furloughs.

In the trenches, distant from these headline-grabbing events, public lawyers face a daunting daily reality in practice. The impacts may not be as dramatic as New Mexico's Chief Justice seeking money to ensure the state has a functional jury system, but the net effects are a threat to the populations



who rely on the work of public lawyers and a diminished work experience and quality of life for public lawyers.

The numbers are telling: according to legislative staff, since 2009 the state government workforce has decreased from approximately 25,000 to 21,500—and more than 20 percent of positions in state government are vacant. At the same time, the demand for many government services has surged, in particular with respect to indigent criminal defense, child welfare, and a host of other services involving public lawyers. At times, state employment has even been subject to a hiring freeze, the most recent of which was just lifted.

Tightening the vise further are decreases in access to legal services from non-profits and legal aid. Both serve to fill gaps in meeting the needs of the indigent and working poor, in both the criminal and civil realms, but especially the latter.

In New Mexico, 28 percent of the state's residents are eligible for civil legal assistance from the Legal Services Corporation, the Congressionally created not-for-profit entity that provides access to the justice system for low-income citizens. The universe of those eligible for LSC services has been expanding, while funding from the state and federal governments has declined. As a result, LSC must turn away most clients that come through its doors.

President Donald J. Trump's budget proposal seeks to eliminate federal government funding for the LSC entirely. In response, American Bar Association President Linda Klein expressed outrage, noting that the organization provides legal services to 1.9 million Americans annually, in every congressional district. Klein noted, "Some of the worthy services the LSC provides include securing housing for veterans, protecting seniors from scams, delivering legal services to rural areas, protecting victims of domestic abuse and helping disaster survivors."

At the same time that public interest lawyers and organizations face drastic cuts in funding, recessionary times have the ironic effect of driving increased demand for the services of those same lawyers and organizations. The housing crisis, the opioid epidemic, the deleterious impacts of chronic unemployment, rising crime, etc., elevate the need for skilled criminal and civil lawyers working for people without the resources to pay attorney fees.

In addition to obvious difficulties like a shrinking lawyer workforce, government lawyers and other public interest lawyers must navigate a host of other challenges: from overworked support staff, to fewer litigation resources, to overwhelming and ever-changing responsibilities. Adding to the mix is the indignity and real world consequences of stagnating (or often frozen) wages, not to mention increases in the cost of health insurance and other benefits, which have long been the redeeming pecuniary upside of accepting a more modest public interest wage.

For many state employees, austerity has meant dealing with the frustrating reality of failing to keep pace with the cost of living. While cause exists to be grateful for steady, meaningful work and dignity in sharing in the collective sacrifice during tough economic times, such prolonged periods of financial regression can be difficult to stomach. For many, this has meant that the temptation to leave government, or public service altogether, is too powerful to resist.

At the same time, policymakers have made some choices that appear to exasperate the tension between dwindling resources, fewer personnel, and surging demand. A recent episode highlights a curious trend: the New Mexico Public Education Department went before the Board of Finance on Feb. 21, 2017 to request $540,000 in emergency funding to pay legal fees to outside counsel defending the department in lawsuits challenging the sufficiency of education funding. The legal fees had actually already been paid, in addition to $1.2 million that had already been appropriated for the current fiscal year. In June, a six-week trial began in which it was estimated that another $2.5 million in state funds would be required to fund the government's defense.

This is not the only time the state government has declined to field in-house lawyers to defend or prosecute the state's interests. Instead of litigating, the role of many government lawyers is limited to oversight of the work done by private litigation counsel. As was noted at the Board of Finance meeting last winter by PED's secretary, expenditures by PED's private counsel were subject to "monitoring" by the public lawyers at PED.

In the past, such litigation was handled by government lawyers. In the landmark Zuni litigation, for instance, which concerns the manner in which capital improvements to education facilities are funded, lawyers from the New Mexico Attorney General's Office represented the state. That lawsuit, which is now nearing 20 years of existence, is still being defended by lawyers from the AG's office. The cost of defending the Zuni litigation is a tiny fraction of what has been assembled to fund PED's engagement in a six-week trial.

Going forward, the lessons that New Mexico learns from this era of austerity can inform how we navigate the future.

In the short term, the public law would benefit from an infusion of resources. Taking steps to avoid emergencies like the Supreme Court having to secure funding for juries seems to be a prudent first step. Shoring up such foundational aspects of the judiciary protects our constitutional system from peril.

For those soldiering along in the public law trenches, finding ways to keep compensation more in step with the cost of living would be a welcome development. After so many years of sacrifice, the personal financial and psychological benefits of stabilized wages would be a welcome boost to the ranks of government lawyers. Improving the financial outlook of public lawyers would also undoubtedly serve to keep quality lawyers working inside of government and in the public interest.

Long-suffering core functions, like the state's district attorneys and public defenders, are also long overdue for better compensation and improved staffing levels.

Finally, perhaps this is the time to consider upping the ranks of government lawyers. By bringing in and retaining more lawyers with litigation chops and other core skills, reliance on private counsel can be reduced. At the same time, the state could shore up its capacity to effectively defend and prosecute litigation. ■

Sean M. Cunniff is an assistant attorney general with the Attorney General's Office. He is a past chair of the State Bar Public Law Section.

A Long Time Coming:

New Mexico Legislature Adopts Uniform Rulemaking Procedures

By Bill Brancard

The 2017 Legislature achieved a milestone for New Mexico administrative law with the passage of uniform procedures for rulemaking by state agencies. House Bill 58 (HB 58)[1] amends the State Rules Act to provide requirements for public notice, comment periods, and public hearings prior to the adoption of a rule change along with standards for developing a record, explaining the rule change, and filing the rule. While previous attempts to adopt a uniform rulemaking bill have failed, this year the sponsors of HB 58, Senator Daniel Ivey-Soto and Representatives Linda Trujillo, Nate Gentry and Tomás Salazar, navigated the bill through committees and floor debates, where it was amended several times, and achieved final passage and the Governor's signature.

HB 58 is the culmination of a lengthy effort to provide uniform administrative rulemaking procedures for New Mexico. Almost a half century ago, the Legislature passed the New Mexico Administrative Procedures Act (NMAPA)[2], which included rulemaking standards, but then failed to apply the NMAPA to any agency. Since then, rulemaking procedures have appeared in various substantive laws, but no law required that every agency provide basic process protections such as public notice and hearing. The New Mexico Supreme Court, meanwhile, determined that "[t]here is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory only."[3]

The recent push for uniform rulemaking standards began with a task force which, in 2010, drafted rulemaking legislation based on the newly revised Model State Administrative Procedures Act. Bills based on the task force proposal were introduced in several sessions and failed. HB 58 is a departure from the task force's proposal but maintains the idea of housing rulemaking procedures in the State Rules Act, rather than in the NMAPA.

Purposes and Impacts of HB 58

The legislation serves several purposes. First, there are the goals of uniformity and the need to provide basic procedures for agencies that currently lack them. Second, the procedures in HB 58 focus on increased notice to the public during the rulemaking process and providing greater transparency about the authority and technical support for an agency's rule proposal. The impact of HB 58 on agencies will vary depending on the agency's current requirements for rulemaking. Much of the rulemaking structure in HB 58 is already followed by most agencies. Some specific requirements will likely be new to agencies but the greatest impacts may be the deadlines for providing notices, holding hearings, filing the final rule and completing the rulemaking proceeding; all which create the potential for legal challenges.

HB 58 Outline

HB 58 is drafted as amendments to the State Rules Act.[4] The Rules Act, which had previously focused on the format, filing and publication of rules, applies to all state rules and no rule is valid until published in the *New Mexico Register* as provided in the Act. HB 58 amends existing provisions of the Rules Act and also adds several new sections covering public notice, public participation and rule hearings, agency record, concise explanatory statements, emergency rules, and procedural rules.

Notice

The greatest impact of HB 58 concerns public notice. HB 58 defines the content of the public notice, the distribution of the notice, the timing of the notice and the frequency of notice. Section 4 of HB 58 lists seven categories of information that must be included in the notice including a summary of the rule text, an explanation of the rule's purpose and how to obtain a copy of the rule and a description of how to comment on the rule or participate in the hearing. The agency must also provide citations to the legal authority authorizing the rule and to any technical information that served as a basis for the proposal.

The distribution list for the notice is found in the definition of the new term "provide to the public." The agency is required to post the notice on its website and on the "sunshine portal," to send it by e-mail or regular mail to persons who requested notice or participated in the rulemaking and to make it available in the agency's offices. The notice must also be provided to the Legislative Council Service. Not included in the definition is the traditional notice by publication. HB 58 does require certain notices to be published in the New Mexico Register.

In addition to the notice of proposed rulemaking, HB 58 requires notice at various other points in the rulemaking process. Public notice is required whenever the agency changes the date of the hearing or the deadline for submitting comments. The agency must file the final rule with the records administrator and provide notice. If the records administrator makes minor, non-substantive corrections to the filed rule and then notifies the agency, the agency must provide public notice of the corrections. Also, if the agency terminates the rulemaking at any time after the notice of proposed rulemaking, it must publish a notice of termination in the Register and provide notice.

Hearings
While many agencies currently hold public hearings on rules, HB 58 makes it a requirement for all agencies. HB 58 offers few details on the conduct of a public hearing and instead grants agencies the authority to determine the way parties and the public can participate in a public hearing. The Attorney General must, by January 1, 2018, adopt procedural rules for hearings that apply to agencies that have not adopted their own rules. Agency rules must provide for at least as much public participation as the Attorney General's rules.

> The greatest impact of HB 58 concerns public notice.

Record
An essential part of judicial review is determining whether the agency action is supported by substantial evidence in the record. However, neither the statutes nor the courts have defined precisely what must be contained in a record. HB 58 does so. Section 7 lists the elements of a record including the notice publications, rule text, public comments, hearing transcript and explanatory statement. Also included is "any technical information that was relied upon in formulating the final rule."

Concise Explanatory Statement
A new statutory requirement, though not necessarily a new legal requirement, is the preparation of a "concise explanatory statement" which includes a reference to the authority authorizing the rule and any required findings. While the phrase "concise explanatory statement" is new, courts have long required agencies to provide a statement of reasons for a rule change.[5] Now, an agency will be required to file the statement with the state records administrator and provide the statement to the public.

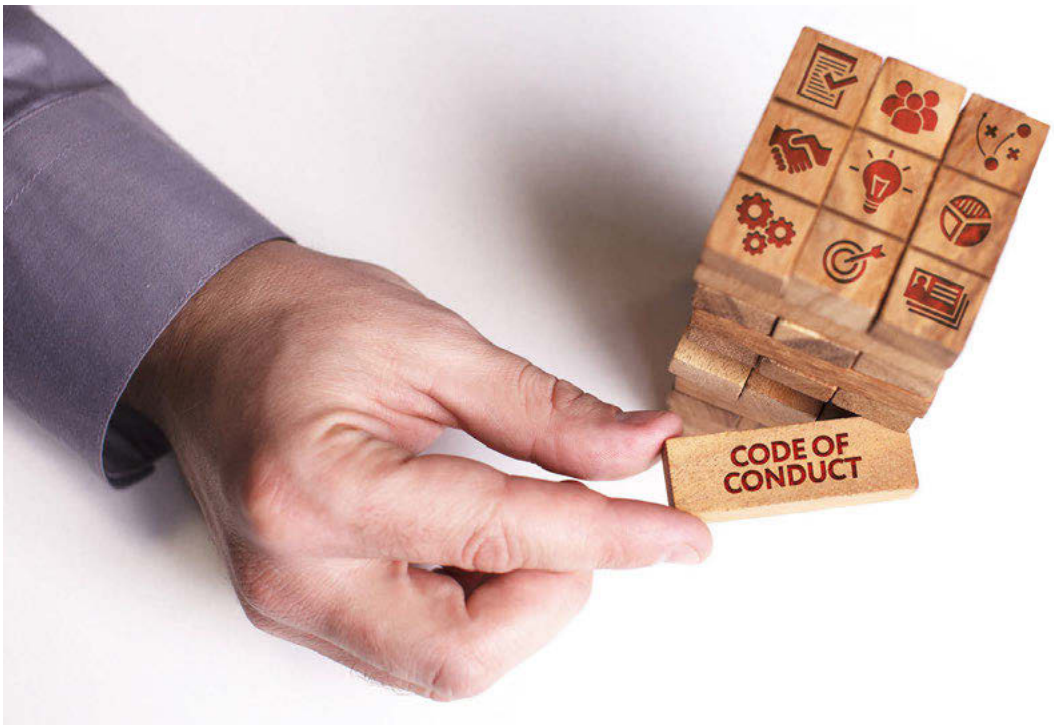
Deadlines
Sprinkled through HB 58 are deadlines and time frames that an agency or the state records administrator must track. The notice of proposed rulemaking must be provided to the public and published in the New Mexico Register at least 30 days before the public hearing on the rule. However, the notice will need to be developed well in advance because the New Mexico Register is only published twice a month and the Records Administrator requires submission of the notice at least twelve days before the publication date. Once the rule is adopted, the agency must file the rule and provide notice to the public within 15 days. The records administrator then has 90 days to publish the rule. If the records administrator makes nonsubstantive changes to the rule, it must notify the

continued on page 10

A Decent Proposal:

Adopt a Code of Conduct for New Mexico Administrative Law Judges and Hearing Officers

By Felicia L. Orth



Introduction

New Mexico administrative law judges and hearing officers in the executive branch (collectively, "ALJs") play a central role in assuring fairness and due process in executive agency actions. Their conduct should ensure public confidence in their impartiality, integrity and competence.

Some individual state agencies, boards and commissions have adopted rules addressing ex parte contact or other specific ethical issues. However, unlike many states, New Mexico does not have a broadly applicable code of conduct for its state ALJs.

The matter was raised during an Administrative Law Institute presentation[1], and a subcommittee of the Public Law Section drafted a proposed code of conduct that could be adopted for use by the executive branch.

The Public Law Section encourages the adoption by executive agencies of the draft Code of Conduct for New Mexico ALJs as an excellent way of promoting fairness in administrative due process.

New Mexico ALJs and Other Hearing Officials

The proposed code of conduct would apply to all who perform duties in the executive branch that are functionally equivalent to those performed by judges in the judicial branch, regardless of differences in title, education, position or status. Many practical distinctions can be drawn within the corps of New Mexico state ALJs and hearing officials: dozens of ALJs are lawyers, but not all; some are subject matter experts. Most are employees of the agency in question and others provide hearing services as contractors. Many work as individuals when conducting hearings; at the State Engineer's Office they work as teams or panels. Some work directly for cabinet secretaries; some work for boards and commissions. One group of ALJs was moved in 2015 from the agency they served to the Department of Finance and Administration.[2] (Federal ALJs and those employed by the judicial branch are not included in this discussion, nor are those who only occasionally serve as "hearing officers" by virtue of chairing a board or commission.) These practical distinctions do not alter the basic strictures assuring fairness in administrative due process.

In roughly 30 states and several large cities across the country, ALJs have been collected into a central panel rather than attached to the agencies, board or commissions they serve. This structure is thought to increase the perception of independence or impartiality by those participating in the hearings,[3] and such panels facilitate the adoption and enforcement of a code of conduct by the chief ALJ. Apart from establishing a central panel, many states have extended the application of the state judicial code of conduct for Article III judges to their ALJs. The New Mexico Supreme Court has declined to extend the New Mexico Judicial Code of Conduct to ALJs. Whatever might be said about the similarity of function, ALJs are part of the executive branch and the direct application of the entire Judicial Code of Conduct would be overreaching and unnecessary. Those familiar with the Judicial Code of Conduct will recognize many of the rules from Canons 1 and 2 of that Code in the draft code proposed for ALJs. Canons 3 and 4 of the Judicial Code of Conduct are not a good fit for ALJs directly. As noted below in Section 11, many of the rules constraining judges from community engagement and political activity would be unnecessarily onerous when applied to ALJs. ALJs should nevertheless reduce the possibility that their private lives will interfere with the performance of their duties.

The draft code is not intended as an exhaustive guide for ALJ conduct; those who are licensed as lawyers must also comply with the New Mexico Rules of Professional Conduct, and all may be subject to additional codes of conduct adopted by the agencies they serve. All state employees are subject to the Governmental Conduct Act, NMSA 1978, Section 10-16-1, et seq., providing for certain codes of conduct, none specific to ALJs.[4]

The Proposed Canons

In drafting the proposed code, the subcommittee reviewed pertinent New Mexico regulations, codes of conduct from many other states, the New Mexico Code of Judicial Conduct (Canons 1 and 2) and model codes published by national hearing official organizations.

The draft code of conduct includes 13 canons, or sections, each with a narrative explanation, examples or relevant New Mexico case law, and commentary similar to the commentary included in the New Mexico Code of Judicial Conduct.

Section 1. Promote Public Confidence in the Integrity of the Process

Section 2. Perform Duties Competently and Diligently

Section 3. Perform Duties Without Bias, Prejudice or Harassment

The drafting committee easily agreed on much of the language in the draft code. ALJs should promote public confidence in the integrity of the hearing process, perform their duties competently and diligently, and perform their duties without bias, prejudice or harassment.

Section 4. Avoid External Influences and the Impression of External Influence

The duty to avoid external influences in Section 4 was the subject of extended discussion as it related to supervisory input or the input of a lawyer assigned to advise a non-lawyer hearing officer or subject matter expert. This was because many ALJs are supervised by other ALJs; others are supervised by cabinet secretaries, boards or commissions, creating a risk of influence. A supervisor may properly direct necessary procedures for the hearing process, timelines, the format of a report, and many other matters that do not go to the merits of an action. ALJ colleagues can sometimes offer helpful suggestions for tangled matters based upon their own experience. A subject matter expert can properly be advised on the applicable law without undermining his or her impartiality on the merits of a matter. The drafting committee considered a wide variety of possible scenarios to distinguish between appropriate and inappropriate supervision, advice or consultation in their drafting of the proposed language:

> "Regardless of a hearing officer's employment or contractual relationship with a party agency, the hearing officer should exercise independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct result in a case, maintaining decisional independence from agency management and programs. This provision is not intended to preclude consultation between hearing officers, with a supervising hearing officer, or between a subject matter expert hearing officer and a lawyer assigned to advise that hearing officer; what it precludes is a hearing officer allowing the substitution of another's judgment for his or her own."

Section 5. Ensure the Right to Be Heard

Section 6. Maintain Order and Decorum

Their conduct should ensure public confidence in their impartiality, integrity and competence.

Section 6, requiring the ALJ to maintain order and decorum, to remain courteous and direct all others to remain courteous, is a critical part of any ALJ's job and is simply stated (and is sometimes a great challenge without a bailiff or contempt power).

Section 7. Avoid Ex Parte Communications

Section 7 is the lengthiest and most explicit of the sections, and is drawn largely from the ex parte provisions adopted by the Public Regulation Commission in Section 1.2.3 NMAC. Subsections include the definition of such communications, when they are prohibited, when they are permitted, and when disclosure is required. The committee discussed, but did not ultimately include, a provision for the use of outside experts retained by the ALJ. The committee did not want to encourage the use of such experts.

Section 8. Take Care in Making Public Statements on Pending Matters

Section 9. Disqualification May Be Necessary

Discussion on Section 8, regulating public statements that might reasonably be expected to impair the fairness of a pending matter, centered on the primary exception necessary to allow for public explanations of procedures. ALJs are often asked to explain their process to those who have not participated before. The subcommittee's discussion on Section 9, related to disqualification, was extended for research into the reach of

the third degree of familial relationship that would cause impartiality to be reasonably questioned. New Mexicans are well connected to one another in myriad ways; although the committee considered expanding the provision's reach still further, the committee proposes to use the same constraints used in the New Mexico Code of Judicial Conduct.

Section 10. Report Known Misconduct By Colleagues and Lawyers

Lawyer ALJs are bound already by the directive in Section 10 to report known misconduct by colleagues and lawyers. The directive seems duplicative, but the committee felt it important to extend the requirement to non-lawyer hearing officers. Lawyers often appear before non-lawyer hearing officers, and it is important to protect the public from unsavory practices or those who would undermine the integrity of the hearing process in any agency.

Section 11. Personal Conduct Should Minimize the Risk of Conflict

The committee discussed Section 11 at length, requiring ALJs to minimize the risk of conflict and disqualification in their personal activities. It is primarily in this section that the differences between Article III judges and ALJs require adjustment of constraints. New Mexico judges are governed on this topic by Canon 3, Sections 21-301 through 315, NMRA, and are precluded from several activities in connection with community organizations, public speaking and fundraising. NMRA Canon 4 further constrains political and campaign activity. ALJs are proscribed in the proposed code from activities that will interfere with the performance of their duties or lead to frequent disqualification, but are not otherwise constrained. This less onerous provision is appropriate considering the less public role held by ALJs and the fact that they are generally employed, not elected, appointed, or confirmed by the Senate, for example.

Section 12. Do Not Disclose or Make Personal Use of Nonpublic Information

Section 13. Do Not Accept Things of Value

Sections 12, prohibiting the disclosure of nonpublic information, and 13, prohibiting the acceptance of gifts from parties or lawyers before the tribunal, address issues already addressed in the Governmental Conduct Act. Their inclusion in the draft code reinforces the constraints in the administrative hearing context and extends them to those who serve as ALJs who are not employed in state government.

Notably, the proposed code does not yet include an enforcement provision. The most likely appropriate provision will provide for complaints to the head of the agency in question, with an investigation and potential discipline to be based on the outcome, consistent with existing personnel rules and agency codes of conduct. In the case of a central panel, the complaint would be handled by the chief judge.

Conclusion

As the Supreme Court noted in *Butz v. Economou*, 438 U.S. 478 (1978), within the executive branch the role, if not power, of the modern hearing official or administrative law judge is "functionally comparable" to that of a trial judge: He or she may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing and make or recommend decisions. It is important to structure the process and apply the ethical codes that will assure the exercise of independent judgment on the evidence, free from pressures by the parties or other officials within the agency. Fair and competent hearing personnel are essential to administrative due process. The Public Law Section Board encourages all who practice in administrative venues to review the draft code of conduct, including the commentary, and to submit comments. Visit www.nmbar.org/publiclaw. In the fall, the Board will present the final draft for adoption by New Mexico's executive agencies. ■

Endnotes

[1] Serving as an ALJ for the state of New Mexico for 15 years had provided many examples of times when a code of conduct would have been helpful in discerning an ethical response to surprising or challenging circumstances, many of which were shared during the presentation, and many of which are shared by other ALJs: feeling compelled to do technical research after a hearing when a private expert witness has lied about something important, or when comparably credentialed experts submit exactly contrary opinions; taking tours of far-flung facilities before a hearing where ex parte opportunities abound; having a lawyer appear in a matter when months earlier he had made an aggressive sexual pass during a conference; being physically threatened during a hearing; having pro se participants seek too much assistance from staff; and a spouse's employment by a party in extensive rulemaking. Carolyn Wolf, then Chair of the Public Law Section Board, agreed that the ALJs and those appearing before them would all benefit from a code of conduct. She established and chaired the drafting subcommittee and invited me to help with the task. The subcommittee also included Sean Cunniff, James Martin and Thomas W. Olson.

[2] The New Mexico Taxation and Revenue Hearings Bureau was dissolved. The ALJs hearing tax disputes are now part of an Administrative Hearings Office within DFA, and are led by a chief hearing officer appointed by the New Mexico Governor. NMSA 1978, Section 7-1B-6. The Act establishing the office also requires the promulgation of a hearing officer code of conduct. The chief hearing officer expects to complete that rulemaking by the end of 2017. (Telephone call with Brian Vandenzen, 6/9/17.)

[3] A 2010 task force (mentioned by Bill Brancard in his note) drafted legislation establishing such a panel in New Mexico, but the related bills introduced over the years have never passed.

[4] Attempts to establish a state ethics commission and expand that Act during the 2017 legislative session were not successful. This would have been another opportunity to mandate a code of conduct for ALJs. See Senate Bill 72 and House Bill 462, the "Public Accountability Act," stalled in the Senate Rules Committee and the House Judiciary Committee, respectively.

Felicia L. Orth retired as an ALJ from the State of New Mexico in 2014 and now serves a number of state and local entities as an ALJ under contract. She is a member of the State Bar Public Law Section Board of Directors.

A Long Time Coming

continued from page 6

agency within 10 days. The agency then has 30 days to provide public notice of the changes. Finally, if an agency fails to take action on a proposed rule after publishing a notice of proposed rulemaking, the rulemaking will automatically terminate in two years.

What is missing?

Perhaps the most notable gap in HB 58 is the absence of a judicial appeal provision. This is especially noteworthy since the current statute for appeals of administrative decisions, NMSA 1978 Section 39-3-1.1, does not cover rulemaking actions.[6] To appeal a rule adopted under the HB 58 procedures, potential appellants must employ the appeal provision in the specific authorizing statute or, if no provision exists, file a petition for a writ of certiorari under Rule 1-075.

What's Next?

HB 58 will likely trigger debates, and possible litigation, over how its procedures fit with existing rulemaking requirements in substantive laws. For instance, many existing laws require the notice to be published in "a newspaper of general circulation." Is that requirement superseded by HB 58 or is it now in addition to the notice requirements in HB 58? A possible solution may be for the Legislature to start amending existing requirements to reconcile them with HB 58. Although HB 58 leaves some questions unanswered, it accomplishes the legislature's goals of providing minimum uniform procedures and greater transparency in the rulemaking process. ■

Endnotes

[1] Laws 2017, Chapter 137

[2] NMSA 1978, Sections 12-8-1 et seq.

[3] Livingston v. Ewing, 1982-NMSC-110, ¶14, 98 N.M. 685

[4] NMSA 1978, Sections 14-4-1 et seq.

[5] *See eg.,* City of Roswell v. NM Water Quality Control Comm'n, 1972-NMCA-160, ¶16, 84 N.M. 561 ("the record must indicate the reasoning of the Commission and the basis on which it adopted the regulations").

[6] Section 39-3-1.1.H. ("'Final decision' does not mean a decision by an agency on a rule.")

Bill Brancard is general counsel for the Energy, Minerals and Natural Resources Department. He has served as chair of the State Public Law Section and the Natural Resources, Energy and Environmental Law Section. He also served on the 2010 task force mentioned in the article.

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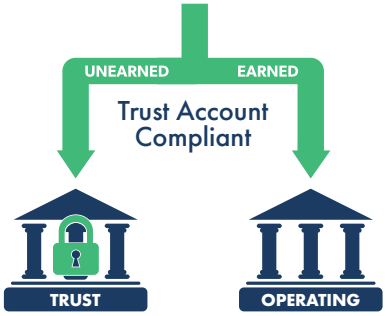

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(5) the email address of the person or entity filing the document; and

(6) the page count of the filed document.

K. **Conformed copies.** Upon request of a party, the Court clerk shall stamp additional copies provided by the party of any paper filed by electronic transmission. A filestamped copy of a document filed by electronic transmission can be obtained through the EFS. Certified copies of a document may be obtained from the Court clerk.

L. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

M. **Requests for exemptions from electronic filing requirement.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from the mandatory electronic filing requirements under this rule. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule. An exemption granted under this subparagraph remains in effect for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format[~~ with the Court~~]. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The Court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents by electronic transmission without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

[Approved, effective July 1, 1997; as amended by Supreme Court Order No. 068300031, effective January 15, 2007; as amended by Supreme Court Order No. 17-8300-004, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 17-8300-009, effective for all cases pending or filed on or after August 21, 2017.]

Certiorari Denied, April 17, 2017, No. S-1-SC-36368

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-047

No. 34,792 (filed March 14, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BILL TURNER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
KAREN L. PARSONS, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico
JANE A. BERNSTEIN
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
MARY BARKET
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Jonathan B. Sutin, Judge

{1} Defendant Bill Turner pleaded guilty to 13 counts of securities fraud, contrary to NMSA 1978, Section 58-13C-501 (2009), and one count of conspiracy to commit securities fraud, contrary to NMSA 1978, Section 30-28-2 (1979) and Section 58-13C-501. After failing to pay any restitution to his victim in the ten months following his guilty plea, Defendant was sentenced to a total period of incarceration of ten years, less 182 days for pre-sentence incarceration credit, plus two years of parole to run concurrently with five years of supervised probation. On appeal, he argues that (1) the district court abused its discretion when it refused to permit Defendant to withdraw his guilty plea on the ground that the plea was involuntary because he was denied effective assistance of counsel and because the plea was coerced, and (2) the district court abused its discretion when it refused to grant his requests for continuance of his restitution and sentencing hearings and proceeded to sentence him. For the reasons outlined in this opinion, we affirm.

BACKGROUND

{2} Defendant was indicted on 211 counts, including 52 counts of securities fraud, 52 counts of prohibited conduct in providing investment advice, 52 counts of fraud,[1] 52 counts of forgery, two counts of theft of identity, and one count of conspiracy to commit securities fraud. Following Defendant's plea of not guilty, the State filed a motion to set conditions of release. After a hearing on December 4, 2013 on that motion, the district court ordered a bond study and set standard conditions pending the results of the study.

{3} On January 10, 2014, the district court again considered Defendant's conditions of release. The State argued that the court should follow the recommendation given by the Probation and Parole Department in the pre-release report and place Defendant on a no-bond hold. The State highlighted the crimes with which Defendant was charged, the known and unknown facts about Defendant's alleged scheme, the impact on the victim, and the potential financial resources of Defendant and Defendant's extended family. The State argued that it did not have a good idea of the financial resources available to Defendant because he was hiding needed information and also argued that a no-bond hold was appropriate pending receipt of that information. In response, Defendant highlighted Defendant's connection to his community, his compliance with terms and conditions of release to date, and the fact that he had not fled despite facing serious prison time. The district court expressed its concern that Defendant could flee given the prison time faced. The court imposed a $250,000 cash only bond and ordered that if Defendant got released on that bond, he must surrender his passport and could only travel to a limited number of counties in New Mexico. Defendant was then arrested and detained at the Lincoln County Detention Center (LCDC).

{4} On February 27, 2014, Defendant moved to modify his conditions of release. The motion to modify stated that Defendant had a documented history of physical disabilities that required timely issuance of medications, that he would not leave New Mexico, that he was a life-long resident of Otero County and was not a flight risk, that he had no prior convictions, and that his father-in-law was willing to place his property with the State as security to assure Defendant's appearance.

{5} During the hearing on Defendant's motion to modify the conditions of release, defense counsel again informed the court that Defendant's father-in-law had agreed to put up his ranch as a property surety to assure Defendant's appearance in this matter. Defense counsel reiterated Defendant's ties to the community, informed the district court that Defendant had health problems that were not being attended to at LCDC and asserted that Defendant was not a flight risk. Defense counsel stated that the property bond (which would be connected to a piece of property that could be worth in excess of one million dollars) would assure Defendant's appearance. The State responded that they had found six bank accounts, and they were contemplating filing money laundering charges against Defendant. The State argued that the evidence against Defendant was "overwhelming," that it would convict him of every count with which he was charged, and that the cash bond was appropriate given the circumstances and the impact on the victim. The State represented that part of the logic in imposing the $250,000 cash bond was so that there was money available should restitution be ordered later in the proceedings. The court indicated that the case appeared strong and that the bond as previously ordered would remain.

[1]Count 165 is identified as a "forgery" count but uses the "fraud" count language.

{6} After Defendant's failed attempt to modify the conditions of his release, Defendant, pro se, filed a motion for appointment of new counsel. The district court granted his motion, and on June 28, 2014, Molly Kicklighter with the Office of the Public Defender entered her appearance on behalf of Defendant and filed a motion to review conditions of release.

{7} On July 9, 2014, Defendant changed his plea and entered a plea and disposition agreement (the agreement) wherein he pleaded guilty to 13 counts of securities fraud and one count of conspiracy to commit securities fraud. As part of the agreement, the parties agreed that the district court would conduct a restitution hearing and that if Defendant paid the court-determined restitution amount in full prior to sentencing, the State would agree to an incarceration cap of twenty years. However, if Defendant did not pay restitution in full before sentencing, Defendant agreed to serve no less than five years and no more than thirty years of incarceration. Defendant would be released pending the restitution hearing and sentencing in order to begin making arrangements to pay restitution.

{8} During the July 9, 2014 hearing on Defendant's change of plea, Defendant confirmed that he signed the plea agreement, he had reviewed it with his attorney before signing, and he understood what the document said. The district court went through the plea colloquy, during which it asked a number of questions to assure that the plea was made "knowingly, voluntarily, and intelligently." The court confirmed that Defendant understood that he could face up to forty and one-half years of incarceration under the plea agreement and could be fined up to $70,000. Defendant indicated that part of the reason for entering the plea was to have the remaining charges dismissed. The court informed Defendant that as part of the sentencing agreement, a restitution hearing would be held to determine how much money was owed to the victim, that the State alleged that approximately $215,000 was owed to the victim, and that if Defendant paid restitution in full prior to sentencing, the parties had agreed to an incarceration cap of twenty years. Defendant indicated that he understood that in entering his plea he was waiving any defenses in his case and was waiving his right to appeal. Defendant also stated that he understood that if the court agreed to accept Defendant's plea, he would not be permitted to withdraw that plea. When asked whether "anybody made any promises to [him] to get [him] to do this" or whether "anybody threatened [him] to do this" Defendant responded, "No, ma'am." Defense counsel stated to the district court that she was not aware of any reason why the court should not accept the plea as a knowing, voluntary, and intelligent act.

{9} After the plea colloquy, and while the parties discussed on the record the timing of the restitution hearing, defense counsel expressed to the court that the Office of the Public Defender was extremely short-staffed and requested that a restitution hearing not take place until September 2014. The court approved the plea and disposition agreement, and in relevant part, it indicated that "the plea [was] voluntary and not the result of force, threats or promises other than a plea agreement." That same day, the court entered a release order.

{10} The day before the August 2014 restitution hearing was set to occur, the court entered a stipulated order for continuance of that hearing because Defendant needed more time to prepare. On November 6, 2014, Kicklighter filed a notice of inability to provide competent representation, request for expedited hearing, and motion to withdraw from representation. Kicklighter apparently filed similar motions in all of her Twelfth Judicial District cases and filed a single "mass memo" in support of all those motions. In her memo, Kicklighter addressed caseload standards, argued that her caseload was unreasonable, and indicated that with her current caseload she was unable to effectively represent her clients. The State responded and filed a cross-motion for entry of an order disqualifying Kicklighter and for an order to show cause as to why the "Chief Public Defender and District Defender should not be held in contempt."

{11} On December 5, 2014, while Kicklighter's motion to withdraw was pending, but before she filed her memo in support of that motion, the district court held the restitution hearing in Defendant's case. During the hearing, Kicklighter requested a continuance. Kicklighter stated that she needed a continuance because she had not had "time to really even understand" the restitution figures provided to her by the State. Kicklighter admitted that she should have retained a forensic accountant but had not yet done so. The State argued that the restitution hearing should not be continued because it had a witness from Texas, who had traveled for the purpose of testifying, and that the hearing had already been continued once before. The State also argued that the hearing needed to happen because the plea agreement contemplated a longer sentence should Defendant fail to pay full restitution by the time of sentencing, which was set in January 2015.

{12} The district court suggested that the State conduct direct examination and that Defendant be permitted to cross-examine the witnesses by phone a week later. When discussing possible dates for a continuance, Kicklighter stated to the court that Defendant's case was the reason she ended up "doing anything in [Lincoln] county ever," that she had too many cases, and that she had moved to withdraw. In Kicklighter's opinion she had been ineffective, Defendant needed the restitution hearing done right, and she had not handled the case correctly. The court ultimately allowed the State's witnesses to testify, and defense counsel reserved cross-examination for the continued hearing to take place on January 9, 2015.

{13} On December 29, 2014, Mario Torrez, newly appointed District Public Defender, entered an appearance on behalf of Defendant. Two days before Defendant's restitution hearing was set to continue in January 2015, Torrez moved to again continue the restitution hearing. In support of his motion, Torrez stated that he requested additional time to review the case and that he had a conflict on the day of the hearing. On January 8, 2015, Torrez filed a notice of withdrawal of Kicklighter's notice and indicated that there had been no ineffective assistance on any of her cases (including Defendant's case) and that he has entered his appearance in all of the at-issue cases.

{14} On January 9, 2015, the district court agreed to continue the restitution hearing until January 21, 2015, and the sentencing hearing for "maybe thirty days," but only if Defendant paid at least $50,000 in restitution by January 21, 2015. The court stated that if Defendant failed to make said payment, sentencing would take place on January 21, 2015.

{15} The district court held a hearing on Kicklighter's motion to withdraw on January 10, 2015. During the hearing, the public defender argued that there had been no specific showing of ineffective assistance on any of Kicklighter's cases and that it was inappropriate to hear all of the motions at once. Torrez, Kicklighter's supervisor, testified that Kicklighter never said she was ineffective on specific cases, confirmed that the Office of the Public Defender had hired another attorney, and stated that he had entered his appearance in the at-issue cases to help ensure that Kicklighter's clients received effective assistance. Kicklighter testified that she had not yet done individual analyses on

her cases to determine how her representation was ineffective in each specific case, but believed that she could articulate ineffectiveness on every case if given the opportunity at a later date. Ultimately Kicklighter was not allowed to withdraw on the cases in which she filed her motion, but the court indicated it would permit additional counsel to work those cases as co-counsel, and it would not require Kicklighter to personally appear at hearings in those cases.

{16} The restitution hearing was re-set for January 21, 2015, but on January 20, 2015, the State moved to continue the hearing so that the victim could testify. The hearing was re-set for April 17, 2015 to accommodate the State's request.

{17} After a reassignment of Defendant's case within the Office of the Public Defender in February 2015, Defendant retained W. Chris Nedbalek in March 2015 to represent him. On April 13, 2015, four days before the continued restitution hearing was scheduled to take place, Nedbalek filed a motion to vacate the restitution hearing and informed the court that he intended to file a motion to withdraw the plea but needed additional time.

{18} Defendant's motion to withdraw his plea was filed on April 17, 2015. In this motion, Defendant argued that during his 181 days of incarceration, he was housed with an inmate (A.H.) who engaged in "profoundly offensive and dangerous habits," including defecating on the floor of the communal cell, using his bare hands to wipe himself after defecating, and then submerging his unwashed hands into a communal water bowl. Defendant alleged that guards at LCDC would require other inmates to clean up after A.H. without proper gloves or chemicals. When Defendant began to notice physical symptoms (in the form of bumps, pimples, and hard knots on his skin), and asked LCDC to move A.H., Defendant was allegedly threatened with solitary confinement. Defendant also alleged that his multiple requests for medical attention were denied. Defendant argued that, given the "hazardous biological" conditions in jail and being offered a plea deal under which he would be released, Defendant agreed because he "would have agreed to anything." He argued that, after being released, he was diagnosed with a MRSA infection and that his doctor had told him that his infection was due to the profoundly unclean habits and deficient cleaning practices that occurred at LCDC. In the motion to withdraw his plea, Defendant argued that his plea was not voluntary and that the conditions at LCDC, coupled with Kicklighter's assertion that her representation of Defendant was ineffective, should be enough for Defendant to withdraw his plea.

{19} On April 17, 2015, in lieu of holding the continued restitution hearing, the district court heard Defendant's motion to vacate the restitution hearing and his motion to withdraw his plea. As to the motion to vacate, defense counsel stated that he did not think that he could cross-examine witnesses that day because he did not fully understand the case and because the motion to withdraw Defendant's plea was reasonable and ought to be heard prior to any restitution hearing. The State argued that Defendant was attempting to further delay the proceedings and requested that the court proceed to sentencing. The court stated that it would deny Defendant's motion to vacate and that restitution could occur after sentencing.

{20} On the motion to withdraw his plea, Defendant argued primarily that the plea was not voluntary, and secondarily, that Defendant did not receive effective assistance of counsel. When asked by the district court whether that ineffectiveness happened prior to or at the time the plea was entered, defense counsel stated that Kicklighter had indicated that she was overwhelmed but that Kicklighter would have to inform the court on that issue. When addressing the alleged conditions at LCDC, the court stated that it would accept all of Defendant's arguments regarding the conditions in jail and LCDC's response to Defendant's concerns and requests as true in determining whether the plea was voluntary. The court then indicated that in order to make it believable or convincing that the situations were part of the duress, why were the conditions and threats not mentioned to his attorney. Defense counsel offered to put Defendant on the stand to question him about why he did not report the allegedly coercive conditions at the time of the plea, and the court replied that no coercive conditions were reported, and the court was not put on notice. Defense counsel neither offered to nor actually called Kicklighter to testify about her work on the plea negotiations in Defendant's case.

{21} In response, the State called John Sugg, the former prosecuting attorney that negotiated the plea for the State in Defendant's case. According to Sugg, the plea was not the result of one day of negotiation, and he indicated that he had been working with Kicklighter for several months and with another defense attorney prior to that. There was no reason for Sugg to believe that the plea was not voluntary, and in fact, Sugg made certain concessions on the plea at Kicklighter's request, including removing the floor on sentencing and allowing Defendant to be released from jail that day to assist in preparing for the restitution hearing. The State argued that there was no evidence that Defendant was actually coerced into pleading and that he failed to meet his burden for withdrawing his plea. The State asserted that, as to Kicklighter's alleged ineffectiveness in Defendant's case, any ineffectiveness which may have occurred did not occur until *after* the plea was entered. The State also argued that allowing Defendant to withdraw his plea would be prejudicial to the State because the prosecuting attorney on the case, Sugg, was no longer employed with the Office of the District Attorney.

{22} The district court found that Kicklighter provided effective assistance of counsel to Defendant. The court observed that "Kicklighter is . . . a great attorney and . . . she did a very nice job of representing [Defendant]." It also found that, while the conditions at LCDC gave rise to "a heck of a lawsuit," even accepting Defendant's claims as true, there was not sufficient grounds to set aside the plea. Moreover, the court concluded that the plea was well-reasoned, had been adequately discussed with Defendant during the colloquy, and the plea was knowingly, voluntarily, and intelligently made.

{23} The district court re-set the hearing for restitution/sentencing for May 27, 2015. In response, defense counsel filed a second motion to vacate the restitution hearing, arguing that he did not see how the restitution hearing could proceed "given the statutes of New Mexico . . ., due process, and fundamental fairness to . . . Defendant." In this motion, defense counsel argued that the restitution hearing should be vacated essentially because he could not determine a reasonable amount of restitution without the receipts and documentation in the State's possession. The court agreed that, at this point, restitution did not need to be calculated until Defendant was put on probation or parole, and the restitution hearing was vacated.

{24} During the May 27, 2015 sentencing hearing, Defendant was judged guilty pursuant to his plea and sentenced to a total period of incarceration of ten years, less 182 days for pre-sentence incarceration credit, plus two years of parole to run concurrently with five years of supervised probation. Restitution in an amount yet to be determined was also ordered as a

special condition of probation. This appeal followed.

DISCUSSION

{25} As indicated earlier, Defendant argues that the district court (1) abused its discretion when it refused to permit Defendant to withdraw his plea because he did not receive effective assistance of counsel and because his plea was coerced, and (2) abused its discretion when it refused to grant Defendant's requests for continuance of his restitution and sentencing hearings and proceeded to sentence him. We address each argument in turn.

I. Plea Withdrawal

{26} A district court's denial of a motion to set aside a plea is reviewed for an abuse of discretion. *State v. Barnett*, 1998-NMCA-105, ¶ 12, 125 N.M. 739, 965 P.2d 323. "[A] trial court abuses its discretion when it acts unfairly or arbitrarily, or commits manifest error[.]" *Id.* "A denial of a motion to withdraw a guilty plea constitutes manifest error when the undisputed facts establish that the plea was not knowingly and voluntarily given." *State v. Garcia*, 1996-NMSC-013, ¶ 7, 121 N.M. 544, 915 P.2d 300.

A. Ineffective Assistance of Counsel

{27} "The voluntariness of a plea entered on the advice of counsel depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard delineated in *Strickland v. Washington*, 466 U.S. 668 . . . (1984), applies to ineffective-assistance claims arising out of a plea agreement. To establish ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Hunter*, 2006-NMSC-043, ¶ 12, 140 N.M. 406, 143 P.3d 168 (internal quotation marks and citations omitted).

{28} As to the first prong, "[c]ounsel's performance is deficient if it fell below an objective standard of reasonableness." *Id.* ¶ 13 (internal quotation marks and citation omitted). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks and citation omitted). As to the second prong, to establish prejudice from trial counsel's ineffectiveness, a defendant must show that there is a reasonable probability that but for counsel's ineffectiveness, the result of the proceeding would have been different. *State v. Dylan J.*, 2009-NMCA-027, ¶ 38, 145 N.M. 719, 204 P.3d 44. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 28, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted). In the context of pleas, prejudice is established by showing that "counsel's constitutionally ineffective performance affected the outcome of the plea[.]" *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

{29} In this case, Defendant begins his argument by stating that the district court erred in rejecting his ineffective assistance of counsel claim on the ground that Kicklighter's ineffectiveness only impacted his restitution hearing and not his plea. He asserts that the restitution hearing was incorporated into his plea, and the results of that hearing directly impacted his sentencing exposure. Defendant also argues that Kicklighter was not effective specifically as to the plea because: (1) she was on the case for less than a month before having Defendant plead guilty, and she was unfamiliar with the facts of the case as evidenced during the restitution hearing; (2) she failed to investigate viable defenses, as evidenced by the fact that a subsequent defense attorney allegedly discovered evidence that the victim was not as financially devastated as the State had represented to the court; (3) she failed to investigate whether the counts violated double jeopardy; (4) she failed to retain an expert forensic accountant; and (5) she failed to challenge a viable pretrial release issue and instead used release as a means of inducing a plea.

{30} Defendant asserts that all of the aforementioned deficiencies prejudiced him because they effectively denied him counsel during critical stages of the proceedings and resulted in him entering a plea involuntarily and unknowingly. In support of his argument that he was prejudiced, Defendant contends that the record establishes that he would have taken his case to trial had Kicklighter and his prior attorneys not been ineffective.

{31} In response, the State first argues that because Defendant unconditionally pleaded guilty, he waived all nonjurisdictional defects and defenses, and he may not now challenge Kicklighter's alleged failures to investigate defenses, raise a double jeopardy argument, retain an expert, or challenge any pretrial release issues. Putting aside Defendant's nonjurisdictional contentions, the State contends that Defendant's position boils down to the notion that he would have taken his case to trial had Kicklighter and his prior attorneys not been ineffective. In response to Defendant's position, the State asserts that it is "highly improbable" that Defendant, facing a possible life sentence if convicted, would have insisted on proceeding to trial given that Kicklighter was able to negotiate a plea agreement that included the possibility of no incarceration. The State argues that Defendant's position that he would have gone to trial absent Kicklighter's alleged deficient performance is nothing more than a self-serving, unsubstantiated declaration that is insufficient to prove prejudice.

{32} As a preliminary matter, we agree with the State that "a voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds." *State v. Chavarria*, 2009-NMSC-020, ¶ 9, 146 N.M. 251, 208 P.3d 896 (internal quotation marks and citation omitted). But in this case, it is precisely the voluntariness of the plea that Defendant is disputing. We do not interpret Defendant to be arguing for reversal on the basis of particular defenses, on double jeopardy grounds, or based on the expert or pretrial release issues. We interpret Defendant to be arguing that Kicklighter's alleged failures to raise those certain issues suggest that she was ineffective and that Defendant should be permitted to withdraw his plea because her deficient performance prejudiced him. *See Hunter*, 2006-NMSC-043, ¶¶ 14-15 (outlining alleged deficiencies by trial counsel and indicating that to determine whether the defendant's counsel was constitutionally ineffective, the appellate courts must examine the merits of each alleged deficiency).

{33} Insofar as Defendant asserts that the district court erred in holding that Kicklighter's ineffectiveness only impacted his restitution hearing in an attempt to reinvigorate Defendant's ineffective assistance of counsel claim due to institutional ineffectiveness or Kicklighter's caseload issues, we are unconvinced. The district court was correct to note that Kicklighter's statements to the court regarding her representation and her caseload occurred at Defendant's restitution hearing, which undisputedly happened nearly five months after the change of plea hearing. Kicklighter's statements to the court at the restitution hearing indicate that she was overloaded at that time, but that the Office of the Public Defender assigned her numerous cases in Lincoln County sometime *after* she was assigned Defendant's case. We are

unable to find any support in the record for Defendant's contention that Kicklighter's caseload issues impacted her ability to negotiate his plea. To the contrary, the only evidence in the record regarding Kicklighter's representation in the plea negotiations suggests that (1) she herself felt that the plea was voluntary, and (2) she was able to effectively negotiate with the State. During the hearing on the motion to withdraw Defendant's plea, the State elicited testimony from the former prosecutor, Sugg, that he had worked with Kicklighter on the deal over a few months and that Kicklighter had bargained for certain concessions by the State. The plea provided an avenue under which Defendant could possibly serve no jail time, and Kicklighter obtained two different caps on sentencing. Kicklighter was also able to negotiate for Defendant's immediate release. Thus, insofar as Defendant tries to rely on Kicklighter's broader caseload issues for his ineffective assistance of counsel claim, we are not persuaded.

{34} As to the specific alleged deficiencies highlighted by Defendant in his brief in chief that are separate from the institutional/caseload issues, we conclude that Defendant has failed to meet his burden of proving that Kicklighter's performance was deficient and that her performance prejudiced Defendant. Although he alleges that Kicklighter was unfamiliar with the facts and the victim's background such that there may have been viable but unpursued defenses, we see no evidence in the record to support Defendant's position. *In re Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("This [C]ourt will not search the record to find evidence to support an appellant's claims."). Defendant's mere allegations are insufficient to establish a deficiency as there is nothing in the record, either in the form of testimony from Kicklighter or Defendant, about Kicklighter's knowledge of the case at the time the plea was entered. Additionally, Defendant's argument that there may have been a viable defense because the victim may not have been as financially impacted as represented to the district court is purely speculative. *See State v. Ortega*, 2014-NMSC-017, ¶¶ 57, 59, 327 P.3d 1076 (rejecting claims of ineffective assistance of counsel because the arguments were speculative). Similarly, Defendant's argument that Kicklighter failed to investigate the possibility of double jeopardy is speculative, as we have no testimony from either Kicklighter or Defendant about what was done in preparation of the plea. *See id.*

{35} As to Kicklighter's final two alleged deficiencies, i.e. that she failed to retain an expert in anticipation of the plea and improperly made immediate release a condition of the plea, Defendant cites to no evidence or authority that these decisions fell below an objective standard of reasonableness. Because we have a strong presumption that the conduct of counsel is within the wide range of reasonable professional assistance, *see Hunter*, 2006-NMSC-043, ¶ 13, and because Defendant provides no authority in support of his assertion that Kicklighter was deficient in her performance, we conclude that Defendant has not met his burden in proving the first part of the two-pronged *Strickland* standard. *See State v. Ponce*, 2004-NMCA-137, ¶ 36, 136 N.M. 614, 103 P.3d 54 (declining to address an assertion where the defendant provided no authority in support of that assertion); *see also Hunter*, 2006-NMSC-043, ¶ 12 (recognizing the *Strickland* two-prong standard).

{36} But even if this Court agreed that defense counsel exhibited some deficiencies during the pendency of Defendant's case, we nevertheless conclude that Defendant failed to prove that defense counsel's performance prejudiced the defense and failed to prove there is a reasonable probability that, but for counsel's ineffectiveness, the result of the proceeding would have been different, as required by *Strickland*, 466 U.S. at 687, *Hunter*, 2006-NMSC-043, ¶ 12, and *Dylan J.*, 2009-NMCA-027, ¶ 38.

{37} In considering the prejudice prong, we may consider the strength of the State's evidence, "reasoning that a defendant may be more likely to plead guilty if the evidence against him is strong." *Hunter*, 2006-NMSC-043, ¶ 26. "Also strongly persuasive of the voluntariness of the plea are the responses made by [the] defendant himself to the court's inquiries concerning his desires relative to the change of his plea[.]" *State v. Byrd*, 1968-NMSC-051, ¶ 14, 79 N.M. 13, 439 P.2d 230. Moreover, "[b]ecause courts are reluctant to rely solely on the self-serving statements of defendants, which are often made after they have been convicted and sentenced, a defendant is generally required to adduce additional evidence to prove that there is a reasonable probability that he or she would have gone to trial." *Hunter*, 2006-NMSC-043, ¶ 26 (internal quotation marks and citation omitted).

{38} We conclude that it is improbable that Defendant, who was facing a life sentence if convicted and against whom the State had a strong case, would have gone to trial given that Kicklighter was able to negotiate a plea agreement under which he could potentially serve no prison time. Defendant's assertion otherwise is merely a self-serving statement upon which we decline to rely. We conclude that Defendant's position as to prejudice is essentially that Nedbalek would take the case to trial if given the opportunity, and we further conclude that his position is wholly self-serving and does not actually prove prejudice. *State v. Hoxsie,* 1984-NMSC-027, ¶ 8, 101 N.M. 7, 677 P.2d 620 ("An assertion of prejudice is not a showing of prejudice."), *overruled on other grounds by Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, 108 N.M. 722, 779 P.2d 99. We also note that Defendant, during the plea colloquy, stated that (1) no one threatened him or promised him anything to accept the plea, (2) part of the reason for entering the plea was to have the remaining charges dismissed, and (3) he believed he understood the plea agreement and he understood his sentencing exposure under the agreement. Thus, Defendant's responses to the district court's colloquy supported his change of plea to guilty.

{39} Because Defendant failed to show in this direct appeal that Kicklighter's assistance regarding his plea was ineffective, we decline to reverse. There is a lack of evidence on the record to support Defendant's claim that Kicklighter was overwhelmed, at the time of his plea, and therefore did not effectively negotiate the plea or was otherwise deficient in her performance. Because many of Kicklighter's alleged failures are based on facts that are not of record, Defendant's ineffective assistance of counsel claim is likely more appropriately pursued, if at all, in habeas corpus proceedings. *See State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that "[t]his Court has expressed its preference for habeas corpus proceedings over remand when the record on appeal does not establish a prima facie case of ineffective assistance of counsel").

B. Coercion

{40} A plea is constitutionally void if "induced by threats (or promises to discontinue improper harassment) [or] misrepresentation (including unfulfilled or unfulfillable promises)[.]" *Brady v. United States*, 397 U.S. 742, 755 (1970) (internal quotation marks and citation omitted); *Byrd*, 1968-NMSC-051, ¶ 13 ("If a plea be induced by promises or threats, it is void[.]"). "[T]he agents of the [s]tate may not produce a plea by actual or threatened physical harm or by mental coercion over-

bearing the will of the defendant." *Brady*, 397 U.S. at 750. "The burden [is] on [the] defendant . . . to prove that his plea was coerced as he claims and that it was not voluntarily made." *Byrd*, 1968-NMSC-051, ¶ 16.

{41} Defendant argues that his plea was not voluntary because he was subject to the following coercive conditions: (1) the "unconstitutional bail" that "was set at the State's behest and pursuant to the district court's orders[,]" (2) the "unsanitary and hazardous conditions and substandard medical treatment at LCDC[,]" and (3) the "ongoing staffing issues and institutional ineffectiveness at the . . . [Office of the Public Defender]."

1. Bail and Pretrial Incarceration

{42} Article II, Section 13 of the New Mexico Constitution affords criminal defendants a right to bail, stating that "[a]ll persons shall, before conviction, be bailable by sufficient sureties" and that "[e]xcessive bail shall not be required[.]" *See State v. Brown*, 2014-NMSC-038, ¶ 19, 338 P.3d 1276.[2] Rule 5-401(A) NMRA similarly reflects a defendant's right to bail, stating that "[p]ending trial, any person bailable . . . shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, . . . unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required."

{43} Factors bearing upon the determination of what conditions of release are appropriate are set forth in Rule 5-401(C) and include:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
> (2) the weight of the evidence against the person;
> (3) the history and characteristics of the person, including:
> (a) the person's character and physical and mental condition;
> (b) the person's family ties;
> (c) the person's employment status, employment history and financial resources;
> (d) the person's past and present residences;
> (e) the length of residence in the community;
> (f) any facts tending to indicate that the person has strong ties to the community;
> (g) any facts indicating the possibility that the person will commit new crimes if released;
> (h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and
> (i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and
> (5) any other facts tending to indicate the person is likely to appear.

{44} Defendant argues that in setting bail in his case, the district court focused exclusively on the seriousness of the charges and the State's representations as to the strength of its case, but improperly ignored all other factors outlined in Rule 5-401(C). He asserts that the nature of the offenses in this case were not violent, he did not present a threat of violence to the community, and his history and characteristics supported releasing him on minimal or no bail. He also argues that the district court improperly "used bail as a security deposit to ensure that there was money to pay the victim's restitution if [Defendant] was found guilty[.]"

{45} The State responds to Defendant's argument by highlighting the arguments made to the district court during the January 10, 2014 hearing on the conditions of release. While agreeing that defense counsel had argued to the district court that Defendant presented no threat of violence, had lived in the State of New Mexico for an extended period of time, had been married with three children, had no prior charges, had not yet fled, and had complied with court orders and stayed in touch with his attorneys, the State also highlighted arguments made to the court that supported imposition of a bond. Specifically, the State highlighted representations that Defendant was believed to have fraudulently transferred $350,000, causing his victim a loss of approximately $250,000, posed a flight risk, possessed substantial resources, was uncooperative in pre-release interviews, and hid information relating to his finances. The State asserts that the court evaluated a number of factors both for and against setting a bond and concluded that a $250,000 cash-only bond would reasonably assure Defendant's appearance.

{46} We agree with the State that the district court heard argument from both sides and weighed the factors to correctly arrive at its determination that a bond was appropriate. The court evaluated Defendant's conditions of release on three separate occasions before Defendant changed his plea from not guilty to guilty. After hearing the State's arguments about the crimes with which Defendant was charged, the facts about his alleged scheme, the impact on the victim, the potential financial resources of Defendant and his extended family, and after receiving the Probation and Parole Department's recommendation in its pre-release report, the court decided to impose a bond. When initially imposing the bond, the court expressed concern that Defendant could flee given the amount of prison time faced. In ordering the bond, the court ordered that it be in an amount less than that requested by the State. When reconsidering the bond, the court indicated that the case appeared strong and that the bond as previously ordered would remain. Despite the fact that Defendant had ties to the community and had not engaged in a violent crime, given the weight of the evidence and the concern that Defendant might flee, we do not conclude that the district court erred in imposing a $250,000 cash-only bond under Rule 5-401(C).

{47} Because the district court did not err, we fail to see how the fact that Defendant was confined pre-trial, on its own, created a coercive condition that warrants withdrawal of Defendant's plea.

[2]We note that Article II, Section 13 of the New Mexico Constitution has been amended since Defendant pleaded guilty and was sentenced. See N.M. Const. art. II, § 13 (2016); 2016 S.J.R. 1 (adopted Nov. 8, 2016). The analysis in this opinion is conducted under the framework in place at the time Defendant's case was pending. We urge our trial courts and members of the bar to monitor changes in this area moving forward.

We address the conditions of Defendant's confinement in the following subsection.

2. Conditions at LCDC

{48} Defendant next argues that the hazardous conditions at LCDC similarly created a coercive condition that rendered his guilty plea involuntary. Defendant notes that the district court accepted Defendant's assertions regarding the unsanitary conditions at LCDC but did not consider the conditions relevant to Defendant's agreement to plead guilty as the court did not believe Defendant had told his attorney or the court about the situation at LCDC. Defendant argues that his attorneys and the court were informed of his health situation as evidenced by the fact that Bradley told the court that Defendant had medical issues that were not being addressed in jail during the conditions of release hearing on April 16, 2014. Defendant then argues that his decision to plead guilty was a choice between "continuing to suffer actual mental and physical harm or pleading guilty and living to fight another day." He argues that the conditions at LCDC "subjectively induced a plea" and "were constitutionally unacceptable governmental forces" that should void his plea. Finally, Defendant argues that incarceration itself has been found to give rise to psychological and cognitive impairments, and when coupled with the unique stress created by the deplorable conditions at LCDC, Defendant was unable to "fully assess and knowingly waive his rights."

{49} The State responds that Defendant's dissatisfaction with his confinement conditions does not render his voluntary plea involuntary. Although the State recognizes that the conditions at LCDC involve more than just dissatisfaction, it argues that nothing in the record supports a conclusion that Defendant's plea was anything other than voluntary. The State highlights the clear and comprehensive nature of the plea colloquy, the fact that Defendant confirmed nobody had threatened him or promised him anything in exchange for his plea, and the fact that Kicklighter similarly stated during the colloquy that she was not aware of any reason that the court should not accept Defendant's plea as a knowing, intelligent, and voluntary act. The State also asserts that Defendant made no mention of the conditions of his confinement at the change of plea hearing and did not alert the court to the conditions of his confinement until nine months later. The State argues that Defendant informed the court during the colloquy that he was motivated to plead guilty to 14 felony counts because, in exchange, the State had agreed to dismiss the remaining 197 counts, and the record supports that Defendant pleaded guilty as part of a bargained-for transaction.

{50} We agree that there is no evidence in the record that, at the time Defendant pleaded guilty, he was doing so to escape inhumane conditions in jail. As noted by the State, the district court went through the plea colloquy diligently, and Defendant indicated he understood the impact of his plea. The court stated that it would be asking Defendant a number of questions for the express purpose of making certain that he was knowingly, voluntarily, and intelligently pleading guilty. Defendant stated that nobody had threatened him or promised him anything in exchange for his plea. While Defendant's attorney had vaguely mentioned that Defendant had unaddressed health conditions in jail at a hearing on conditions of release earlier in the case, neither Defendant nor Defendant's attorney mentioned at the change of plea hearing that the conditions of his confinement were intolerable. Defendant stated at his change of plea hearing that he was motivated to plead guilty to 14 felony counts because, in exchange, the State had agreed to dismiss the remaining 197 counts. As explained by our Supreme Court, "strongly persuasive of the voluntariness of the plea are the responses made by [the] defendant himself to the court's inquiries concerning his desires relative to the change of his plea[.]" *Byrd*, 1968-NMSC-051, ¶ 14. In this case, we agree that the record supports that Defendant pleaded guilty as part of a bargained-for transaction, not because he was coerced into doing so.

3. Ineffective Assistance of Counsel

{51} Defendant argues that his ineffective assistance of counsel claim is relevant on its own to allow withdrawal of his plea, but also as a coercive condition that calls into question the voluntariness of his plea. Because, as outlined earlier, we see no evidence in the record of ineffective assistance of counsel at the institutional level or as to Kicklighter's performance that specifically impacted Defendant's plea, we similarly fail to see how Defendant's counsel's representation created a coercive condition. There is no evidence in the record of defense counsel's workload at the plea phase, of Defendant's knowledge of Kicklighter's workload and its effect on his case, or his knowledge of the institutional issues at the Office of the Public Defender such that we can conclude the institutional issues created a coercive condition. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)).

II. Continuances

{52} "The grant or denial of a continuance is within the sound discretion of the trial court, and the burden of establishing abuse of discretion rests with the defendant." *State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. There are no grounds for reversal unless the defendant demonstrates abuse of discretion that resulted in prejudice to the defendant. *See State v. Sanchez*, 1995-NMSC-053, ¶ 17, 120 N.M. 247, 901 P.2d 178.

> There are a number of factors that trial courts should consider in evaluating a motion for continuance, including the length of the requested delay, the likelihood that a delay would accomplish the movant's objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion.

State v. Torres, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

{53} Defendant argues that the district court abused its discretion when it refused to grant his requests for continuance of his restitution and sentencing hearings and proceeded to sentence him. Although Defendant admits that the court granted a number of continuances for his restitution and sentencing hearings, Defendant argues that the court became "increasingly prone to blaming [Defendant] for his attorneys' ineffectiveness[.]" He argues that an examination of the factors outlined in *Torres*, 1999-NMSC-010, ¶ 10, demonstrates that the request for continuance should have been granted.

{54} According to Defendant, he should have been granted continuances so that his new attorney had a reasonable amount of time to provide constitutionally adequate assistance. He notes that his sentencing exposure under the plea agreement was related to the pre-sentence restitution hearing, and he was inherently entitled to effective assistance in those matters. He also argues that the prior continuances were needed for "systemic reasons" beyond Defendant's

control and that there was no evidence that delaying the matter a few more months would have inconvenienced the State. According to Defendant, the district court's refusals to grant continuances were based on "improper bias" against Defendant as specifically evidenced by the court's position on the bond early in the case; blaming Defendant for his attorneys' ill-preparedness and "imposing fees for continuances"; and holding Defendant's "decision to hire private counsel against him for sentencing purposes." Defendant argues that the court's ruling prejudiced him because there was evidence that he wanted to present, but was unable to do so. He asserts that because of the court's rulings, he was denied effective assistance of counsel, was sentenced by a court that could not be fair and impartial, punished for exercising his rights, and denied due process.

{55} The State responds that Defendant's argument that the district court abused its discretion in refusing to continue his restitution hearing is without a factual basis, and to the extent Defendant argues that sentencing should have been continued, he failed to preserve that claim for appellate review. According to the State, the district court "granted each and every one" of Defendant's requests to continue the restitution hearing, and Defendant never asked to continue sentencing. Because Defendant did not request to continue sentencing, this Court should only review the decision for fundamental error. The State, citing *State v. Bowie*, 1990-NMCA-068, ¶¶ 2, 19, 110 N.M. 283, 795 P.2d 88, argues that the district court did not err when it sentenced Defendant in accordance with the terms of the plea agreement after he failed to honor his promise to make restitution pending sentencing.

{56} We note preliminarily that the purpose of restitution in this case was twofold: (1) to determine the amount that Defendant needed to pay prior to sentencing to benefit from a more favorable sentencing structure under the plea agreement, and (2) to determine how much ought to be paid once Defendant was on probation. Initially, the district court scheduled the restitution hearing for August 2014 and the sentencing hearing for January 2015, presumably so that an amount could be determined, Defendant would have some time to pay restitution, and then the court would know which sentencing structure to proceed with. However, the restitution hearing was continually pushed back—to December 2014, to early January 2015, to late January 2015, to April 2015, and finally to May 2015. By May 2015, the district court decided that it could wait to determine a restitution amount until Defendant was on probation, but that it should proceed with sentencing. Thus, the court focused on determining restitution for the purpose of probation, rather than determining restitution for the purpose of sentencing.

{57} In assessing the appropriateness of the district court's approach to the restitution and sentencing hearings, *Bowie* is instructive. In *Bowie*, the defendant appealed his sentence following a guilty plea. 1990-NMCA-068, ¶ 1. The defendant's plea and disposition agreement provided that sentencing be postponed for at least six months. *Id.* ¶ 17. After granting a number of continuances as to the sentencing hearing and after the defendant failed to make any restitution payments, the court imposed a sentence. *Id.* ¶¶ 17-19. This Court held that the defendant "was given an opportunity to explain what efforts he had made to acquire funds" and that he "was provided with an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* ¶ 19. The Court also noted that the defendant's argument that the district court could not have evaluated his efforts to make restitution because no conditions of restitution or any amount to be paid had been established was unconvincing, in part, because "in view of [the] defendant's failure to make *any* restitution, he was not prejudiced by the failure to specify conditions and the amount of restitution." *Id.* ¶ 20.

{58} Similar to the defendant in *Bowie*, Defendant was initially given approximately six months to attempt to pay restitution prior to sentencing. Also as in *Bowie*, Defendant's sentencing hearing was delayed but, despite the delay, no restitution payments were made. There was no effort by Defendant to make any restitution payments, even though the district court indicated that a $50,000 payment would be a showing of good faith. As asserted by the State during the May 2015 hearing, the purpose of the pre-sentencing restitution was so that Defendant could have a lower ceiling and no floor as to his incarceration, on the condition that he pay restitution. In this case, there was no indication that Defendant made any payments whatsoever. Therefore, as in *Bowie*, we conclude here that because Defendant failed to make any restitution, he was not prejudiced by the failure to specify the amount of restitution owed prior to sentencing.

{59} The district court's decision to proceed with sentencing aside, we agree with the State that under the facts of this case, the court did not fail to grant any continuance on the matter of restitution. The district court merely proceeded to sentencing and decided to continue the restitution hearing until Defendant was on probation. Additionally, Defendant did not request a continuance on the sentencing hearing and that issue was therefore not preserved. *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 ("In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." (internal quotation marks and citation omitted)). We need not consider the matter. *State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 ("We generally do not consider issues on appeal that are not preserved below." (internal quotation marks and citation omitted)).

{60} Even if we acquiesce to Defendant's request that this Court review the matter for fundamental error, we still conclude that there is no basis on which to reverse. *See* Rule 12-216(B)(2)(c), (d) NMRA (2004) (recompiled as Rule 12-321(B)(2)(c), (d) NMRA) (providing appellate court discretion as an exception to the preservation rule to review questions involving fundamental error or fundamental rights); *State v. Sosa*, 1997-NMSC-032, ¶ 23, 123 N.M. 564, 943 P.2d 1017 (stating that an unpreserved claim may be reviewed for fundamental error). "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. Fundamental error "must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *Id.* (internal quotation marks and citation omitted); *State v. Garcia*, 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459. Defendant has failed to demonstrate such exceptional circumstances.

CONCLUSION

{61} For the reasons set forth in this opinion, we affirm.

{62} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

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

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Atkinson, Baker & Rodriguez, P.C. seeks attorney with strong academic credentials and 3-8 years civil litigation experience for successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Baker & Rodriguez, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

13th Judicial District Attorney
Assistant Trial Attorney,
Associate Trial Attorney
Sandoval and Valencia Counties
Associate Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry level positions for Sandoval (Bernalillo), Cibola (Grants) and Valencia (Belen) County Offices. These positions require misdemeanor and/or juvenile cases for the associate's and felony cases for assistant's. Upon request, be prepared to provide a summary of cases tried. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: RAragon@da.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

Family Law Associate Attorney
The Law Office of Jill V. Johnson Vigil LLC., a Las Cruces based family law practice, is seeking to add an attorney to our team. Preferably applicants should have 2-3 years experience in family law. All applicants should be highly motivated, able to multi-task and manage a large case load. The Law Office of Jill V. Johnson Vigil LLC. offers a comfortable and friendly work environment with benefits and competitive salary commensurate with your qualifications and experience. Applicants must be in good standing with NM Bar and willing to relocate to Las Cruces. Spanish speaking is preferred, but not required. If you are ready for the next step in your career, please send your cover letter, resume, writing sample, and three references via email to careers@jvjvlaw.com before August 31, 2017. Please visit us online at www.jvjvlaw.com.

Assistant City Attorney
The City of Alamogordo is recruiting for an Assistant City Attorney to prosecute violations of City ordinances in municipal court and provide legal advice and research for the Mayor, City Manager, City Commission, and other City departments as directed by the City Attorney. Please see the City website at ci.alamogordo.nm.us for the full job description, position requirements and to submit an application or call 575-439-4399 for more information. Recruitment is open until filled. First review of applicants will be August 21, 2017. Salary $58,212. – $75,000. DOQ.

Civil Litigation Attorney
Butt Thornton & Baehr PC seeks an attorney with at least 3 years' experience in civil litigation. Our growing firm is in its 58th year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest and resume to Agnes Fuentevilla Padilla, afpadilla@btblaw.com

Attorney
The Pantex Plant in Amarillo, TX is looking for an Attorney with well-developed counseling, investigative, and negotiation skills who has at least five years of experience representing employers in private practice or in a corporate law department as labor and employment counsel. Candidates must possess strong interpersonal, writing, and verbal skills, the ability to manage simultaneous projects under deadline, and flexibility to learn new areas of law. Candidates must be licensed to practice law in at least one state and must be admitted, or able to be admitted, to the Texas bar. For more information on the position please visit www.pantex.com, Careers, Current Opportunities and reference Req #17-0227. Pantex is an equal opportunity employer.

Associate Attorney
Ray McChristian & Jeans, P.C., an insurance defense firm, is seeking a hard-working associate attorney with 2-5 years of experience in medical malpractice, insurance defense, insurance law, and/or civil litigation. Excellent writing and communication skills required. Competitive salary, benefits, and a positive working environment provided. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

Associate Attorney
Well established plaintiff's personal injury law firm in Los Lunas seeks associate attorney with 2-6 years of experience, preferably in personal injury and/or medical malpractice. Will consider new attorney if candidate has previous relevant experience. Competitive salary commensurate with experience. All responses kept strictly confidential. Please send your cover letter, resume and references to Office Manager, PO Box 2416, Los Lunas, NM 87031.

Appointment Of Chapter 13 Standing Trustee

The United States Trustee seeks resumes from persons wishing to be considered for appointment as a standing trustee to administer cases filed under chapter 13 of the bankruptcy code. The appointment, located in Albuquerque, New Mexico, is for cases filed in the United States Bankruptcy Court for the District of New Mexico. Standing trustees receive compensation pursuant to 28 U.S.C. § 586(e)(1)(A). Standing trustees are not federal government employees. For additional information, qualification requirements, and application procedures go to http://www.justice.gov/ust/eo/private_trustee/vacancies/13ad.htm

Board of Directors Position

The Isleta Tribal Council is soliciting letters of interest from individuals qualified to serve on the Isleta Business Corporation's Board of Directors. The Isleta Business Corporation was established to seek and promote business opportunities to benefit the Pueblo of Isleta. At least 10+ years in leadership roles in business management, finance, legal, personnel management, sales and/or marketing required. An MBA, JD or previous Board experience preferred. TO APPLY: Send a letter of interest and resume to Isleta Tribal Council Administration Office, P. O. Box 1270, Isleta, NM 87022.

Legal Assistant for Hire

PI, Ins. Def., CV Litigation, WC, Transcription, Odyssey-CM/ECF, Prepare/Answer Discovery, Med. Rec. Reqts, Notary. MS Office, Calendar, Hard-Working, Attn to detail, Strong work ethic. Please email me for resume, salary requirements at 'legalassistantforhire@gmail.com.'

Legal Secretary – Albuquerque, NM

Lewis Roca Rothgerber Christie LLP is searching for a Legal Secretary to support the Regulatory and Government group and will provide administrative support to attorneys and paralegals practicing in the areas of water rights applications, permits, adjudications, filings and/or hearings before the office of the State Engineer; and filings and/or hearings before the New Mexico Public Regulation Commission in electric, telecommunication and/or water utility cases. The ideal candidate will have 3+ years of Legal Secretary experience either in regulatory-government agency or business, and have experience with filing documents under seal, coordinating with in-house corporate counsel, and processing electronic and non-electronic court filings. If interested please email your resume to staffrecruiting@lrrc.com. Equal Opportunity Employer

Paralegal

Kemp Smith LLP has an immediate opening for a paralegal in their Las Cruces office. Visit www.kempsmith.com to view the job description and to apply. EEOE

Electronic Billing Position

Law firm seeks person experienced in electronic billing. Experience with TABS3 software is preferred. The ideal candidate must be a team player with a positive attitude, exhibit strong communication skills and be extremely detail-oriented. Schedule is Monday thru Friday, 8 am to 5 pm. Starting salary DOE. Benefits include paid parking, health, life, disability and dental insurance, matching 401(K), paid holidays, generous vacation. Please submit your resume and references to POB 92860, ABQ, NM 87199 Attn: Box B.

Services

Nurse Paralegal

Specialist in medical chronologies, related case analysis/research. Accurate, knowledgeable work product. For resume, work samples, references: maryj.daniels68@gmail.com

Miscellaneous

Furnished Law Office

Attorney retiring. Fully equipped law office – desks, chairs, conference room furniture color copier, laser printer, phone system, library (including New Mexico Reports – volumes 1 – 147), bookshelves, lateral filing cabinets, and misc. supplies and equipment. Located ½ block from Santa Fe Courthouse – rental of an excellent office, with parking, may also be available. Ready to walk in and start working. If interested call (505) 988-1797

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Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

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