

# BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

September 20, 2017 • Volume 56, No. 38



*Free Rider*, by Mark Yale Harris (see page 3)

Greenberg Fine Art, Santa Fe

## Inside This Issue

Lawyers Professional and Liability and Insurance Committee Tips: Coverage for Pre-claim Subpoenas and Depositions ..... 8

First Annual Golf Classic Tournament Benefitting the New Mexico State Bar Foundation..... 9

Board of Bar Commissioners Election Notice ..... 11

Clerk's Certificates ..... 13

### Rules/Orders

No. 17-8300-010, In the Matter of the Amendment of Rule 18-203 NMRA of the Rules for Minimum Continuing Legal Education ..... 17

### From the New Mexico Court of Appeals

2017-NMCA-054, 34,914: Oakey v. May Maple Pharmacy, Inc. .... 18

2017-NMCA-055, 34,610/35,853: Tomlinson v. Weatherford..... 27

2017-NMCA-056, 34,506: State v. Lewis...31

# CLE Planner

Don't miss these upcoming CLEs!

Sept. 22



## 2017 Tax Symposium

8.0 recommended  
CPE credits  
(7.0 Technical, 1.0 Ethics)

6.0 G

1.0 EP



Friday, Sept. 22, 2017 • 8:25 a.m.–4:30 p.m.  
State Bar Center, Albuquerque

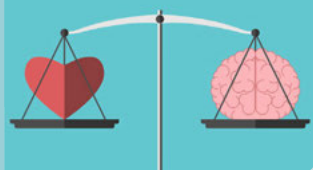
\$99 Non-member not seeking CLE credit (CPAs and bankers are encouraged to attend!)  
\$279 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members  
\$309 Standard and Webcast Fee

**Co-sponsor:** Taxation Section and Business Law Section

Morning sessions will cover federal and state tax updates. The afternoon sessions will focus on business and tax law special topics. An ABC (attorneys, bankers and CPAs) Networking Event/Reception will begin at 4:30 p.m., hosted by the Taxation Section and the New Mexico Society of CPAs.

*Can't attend the full day? Registration options for the morning or afternoon only are available. Call the Center for Legal Education at 505-797-6020 to register.*

Oct. 2



## Uncovering and Navigating Blind Spots Before They Become Land Mines

2.0 EP



Monday, Oct. 2, 2017 – 9–11 a.m.  
State Bar Center, Albuquerque

\$99 Non-member not seeking CLE credit  
\$89 Government and legal services attorneys and Paralegal Division members  
\$109 Standard Fee  
\$125 Webcast Fee

Neuroscience and behavioral science health research has shown that being aware of one's emotional state and expanding our emotional intelligence yields multiple benefits for professional and personal lives. Legal professionals may experience ambiguity, stress, abrasiveness, unreasonableness, ethical dilemmas and other unsettling situations. This interactive course offers tools to help attendees recognize their blind spots and modify "reactions" to challenging situations so they can maintain professionalism, competence and discretion and remain centered.

Oct. 4



## Bankruptcy Law: The New Chapter 13 Plan

3.1 G



Wednesday, Oct. 4, 2017 • 8:30 a.m. – noon  
State Bar Center, Albuquerque

99 Non-member not seeking CLE credit  
\$129 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members  
\$159 Standard Fee and Webcast Fee

**Co-sponsor:** Bankruptcy Law Section

This program includes a review of the features of the new mandatory Chapter 13 plan for New Mexico Bankruptcy Law practitioners.

*A \$20 late fee will be assessed for walk-in registrations (applies to live attendance only).  
Registration and payment must be received in advance to avoid the fee.*



Register online at [www.nmbar.org/CLE](http://www.nmbar.org/CLE)  
or call 505-797-6020.



#### Officers, Board of Bar Commissioners

Scotty A. Holloman, President  
Wesley O. Pool, President-elect  
Gerald G. Dixon, Secretary Treasurer  
J. Brent Moore, Immediate Past President

#### Board of Editors

Bruce L. Herr, Chair	Taylor V. Bui
Gabrielle L. Dorian	Curtis G. Hayes
Anne E. Minard	Andrew Sefzik
Michael Sievers	Mark Standridge
Nancy L. Vincent	Carolyn A. Wolf

#### State Bar Staff

Interim Executive Director Richard Spinello  
Communications and Member Services  
Program Manager Evann Kleinschmidt  
505-797-6087 • notices@nmbar.org  
Graphic Designer Julie Schwartz  
jschwartz@nmbar.org  
Account Executive Marcia C. Ulibarri  
505-797-6058 • mulibarri@nmbar.org  
Digital Print Center  
Manager Brian Sanchez  
Assistant Michael Rizzo

©2017, State Bar of New Mexico. No part of this publication may be reprinted or otherwise reproduced without the publisher's written permission. The *Bar Bulletin* has the authority to edit letters and materials submitted for publication. Publishing and editorial decisions are based on the quality of writing, the timeliness of the article, and the potential interest to readers. Appearance of an article, editorial, feature, column, advertisement or photograph in the *Bar Bulletin* does not constitute an endorsement by the *Bar Bulletin* or the State Bar of New Mexico. The views expressed are those of the authors, who are solely responsible for the accuracy of their citations and quotations. State Bar members receive the *Bar Bulletin* as part of their annual dues. The *Bar Bulletin* is available at the subscription rate of \$125 per year and is available online at [www.nmbar.org](http://www.nmbar.org).

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

505-797-6000 • 800-876-6227 • Fax: 505-828-3765  
address@nmbar.org • [www.nmbar.org](http://www.nmbar.org)

September 20, 2017, Vol. 56, No. 38

## Table of Contents

Notices .....	4
Continuing Legal Education Calendar .....	6
Lawyers Professional and Liability and Insurance Committee Tips:	
Coverage for Pre-claim Subpoenas and Depositions .....	8
First Annual Golf Classic Tournament .....	9
2017 Board of Bar Commissioners Election Notice .....	11
Court of Appeals Opinions List .....	12
Clerk's Certificates .....	13
Recent Rule-Making Activity .....	15
Rules/Orders	
No. 17-8300-010, In the Matter of the Amendment of Rule 18-203 NMRA of the Rules for Minimum Continuing Legal Education .....	17
Opinions	
<b>From the New Mexico Court of Appeals</b>	
2017-NMCA-054, 34,914: Oakey v. May Maple Pharmacy, Inc. ....	18
2017-NMCA-055, 34,610/35,853: Tomlinson v. Weatherford .....	27
2017-NMCA-056, 34,506: State v. Lewis .....	31
Advertising .....	35

## Meetings

### September

- 22**  
**Immigration Law Section Board**  
Noon, New Mexico Immigrant Law Center
- 26**  
**Intellectual Property Law Section Board**  
Noon, Lewis Roca Rothgerber Christie, Albuquerque
- 27**  
**Natural Resources, Energy and Environmental Lawyers Section Board**  
Noon, teleconference
- 28**  
**Trial Practice Section Board**  
Noon, State Bar Center

### October

- 3**  
**Bankruptcy Law Section Board**  
Noon, U.S. Bankruptcy Court, Albuquerque
- 3**  
**Health Law Section Board**  
9 a.m., teleconference
- 4**  
**Employment and Labor Law Section**  
Noon, State Bar Center

## Workshops and Legal Clinics

### September

- 20**  
**Common Legal Issues for Senior Citizens Workshop**  
10–11:15 a.m., Bonnie Dallas Senior Center, Farmington, 1-800-876-6657
- 20**  
**Family Law Clinic**  
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 27**  
**Consumer Debt/Bankruptcy Workshop**  
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

### October

- 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

**About Cover Image and Artist:** Born in Buffalo, New York, Mark Yale Harris spent his childhood enthralled in a world of drawing and painting. Though honored for his creative endeavors, he was encouraged to pursue a more conventional career. After finding conventional success, the artistic passion that existed just beneath the surface was able to present itself. Harris began sculpting, and has since created an evolving body of work in stone and bronze, now featured in public collections, museums and galleries worldwide including Booth Western Art Museum, Cartersville, Ga.; the Four Seasons Hotel, Chicago; and the Open Air Museum, Ube, Japan.

# Notices

## COURT NEWS

### New Mexico Supreme Court ADR Commission Meeting Notice

The next meeting of the Statewide ADR Commission is 10 a.m.–12:30 p.m., Sept. 22, at the Bernalillo County Metropolitan Court (Room 849) in Albuquerque. The Commission will decide on recommendations to the New Mexico Supreme Court for the implementation of HB131, regarding a sliding fee scale for use in district court dispute resolution services for civil cases. All interested parties are welcome to attend. More information about the Commission is available at [www.nmcourts.gov](http://www.nmcourts.gov) > Court Services/Programs > ADR > NM ADR Commission.

### Board of Legal Specialization Comments Solicited

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

#### *Family Law*

Jennifer deGraauw  
Elizabeth Hartwell

#### *Trial Specialist—Criminal Law*

Chandler Blair

#### *Employment and Labor Law*

Barbara G. Stephenson

#### *Natural Resources—Water Law*

John W. Utton

### First Judicial District Court New Fax Number for Chief Judge Mary Marlowe Sommer

Effective Sept. 5, Chief Judge Mary Marlowe Sommer has a new fax number. The Division VIII fax number is 505-455-8169.

### Second Judicial District Court Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District

## Professionalism Tip

**With respect to the public and to other persons involved in the legal system:**

I will keep current in my practice areas, and, when necessary, will associate with or refer my client to other more knowledgeable or experienced counsel.

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 defendant(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 Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, 1.21.2.617, the Seventh Judicial District Court, Catron County, Socorro County, Sierra County, and Torrance County will destroy exhibits filed with the Court; all unmarked exhibits, oversized poster boards/maps, diagrams and miscellaneous items; the Domestic (DM/DV) cases for the years of 1987 to the end of 2015; the Civil (CV/PB) cases for the years of 1997 to the end of 2015; the Sequestered exhibits (SQ/PQ/JQ/SI/SA) cases for the years of 1992 to the end of 2015; including but not limited to cases which have been consolidated. Counsel for parties are advised that exhibits may be retrieved through Sept. 22. For more information or to claim exhibits, contact Jason Jones, court executive officer, at 575-835-0050. 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.

### Twelfth Judicial District Court Notice of Reassignment of Cases

A mass reassignment of all cases previously assigned to the Hon. Jerry H. Ritter,

Twelfth Judicial District Judge, Division I, were automatically reassigned to the Hon. Steven Blankinship effective Sept. 11. Pursuant to Rules 1-088.1 and 5-106, NMRA, any party who wants to exercise their right to excuse Judge Blankinship must do so by Oct. 25.

### Judicial Appointment

On Sept. 1, Gov. Susana Martinez announced the appointment of Steven Blankinship to Division I of the Twelfth Judicial District Court.

## STATE BAR NEWS

### Attorney Support Groups

- Oct. 2, 5:30 p.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Oct. 9, 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. 16, 7:30 a.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)

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

### Committee on Women and the Legal Profession

#### *Balancing the Scales* Documentary Screening

The Committee on Women and the Legal Profession and the Women's Law Caucus invite all members to lunch over a special viewing of *Balancing the Scales*. The documentary delves into the challenges women lawyers have faced historically and still face today, including the additional hurdles faced by women lawyers of color, and illustrates how U.S. culture has accepted less than full equality for women and how few women lawyers have really broken the glass ceiling. Ex-



plore how the intersectionality of gender and race creates additional challenges, and what we as a society can do about it at noon, Sept. 27, at the UNM School of Law. R.S.V.P. with Co-chair Quiana Salazar-King at [salazar-king@law.unm.edu](mailto:salazar-king@law.unm.edu). View the trailer by visiting <https://vimeo.com/80957214>. The CWLP and WLC wish to give a special thank you to New Mexico PBS for supplying a copy of the film and permitting this special showing.

### Entrepreneurs in Community Lawyering Fall Incubator Boot Camp Open to Solo Practitioners

The Entrepreneurs in Community Lawyering program, the State Bar's new legal incubator program, will host its third Boot Camp Oct. 17-20 at the State Bar Center. The Boot Camp is a condensed and intense introduction to the basics of setting up and managing a solo law practice. It also offers a learning opportunity for new lawyers not in ECL who are starting or considering starting a solo practice. The Boot Camp covers a wide range of business topics and practice management issues. The State Bar invites up to 10 members to join ECL's participating attorneys for the October 2017 Boot Camp, on a first-come, first-served basis. CLE credit is not offered but materials will be provided to each participant. A \$150 fee will be charged for lawyers participating in the Bootcamp who are not admitted to ECL. View the curriculum at [www.nmbar.org/ECL](http://www.nmbar.org/ECL). For more information or to enroll contact Stormy Ralstin at 505-797-6053 or Ruth Pregenzer at 505-797-6077.

### Intellectual Property Law Section

#### The U.S. Trademark Office Comes to Albuquerque

Join the Intellectual Property Law Section from 8:45 a.m. to 4:45 p.m., Oct. 18, at the Hyatt Regency Hotel in Albuquerque for "The U.S. Trademark Office Comes to Albuquerque" CLE. Lawyers and entrepreneurs alike will find this to be a highly unique opportunity. Attendees will meet and hear from patent examiners, patent trial and appeal board judges, and trademark examiners from the USPTO. Topics will include the patent examination and trademark registration

processes, the administrative trial and appeal process, litigating infringement cases in federal court, and the value intellectual property protection can bring to a startup. Over lunch, the USPTO will present an update on their Dallas regional office and what resources are available to local start-ups and entrepreneurs. The day will end with a panel discussion by local businesses engaged in innovation and economic development followed by a reception. The cost is \$130 for attorneys (5.0 G), \$25 for non-attorneys and free to law students. Register online at [www.nmbar.org/cle](http://www.nmbar.org/cle) or call 505-797-6020. Space is limited.

### Paralegal Division Half-Day Mixed Bag CLE—Open to Paralegals and Attorneys

The Paralegal Division presents a "Half-Day Mixed Bag" CLE program (3.0 G), from 9 a.m.–noon, Sept. 23, at the State Bar Center. The CLE is open to paralegals and attorneys. The cost is \$35 for Paralegal Division members, \$50 for non-member paralegals and \$55 for attorneys. Topics include Pre-Adjudication Animal Welfare (P.A.W.) Court, third party sexual harassment and the attorney/paralegal relationship. Contact Christina Babcock at [cbabcock1@cnm.edu](mailto:cbabcock1@cnm.edu).

### UNM Law Library Hours Through Dec. 16

#### Building & Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

#### Reference

Monday–Friday	9 a.m.–6 p.m.
---------------	---------------

#### Holiday Closures

Nov. 24–25 (Thanksgiving)

### New Mexico Law Review Symposium: A Look at Aid in Dying

The *New Mexico Law Review* presents "Establishing New Rights A Look at Aid in Dying" (5.5G) from 9 a.m.–4 p.m., Sept. 23, at the UNM School of Law. This Symposium will explore aid in dying from medical and legal perspectives, the background of New Mexico's rulings on aid in dying, and how other states have tried or succeeded in legalizing aid in dying. It will also focus on the



**New Mexico Lawyers  
and Judges  
Assistance Program**

Help and support are only a phone call away.

**24-Hour Helpline**  
Attorneys/Law Students  
505-228-1948 • 800-860-4914  
Judges 888-502-1289  
[www.nmbar.org/JLAP](http://www.nmbar.org/JLAP)

issue of using state supreme courts and constitutions to create rights that do not currently exist on a national level. Erwin Chemerinsky, Dean of the University of California Berkeley School of Law, will present the keynote address on the history of state constitutions in providing civil rights. New Mexico Supreme Court Justice Charles W. Daniels will present on the New Mexico Supreme Court's history of interpreting its constitution to establish civil liberties. Panels comprised of New Mexico judges and legal experts will discuss the topics of Aid in Dying and the role of state judiciaries. Early registration is strongly encouraged. Visit <http://lawschool.unm.edu/events/aid/registration.html>.

### Utton Center The Fate of Environmental Law during the Trump Administration

Professor David Uhlmann of the University of Michigan Law School will present "The Fate of Environmental Law during the Trump Administration" (1.25 G) from 5:15-6:30 p.m. on Sept. 20 at the UNM School of Law, room 2402. President Trump is vowing to undo many of the environmental regulations implemented during the past administration and has announced his intent to withdraw from the Paris Accord. For more than 25 years the U.S. has retreated from the bipartisan support that created the modern environmental law system and allowed the fate of the environment to become yet another topic of partisan discord. These challenges call for a broad-based, bipartisan social movement to protect the environment that sustains all life on Earth. There is no registration fee and parking is free at the law school. For more

*continued on page 8*

# Legal Education

## September

- |  |  |   |
|--|--|---|
| <p>20 <b>Concealed Weapons and Self-Defense</b><br/>1.0 G<br/>Live Seminar, Albuquerque<br/>Davis Miles McGuire Gardner<br/>www.davismiles.com</p>   | <p>22 <b>2017 Tax Symposium</b><br/>6.0 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>         | <p>29 <b>PLSI 50th Anniversary CLE: Evolution of Indian Laws and Indian Lawyers</b><br/>4.5 G, 2.0 EP<br/>Live Seminar, Isleta<br/>American Indian Law Center<br/>www.ailec-inc.org</p> |
| <p>20 <b>The Fate of Environmental Law During the Trump Administration with Prof. David Uhlmann</b><br/>1.25 G<br/>Live Seminar, Albuquerque<br/>UNM Natural Resources and Environmental Law Program and Utton Center<br/>505-277-3253</p> | <p>23 <b>How Jurors View Mistakes and Conflicts</b><br/>1.5 EP<br/>Live Seminar, Santa Fe<br/>Attorneys Liability Assurance Society<br/>www.alas.com</p>               | <p>29 <b>Professional Liability Insurance: What You Need to Know (2015)</b><br/>3.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>       |
| <p>21 <b>Controversial Issues Facing the Legal Profession (2016)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p>23 <b>Half-Day Mixed Bag CLE</b><br/>3.0 G<br/>Live Seminar, Albuquerque<br/>State Bar of New Mexico Paralegal Division<br/>505-203-9057</p>                        | <p>29 <b>Deposition Practice in Federal Cases (2016)</b><br/>2.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                   |
| <p>21 <b>Legal Technology Academy for New Mexico Lawyers (2016)</b><br/>4.0 G, 2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p>28 <b>32nd Annual Bankruptcy Year in Review (2017)</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p>29 <b>Ethically Managing Your Law Practice (2016 Ethicspalooza)</b><br/>1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            |
| <p>21 <b>Guardianship in New Mexico/The Kinship Guardianship Act (2016)</b><br/>5.5 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p>28 <b>Transgender Law and Advocacy (2016)</b><br/>4.0 G, 2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>          | <p>29 <b>Mental Disabilities and Competency</b><br/>3.5 G, 1.0 EP<br/>Live Seminar, Las Vegas, N.M.<br/>New Mexico Criminal Defense Lawyers Association<br/>www.nmcdla.org</p>          |
| <p>21 <b>Structured Settlements in Claims Negotiations</b><br/>1.0 G<br/>Live Seminar, Albuquerque<br/>National Structured Settlements Trade Association<br/>202-289-4004</p>  | <p>28 <b>Ethics for Government Attorneys (2017)</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>              |   |

## October

- |  |  |   |
|--|--|---|
| <p>2 <b>Uncovering and Navigating Blind Spots Before They Become Land Mines</b><br/>2.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p>4 <b>Bankruptcy Law: The New Chapter 13 Plan</b><br/>3.1 G<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p>4 <b>Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
|--|--|---|

## October

4	<b>2016 Administrative Law Institute</b> 4.0 G, 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	12	<b>Human Trafficking (2016)</b> 3.0 G Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Ethics and Client Money: Trust Funds, Setoffs and Retainers</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
4	<b>Deposition Practice in Federal Cases (2016)</b> 2.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	12	<b>Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)</b> 1.5 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Annual Criminal Law Seminar</b> 10.0 G, 2.0 EP Live Seminar, Ruidoso El Paso Criminal Law Group, Inc. 915-534-6005
5	<b>2017 Health Law Symposium</b> 6.0 G, 1.0 EP Live Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	13-14	<b>Heartburn Issues: How Not To Commit Malpractice in Military Divorce Relocation Cases</b> Total Possible CLE Credits: 10.0 G, 1.0 EP (plus an optional 1.0 EP) Live Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	24	<b>Network of State and Federal Counsel Conference</b> 7.7 G, 2.0 EP Live Seminar, Santa Fe Davis and Henderson 800-274-7280 x2816
6	<b>2017 Employment and Labor Law Insititute</b> 5.0 G, 1.0 EP Live Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	18	<b>U.S. Patent and Trademark Office Comes to Albuquerque</b> 5.0 G Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	26	<b>2016 Trial Know-How! (The Reboot)</b> 4.0 G, 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
6	<b>Ethics, Disqualification and Sanctions in Litigation</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	19	<b>Complying with the Disciplinary Board Rule 17-204</b> 1.0 EP Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	26	<b>2016 Real Property Institute</b> 4.5 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
9	<b>Basic Practical Regulatory Training for the Electric Industry</b> 27.0 G Live Seminar, Albuquerque Center for Public Utilities NMSU <a href="http://business.nmsu.edu">business.nmsu.edu</a>	19	<b>Complying with the Disciplinary Board Rule 17-204</b> 1.0 EP Live Seminar, Taos Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	26	<b>Lessons Learned from the "Trial of The Century" (2017 Annual meeting)</b> 1.0 G Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
10	<b>Estate Planning for Second Marriages</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	19	<b>New Mexico DWI Cases: From the Initial Stop to Sentencing (2016)</b> 2.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	27	<b>Craig Othmer Memorial Procurement Code Institute</b> 2.5 G, 1.0 EP Live Seminar, Santa Fe Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
12	<b>Complying with the Disciplinary Board Rule 17-204</b> 1.0 EP Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Death of Expertise: Skeptical Views of Scientific Evidence</b> 3.5 G, 2.5 EP Live Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	27	<b>Hot Topics in Adult Guardianship Law</b> 4.5 G, 1.5 EP Live Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>

*continued from page 5*

information, call Laura at 505-277-3253. This program is held in cooperation with the State Bar Natural Resources, Energy and Environmental Section.

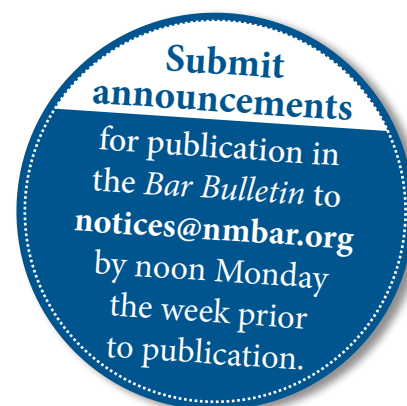
## OTHER BARS

### New Mexico Criminal Defense Lawyers Association

#### Mental Disabilities/Competency CLE

Interested in knowing more about what happens to your client when com-

petency is raised, and what happens at N.M. BHI? Want to get the latest update on linaires and working with experts when your client's mental health is a concern? You won't want to miss the New Mexico Criminal Defense Lawyers Association's "Mental Disabilities and Competency CLE" (5.3 G, 1.0 EP) on Sept. 29 in Las Vegas, N.M. Before the CLE, attendees will get a brief intake tour of the BHI facility. Visit nmcdla.org to join NMCDLA and register for this seminar today.



*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.*

### Policy Provides Coverage for Pre-claim Subpoenas and Depositions

It's not unusual for a lawyer to be subpoenaed for his or her deposition in a lawsuit in which the lawyer, the law firm, or the company employing the lawyer isn't a party. Lawyers also can receive subpoenas for documents in cases where the lawyer isn't a defendant. Sometimes these subpoenas are part of a genuine fact-finding mission and others they foreshadow a nascent malpractice claim. Whatever the motivation prompting the subpoena, the lawyer who is a third-party witness is faced with a host of confidentiality, privilege, and other issues that should prompt the lawyer's deliberate actions in response.

Consider contacting your carrier as one of those actions for a couple of very practical reasons.

- First, depending on the circumstances and the content of the subpoena, the receipt of a subpoena may clue you in to a

potential claim against you. Most, if not all, policies obligate you to immediately give your carrier written notice if you become aware of facts that could reasonably be expected to be the basis of a claim against you. They also require the same disclosure when the policy is renewed. If a subpoena puts you on notice of a possible claim, you need to notify your carrier. Plus, by asking your carrier for assistance in responding to a subpoena, you may also trigger coverage for a potential claim under your existing policy.

- Second, and irrespective of whether you believe a claim against you may be forthcoming, many legal malpractice policies include some type of subpoena assistance coverage that is available to the lawyer for even if the lawyer

is not a named defendant in the lawsuit. The details of this type of coverage vary, but they all require that the subpoena be related to the lawyer's provision of legal services. Some provide that the carrier will engage the lawyer for you and pay him/her directly without any deductible and in addition to the other policy limits. Others provide capped coverage of, say, \$2,500 or \$5,000 that will reimburse you for attorneys' fees and other expenses incurred in responding to the subpoena.

If your policy doesn't include subpoena assistance, check with your carrier to see if they offer it. Having a lawyer help negotiate the complex issues that can arise when you receive a subpoena relating to your work for a current or former client can be invaluable. Check your policy for this added perk.





## *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.*



For more information, contact Stephanie at  
505-797-6007 • [swagner@nmbar.org](mailto:swagner@nmbar.org)

- ▼ 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*

For registration and more details, visit [www.nmbar.org/NmbarDocs/forMembers/GolfClassicSignUp.pdf](http://www.nmbar.org/NmbarDocs/forMembers/GolfClassicSignUp.pdf).

# CELEBRATE

## PRO BONO

[www.celebrateprobono.org](http://www.celebrateprobono.org)

**OCTOBER 2017:** The American Bar Association has dedicated an entire week in October to the “**National Celebration of Pro Bono.**” In New Mexico, the local Judicial District Court Pro Bono Committees have extended this celebration to span the entire month of October (and parts of September and November). The committees are hosting a number of pro bono events across the state, including free legal fairs, clinics, recognition luncheons, Continuing Legal Education classes and more! To learn more about any of the events below, or to get involved with your local pro bono committee, **please contact Aja Brooks at [ajab@nmlegalaid.org](mailto:ajab@nmlegalaid.org) or 505-814-5033.** Thank you for your support of pro bono in New Mexico!

### 1st JUDICIAL DISTRICT:

#### Free Legal Fair

Oct. 21, 2017 from 10 am–1 pm  
Mary Esther Gonzales Senior Center  
(1121 Alto St., Santa Fe, NM 87501)

#### Pro Bono Appreciation Luncheon and CLE

Oct. 23, 2017 from 11 am–1:30 pm  
Hilton of Santa Fe  
(100 Sandoval St., Santa Fe, NM 87501)  
CLE and luncheon details TBA

### 2nd JUDICIAL DISTRICT:

#### Law-La-Palooza Free Legal Fair

Oct. 19, 2017 from 3–6 pm  
Westside Community Center  
(1250 Isleta Blvd SW, Albuquerque, NM 87105)

### 4th JUDICIAL DISTRICT:

#### Free Legal Fair and Pro Bono Appreciation Luncheon

Oct. 10, 2017 from 9 am–2 pm  
New Mexico Highlands University  
(Student Union Building, 800 National Ave. Las Vegas, NM 87701)

### 5th JUDICIAL DISTRICT (CHAVES):

#### Free Legal Fair and Pro Bono Appreciation Luncheon

Oct. 6, 2017 from 12 noon–5 pm  
Roswell Adult and Senior Center  
(807 N. Missouri Ave., Roswell, NM 88201)

### 5th JUDICIAL DISTRICT (LEA):

#### Free Legal Fair, Pro Bono Appreciation Luncheon and CLE

Nov. 3, 2017 from 11 am–4 pm  
Hobbs City Hall  
(200 E. Broadway, Hobbs, NM 88240)  
CLE and luncheon details TBA

### 6th JUDICIAL DISTRICT (LUNA):

#### Free Legal Fair

Nov. 3, 2017 from 10 am–1 pm  
Luna County District Court  
(855 S. Platinum, Deming, NM 88030)

### 8th JUDICIAL DISTRICT:

#### Pro Bono Appreciation Luncheon and CLE

Oct. 19, 2017 from 11:30 am–3 pm  
Taos Country Club  
(54 Golf Course Drive, Ranchos de Taos, NM 87557)  
CLE and Luncheon details TBA

### 9th JUDICIAL DISTRICT:

#### Free Legal Fair and Pro Bono Appreciation Luncheon

Sept. 28, 2017 from 11:30 am–4 pm  
The Yam Theater  
(219 Main Street, Portales, NM 88130)

### 11th JUDICIAL DISTRICT (SAN JUAN):

#### Free Legal Fair

Sept. 22, 2017 from 12 noon–5 pm  
San Juan County District Courthouse  
(103 S. Oliver, Aztec, NM 87410)

### 12th JUDICIAL DISTRICT (LINCOLN):

#### Free Legal Fair

Oct. 28, 2017 from 10 am–2 pm  
Ruidoso Community Center  
(501 Sudderth Dr., Ruidoso, NM 88345)

# BOARD OF BAR COMMISSIONERS ELECTION NOTICE 2017



Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Candidates must consider that voting members of the Board of Bar Commissioners are required to do the following:

## **Duties and Requirements for Board of Bar Commissioner Members:**

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar and the New Mexico State Bar Foundation.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Ensure financial accountability for the organization.
- Support and participate in State Bar referral programs.
- Establish and enforce bylaws and policies.
- Serve as a director of the New Mexico State Bar Foundation Board.

Notice is hereby given that the 2017 election of six commissioners for the State Bar of New Mexico will close at noon, Nov. 30. Nominations to the office of bar commissioner shall be by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. (See the nomination petition at [www.nmbar.org/nmbardocs/aboutus/governance/BBC ElectionNotice-Petition.pdf](http://www.nmbar.org/nmbardocs/aboutus/governance/BBC ElectionNotice-Petition.pdf)). **The following terms will expire Dec. 31, and need to be filled in the upcoming election. All of the positions are three-year terms and run from Jan. 1, 2018–Dec. 31, 2020.**

## **First Bar Commissioner District**

### **Bernalillo County**

Two positions currently held by:

- Aja N. Brooks
- Raynard Struck

## **Third Bar Commissioner District**

### **Los Alamos, Rio Arriba, Sandoval and Santa Fe counties**

Two positions currently held by:

- J. Brent Moore \*
- Elizabeth J. Travis

## **Sixth Bar Commissioner District**

### **Chaves, Eddy, Lea, Lincoln and Otero counties**

Two positions currently held by:

- Erinna M. Atkins
- Jared G. Kallunki

\*Ineligible to seek re-election

### **Send nomination petitions to:**

Interim Executive Director Richard Spinello  
State Bar of New Mexico  
PO Box 92860  
Albuquerque, NM 87199-2860  
[rspinello@nmbar.org](mailto:rspinello@nmbar.org)

**Petitions must be received by 5 p.m., Oct. 20**

Direct inquiries to 505-797-6038 or [kbecker@nmbar.org](mailto:kbecker@nmbar.org).

# Opinions

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

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

**Effective September 8, 2017**

## **PUBLISHED OPINIONS**

A-1-CA-34737	AFSCME v. NM Dept of Corrections	Affirm	09/05/2017
--------------	----------------------------------	--------	------------

## **UNPUBLISHED OPINIONS**

A-1-CA-35905	T Scoggins v. Target Corp	Affirm	09/05/2017
A-1-CA-36164	L Weatherwax v. City of Alamogordo	Reverse	09/05/2017
A-1-CA-34718	T Scarborough v. Angel Fire	Affirm/Reverse/Remand	09/06/2017
A-1-CA-34921	S Lowder v. B Shoemaker	Affirm	09/06/2017
A-1-CA-36107	State v. A Rivas	Affirm	09/06/2017
A-1-CA-36260	Deutsche Bank v. R Riordan	Affirm	09/07/2017

**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 August 29, 2017**

## **CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES**

### **Arthur Brent Bailey**

Kasdan LippSmith Weber  
Turner LLP  
6301 Indian School Rd. NE,  
Suite 720  
Albuquerque, NM 87110  
505-219-4204  
505-219-4205 (fax)  
bbailey@kasdancdlaw.com

### **Justin C. Bateman**

Odessa College  
201 W. University  
Odessa, TX 79764  
432-335-6468  
jbateman@odessa.edu

### **Hanna Bridget Bell**

Tandy Hunt, PC  
116 E. Country Club Road  
Roswell, NM 88201  
575-622-1776  
hannah@thlaw.org

### **Brandee Bess Bower**

Bower Law Firm  
4600 Madison Avenue,  
Suite 711  
Kansas City, MO 64112  
816-506-6397  
bbower@bowerlawfirm.com

### **Savannah Skye**

**Brandenburg-Koch**  
Office of the Thirteenth  
Judicial District Attorney  
101 S. Main Street, Suite 201  
Belen, NM 87002  
505-861-0311  
brandenburg-koch@da.state.  
nm.us

### **Melissa A. Brown**

Carpenter, Hazlewood,  
Delgado & Bolen, LLP  
4401 Masthead Street NE,  
Suite 130  
Albuquerque, NM 87109  
505-596-5130  
800-743-0494 (fax)  
melissa@  
carpenterhazlewood.com

### **Joshua Carpenter**

Integrity Title  
101 E. Park Blvd., Suite 975  
Plano, TX 75074  
972-455-8700  
josh@carplawfirm.com

### **Gregory Ara Chakalian**

Office of the First Judicial  
District Attorney  
PO Box 2041  
327 Sandoval Street (87501)  
Santa Fe, NM 87504  
505-827-5000  
505-827-5076 (fax)  
gchakalian@da.state.nm.us

### **Marissa Crollett**

Legal Solutions of New  
Mexico  
4520 Montgomery Blvd. NE,  
Suite 3  
Albuquerque, NM 87109  
505-445-4444  
505-213-6551 (fax)  
marissa@legalsolutionsofnm.  
com

### **Corrie Lynn Gerdts Darr**

Darr Law Firm  
1630 Seventh Street  
Las Vegas, NM 87701  
505-426-7010  
darrlawfirm@gmail.com

### **Larissa N. Duran**

Law Offices of  
Albert Duran, Jr.  
210 S. Water Street  
Las Cruces, NM 88001  
575-524-1111  
575-525-8045 (fax)  
larissa.duran@gmail.com

### **Kenneth E. Fladager**

5901 Chaco Loop NE  
Rio Rancho, NM 87144  
505-867-9003  
kvfladager@aol.com

### **S. Rafe Foreman**

UMKC School of Law  
PO Box 920  
Grandview, MO 64030  
816-235-2381  
816-235-6513 (fax)  
foremansr@umkc.edu

### **Ashley L. Funkhouser**

PO Box 93752  
Albuquerque, NM 87199  
ashley.l.funkhouser@gmail.  
com

### **Consuelo Ursula Garcia**

Office of the Eighth Judicial  
District Attorney  
112 N. Third Street  
Raton, NM 87740  
575-445-5516  
cgarcia2@da.state.nm.us

### **Havi Albert Graeber**

Intel Corporation  
4500 S. Dobson Road, MS  
OC2-157  
Chandler, AZ 85248  
505-358-2829  
havi.graeber@intel.com

### **Timothy R. Hasson**

Office of the Eighth Judicial  
District Attorney  
105 Albright Street, Suite L  
Taos, NM 87571  
575-758-8683  
thasson@da.state.nm.us

### **Marc G. Hufford**

Office of the Second Judicial  
District Attorney  
520 Lomas Blvd. NW  
Albuquerque, NM 87102  
505-222-1099  
505-241-1000 (fax)  
mhufford@da2nd.state.nm.us

### **Robert Lara**

Heinrich for Senate  
PO Box 25763  
Albuquerque, NM 87125  
505-610-1374  
robert.lara@martinheinrich.  
com

### **Antoinette M. Sedillo Lopez**

UNM School of Law  
233 High Street NE  
Albuquerque, NM 87108  
505-480-2469  
asedillolopez@gmail.com

### **Ron P. Lopez**

112 Calle de San Miguel  
Socorro, NM 87801  
575-835-1221  
ronlopez1221@gmail.com

### **Angela Macdonald**

Office of the Eleventh Judicial  
District Attorney  
335 S. Miller Avenue  
Farmington, NM 87401  
505-599-9810

### **Jordan Ashley Mader**

Machol & Johannes  
4209 Montgomery Blvd. NE  
Albuquerque, NM 87109  
970-818-0674  
866-857-7527 (fax)  
jordan.mader@mjfirm.com

### **Charles C. McLeod Jr.**

1114 Blackbeard Drive  
Stafford, VA 22554  
540-659-8295

### **Doreen N. McPaul**

Pascua Yaqui Tribe, Office of  
the Attorney General  
7777 S. Camino Huivisim,  
Bldg. C  
Tucson, AZ 85757  
520-883-5106  
doreen.mcpaul@  
pascuayaqui-nsn.gov

### **Jeres Santiago Rael**

Office of the Thirteenth  
Judicial District Attorney  
PO Box 1750  
711 S. Camino Del Pueblo  
Bernalillo, NM 87004  
505-771-7413  
jrael@da.state.nm.us

### **Henry M. Rivera**

Wiley Rein LLP  
1216 La Rambla  
Santa Fe, NM 87505  
202-719-7501  
202-719-7049 (fax)  
hrivera@wileyrein.com

### **Jackie L. Russell**

Office of the Fifth Judicial  
District Attorney  
301 N. Dalmont Street  
Hobbs, NM 88240  
575-397-2471  
jrussell@da.state.nm.us

### **Kathleen Ann Sabo**

912 Avenida Estrellita NE  
Albuquerque, NM 87110  
505-507-7548  
kathleensabo@comcast.net



**Paul Philip Santoyo**  
Santoyo Moore Wehmeyer PC  
12400 San Pedro Avenue,  
Suite 300  
San Antonio, TX 78216  
210-998-4185  
210-998-4201 (fax)  
psantoyo@smwenergylaw.com

**David E. Shelle**  
Hinkle Law Offices  
3939 San Pedro Drive NE,  
Bldg. A  
Albuquerque, NM 87110  
505-883-4357  
505-881-6668 (fax)  
david@hinklelawoffices.com

**McKenzie St. Denis**  
Legal Solutions of New  
Mexico  
4520 Montgomery Blvd. NE,  
Suite 3  
Albuquerque, NM 87109  
505-445-4444  
505-213-6551 (fax)  
mckenzie@  
legalsolutionsofnewmexico.com

**Jared Floyd Stensrud**  
N.M. Risk Management  
Division  
PO Box 6850  
1100 St. Francis Drive,  
Rm. 2073 (87505)  
Santa Fe, NM 87502  
505-827-2036  
505-827-0593 (fax)  
jared.stensrud@state.nm.us

**Sarah L. Strickland**  
U.S. District Court-District of  
New Mexico  
100 N. Church Street  
Las Cruces, NM 88001  
575-528-1692  
sarah\_strickland@nmcourt.fed.us

**Adrianne R. Turner**  
Law Offices of  
Adrianne R. Turner  
PO Box 10718  
Albuquerque, NM 87184  
505-570-2113  
505-212-1983 (fax)  
adrianne.turner.law@gmail.com

**Hessel E. Yntema IV**  
215 Gold Avenue SW,  
Suite 201  
Albuquerque, NM 87102  
505-843-9565

**Catha N. Lyons**  
4317-E Callalily Drive  
Dayton, OH 45459

**P. Renee Reimer**  
907 Greenway Circle  
Duncanville, TX 75137

**Linda J. R. Rios**  
Rios Law Firm, PC  
2001 San Mateo Blvd. NE,  
Suite C  
Albuquerque, NM 87110  
505-232-2298  
888-392-5307 (fax)

**Adrienne C. Rowberry**  
Whitsitt & Gross, PC  
320 Main Street, Suite 200  
Carbondale, CO 81623  
970-328-5553  
arowberry@roaringforklaw.com

**David Alan Wilton**  
PO Box 733  
El Paso, TX 79944  
david@davidwilton.net

**Jeannie Hunt**  
Brant & Hunt, Attorneys  
202 Tulane Drive SE  
Albuquerque, NM 87106  
505-232-5300  
505-232-5335 (fax)  
jeannie@brantandhunt.com

**William Scott Jaworski**  
Jaworski Law  
117 Bryn Mawr Drive SE  
Albuquerque, NM 87106  
505-585-1441  
505-393-4533 (fax)  
wsj@jaworskilaw.com

**Matthew J. O'Gorman**  
Law Offices of the Public  
Defender  
505 Marquette Avenue NW,  
Suite 120  
Albuquerque, NM 87102  
505-835-2113  
matthew.ogorman@lopdm.us

**Susan Waller Ramos**  
McKinney Immigration Law  
28 Schenck Parkway,  
Suite 200  
Asheville, NC 28803  
828-595-9486  
828-595-9548 (fax)  
susan@  
mckinneyimmigration.com

**Jensen Nicole Wallace**  
Genus Law Group  
500 Marquette Avenue NW,  
Suite 1200  
Albuquerque, NM 87102  
505-835-6950  
505-212-1256 (fax)  
jwallace@genuslawgrp.com

## CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

Effective September 1, 2017:  
**Ben Murphy Allen**  
9 Nizhoni Court  
Sandia Park, NM 87047

Effective September 1, 2017:  
**Alexander W. Purdue**  
26 Blue Jay Way Drive  
Santa Fe, NM 87506

Effective September 1, 2017:  
**Roger Alan Wagman**  
13616 Ernesto Court NE  
Albuquerque, NM 87112

## CLERK'S CERTIFICATE OF RECIPROCAL DISCIPLINE

Effective June 1, 2017:  
**Burt L. Burnett**  
Burnett Law Firm  
342 Cedar Street  
Abilene TX 79601

## CLERK'S CERTIFICATE OF ADMISSION

On August 29, 2017:  
**Michael Cowen**  
Cowen Mask Blanchard  
6243 IH-10 West, Suite 801  
San Antonio, TX 78201  
210-941-1301  
956-504-3674 (fax)  
michael@cmbtrial.com

On August 29, 2017:  
**Kimberly Wilson Trykoski**  
Wilson Elser LLP  
901 Main Street, Suite 4800  
Dallas, TX 75202  
214-698-8005  
214-698-1101 (fax)  
kimberly.wilson@wilsonelser.com

## IN MEMORIAM

As of August 21, 2017:  
**Warren O. F. Harris**  
1331 Park Avenue SW  
Albuquerque, NM 87102

As of July 31, 2017:  
**Robert R. Rothstein**  
Rothstein Donatelli LLP  
PO Box 8180  
Santa Fe, NM 87504

As of August 15, 2017:  
**Hon. Daniel A. Sisk**  
5917 Camino Placido NE  
Albuquerque, NM 87109

## CLERK'S CERTIFICATE OF NAME CHANGE

As of August 31, 2017  
**Brittany Brooke Malott f/k/a  
Brittany Brooke Maldonado**  
Law Offices of the Public  
Defender  
505 Marquette Avenue NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3573  
brittany.maldonado@lopdm.us

## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective September 1, 2017:  
**Glynette R. Carson McNabb**  
17440 S. 360 Road  
Boynton, OK 74422  
918-758-8309  
sixshooterranchok@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 September 20, 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
<b>Rules of Civil Procedure for the District Courts</b>	
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
<b>Rules of Civil Procedure for the Magistrate Courts</b>	
2-112 Public inspection and sealing of court records	03/31/2017
<b>Rules of Civil Procedure for the Metropolitan Courts</b>	
3-112 Public inspection and sealing of court records	03/31/2017
<b>Civil Forms</b>	
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
<b>Rules of Criminal Procedure for the District Courts</b>	
5-106 Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123 Public inspection and sealing of court records	03/31/2017
5-204 Amendment or dismissal of complaint, information and indictment	07/01/2017
5-401 Pretrial release	07/01/2017
5-401.1 Property bond; unpaid surety	07/01/2017
5-401.2 Surety bonds; justification of compensated sureties	07/01/2017
5-402 Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403 Revocation or modification of release orders	07/01/2017

5-405 Appeal from orders regarding release or detention	07/01/2017
5-406 Bonds; exoneration; forfeiture	07/01/2017
5-408 Pretrial release by designee	07/01/2017
5-409 Pretrial detention	07/01/2017
5-615 Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017

## Rules of Criminal Procedure for the Magistrate Courts

6-114 Public inspection and sealing of court records	03/31/2017
6-207 Bench warrants	04/17/2017
6-207.1 Payment of fines, fees, and costs	04/17/2017
6-401 Pretrial release	07/01/2017
6-401.1 Property bond; unpaid surety	07/01/2017
6-401.2 Surety bonds; justification of compensated sureties	07/01/2017
6-403 Revocation or modification of release orders	07/01/2017
6-406 Bonds; exoneration; forfeiture	07/01/2017
6-408 Pretrial release by designee	07/01/2017
6-409 Pretrial detention	07/01/2017
6-506 Time of commencement of trial	07/01/2017
6-703 Appeal	07/01/2017

## Rules of Criminal Procedure for the Metropolitan Courts

7-113 Public inspection and sealing of court records	03/31/2017
7-207 Bench warrants	04/17/2017
7-207.1 Payment of fines, fees, and costs	04/17/2017
7-401 Pretrial release	07/01/2017
7-401.1 Property bond; unpaid surety	07/01/2017
7-401.2 Surety bonds; justification of compensated sureties	07/01/2017
7-403 Revocation or modification of release orders	07/01/2017
7-406 Bonds; exoneration; forfeiture	07/01/2017
7-408 Pretrial release by designee	07/01/2017
7-409 Pretrial detention	07/01/2017
7-506 Time of commencement of trial	07/01/2017
7-703 Appeal	07/01/2017

## Rules of Procedure for the Municipal Courts

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*
12-307.2	Electronic service and filing of papers	08/21/2017*
12-314	Public inspection and sealing of court records	03/31/2017

\*The rule adopted effective July 1, 2017, implemented mandatory electronic filing for cases in the Supreme Court. The rule adopted effective August 21, 2017, implements mandatory electronic filing in the Court of Appeals.

## 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 for Minimum Continuing Legal Education

18-203	Accreditation; course approval; provider reporting	08/11/2017
--------	--	------------

## 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>.

# Rules/Orders

From the New Mexico Supreme Court

<http://www.nmcompcomm.us/>

## IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SEPTEMBER 11, 2017

No. 17-8300-010

### IN THE MATTER OF THE AMENDMENT OF RULE 18-203 NMRA OF THE RULES FOR MINIMUM CONTINUING LEGAL EDUCATION

#### ORDER

WHEREAS, this matter came on for consideration by the Court to amend Rule 18-203 NMRA, 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 of Rule 18-203 NMRA are APPROVED;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective September 11, 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 11th day of September, 2017.

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

#### RULES FOR MINIMUM CONTINUING LEGAL EDUCATION

##### 18-203. ACCREDITATION; COURSE APPROVAL; PROVIDER REPORTING.

A. **Accreditation.** The board shall do the following:

- (1) accredit institutions
  - (a) that have a history of providing quality continuing legal education; and
  - (b) that meet current accredited provider standards established by the board[-];
- (2) approve individual programs of continuing legal education. The content of the instruction provided may include, but not be limited to, live seminars, participation in educational activities involving the use of computerbased resources, audiotapes, and videotapes; and
- (3) periodically review accredited institutions.

B. **Accredited institutions and program provider requirements.** Accredited institutions and program providers shall do the following:

- (1) assure that each program addresses the ethical or professionalism implications where appropriate; provided, however, that only those portions of a program specifically approved or specified as granting ethics and professionalism credit shall be used to fulfill the [attorneys'] attorney's ethics and professionalism requirement;
- (2) assure that the course has significant intellectual or practical content and that its primary objective is to increase the participant's professional competence as an attorney;
- (3) assure that the curriculum offered relates to legal subjects or subjects which relate to the individual attorney's practice of law, including legal ethics and professionalism;
- (4) assure that presenters for all programs are qualified by practical or academic experience to teach the subject to be covered;
- (5) assure that legal subjects are normally taught by attorneys;
- (6) assure that, with the exception of wellness programs submitted by the New Mexico Lawyers and Judges Assistance Program, program faculty include at least one (1) lawyer, judge, or fulltime law professor;

(7) assure that thorough, high quality, current, readable, carefully prepared written materials are distributed to all participants at or before the time the course is offered; and[;]

(8) assure that a level of activity is noted on the promotional materials following the guidelines listed below:

(a) *Advanced.* An advanced continuing legal education course should be designed for the practitioner who specializes in the subject matter of the course;

(b) *Intermediate.* An intermediate course is designed for the practitioner experienced in the subject matter, but not necessarily an expert. A survey course in which there have been recent, substantial changes will be deemed intermediate. In an intermediate course, some [segment] segments may be low intermediate or basic and others high or advanced. In those instances, the course taken as a whole will be considered intermediate;

(c) *Basic.* A basic course is designed for the practitioner with no experience or limited experience in the area of law with which the course deals. A survey course will be considered basic unless there are recent, significant changes in the law.

C. **Announcement of approval.** Providers shall announce, as to a program that has been given approval, that: "This course has been approved by the New Mexico Minimum Continuing Legal Education Board for \_\_\_\_\_ hours of credit."

D. **Provider attendance lists.** [Pursuant to] Under practices and procedures adopted by the board, all continuing legal education providers must, as a condition of accreditation or program approval, agree to provide the board a list of all New Mexico attorneys and judges who attended the continuing legal education program and the number of hours claimed by each participant. [Such] The list and any required credit filing fees shall be provided within thirty (30) days of the program being held.

[As amended, effective January 1, 1990; November 1, 1991; January 1, 1994; January 16, 1996; February 18, 1998; January 1, 2001; January 1, 2001; as amended by Supreme Court Order 05830007, effective January 1, 2006; by Supreme Court Order 06830033, effective January 1, 2007; by Supreme Court Order No. 08830049, effective December 31, 2008; by Supreme Court Order No. 118300020, effective May 1, 2011 for compliance year ending December 31, 2011, and subsequent compliance years; as amended by Supreme Court Order No. 17-8300-010, effective September 11, 2017.]

**Certiorari Denied, June 12, 2017, No. S-1-SC-36470**

From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-054**

No. 34,914 (filed April 13, 2017)

KATHLEEN M. OAKLEY, Personal Representative of the  
Estate of TAWANA LUCERO, deceased,  
Plaintiff-Appellant,

v.

MAY MAPLE PHARMACY, INC.,  
Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

C. SHANNON BACON, District Judge

MARK FINE  
FINE LAW FIRM  
Albuquerque, New Mexico

SCOTT FUQUA  
FUQUA LAW & POLICY, P.C.  
Santa Fe, New Mexico  
for Appellant

SCOTT P. HATCHER  
MARK A. COX  
HATCHER LAW GROUP, P.A.  
Santa Fe, New Mexico  
for Appellee

**Opinion****Linda M. Vanzi, Chief Judge**

{1} This appeal arises from a lawsuit brought by the personal representative of the estate of Tawana Lucero, who died at the age of nineteen from an overdose of physician-prescribed medications, including opioids classified under federal and state law as Schedule II controlled substances because of their high potential for abuse and addiction. As relevant here, the personal representative (Plaintiff) asserts claims of negligence and negligence per se against May Maple Pharmacy, Inc. (the Pharmacy). The Pharmacy moved for summary judgment, contending that it was entitled to judgment as a matter of law because “a pharmacist’s standard of care is to dispense appropriately prescribed medications to a patient in accordance with a proper medical doctor’s prescription[,]” and the Pharmacy met that standard in filling the prescriptions at issue. The district court entered an order

granting the motion, dismissing all claims against the Pharmacy with prejudice, and awarding costs to the Pharmacy. We reverse.

**FACTUAL BACKGROUND**

{2} The record reveals the following undisputed facts. On December 1, 2009, Lucero died from multiple drug toxicity. The autopsy report identified the drugs in her system as Oxycodone, Oxymorphone, and Alprazolam. At the time of her death, Lucero’s Oxycodone levels were 980 ng/mL; her Oxymorphone<sup>1</sup> levels were 26 ng/mL; and her Alprazolam levels were 95 ng/mL.<sup>2</sup>

{3} As described in the toxicology report, Oxycodone is a “semi-synthetic narcotic analgesic” used to control pain. It has an “addiction liability” similar to that of morphine and should be administered in the smallest dose possible and as infrequently as possible; the usual adult dose is 5 mg every six hours. Oxycontin is an extended-release form of Oxycodone. It can cause adverse reactions, including

death, at concentrations well less than 1000 ng/mL, especially when taken in combination with other central nervous system (CNS) depressants. Opioids have a high potential for abuse and addiction and are classified as Schedule II controlled substances under federal and state law. 21 U.S.C. § 812(b)(2), (Schedule II)(a)(1) (2012); 21 C.F.R. § 1308.12(b)(1); NMSA 1978, § 30-31-5(B) (1972); NMSA 1978, § 30-31-7(A)(1)(a), (A)(2)(p) (2007); 16.19.20.66(A)(1)(n) NMAC. Alprazolam is a benzodiazepine with CNS depressant effects used to manage anxiety and related disorders. The recommended dosage is 0.8 to 4 mg for anxiety, and 6 to 9 mg for phobic and panic disorders. When used in conjunction with other CNS depressants, Alprazolam can be toxic even at low concentrations. Alprazolam has a lower potential for abuse than Oxycodone and is classified as a Schedule IV controlled substance. 21 C.F.R. § 1308.14(c)(2) (2015); § 30-31-5(D); 16.19.20.68(A)(2) NMAC.

{4} Dr. John Tyson of Doctor On Call, LLC, a medical clinic focusing on pain management, wrote prescriptions for Oxycodone, Oxycontin, and Alprazolam to treat Lucero’s pain and anxiety, which the Pharmacy dispensed to Lucero from May 28, 2009 through November 16, 2009. Oxycodone was prescribed in 5 mg dosages, and Oxycontin was prescribed in dosages between 20 mg and 80 mg. The Pharmacy sometimes dispensed medication to Lucero “early,” i.e., prior to the time the previously prescribed amount should have lasted if taken as directed.

{5} The Pharmacy does not dispute Plaintiff’s interpretation of the record as showing that the Pharmacy filled Oxycontin prescriptions for Lucero between two and twenty-three days “early” on at least seven occasions between May 28, 2009 and September 21, 2009. At least some of these prescriptions contained the words “OK to fill early” or a similar indication that the prescription could be filled “early.” On a few occasions, Lucero paid a substantial amount of cash to purchase Oxycontin from the Pharmacy, and at least once paid \$1,107 for 90 Oxycontin 80 mg pills in September 2009. An October 2009 “addendum” note by Doctor on Call’s Dr. Maron with the subject “Rx FRAUD?” indicates receipt of a call from

<sup>1</sup> Oxymorphone is an opioid analgesic used to treat pain, and a pharmacologically active metabolite of Oxycodone, with adverse effects typical of opioids. It is also classified as a Schedule II controlled substance. See 21 C.F.R. § 1308.12(b)(1) (2016).

<sup>2</sup> “ng” means nanogram; “mL” means milliliter; “mg” means milligram.



an unidentified pharmacist reporting that Lucero had “presented to pharmacy for early refill” and had offered to pay over \$1000 cash, despite that she would have received the medication free via Medicaid three days later.

#### PROCEDURAL BACKGROUND

{6} Plaintiff initially sued Dr. Tyson and Doctor On Call, asserting claims for malpractice, negligence, and wrongful death (among others), based on allegations that Dr. Tyson had prescribed excessive amounts of dangerous medications to Lucero. A subsequent amended complaint also asserted claims against the Pharmacy, as follows: (1) negligence, based on allegations that the Pharmacy breached its “duty of care to apply the knowledge ordinarily used by reasonably well-qualified pharmacists” by dispensing “excessive quantities of Schedule II or other dangerous drugs” to Lucero; and (2) negligence per se, based on allegations that the Pharmacy, by dispensing “excessive quantities of medications” to Lucero “departed from the standard of care, knowledge, and skill of a reasonably trained pharmacist” and breached regulatory duties to “properly and reasonably dispense controlled medications” mandated by 16.19.20.41(A) NMAC and 16.19.4.16 NMAC.

{7} The Pharmacy moved for summary judgment, dismissal with prejudice, and costs, based on the argument that “[a] pharmacist who accurately fills prescription medication as prescribed by the doctor has no liability exposure to one who is injured by the drugs on claims the amounts were excessive, unless the pharmacist has some reason to know the specific customer will be harmed[.]” and that the Pharmacy “accurately dispensed what . . . Lucero’s doctors prescribed and otherwise met all applicable standards of care.” The Pharmacy’s motion discussed no standard other than its proffered clerical accuracy standard, for which it relied on case law from other jurisdictions. The motion made no mention of any statutes or regulations applicable to pharmacy practice or controlled substances and no

argument concerning Plaintiff’s claim of negligence per se, nor did the Pharmacy’s reply brief,<sup>3</sup> although Plaintiff addressed these points in opposing the motion. Plaintiff argued that genuine issues of material fact precluded summary judgment because the parties’ experts gave contrary opinions concerning the conduct required of a retail pharmacist in these circumstances, pursuant to statutes, regulations, and public policy, and whether the Pharmacy’s conduct deviated from the standard of care.

{8} The parties’ expert affidavits reflect differing opinions concerning the standard of care for retail pharmacists dispensing Schedule II drugs and whether the Pharmacy’s conduct met that standard. The Pharmacy’s expert, Dr. Matthew C. Lee, stated that “[t]he appropriate standard of care for a retail pharmacist is that he or she has a duty to dispense appropriately prescribed medications to a patient” and that if the pharmacist “does not dispense medication in accordance with the medical doctor’s prescription, that pharmacist risks interfering with the doctor/patient relationship and may be inappropriately practicing medicine without a license.” According to Dr. Lee, there were instances in this case “where the customer presented with an early refill” but Dr. Tyson had approved “those early refills for reasons medically indicated by the doctor[.]” and physician-approved “early refills” are valid and should be filled by the pharmacist.

{9} Dr. Lee stated that, “[i]f the retail pharmacist does find discrepancies in either the prescriptions ordered or in fact has evidence of drug abuse, the pharmacist should call the prescribing physician to ensure that the prescriptions presented are in fact what the physician intended to order[.]” noting but not identifying “certain indications in the record” that the Pharmacy “did consult with personnel at Doctor[on]Call[.]” Dr. Lee added,

[T]here is nothing unusual or inappropriate about either the level or amount of narcotic medication prescribed which should have led

any retail pharmacist to question or refuse to dispense the prescription. Although the dosages are considered high, specifically for Oxycontin, there is nothing unusual in this dosage level as prescribed for patients with chronic pain. In other words, all prescriptions of Dr. Tyson and filled at the May Maple Pharmacy are valid and legitimate.

{10} Dr. Lee’s affidavit did not explain the basis for his opinions or identify any source materials supporting them, other than his background in pharmacy and his review of certain case documents, including prescriptions, medical records, and deposition transcripts of the medical examiner and a state police officer. Although he cited no authorities—legal or professional—Dr. Lee said he “found no violation of any federal or New Mexico statutory or regulatory requirements dealing with the practice of pharmacy[.]” and concluded without further explanation that the Pharmacy “accurately filled all prescriptions according to the terms and instructions written by Dr. Tyson” and “met all applicable standards of care which apply to the practice of retail pharmacy.”

{11} Plaintiff’s expert, Dr. James T. O’Donnell, relied on his background in pharmacy and review of record materials but also on his review of other materials, including the Standards of Practice for the Profession of Pharmacy, the New Mexico Pharmacy Practice Act, provisions of the federal Controlled Substances Act, and materials addressing the responsibilities of pharmacists under the Controlled Substances Act. Dr. O’Donnell disagreed with Dr. Lee’s opinions that the prescriptions at issue were facially valid and that the standard of care for retail pharmacists required nothing more of the Pharmacy in these circumstances than that it accurately fill facially valid prescriptions. He said that prescriptions indicating “OK to fill early” were illegal and could not be filled “no matter what the prescriber has written

<sup>3</sup> The reply brief was accompanied by a supplemental expert affidavit, which asserted that the affidavit of Plaintiff’s expert did not substantiate a violation of the federal Controlled Substances Act or New Mexico’s Pharmacy Act or Administrative Code. The reply brief, however, made no such argument. We do not consider the supplemental affidavit, as the motion itself must establish a prima facie case of entitlement to summary judgment. See, e.g., *Brown v. Taylor*, 1995-NMSC-050, ¶¶ 8, 15, 120 N.M. 302, 901 P.2d 720 (stating that the party moving for summary judgment bears “the burden of showing the absence of any genuine issue of material fact, and also that the undisputed facts supported judgment in its favor as a matter of law” and that “until the moving party has made a prima facie case that it is entitled to summary judgment, the non-moving party is not required to make any showing with regard to factual issues” (internal quotation marks and citation omitted)).

on the prescription” because they were for Schedule II controlled substances, which cannot be “refilled”<sup>4</sup> or authorized as “OK to fill early.” According to Dr. O’Donnell, a pharmacist faced with an “early” request to fill a prescription for a Schedule II controlled substance “has a duty to inquire [of] the patient why, and then speak to the physician and get authorization from the physician.”

{12} Dr. O’Donnell said that such “early” requests are “evidence of excessive use of the [c]ontrolled [s]ubstance, in excess of the prescribed dose.” Excess use “places the patient at risk ([of] death or serious injury), increases abuse, dependence, and addiction, and may be evidence of diversion.” A pattern of such “early” requests “is highly suspicious of abuse and[/]or diversion, and would preclude the pharmacist” from filling the prescriptions; to do otherwise would violate requirements of “[g]ood [f]aith, [r]easonable [j]udgment, and [c]orresponding [r]esponsibility” imposed by federal and state law. According to Dr. O’Donnell, provisions of the federal Controlled Substances Act, the New Mexico Pharmacy Act, and their respective implementing regulations “require the pharmacist to consider issues beyond the face legality of the prescription” such as abuse, diversion, and whether the prescription is for a legitimate medical need. He concluded that the Pharmacy breached the “[s]tandard of [c]are of the [p]rofession of [p]harmacy” and violated the New Mexico Pharmacy Practice Act, NMSA 1978, § 61-11-1 (1997); 16.19.20.41 NMAC; and the federal and state Controlled Substances Acts, 21 U.S.C. § 829 (2016); 21 C.F.R. § 1306.04(a) (2017); and NMSA 1978, § 30-31-1 (2005).

{13} At the motion hearing, the district court responded to Plaintiff’s observation that no New Mexico case prescribes a standard of care for pharmacists in this circumstance by stating that “there is a standard. It’s called the reasonably prudent pharmacist.” The court focused heavily on Dr. O’Donnell’s opinion that prescriptions indicating “OK to fill early” were illegal because they were for Schedule II controlled substances, which cannot be “refilled” or authorized as “OK to fill early,” inquiring

what law supports that opinion, and stating that Dr. O’Donnell’s affidavit “needed to be clear on its face” but fell “woefully short” and did not “set forth a standard of care.” In the district court’s view, “Dr. O’Donnell needed to take on Dr. Lee in order to create that genuine issue of material fact” and failed to do so.

{14} The district court entered an order dismissing the Pharmacy from the lawsuit and awarding costs to the Pharmacy, stating without further elaboration that there were no issues of material fact and that the Pharmacy was entitled to summary judgment as a matter of law. This appeal followed.

#### STANDARD OF REVIEW

{15} Summary judgment is appropriate where “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Rule 1-056(C) NMRA. “An issue of fact is ‘material’ if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties’ dispute.” *Martin v. Franklin Capital Corp.*, 2008-NMCA-152, ¶ 6, 145 N.M. 179, 195 P.3d 24. The motion must present “such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). If it does, the opposing party “must adduce evidence to justify a trial on the issues.” *Id.* (internal quotation marks and citation omitted). Nevertheless, “[t]he mere fact that the non-moving party has failed to contravene the assertions of the material supporting a motion for summary judgment does not mean that the moving party is entitled to judgment. The moving party may not be entitled to judgment even if the non-moving party totally fails to respond to the motion.” *Brown*, 1995-NMSC-050, ¶ 8. This is because “the non-moving party is not required to make any showing with regard to factual issues” unless “the moving party has made a prima facie case that it is entitled to summary judgment[.]” *Id.* (internal quotation marks and citation omitted). “If there is the slightest doubt as to the existence of material factual issues,

summary judgment should be denied.” *Garcia-Montoya v. State Treasurer’s Office*, 2001-NMSC-003, ¶ 7, 130 N.M. 25, 16 P.3d 1084 (internal quotation marks and citation omitted).

{16} We apply a de novo standard of review, pursuant to which we employ the same standard the district court is required to apply on summary judgment, i.e., we “view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits.” *Romero*, 2010-NMSC-035, ¶ 7 (internal quotation marks and citation omitted); see *Thompson v. Potter*, 2012-NMCA-014, ¶ 7, 268 P.3d 57 (“On appeal from the grant of summary judgment, we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute.” (internal quotation marks and citation omitted)).

#### DISCUSSION

{17} The district court’s order granting summary judgment contains no analysis but necessarily reflects the court’s conclusion that Dr. Lee’s affidavit sufficed to satisfy the Pharmacy’s burden to establish a prima facie case of entitlement to judgment as a matter of law as to the applicable standard of care, the Pharmacy’s compliance with the standard, and the court’s rejection of Plaintiff’s argument that the differing opinions of the parties’ experts demonstrated the existence of a genuine dispute of material fact on those issues. In addition, the district court’s dismissal of the Pharmacy “from this suit[.] with prejudice” necessarily reflects the dismissal of all claims against the Pharmacy—the negligence claim and the separate claim for negligence per se.

{18} We reverse, based on our conclusions that (1) the Pharmacy’s motion did not establish a prima facie case of entitlement to judgment as a matter of law as to the standard of care or the Pharmacy’s compliance with the standard; (2) even if the Pharmacy had met that burden, Plaintiff’s expert affidavit sufficed to establish a genuine dispute of material fact concerning these material issues; and (3)

<sup>4</sup> The Pharmacy and the district court criticized Dr. O’Donnell’s use of the term “refill.” But Dr. Lee used that term in his affidavit, and Dr. O’Donnell responded that Schedule II controlled substances may not be “refilled.” See NMSA 1978, § 30-31-18(A) (2005); 16.19.20.43 NMAC. We note that the Administrative Code uses the term “early refill” in listing indicators of “potential abuse or misuse of opioids,” despite that opioids are Schedule II controlled substances. See 16.19.4.16(E)(1)(a) NMAC. In any event, we do not understand the issue in this case to turn on the difference between a “refill” and a request to fill a new prescription “early,” i.e., prior to the time the previously prescribed amount should have lasted if taken as directed.

dismissal of the Pharmacy from the case was improper because the motion did not demonstrate the Pharmacy's entitlement to summary judgment on the separate claim of negligence per se, and there is no indication that the district court even considered that issue.<sup>5</sup>

{19} This case involves a question of first impression in New Mexico: the conduct required of retail pharmacists in filling prescriptions for controlled substances with a significant potential for abuse and addiction, such as Oxycodone and Oxycontin. The few New Mexico negligence cases involving the conduct of pharmacists provide no guidance. See, e.g., *Johnson v. Primm*, 1964-NMSC-217, ¶¶ 6, 15-16, 74 N.M. 597, 396 P.2d 426 (reversing summary judgment in favor of the pharmacy in a case alleging that the pharmacy failed to exercise due care in selling the plaintiff a drug in excess of the prescribed amount based on consideration of contributory negligence and proximate cause without addressing the standard of care); *Wilcox v. Butt's Drug Stores, Inc.*, 1934-NMSC-060, ¶ 12, 38 N.M. 502, 35 P.2d 978 (affirming judgment against a pharmacy in a case in which the plaintiff sought damages for the death of her dog from a dangerous drug, applying the "controlling" principle that "[a] druggist who negligently delivers a deleterious drug when a harmless one is called for is responsible to the customer for the consequences, as being guilty of a breach of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others" (internal quotation marks and citation omitted)); *Thompson*, 2012-NMCA-014, ¶¶ 19-23 (declining to reach question of a consulting pharmacist's duty to patients of nursing facility).

{20} We recognize the importance of this question, especially in light of the nation's ongoing "opioid crisis," the subject of news reports and commentary almost daily. But the factual record and the law potentially relevant to this determination were not

adequately developed below, nor did the district court actually rule on the issue,<sup>6</sup> leaving us with an insufficient basis for appellate review. Accordingly, we reverse and remand for these reasons as well. See *Garcia-Montoya*, 2001-NMSC-003, ¶ 48 (remanding for district court to consider an issue in the first instance and, if necessary, to develop additional facts); *Brown*, 1995-NMSC-050, ¶ 15 (stating that summary judgment is inappropriate "when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved" (internal quotation marks and citation omitted)); *Horner v. Spalitto*, 1 S.W.3d 519, 524 (Mo. Ct. App. 1999) (reversing summary judgment where the appellate court did not have "in the record presented . . . sufficient detail to determine whether [the defendant] fulfilled his duty as a pharmacist").

#### A. The Substantive Legal Framework: Negligence and Negligence Per Se

{21} To prevail on a negligence claim, a plaintiff must prove "the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff's damages." *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 18, 137 N.M. 64, 107 P.3d 504 (internal quotation marks and citation omitted). To support a claim for negligence per se (distinct from a negligence claim), "the regulation or statute at issue must specify a duty that is distinguishable from the ordinary standard of care[.]" rather than "impose general duties[.]" *Thompson*, 2012-NMCA-014, ¶¶ 32-33; see *Heath v. La Mariana Apartments*, 2008-NMSC-017, ¶ 21, 143 N.M. 657, 180 P.3d 664 (explaining that, to support a claim for negligence per se, a statute or regulation must "contain a specific standard of care that does not merely repeat the common law standard"). "Duty" and the "standard of care" are separate and distinct concepts.

The difference may not always be clear in the case law, in part, because courts address the issues as they are framed by the facts of the particular case and by the arguments of the parties.

{22} "Duty" is a requirement imposed by law to conform one's conduct to a certain "standard of care." See *Calkins v. Cox Estates*, 1990-NMSC-044, ¶ 8 n.1, 110 N.M. 59, 792 P.2d 36 (discussing "duty" as defining "the legal obligations of one party toward another"). The existence of a duty is a question of policy to be determined by the court as a matter of law "with reference to legal precedent, statutes, and other principles comprising the law." *Id.* ¶ 8 (citing W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 37 (5th ed. 1984) (Prosser & Keeton)); see *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 19, 326 P.3d 465 (noting that "courts should focus on policy considerations when determining the scope or existence of a duty of care"); *Tafuya v. Rael*, 2008-NMSC-057, ¶ 14, 145 N.M. 4, 193 P.3d 551 ("It is well established that the existence of a tort duty in a given situation is a question of policy to be answered by reference to legal precedent, statutes, and other principles of law.") (internal quotation marks and citation omitted); *Lester ex rel. Mavrogenis v. Hall*, 1998-NMSC-047, ¶ 10, 126 N.M. 404, 970 P.2d 590 (stating that "[p]olicy determines duty" (internal quotation marks and citations omitted)).

{23} Where a "duty" exists, it generally requires that the defendant's conduct conform to the same standard of care—that of a reasonable person under the same or similar circumstances, usually referred to as the "ordinary care" standard. See Prosser & Keeton, *supra*, § 37[4] at 236; see also *Calkins*, 1990-NMSC-044, ¶ 11 ("New Mexico law recognizes that there exists a duty assigned to all individuals requiring them to act reasonably under the circumstances according to the standard of conduct imposed upon them by the circumstances."); *UJI* 13-

<sup>5</sup> We reject the Pharmacy's contention that Plaintiff waived the improper-dismissal argument by failing to raise the issue in the docketing statement and violated Rule 12-208 NMRA by including this argument in the brief in chief. See Rule 12-213(A)(1) NMRA (current version at Rule 12-318(A)(1) NMRA) (stating that appellant's brief in chief "may raise issues in addition to those raised in the docketing statement . . . unless the appellee would be prejudiced"); *State v. Salgado*, 1991-NMCA-044, ¶ 3, 112 N.M. 537, 817 P.2d 730 (stating that, for cases assigned to the general calendar, "we can consider any evidence in the record on appeal even if not noted in the docketing statement"). The Pharmacy claims no prejudice, nor is any prejudice apparent.

<sup>6</sup> We do not regard the district court's statement at the motion hearing that "there is a standard . . . called the reasonably prudent pharmacist" as a ruling resolving the questions of the conduct required of retail pharmacists in these circumstances and whether the Pharmacy's conduct complied with that standard as a matter of law. As we discuss further, the Pharmacy does not dispute the existence of a duty to conform its conduct to that of a reasonably prudent pharmacist. At issue is the specific conduct required in these circumstances and whether the Pharmacy's conduct met those requirements.

1604 NMRA (“Every person has a duty to exercise ordinary care for the safety of the person and the property of others.”); UJI 13-1603 NMRA (instructing that “[o]rdinary care” is that care which a reasonably prudent person would use in the conduct of the person’s own affairs”; “[w]hat constitutes ‘ordinary care’ varies with the nature of what is being done”; “[a]s the risk of danger that should reasonably be foreseen increases, the amount of care required also increases” and that, “[i]n deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances”).

{24} In contrast to the question whether the defendant has a legal duty, determined by the court as a matter of law, questions concerning whether the defendant has exercised proper care in the performance of a legal duty are factual issues. See *Rodriguez*, 2014-NMSC-014, ¶ 15 (explaining that “a court’s concern that the plaintiffs are seeking a broader standard of care is a concern about whether the plaintiffs expect too much of the defendants—something more than what is reasonable—which is relevant to the issue of breach of duty, not whether a duty is owed, and breach of duty questions are usually reserved for the jury”); *Crouch v. Most*, 1967-NMSC-216, ¶ 16, 78 N.M. 406, 432 P.2d 250 (“[T]he question of whether or not [the] appellee’s treatment was within an accepted medical standard was a factual question requiring special scientific knowledge that could best be answered by the expert witnesses.”); *Lasley v. Shrake’s Country Club Pharm., Inc.*, 880 P.2d 1129, 1132 (Ariz. Ct. App. 1994) (explaining, in a case against a pharmacy, that “[s]pecific details of conduct do not determine whether a duty exists but instead bear on whether a defendant who owed a duty to the plaintiff breached the applicable standard of care” and that “whether the defendant’s conduct met the standard of care is a question for the trier of fact” in most cases); *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994) (stating in a pharmacy case that “[w]hat constitutes due care in a particular case will depend upon the circumstances of that case, and will usually be a question of fact”); *Horner*, 1 S.W.3d at 522 (stating that a pharmacist “must exercise the care and prudence which a reasonably careful and prudent pharmacist would exercise” and that the fact-finder must determine what this requires in a particular case); *Dooley v. Everett*, 805 S.W.2d 380, 384

(Tenn. Ct. App. 1990) (explaining in a pharmacy case that duty “raises the question of whether the defendant is under any obligation required by law for the benefit of the particular plaintiff[,]” and that “once a duty is established, the scope of the duty or the standard of care is a question of fact to be decided by the trier of fact”).

{25} Where the defendant is a professional, the duty imposed by law is not the requirement to exercise “ordinary care” under the same or similar circumstances but “to apply the knowledge, care, and skill of reasonably well-qualified professionals practicing under similar circumstances.” *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, ¶ 50, 331 P.3d 942 (internal quotation marks and citation omitted); see UJI 13-1101 NMRA (instructing that health care providers are “under the duty to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified [health care providers] practicing under similar circumstances”); *Lasley*, 880 P.2d at 1132-33 (applying this standard to pharmacists); *Oleckna v. Daytona Discount Pharmacy*, 162 So. 3d 178, 181 (Fla. Dist. Ct. App. 2015) (same); *Hooks SuperX, Inc.*, 642 N.E.2d at 519 (same); *Horner*, 1 S.W.3d at 522 (same); *Dooley*, 805 S.W.2d at 385 (same). The professional standard of care generally must be established by expert testimony. See *Crouch*, 1967-NMSC-216, ¶ 16; *Buke*, 2014-NMCA-078, ¶ 51; UJI 13-1101 (instructing that the only way to decide whether a health care provider met the professional standard is from expert witnesses); Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 12, cmt. a (2010) (stating that “[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person” and that these skills and knowledge “provide a mere circumstance for the jury to consider in determining whether the actor has complied with the general standard of reasonable care”).

{26} Notwithstanding that inquiries concerning whether a professional has exercised the proper care in the performance of a legal duty are largely fact-specific, see, e.g., *Rodriguez*, 2014-NMSC-014, ¶ 15, statutes, regulations, and court rules imposing requirements on professionals are relevant to the determination of the standard of care required by the circumstances

and whether it has been met, even if they do not necessarily suffice to establish a standard of care or provide a cause of action for their violation. See, e.g., *Spencer v. Barber*, 2013-NMSC-010, ¶¶ 14-19, 299 P.3d 388 (holding that the New Mexico Rules of Professional Conduct are relevant to establish the appropriate standard of conduct for attorneys and that the determination of whether or not the defendant attorney conformed to the standard of conduct required by those rules “will depend on the evidence introduced at trial” and concluding, *inter alia*, that genuine issues of material fact existed concerning whether the defendant attorney failed to exercise reasonable skill and care in his representation of client); *Oleckna*, 162 So. 3d at 183 n.4 (stating that Florida pharmaceutical regulatory statutes and administrative codes do not create private cause of action but “do describe the duties of Florida pharmacists”).

{27} Thus, where statutes, regulations, and/or court rules apply to the conduct of a professional, they should be considered in determining whether the professional fulfilled the duty imposed by the common law to conform his or her conduct to the standard of care required in the circumstances, see *Spencer*, 2013-NMSC-010, ¶¶ 14-19, and expert testimony purporting to address the professional standard of care and whether it was met must account for them.

#### **B. The Pharmacy Did Not Establish a Prima Facie Case of Entitlement to Judgment as a Matter of Law on Either Negligence or Negligence Per Se**

##### **1. The Issue Presented Is Compliance With the Standard of Care**

{28} The parties in this case appear to use the terms “duty” and “standard of care” as if they were interchangeable. Nevertheless, as we understand their arguments, the issue is not whether the law imposes a duty on pharmacists to their customers—that proposition is not challenged—but the specific conduct required of pharmacists in these circumstances, which we view as questions of fact informed by relevant requirements prescribed by statutes and regulations governing the practice of pharmacy and dispensing physician-prescribed controlled substances. See *Trujillo v. Puro*, 1984-NMCA-050, ¶ 27, 101 N.M. 408, 683 P.2d 963 (“Expert testimony from a qualified doctor in the same field, familiar with the circumstances of [the] defendant’s practice, the standard of care

of physicians, and the testimony of [the] plaintiff, is generally sufficient to raise questions of material fact.”); *Lasley*, 880 P.2d at 1132; *Dooley*, 805 S.W.2d at 384. We explain.

{29} The Pharmacy does not argue that it had no legal duty to Lucero. Indeed, the Pharmacy made reference to “duty” below and to policy considerations in this Court. Plaintiff also referenced a “duty of care” imposed by policy, statutes, and regulations in the district court and does so here. And Plaintiff has cited statutes and regulations in arguing that the standard of care required more of the Pharmacy in these circumstances than accurate filling of facially valid prescriptions. Nevertheless, the parties have not presented any developed argument addressing whether and to what extent policy considerations do or do not mandate a legal duty. Instead, the Pharmacy sought summary judgment based on the contention that its conduct met the professional standard of care for retail pharmacists, relying on the affidavit of its expert as evidence supporting that contention.<sup>7</sup> Thus, we interpret the question before us as the specific conduct required by the professional standard of care in the circumstances presented here and whether that standard was met.<sup>8</sup>

{30} The Pharmacy’s expert advocates what amounts to a clerical-accuracy standard, requiring only that a retail pharmacist fill a prescription accurately, unless the prescription is facially invalid or the pharmacist has personal knowledge that filling the prescription would harm a specific customer, and contends that the Pharmacy met that standard. Plaintiff’s expert contends that the Pharmacy’s proffered standard is insufficient to fulfill the pharmacist’s duty of care in the context of prescriptions for Schedule II controlled substances, relying on statutes and regulations as well as facts indicating potential abuse or diversion.

## 2. The Pharmacy Did Not Establish as a Matter of Law That the Clerical-Accuracy Standard Stated and Applied by Dr. Lee Is the Applicable Standard of Care or That the Pharmacy Established Compliance

{31} A summary judgment motion must present “such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” *Romero*, 2010-NMSC-035, ¶ 10 (internal quotation marks and citation omitted); see *Brown*, 1995-NMSC-050, ¶ 15 (stating that the party moving for summary judgment bears “the burden of showing the absence of any genuine issue of material fact, and also that the undisputed facts supported judgment in its favor as a matter of law”). To meet this burden on the grounds stated in its motion, the Pharmacy was required to adduce undisputed facts sufficient to establish as a matter of law that (1) its proffered standard requiring no more than clerical accuracy in filling prescriptions is the applicable standard of care in the circumstances presented here, involving multiple “early” requests for high dosages of Schedule II opioids taken with Schedule IV benzodiazepines; and (2) it complied with this standard. The Pharmacy failed to do so under both requirements.

{32} The Pharmacy’s motion asserted that “the law generally imposes a high degree of care which other prudent and cautious pharmacists would exercise under similar circumstances in the trade”—a proposition consistent with the general articulation of the professional standard of care as requiring the professional “to apply the knowledge, care, and skill of reasonably well-qualified professionals practicing under similar circumstances.” *Buke*, 2014-NMCA-078, ¶ 50 (internal quotation marks and citation omitted). The motion relied on cases from other jurisdictions that it described as “failure to warn” cases, stating that they “are relevant to discuss the standard of care of

pharmacists[.]” According to the motion, these cases “generally” hold that “there is no duty on the part of a pharmacist to monitor and intervene in a customer’s use of drugs sold or otherwise act to ensure the drugs were properly prescribed by the licensed physician[.]” based on the concern that “[p]lacing these duties to warn on the pharmacist would only serve to compel the pharmacist to second guess every prescription a doctor orders in an attempt to escape liability.” *Jones v. Irvin*, 602 F. Supp. 399, 402 (S.D. Ill. 1985). Thus, a pharmacist has “no duty to warn of potential hazards” and is not liable for “any resulting harm to the patients consuming the drugs if the pharmacist accurately dispenses medication pursuant to prescriptions proper on their face, unless the pharmacist knows or has reason to know that harm will occur to a specific customer.”

{33} The motion concluded that Plaintiffs did not allege a failure to warn or that the Pharmacy filled prescriptions inaccurately, but that “the doctor improperly determined the appropriate drug, quantity, and dosage for . . . Lucero, an error not discovered by [the Pharmacy].” Dr. Lee’s affidavit “squarely rejected” this allegation, the Pharmacy contended, by opining that the prescriptions were valid and legal and that “[t]here was nothing on the face of the prescriptions, including the amounts, dosage levels, or quantity dispensed which would indicate to a prudent pharmacist that the customer was being improperly medicated or over prescribed for the condition of chronic pain.” Although Dr. Lee said that he “found no violation of any federal or New Mexico statutory or regulatory requirements dealing with the practice of pharmacy[.]” and that the Pharmacy “met all applicable standards of care which apply to the practice of retail pharmacy[.]” his affidavit cited no statutes, regulations, or other authorities supporting that conclusion or his proffered clerical-accuracy standard.

<sup>7</sup> The parties did not dispute below and do not dispute here that the Pharmacy’s conduct must be assessed under a professional standard of care or that the standard must be established by expert testimony, although the Pharmacy says in this Court that “[u]nder the traditional theory of a liability, a pharmacist owes a duty of ordinary care in practicing his or her profession.”

<sup>8</sup> As explained in Prosser and Keeton, the details of a defendant’s conduct do not determine whether a duty exists but whether a defendant who owed a duty to the plaintiff breached the applicable standard of care:

It is better to reserve “duty” for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation. In other words, “duty” is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty [if it exists] is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty.

Prosser & Keeton, *supra*, § 53, at 356.



{34} In New Mexico, as in other states, the practice of pharmacy is regulated as “a professional practice affecting the public health, safety and welfare.” NMSA 1978, § 61-11-1.1(A) (1997). The Pharmacy Act, NMSA 1978, §§ 61-11-1 to -18.1 (1969, as amended through 2016), created the New Mexico Board of Pharmacy (Board), *see* § 61-11-4(A), and delegated to the Board authority and responsibility for adopting rules and regulations governing the pharmacy profession in New Mexico, *see* § 61-11-6(A). The Legislature also delegated to the Board authority and responsibility for adopting rules and regulations necessary to administer New Mexico’s Controlled Substances Act. *See* NMSA 1978, § 30-31-11 (1994); 16.19.20.3 NMAC. The stated objective of these regulations is “to protect the public health and welfare of the citizens of New Mexico by controlling and monitoring access to controlled substances and to give notice of the board’s designation of particular substances as controlled substances.” 16.19.20.6 NMAC. One of these regulations, 16.19.20.41(A) NMAC, provides that “[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.” Federal law imposes the same “corresponding responsibility” upon pharmacists pursuant to regulations promulgated under the Controlled Substances Act, 21 U.S.C. § 829.21 C.F.R. § 1306.04(a).

{35} Among the specific responsibilities of pharmacists imposed by the New Mexico Administrative Code is the mandatory responsibility (“shall”) to review the patient’s profile and, “[p]rior to dispensing any prescription,” to identify issues including “clinical abuse/misuse” and “incorrect drug dosage.” 16.19.4.16(D) (1)(a), (e) NMAC. “Upon recognizing any of the above, a pharmacist, using professional judgment, shall take appropriate steps to avoid or resolve the potential problem[, which] may include requesting and reviewing a controlled substance prescription monitoring [program] report [(PMP)] . . . , consulting with the prescriber and counseling the patient.” 16.19.4.16(D)(2) NMAC.

{36} The New Mexico Administrative Code provides additional guidelines and responsibilities applicable to opioid prescriptions, including that “[a] pharmacist shall use professional judgment based on prevailing standards of practice in determining whether to obtain and review a

PMP report before dispensing an opioid prescription to that patient,” 16.19.4.16(E) NMAC; and further, “shall request and review a PMP report covering at least a one[-]year time period” if the pharmacist, for example, “becomes aware of a person currently exhibiting potential abuse or misuse of opioids (i.e. over-utilization, early refills, multiple prescribers, appears overly sedated or intoxicated upon presenting a prescription for an opioid . . . , or paying cash when the patient has prescription insurance),” 16.19.4.16(E)(1)(a) NMAC; or the “pharmacist receives an initial prescription for any long-acting opioid formulations,” 16.19.4.16(E)(1)(d) NMAC; or the “pharmacist becomes aware of a patient receiving an opioid concurrently with a benzodiazepine[.]” 16.19.4.16(E)(1)(e) NMAC. “Upon recognizing any” of these conditions, “a pharmacist, using professional judgment, shall take appropriate steps to avoid or resolve the potential problem[.]” which “may include consulting with the prescriber and counseling the patient.” 16.19.4.16(E)(3) NMAC. In addition, “a pharmacist shall use professional judgment base[d] on prevailing standards of practice, in deciding the frequency of requesting and reviewing further [PMP] reports . . . [e]xcept that PMP reports shall be reviewed a minimum of once every three ftlinemonths during the continuous use of opioids for each established patient.” 16.19.4.16(E)(4) NMAC.

{37} As noted, neither the motion nor Dr. Lee’s affidavit mentions any statutes, although Plaintiff’s complaint does, in its allegations supporting the claim for negligence per se. It is not for this Court to determine a professional standard of conduct for pharmacists in these circumstances. Nevertheless, we conclude that a party cannot establish a professional standard of care as a matter of law with an expert affidavit that fails to account for law applicable to the professional and/or to the particular circumstances in which the professional has acted or failed to act. *Spencer*, 2013-NMSC-010, ¶¶ 14-19 (holding that the New Mexico Rules of Professional Conduct are relevant to establish the appropriate standard of conduct for attorneys and that the determination of whether or not the defendant attorney conformed to the standard of conduct required by those rules “will depend on the evidence introduced at trial” and concluding that genuine issues of material fact existed concerning whether the defendant attorney failed to exercise reasonable skill and care in his representation of client).

{38} We recognize the existence of authority supporting the Pharmacy’s proffered clerical-accuracy standard and the significance of policy concerns underlying that standard, including the potential for pharmacists intruding into the doctor-patient relationship or practicing medicine without a license and burdening pharmacists with the responsibility of second-guessing the judgment of physicians in an effort to avoid liability. *See, e.g., Kowalski v. Rose Drugs of Dardanelle, Inc.*, 378 S.W.3d 109, 119-20 (Ark. 2011); *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551, 552-55 (Ill. App. Ct. 1985); *McKee v. Am. Home Prods. Corp.*, 782 P.2d 1045, 1051-53 (Wash. 1989) (en banc). To be sure, there are very good reasons for such concerns. But a standard of care that requires nothing more of pharmacists in the circumstances presented here—involving repeated requests for high dosages of Schedule II opioids taken with Schedule IV benzodiazepines—than that they accurately fill an apparently valid prescription raises other policy concerns related to the potential harm to patients and the public at large. These concerns are reflected in federal and state statutes and regulations, such as those discussed above.

{39} We also note that other cases, which were not presented by the parties for the district court’s consideration, have rejected the Pharmacy’s proffered clerical-accuracy standard. *See, e.g., Oleckna*, 162 So. 3d at 182-83 (recognizing that, in a case involving “early” fills of prescriptions for such drugs as Oxycodone and Alprazolam, refusing “to interpret a pharmacist’s duty to use due and proper care in filling the prescription as being satisfied by robotic compliance with the instructions of the prescribing physician” and stating that in denying the pharmacy’s motion to dismiss that the court was “unwilling to hold, as a matter of law, [the p]harmacy was not negligent” (internal quotation marks and citation omitted)); *Powers v. Thobhani*, 903 So. 2d 275, 278-80 (Fla. Dist. Ct. App. 2005) (considering statutes and regulations governing pharmacists in holding that the trial court erred in dismissing negligence claims against pharmacies brought by the husband of customer who overdosed on prescribed opioids and benzodiazepenes and noting that these statutes and regulations provide a “strong policy basis” for imposing negligence liability on a pharmacy “for failing to use due and proper care in filling prescriptions, even if the prescription is filled in accordance with the physician’s instruction”); *see also Lasley*,

880 P.2d at 1134 (noting that where the plaintiff presented expert affidavit stating that the pharmacist's standard of care "includes a responsibility to advise a customer of the addictive nature of a drug, to warn of the hazards of ingesting two or more drugs that adversely interact with one another, and to discuss with the physician the addictive nature of a prescribed drug and the dangers of long-term prescription of the drug" and concluding that "[o]n this record, we cannot say as a matter of law that [the pharmacy] did not breach the standard of care for the duty it owed to [the customer]"); *Horner*, 1 S.W.3d at 522-24 (rejecting accuracy standard after considering state and federal statutes related to the pharmacy profession and stating that "[r]elegating a pharmacist to the role of order filler . . . fails to appreciate the role recognized" in the state and federal statutes).

{40} Even if the motion did adduce facts sufficient to establish the standard of care required in these circumstances, it did not establish a prima facie case that the Pharmacy complied with that standard as a matter of law. The record also shows that Lucero paid \$1,107 for 90 Oxycontin 80 mg pills in September 2009 and contains an October 2009 note by Dr. Maron with the subject "Rx FRAUD?" indicating receipt of a call from a pharmacist reporting that Lucero had "presented to pharmacy for early refill" and had offered to pay over \$1,000 cash, despite that she would have received the medication free via Medicaid three days later. The Administrative Code deems as indicative of "potential abuse or misuse of opioids" such factors as "early refills" and "paying cash when the patient has prescription insurance[.]" 16.19.4.16(E) (1)(a) NMAC. For this reason alone, we cannot say that the Pharmacy demonstrated as a matter of law that it "met all applicable standards of care which apply to the practice of retail pharmacy[.]" as Dr. Lee concluded.

{41} In sum, Dr. Lee's affidavit, which does not address any regulatory requirements applicable to the practice of pharmacy, or to prescriptions for Schedule II drugs, or to prescriptions for opioid medications, is insufficient to satisfy the Pharmacy's burden to demonstrate a prima facie case of entitlement to judgment as a matter of law. See *Brown*, 1995-NMSC-050, ¶¶ 15-16 (reversing summary judgment because the moving party failed to develop sufficient facts to satisfy "the burden of showing the absence

of any genuine issue of material fact, and also that the undisputed facts supported judgment in its favor as a matter of law"). If, on remand, the Pharmacy wishes to renew its motion for summary judgment based on the argument that it fulfilled its duty to Lucero because it conformed its conduct to the standard of care required in the circumstances presented here, it must adduce competent evidence that accounts for statutes and regulations relevant to the professional responsibilities of pharmacists filling prescriptions for the controlled substances at issue here.

### 3. The Record Shows Genuine Disputes of Material Fact Concerning the Conduct Required of a Retail Pharmacist in These Circumstances and Whether the Pharmacy's Conduct Met the Requirements

{42} The Pharmacy's failure to establish a prima facie case, standing alone, mandates reversal of the district court's entry of summary judgment in favor of the Pharmacy. See, e.g., *id.* ¶ 8 ("[T]he non-moving party is not required to make any showing with regard to factual issues" unless "the moving party has made a prima facie case that it is entitled to summary judgment[.]") (internal quotation marks and citation omitted)). Even if the Pharmacy had carried its burden, reversal is warranted because the record viewed in the light most favorable to Plaintiff shows the existence of genuine disputes of material facts concerning the conduct required of a retail pharmacist in these circumstances (standard of care) and whether the Pharmacy's conduct met those requirements.

{43} The circumstances presented here involve repeated "early" fills of opioid medications prescribed in combination with benzodiazepenes, and at least one instance in which Lucero paid a substantial amount of cash to purchase Oxycontin from the Pharmacy, although her prescriptions were paid with insurance on other occasions. In addition, Plaintiff's expert, Dr. O'Donnell, testified that "early" prescription requests "are evidence of excessive use of the [c]ontrolled [s]ubstance, in excess of the prescribed dose"; "[e]xcess use places the patient at risk ([of] death or serious injury), increases abuse, dependence, and addiction, and may be evidence of diversion"; and a pattern of "early" requests to fill prescriptions for a controlled substance "is highly suspicious of abuse and[/]or diversion, and would preclude the pharmacist" from filling the prescriptions.

{44} We disagree with the district court's view that Dr. O'Donnell's affidavit failed to show the existence of a genuine dispute of material fact because it did not "take on Dr. Lee." The affidavit leaves much to be desired, but so does Dr. Lee's affidavit. Nevertheless, Dr. O'Donnell's affidavit suffices to establish a genuine dispute about the material issues of the applicable standard of care and the Pharmacy's compliance with that standard. See *Trujillo*, 1984-NMCA-050, ¶ 27 ("Expert testimony from a qualified doctor in the same field, familiar with the circumstances of [the] defendant's practice, the standard of care of physicians, and the testimony of [the] plaintiff, is generally sufficient to raise questions of material fact."); *Garcia-Montoya*, 2001-NMSC-003, ¶ 7 ("If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied.") (internal quotation marks and citation omitted); *Lasley*, 880 P.2d at 1134 (concluding that "[o]n this record, we cannot say as a matter of law that [the pharmacy] did not breach the standard of care for the duty it owed to [the customer]" in light of expert affidavit concerning pharmacist's standard of care); *Hooks*, 642 N.E.2d at 519 (affirming denial of summary judgment in pharmacy case after recognizing that "[w]hat constitutes due care in a particular case will depend upon the circumstances of that case, and will usually be a question of fact[.]" including such issues as "the frequency with which the pharmacist filled prescriptions for the customer, any representations made by the customer, the pharmacist's access to historical data about the customer, the manner in which the prescription was tendered to the pharmacists, and the like"); *Dooley*, 805 S.W.2d at 386 ("The fact that the pharmacy owes its customer a duty in dispensing prescription drugs is without question. [The defendant] simply argues that the duty to warn of potential drug interactions is not a part of its duty. The plaintiffs here have introduced expert proof disputing this assertion. Therefore, whether the duty to warn of potential drug interaction is included within the pharmacist's duty to his customer is a disputed issue of fact preventing the granting of summary judgment.").

{45} The district court's criticisms of Dr. O'Donnell's affidavit reflect that the court "took an overly technical view of the evidence which did not resolve all logical inferences in favor of Plaintiff and did not view the facts in the light most favorable to a trial on the merits." *Madrid v. Brinker*

*Rest. Corp.*, 2016-NMSC-003, ¶ 23, 363 P.3d 1197.

**4. The Pharmacy Did Not Address and the District Court Did Not Rule on the Claim for Negligence Per Se**

{46} To support a claim for negligence per se (as distinct from a negligence claim) “the regulation or statute at issue must specify a duty that is distinguishable from the ordinary standard of care[.]” rather than “impose general duties[.]” *Thompson*, 2012-NMCA-014, ¶¶ 32-33; see *Heath*, 2008-NMSC-017, ¶ 21 (explaining that, to support a claim for negligence per se, a statute or regulation must “contain a specific standard of care that does not merely repeat the common law standard”).

{47} The Pharmacy’s motion did not discuss (or even cite) any statutes or regulations. Nor were any specific statutes or regulations cited in Dr. Lee’s affidavit or in the Pharmacy’s reply brief. The motion also made no mention of the case law discussing the requirements for claims of negligence per se. The Pharmacy’s argument on the point in its brief in this Court merely highlights the absence of any such argument in its motion. We reject the Pharmacy’s attempt to convince us that its motion demonstrated a prima facie case of entitlement to summary judgment on this claim and that the district court actually considered this claim in granting summary judgment. The mere fact that statutes and regulations were discussed at the motion

hearing proves nothing.

{48} We hold that the dismissal of the Pharmacy from the case was improper because the motion did not demonstrate the Pharmacy’s entitlement to summary judgment on the separate and distinct claim of negligence per se, and the district court did not decide the issue.

**CONCLUSION**

{49} For the reasons set forth herein, we reverse and remand for proceedings consistent with this opinion.

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

LINDA M. VANZI, Chief Judge

**WE CONCUR:**

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-055**

Nos. 34,610 & 35,853 (Consolidated) (filed April 19, 2017)

CARRIE J. TOMLINSON,  
Petitioner-Appellant,

v.

DANA M. WEATHERFORD,  
Respondent-Appellee.

**APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY**

HENRY R. QUINTERO, District Judge

CAREN I. FRIEDMAN  
Santa Fe, New Mexico

CATHRYN L. WALLACE  
LOPEZ, DIETZEL, PERKINS,  
& WALLACE, P.C.

JESSICA C. ROTH  
NEW MEXICO LEGAL GROUP, P.C.  
Albuquerque, New Mexico  
for Appellant

Silver City, New Mexico  
for Appellee

**Opinion**

**M. Monica Zamora, Judge**

{1} In this domestic relations case, the level of animosity between the parties, their deliberate actions and inactions, and the delays in the judicial system have complicated the situation to the point that the Child (R.W.) has been lost in the process. Petitioner Carrie Tomlinson (Petitioner) appeals the district court's decision to decline jurisdiction over her action to determine parentage, child custody, and timesharing with regard to a child born to her former partner, Dana Weatherford (Respondent). Petitioner argues that the district court applied the incorrect standard in determining jurisdiction and challenges several of the district court's findings. Petitioner also argues that the district court violated her right to due process by failing to address her requests for interim visitation and that the district court's ruling violated her right to equal protection.

{2} While this appeal was pending, Petitioner filed a motion for review of the district court's action on an application for stay and for injunction pending appeal as well as a petition for writ of error, or in the alternative, motion for review. Petitioner requested this Court to review the district court's order denying her motion to stay the enforcement of its judgment pending appeal and order visitation and communi-

cation between herself and R.W. She also requested the appointment of a guardian ad litem. On September 9, 2015, this Court issued an order directing the district court to hold a hearing on Petitioner's motion and the issue of whether to order visitation and communication between Petitioner and R.W. within twenty-one days of the order. Alternatively, if the district court decided to appoint a guardian ad litem (GAL), the district court was required to determine an expedited time frame for the GAL to complete his or her work and then hold a hearing to address the visitation and communication issues. It was not until December 3, 2015, that the district court held the hearing to appoint the GAL. He identified and appointed the GAL without input from the parties. Petitioner alleges that the GAL relied on a "sham" bonding study when making the recommendation with respect to her request for visitation and communication with R.W. According to Petitioner, the district court accepted the GAL's recommendation, even though the study considered only the degree of bonding between Respondent and R.W., and Petitioner was not given the opportunity to examine the GAL about her recommendations or any bias she might have. For the reasons that follow, we reverse and remand for further proceedings.

**BACKGROUND**

{3} Petitioner and Respondent were in a domestic relationship and decided to have

and raise a child together. Respondent was artificially inseminated by an anonymous donor and gave birth to R.W., in Oklahoma in April 2007. In June 2007 an Oklahoma district court appointed Petitioner and Respondent co-guardians of R.W., pursuant to their joint request. In September 2008, the couple and R.W. moved from Oklahoma to New Mexico. From the time of R.W.'s birth until May 2009, she lived with Petitioner and Respondent. In 2009 Petitioner left the home but continued to share parenting responsibilities with Respondent until September 2012, when Respondent cut off contact between R.W. and Petitioner.

{4} Subsequently, Respondent sought an order of protection from domestic violence based on alleged harassment by Petitioner. The district court determined that no domestic violence had occurred. However, the parties stipulated to mutual restraint. On May 20, 2013, Petitioner initiated this action to establish parentage and determine custody and timesharing with regard to R.W.

{5} Shortly after the petition was filed, Respondent left the state with R.W. Respondent could not be located and was not served with process before she left the state. By July 2013 Respondent established residency in Oklahoma. In August 2013 Respondent filed an objection to the district court's jurisdiction over the case.

{6} In December 2013 the district court held a hearing on the issue of jurisdiction. During that hearing, Respondent informed the district court that a hearing was scheduled the same month in Oklahoma pertaining to the order granting co-guardianship that was entered in Oklahoma in 2007.

{7} Apparently, Respondent had filed a change of venue in the guardianship case. Both Petitioner and the district court were under the impression that Respondent intended to have the guardianship revoked. The district court conferred with the Oklahoma court, then stayed proceedings in the present case, pending a final decision in the Oklahoma guardianship. However, after the stay in this case was issued, Respondent did not pursue revocation of the guardianship in Oklahoma. Approximately eleven months after the stay in this case was issued, the Oklahoma court terminated the guardianship over Petitioner's objection.

{8} After the termination of the guardianship, Petitioner again moved to determine parentage and timesharing in this case.

Respondent once again objected to the district court's jurisdiction, arguing that New Mexico was an inconvenient forum and that it would not be in the best interests of R.W. for the district court to exercise its jurisdiction over Petitioner's claim. The district court determined that it was in the best interests of R.W. that "any disputes be brought and heard in Oklahoma."

#### DISCUSSION

{9} On appeal, Petitioner argues that (1) New Mexico has jurisdiction over the action pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (the Act), NMSA 1978, §§ 40-10A-101 to -403 (2001); (2) the district court erred in making findings on the merits of her parentage and child custody claim because the sole issue before the court was subject matter jurisdiction; (3) the district court denied her the opportunity to maintain her relationship with R.W. and violated due process by failing to address her repeated requests for interim visitation; and (4) the district court's rulings violated equal protection. We will address these arguments in turn. We first consider the question of jurisdiction under the Act.

#### The District Court Has Jurisdiction Under the Act

{10} In analyzing Petitioner's argument, it is helpful to examine the historical background of the Act. In New Mexico jurisdiction over child custody disputes is governed by the Act. Prior to the enactment of the Act in 2001, child custody disputes were governed by the Child Custody Jurisdiction Act (CCJA), NMSA 1978, §§ 40-10-1 to -24 (1981, as amended through 1989) (repealed 2001).

{11} The CCJA provided four independent bases for jurisdiction. New Mexico had jurisdiction if: (1) it was the child's home state—the state where the child had lived during the six months immediately preceding the commencement of the custody proceedings; (2) assuming jurisdiction would be in the child's best interests because the child and at least one parent had significant connections with New Mexico; (3) emergency circumstances required the exercise of jurisdiction to protect the child; or (4) there was no home state or another state that had declined jurisdiction. See § 40-10-4(A).

{12} These four bases of jurisdiction were not given any order of priority. As a result, it was possible for states to have concurrent jurisdiction, which in some cases resulted in simultaneous child custody proceedings in different states. See Unif. Child Custody

Jurisdiction Act § 6 cmt. (Am. Law Inst. & Unif. Law Comm'n 1968); Unif. Child Custody Jurisdiction & Enf't Act (UCCJEA) § 206 cmt. (Am. Law Inst. & Unif. Law Comm'n 1997). There was also confusion concerning the "best interests" language of the CCJA. See UCCJEA § 201 cmt. 2. The phrase "tended to create confusion between the jurisdictional issue and the substantive custody determination." *Id.*

{13} In order to clarify the jurisdictional standards in child custody matters and to harmonize the CCJA with the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006), which prioritizes home state jurisdiction, Congress enacted the Act. See UCCJEA References & Annot. (prefatory note). The Act eliminates the "best interests" language, because it tended to be confusing and because it is not necessary for the jurisdictional issue. See UCCJEA § 201 cmt. The Act also prioritizes home state jurisdiction, which has largely resolved the problem of simultaneous proceedings. UCCJEA § 206 cmt.

{14} Under the Act, the child's home state is prioritized such that a court in the home state has exclusive "jurisdiction to make an initial child[] custody determination unless it declines to exercise that jurisdiction on the ground that another state is a more appropriate forum." *Malissa C. v. Matthew Wayne H.*, 2008-NMCA-128, ¶ 25, 145 N.M. 22, 193 P.3d 569; see § 40-10A-201(a). In other words, where there is a home state, "there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings." UCCJEA § 206 cmt.

{15} In the present case, Petitioner argues that the district court erred in declining jurisdiction over the child custody dispute because New Mexico was the home state when the petition was filed and because the district court did not consider the required factors in determining whether it could decline jurisdiction under the Act. See § 40-10A-207(b). When reviewing a district court's jurisdictional determination, we review the factual findings for sufficiency of the evidence. See *Malissa C.*, 2008-NMCA-128, ¶ 20. We review de novo the district court's application of the law to the facts so found. See *State ex rel. Children, Youth & Families Dep't v. Donna J.*, 2006-NMCA-023, ¶ 11, 139 N.M. 131, 129 P.3d 167.

{16} As noted, because the Act prioritizes home state jurisdiction in child custody disputes, the first step in resolving the

jurisdictional question is to identify the child's home state. The Act, like the CCJA, defines the "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Section 40-10A-102(7). The parties in this case do not dispute that R.W. and Respondent lived in New Mexico from September 2008 until after the petition was filed on May 20, 2013. Therefore, at the time the petition was filed, New Mexico was R.W.'s home state, and the district court had jurisdiction to make the initial child custody determination.

{17} Respondent argues that the district court could properly decline jurisdiction based on the 2007 guardianship proceeding in Oklahoma, which Respondent characterizes as a "simultaneous proceeding" for jurisdictional purposes. We are not persuaded. First, we note that the Oklahoma guardianship proceedings commenced in May 2007 when Petitioner and Respondent filed a joint petition for co-guardianship of R.W. In June 2007 after a hearing on the parties' joint petition, the Oklahoma district court entered an order appointing them as co-guardians of R.W. There appear to have been no unresolved issues before the Oklahoma court, and there was no further activity in that case prior to the commencement of the proceedings in this case in 2013. Thus, it appears that the Oklahoma guardianship was not pending when the petition was filed in this case. Respondent does not identify anything in the record showing otherwise.

{18} Second, even if the guardianship in Oklahoma was ongoing, New Mexico was R.W.'s home state and New Mexico had priority jurisdiction under the Act. See *Garcia v. Gutierrez*, 2009-NMSC-044, ¶ 13, 147 N.M. 105, 217 P.3d 591 ("If one state can be established as the home state, and a child custody action is filed first in that state, any other states which have passed a similar statute must stay their proceedings, or decline to exercise jurisdiction." (internal quotation marks omitted)); see also UCCJEA § 206 cmt. ("Under this Act, the simultaneous proceedings problem will arise only when there is no home [s]tate[.]"); § 40-10A-206 (regarding simultaneous proceedings).

{19} We disagree with Respondent's suggestion that Oklahoma should be considered R.W.'s home state because the Oklahoma guardianship commenced in

2007, prior to the commencement of these proceedings, and because Respondent had returned to Oklahoma with R.W. prior to the hearing on jurisdiction in this case. The facts relevant to jurisdiction under the Act are those that existed at the time the petition was filed. See § 40-10A-201(a)(1). Those facts established that New Mexico was R.W.'s home state, conferring jurisdiction to make the initial determination upon the district court. See §§ 40-10A-201, -207, -208; *Malissa C.*, 2008-NMCA-128, ¶ 25. Declining jurisdiction would only have been appropriate here if, under the specific provisions of the Act, the district court determined that another state was a more appropriate forum. See §§ 40-10A-201(a), -207, -208(a)(2); *Malissa C.*, 2008-NMCA-128, ¶ 25.

{20} The Act provides that a court of this state that has jurisdiction to make a child custody determination may decline to exercise its jurisdiction "if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." Section 40-10A-207(a). The court must consider whether it is an inconvenient forum and whether it is appropriate for a court of another state to exercise jurisdiction. See § 40-10A-207(b).

{21} Before determining whether New Mexico is an inconvenient forum, the district court is required to consider all relevant factors including:

- (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child's home state is or recently was another state;
- (3) the distance between the court in this state and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties with respect to travel arrangements;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence required to resolve the pending custody litigation, including testimony of the child;
- (7) the ability of the court of each state to decide the custody issue expeditiously and the procedures necessary to present the evidence; and

- (8) whether another state has a closer connection with the child or with the child and one or more of the parties, including whether the court of the other state is more familiar with the facts and issues in the pending litigation.

*Id.*

{22} Under Section 40-10A-208(a), the district court may decline to exercise jurisdiction if "a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." Unjustifiable conduct such as "parents, or their surrogates, acting in a reprehensible manner, such as removing, secreting, retaining, or restraining the child." UCCJEA § 208 cmt. This section of the Act "ensures that abducting parents will not receive an advantage for their unjustifiable conduct." *Id.*

{23} We conclude that the district court erred in finding that it was in the "best interests" of R.W. that "any disputes be brought and heard in Oklahoma." Because the district court had home state jurisdiction, it was error to defer to another state court that did not have jurisdiction substantially in conformity with the Act without setting out findings that show the basis on which the district court concluded that it is an inconvenient forum and that the court of the other state is a more appropriate forum.

{24} Even in circumstances where a court justifiably declines jurisdiction, under the Act, that court is nevertheless required to "stay the case and direct the parties to file in the [s]tate that has been found to be the more convenient forum[.]" which the district court in this case did not do. UCCJEA § 207 cmt.; see § 40-10A-207(c). The court should not simply dismiss the action, leaving the case in limbo as the district court did in this case, by not following through with a determination that a court of another state is the more appropriate forum. See § 40-10A-207(C); UCCJEA § 207 cmt.

{25} The legal basis for the district court's decision is not clear. Its order cites neither Sections 40-10A-207 nor 208. Indeed the order includes no conclusions of law but only findings of fact, which appear to be based largely on *Barnae v. Barnae*, 1997-NMCA-077, 123 N.M. 583, 943 P.2d 1036. While *Barnae* is factually similar to the present case, the jurisdictional question in *Barnae* relied on the prior statute not in force here, and whose requirements for establishing jurisdiction are materially different from those set forth in the Act.

*Compare Barnae*, 1997-NMCA-077, ¶ 15, with § 40-10A-201, and § 40-10A-202. Thus, *Barnae's* analyses and rationales are neither precedential or instructive to the extent that they are not viable nor consistent with the Act's jurisdiction provision. And although Respondent mentioned the relevant provisions below, she makes no mention of them here, and so is deemed to have abandoned the applicability of either section on appeal.

#### **Superfluous Findings**

{26} Petitioner challenges several of the findings set forth in the district court's order. Petitioner argues that the district court erred in resolving factual discrepancies in favor of Respondent's version of the facts and that the district court erred in making factual findings pertaining to the merits of her parentage and child custody claim.

{27} At the December 11, 2013 hearing, the district court heard the parties' arguments with regard to jurisdiction, acknowledging that the question of jurisdiction needed to be resolved before it considered the merits of Petitioner's claim. The parties stipulated that the question of jurisdiction would be decided on the pleadings and the existing record. In its order declining jurisdiction, several findings made by the district court were immaterial to the question of jurisdiction, and some of those findings appear to go directly to the issues of parentage and child custody. {28} Petitioner challenges the various findings entered by the district court. However, all of the challenged findings are immaterial to the question of jurisdiction. We consider the immaterial findings mere surplusage, which may be disregarded. See *Rosen v. Lantis*, 1997-NMCA-033, ¶ 21, 123 N.M. 231, 938 P.2d 729 ("[F]indings without legal consequence may be treated as surplusage and disregarded in that action and in subsequent litigation."); see also *Tome Land & Improvement Co. v. Silva*, 1973-NMSC-120, ¶ 18, 86 N.M. 87, 519 P.2d 1024 (ignoring as surplusage an erroneous finding that was clearly immaterial and irrelevant). Accordingly, we need not address Petitioner's contention that the findings are not supported by the pleadings or the record.

#### **Petitioner's Requests for Visitation and Contact**

{29} In May 2013 when the petition to determine parentage and child custody was filed, Petitioner moved for interim visitation and contact with R.W. The district court did not rule on Petitioner's motion, and in August 2013 Petitioner again



requested that the court address the issue of visitation. However, it appears from the record before us that while the district court addressed other issues in the case, this particular issue was not addressed. By the time the district court entered its March 2015 order, Petitioner had not had contact with R.W. for over two years.

{30} The extended time that it took for the remanded interim visitation and communication proceedings in the district court to be addressed, ultimately rendered those issues raised in connection with the petition for writ of error moot. See *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 (“A reviewing court generally does not decide . . . moot questions.”). We do note that assuming without deciding that the allegations in the petition are true, we specifically note that the procedures followed by the district court, the psychologist, and the GAL do not appear to have been in compliance with requisite procedures that would ensure a just decision.

{31} Petitioner argues that by initially failing to rule on her requests for visitation and contact with R.W., the district court deprived her of her right to the care and custody of R.W., which implicates her fundamental liberty interests, protected by the Due Process Clauses of the federal and state constitutions. Petitioner also makes a broad assertion that the district court's decision violates equal protection. We understand Petitioner to argue that the district court's decision to decline jurisdiction in this case is a result of her status as

a same-sex parent. Respondent does not address Petitioner's constitutional arguments.

{32} Notwithstanding Petitioner's constitutional arguments and Respondent's failure to respond to those arguments, we need not address them. As we noted earlier, the district court acknowledged that the question of jurisdiction needed to be resolved before it could consider the merits of Petitioner's claims, and we agree.

{33} Because we have concluded that the district court had jurisdiction over this action pursuant to the Act, on remand the district court will need to address whether Petitioner has standing to establish parentage as an interested party under the Uniform Parentage Act (UPA). See NMSA 1978, §§ 40-11A-201 to -204 (2009); *Chatterjee v. King*, 2012-NMSC-019, ¶¶ 48-49, 280 P.3d 283. If Petitioner is found to have standing, it would then be appropriate for the district court to address the merits of Petitioner's petition for determination of parentage, custody, timesharing, and child support as well as Petitioner's motions for interim visitation and custody.

{34} The district court must remain cognizant and vigilant of the requirements for appointment of a GAL on behalf of R.W., and the necessity that the GAL “provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives.” Rule 1-053.3(C) NMRA. In addition, the district court must also ensure that any bonding study with respect to R.W. be properly conducted with full participation of all interested parties in this

case, including Petitioner and Respondent.

#### CONCLUSION

{35} We consider the disposition of the issues in this case to require, for effective review, findings of fact and conclusions of law, as well as a thorough dispositional order. We reverse the district court's March 12, 2015 order for lack of such findings of fact and conclusions of law, and in addition for clarity on the resolution of the issues relating to jurisdiction. We discourage findings of fact stating what the parties argue. What the parties argue are not facts that can support conclusions of law. 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)). The court is instructed to state findings of fact and conclusions of law that directly and explicitly support the grant or denial of jurisdiction over: (1) the subject matter of initial child custody under Section 40-10A-201 of the Act and any grounds to decline to exercise jurisdiction under Section 40-10A-207(a), including whether another state is a more appropriate forum; and (2) the subject matter of parentage under the UPA and any effect of that determination on issues of visitation and custody.

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

**M. MONICA ZAMORA, Judge**

#### WE CONCUR:

**LINDA M. VANZI, Chief Judge**

**JONATHAN B. SUTIN, Judge**

**Certiorari Granted, June 23, 2017, No. S-1-SC-36428**

From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-056**

No. 34,506 (filed April 19, 2017)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
KELSON LEWIS,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

JUDITH K. NAKAMURA, District Judge

HECTOR H. BALDERAS  
Attorney General  
LAURA E. HORTON  
Assistant Attorney General  
Santa Fe, New Mexico  
for Appellee

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

**Opinion****Jonathan B. Sutin, Judge**

{1} Defendant Kelson Lewis appeals from the district court's denial of his motion to bar retrial on the charge of criminal sexual contact of a minor (CSCM) in the third degree. Among other charges, the indictment charged Defendant with second degree CSCM in Count 1. After the close of the State's evidence at trial, the district court granted the State's motion to amend the CSCM charge from second degree to third degree and granted Defendant's motion to include a jury instruction for the lesser included offense of battery. The district court declared a mistrial based on jury disagreement as to Count 1, directed a verdict of acquittal on Counts 2 and 3, and Defendant was found not guilty of Counts 4 and 5. Defendant asserts on appeal that the district court did not appropriately determine whether the jury was hung on the charge of CSCM or the lesser included battery charge. Thus, Defendant argues, double jeopardy principles prevent his retrial for CSCM, and the district court erred in denying his motion to bar retrial. Because we disagree that the record is ambiguous regarding the district court's inquiry into the jury deliberations and

the charge upon which the jury was deadlocked, we affirm.

**DISCUSSION**

{2} Defendant asserts the district court did not properly poll the jury as to whether it was deadlocked on the charge of CSCM or the lesser included charge of battery, and therefore, Defendant received an "implied acquittal" of CSCM. Thus, Defendant argues that retrial for CSCM violates the Double Jeopardy Clauses of the State and Federal Constitutions. "We review double jeopardy claims de novo." *State v. Fielder*, 2005-NMCA-108, ¶ 10, 138 N.M. 244, 118 P.3d 752.

{3} The Double Jeopardy Clause "has been held to incorporate a broad and general collection of protections against several conceptually separate kinds of harm: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Montoya*, 2013-NMSC-020, ¶ 23, 306 P.3d 426 (internal quotation marks and citation omitted). "When a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *State v. Baca*, 2015-NMSC-021, ¶ 34, 352 P.3d 1151 (alteration, internal quotation marks, and

citation omitted), *cert. denied sub nom. Baca v. New Mexico*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 255 (2015) (mem.). Where the jury is properly instructed on a lesser included offense, an acquittal or a hung jury on the greater offense does not preclude retrial on that uncharged, lesser included offense. See *State v. Collier*, 2013-NMSC-015, ¶¶ 21-22, 301 P.3d 370.

{4} Defendant relies primarily on Rule 5-611(D) NMRA; *State v. Castrillo*, 1977-NMSC-059, 90 N.M. 608, 566 P.2d 1146, *overruled on other grounds by State v. Wardlow*, 1981-NMSC-029, 95 N.M. 585, 624 P.2d 527; and *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, to argue that he received an implied acquittal on CSCM and retrial on that charge would violate his right to be free from double jeopardy. Relying on the same authority and also on *Fielder*, 2005-NMCA-108, we conclude that Defendant's retrial for CSCM does not violate double jeopardy. We begin by discussing the relevant authority and then discuss in detail what happened at Defendant's trial and its legal effect on his double jeopardy rights.

{5} In *Castrillo*, the charge of first degree murder, as well as the lesser included offenses of second degree murder and voluntary manslaughter, were submitted to the jury at the defendant's first trial. 1977-NMSC-059, ¶ 1. When the jury was unable to reach a verdict, the district court declared a mistrial without inquiring as to which of the offenses the jury had agreed and upon which the jury was deadlocked. *Id.* ¶ 14. The defendant was tried a second time and was found guilty of second degree murder. *Id.* ¶ 1. The defendant appealed, arguing his second trial violated double jeopardy. *Id.* Our Supreme Court held, though the jury was hung between acquittal and at least one of the offenses included within the murder charge, "[t]he record [was] silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse." *Id.* ¶ 14. Because the record was unclear as to which of the included offenses was the basis for impasse and the district court did not conduct further inquiry to ascertain at which level of charge the jury was deadlocked, our Supreme Court reasoned that any doubt must be resolved "in favor of the liberty of the citizen." *Id.* (internal quotation marks and citation omitted). Thus, our Supreme Court determined that all but the least of the lesser included charges (i.e., voluntary manslaughter) must be dismissed and that

retrial of the defendant on all but the least charge violated double jeopardy. *Id.* ¶¶ 14-15.

{6} In *Garcia*, this Court considered whether the district court erred when it inquired whether the jury was deadlocked on the greater offense but did not inquire whether the jury was deadlocked on the lesser included offenses. 2005-NMCA-042, ¶¶ 2, 10. The jury in *Garcia* was instructed on first degree murder, as well as second degree murder and voluntary manslaughter as lesser included offenses. *Id.* ¶ 2. The district court declared a mistrial after learning the jury could not reach an agreement on the first degree murder count. *Id.* ¶ 20. Upon inquiry by the district court regarding the charge of first degree murder, the foreperson informed the court that the jury was unable to reach a unanimous verdict on that charge. *Id.* The district court did not conduct any inquiry into the jury's deliberations on the lesser included charges of second degree murder and manslaughter. *Id.* This Court determined, based on *Castrillo* and its progeny, the district court was not required to inquire into the jury's deliberations regarding lesser included offenses when the district court had already determined the jury was unable to reach an agreement as to a greater offense. *Garcia*, 2005-NMCA-042, ¶ 17. This Court noted that the holding was consistent with Rule 5-611(D), which requires:

If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

See *Garcia*, 2005-NMCA-042, ¶¶ 25-27. On this basis, we concluded the district court did not err in the manner in which it polled the jury, and the defendant's retrial and conviction of first degree murder did not violate double jeopardy because there

was a manifest necessity to declare a mistrial on that level of the charge. *Id.* ¶ 29.

{7} Shortly after our opinion in *Garcia*, this Court decided *Fielder* in which we considered whether the defendant's retrial for second degree criminal sexual penetration (CSP II) violated double jeopardy because there was no manifest necessity to declare a mistrial on that charge. *Fielder*, 2005-NMCA-108, ¶¶ 1, 10, 15. The jury in *Fielder* was instructed on CSP II and third degree criminal sexual penetration (CSP III), among other charges. *Id.* ¶¶ 5-6. After learning the jury was unable to reach a verdict on CSP, the district court polled the jury regarding the numerical split of the votes for guilty and not guilty but did not determine whether the jury was deadlocked on CSP II or the lesser included offense of CSP III. *Id.* ¶ 8. The defendant was retried on CSP II and the lesser included charge of CSP III and was convicted of CSP III. *Id.* ¶ 9. Again relying on *Castrillo* and its progeny, this Court determined, because the district court did not inquire into the jury's deliberations on the greater offense of CSP II to determine upon which level of CSP the jury disagreed, there was no manifest necessity to declare a mistrial as to that offense, and the defendant's double jeopardy rights were violated when he was retried for CSP II. *Fielder*, 2005-NMCA-108, ¶ 15.

{8} Turning to the trial in the present case, following various recesses and delays on the third day of deliberations, the jury sent a note to the district court asking, "If we cannot come to a unanimous decision for Count 1, do we move on to discuss/decide on the lesser charge for Count 1?" The district court responded with a note stating, "If you have a reasonable doubt as to guilt on Count 1 only then do you move to consideration of the included offense of battery. If you are not unanimous as to Count 1 then you do not move on to the included offense of battery." As Defendant and the State point out, it appears the transcript erroneously indicates two hours elapsed between the jury's first question and the district court's response. Approximately thirty minutes after the district court responded to the jury's first note, the jury sent a second note stating, "On the count of Criminal Sexual Contact we are unable to reach a unanimous decision of guilty or not-guilty. Should we move on to the lesser charge of battery?" The district court sent a response stating, "No. Have you reached a unanimous verdict on the other counts?" Approximately thirty-five minutes later,

the jury responded on the same note below the district court's question, "Yes, we have come to [a] unanimous [decision] on [C]ounts 4 and 5." The district court sent a final note to the jury asking, "Are you finished deliberating on Count 1?" The jury sent its response while the district court was still on the record and responded on the same piece of paper below the district court's question, "Yes the Jury is finished deliberating on Count 1."

{9} Following a request from trial counsel for Defendant, the district court and parties discussed polling the jurors to determine which way each juror had decided Count 1, but the district court determined the jurors could not be formally polled as to whether an individual juror voted to acquit or convict. The jurors were called back into the courtroom, and the district court confirmed with the foreman that "there's no possibility for juror agreement on Count 1[.]" While it does not appear trial counsel for Defendant requested the jury be polled immediately after trial as to whether the jury was deadlocked on the CSCM charge or the lesser included battery charge, Defendant nonetheless argued in his motion to bar retrial that the court did not properly poll the jury as to the level of the impasse.

{10} We note the jury twice asked whether it should proceed to consider the battery charge if it was unable to reach a unanimous decision on the CSCM charge, and the district court twice explicitly instructed the jury not to consider the charge of battery unless the jury was unanimous that it had reasonable doubt about Defendant's guilt of CSCM. The court's second response indicates it understood the jury was unable to reach a unanimous decision on the CSCM charge, and it sought to determine if the jury was still deliberating on the other counts. Indeed, that understanding was consistent with the jury's express statement that it was "unable to reach a unanimous decision" on the CSCM charge. The jury's next response states it had reached a decision on the other counts, and notably, the jury did not indicate a change in its decision on Count 1 or that it had now reached a unanimous verdict on any level of charge included in Count 1. The jury's final note states it was finished with deliberations on Count 1. Also notable and pointed out by the State, the communications between the district court and the jury consistently refer to CSCM as "Count 1" and battery as the "lesser charge" or "included offense."

Thus, we conclude the record of communications makes clear that the jury's inability to agree on a finding of guilty or not guilty applied only to the CSCM aspect of Count 1.

{11} Defendant argues that we must presume the jury continued deliberations on Count 1 for approximately thirty-five minutes between when the court instructed the jury for the second time to not consider battery unless it was unanimous on Defendant's acquittal for CSCM and the time the jury stated it was finished as to Count 1. Defendant argues the court failed to poll the jury after the conclusion of deliberations in accordance with Rule 5-611(D), which states that the court *shall* poll the jury if the jury cannot unanimously agree upon the offenses submitted and that any ambiguity resulting from the lack of formal polling should be resolved in his favor.

{12} We note that in *Castrillo* and *Fielder* the record was silent regarding the level of charge at which the jury was hung. See *Castrillo*, 1977-NMSC-059, ¶ 14 (dismissing on double jeopardy grounds all but the least of the lesser included charges when the record was unclear as to which of those offenses was the basis for the impasse and the district court did not conduct further inquiry to ascertain at which level of charge the jury was deadlocked); *Fielder*, 2005-NMCA-108, ¶ 15 (determining no manifest necessity existed to declare a mistrial on the charge of CSP II because the district court did not inquire into the jury's deliberations to determine upon which level of CSP the jury disagreed). In contrast, the record shows the jury in the present case twice indicated it was hung on the CSCM charge.

{13} Defendant asserts that the level of deadlock is ambiguous because thirty-five minutes elapsed before the conclusion of deliberations, during which the jury could have acquitted Defendant of CSCM and hung on the battery charge, however, Defendant did not develop any facts at the time the jury returned its verdicts or demonstrate there was any question regarding the level of deadlock. We note a double jeopardy challenge need not be preserved. There must, however, exist a factual basis in the record for the argument. See *State v. Wood*, 1994-NMCA-060, ¶ 19, 117 N.M. 682, 875 P.2d 1113 (acknowledging double jeopardy issues may be raised at any time "either before or after judgment," but providing that "a factual basis must appear in the record in order to support such claim"); see also *State v. Antillon*, 2000-NMSC-014,

¶ 6, 129 N.M. 114, 2 P.3d 315 (recognizing double jeopardy claims may not be waived and citing *Wood* for the proposition that a double jeopardy defense "must be supported by a factual basis in the record"); *State v. Sanchez*, 1996-NMCA-089, ¶ 11, 122 N.M. 280, 923 P.2d 1165 (stating that the appellate courts place the burden on the party raising the double jeopardy challenge to provide a sufficient record for appellate analysis of the issue).

{14} Based on the jury's notes stating it was hung and therefore unable to resolve the charge of CSCM and its later confirmation that it was unable to agree on Count 1, the district court held that the jury was hung and obviously understood the level of charge upon which the jury was deadlocked. Moreover, Defendant also appears to have understood the jury to be deadlocked on the CSCM charge, because he only requested the jury be polled to determine individual votes for and against conviction and did not express any question about the level of the jury's impasse or request polling at the time to resolve any ambiguity. Beyond Defendant's argument that further deliberation may have occurred, nothing in the record suggests an interpretation other than that the jury was deadlocked on the CSCM charge. Indeed, the district court's post-deliberation questioning of the foreman and the unsigned verdict forms regarding Count 1 further cement the jury's inability to agree as to Count 1, and given the facts of the case, in particular, CSCM. Thus, based on the extent of the record before us, we decline to speculate whether the jury later acquitted Defendant of CSCM and to presume a double jeopardy violation based upon that speculation when all evidence in the record indicates the contrary.

{15} Defendant contends that the district court did not strictly comply with the mandatory language of Rule 5-611(D) when it determined the level of deadlock through notes exchanged between the jury and the district court, rather than through a more formalized polling process employed at the time the jury delivered its verdicts on the other counts. Thus, Defendant asserts the district court's failure to strictly adhere to the requirements of Rule 5-611(D) bars his retrial on CSCM on double jeopardy grounds. Without opining as to what would constitute an adequate "formalized polling process" as a matter of law, we hold that in this case, where the communications evidence jury disagreement on the CSCM charge, to reverse would be to

read Rule 5-611(D) more technically than substantively.

{16} We hold that the notes exchanged between the jury and the district court, coupled with the verbal confirmation from the foreman that the jury was unable to agree on Count 1, demonstrate the jury was deadlocked on CSCM and satisfied the intent of Rule 5-611(D). To hold otherwise would be to exalt form over substance, which we decline to do. See *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶ 39, 141 N.M. 692, 160 P.3d 601 ("[W]e do not exalt form over substance").

{17} Because the record demonstrates the jury was deadlocked on the charge of CSCM, we conclude manifest necessity existed to declare a mistrial on that charge and double jeopardy did not attach. Accordingly, we affirm.

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

**JONATHAN B. SUTIN, Judge**

**I CONCUR:**

**J. MILES HANISEE, Judge**

**GARCIA, Judge (dissenting).**

{19} I respectfully dissent in this case. This is not a post-deliberation polling case. Post-deliberation polling was never conducted by the district court in this case. See Majority Op. ¶ 9. Although our decisions in *Garcia* and *Fielder* give some guidance to resolve the correct way to poll a jury, both involved *post-deliberation polling* of the jury, and whether, pursuant to Rule 5-611(D), the jury was correctly polled after deliberations were completed. See *Garcia*, 2005-NMCA-042, ¶¶ 27-29; *Fielder*, 2005-NMCA-108, ¶¶ 8-11. In the present case, the district court made a reasonable and clear inquiry regarding a potential deadlock on Count 1 *during jury deliberations but failed to poll the jury after jury deliberations* were concluded, as required under Rule 5-611(D). Majority Op. ¶¶ 8-9. It is this failure to ever poll the jury after deliberations ceased, some thirty-five minutes after the inquiry during jury deliberations, that aligns this case more closely with the circumstances in *Castrillo*. See *Castrillo*, 1977-NMSC-059, ¶ 14 (establishing that post-deliberation polling was not done regarding the included offenses related to the murder charge). Because no polling was ever done in this case, as the majority agrees is a *requirement* under Rule 5-611(D), it is not this Court's role to change or modify the unambiguous requirement in Rule 5-611(D)

regarding polling the jury. *See* Majority Op. ¶¶ 11, 15; *see also State v. Montoya*, 2011-NMCA-009, ¶ 8, 149 N.M. 242, 247 P.3d 1127 (recognizing that interpretation of a Supreme Court rule is a question of law and the plain meaning rule applies where the language of the rule is “clear and unambiguous” (internal quotation marks and citation omitted)).

{20} The issue that concerns me is whether our Supreme Court simultaneously intended to create a rule requiring the polling of the jury while also providing for case-by-case exceptions to polling—where this Court then attempts to interpret questions and answers exchanged between the district court and the jury during deliberations. The majority is correct when it concludes that one reasonable interpretation of the jury deadlock issue would support its interpretation. *See* Majority Op. ¶¶ 14, 16. The issue, however, is not about a potentially reasonable interpretation that this Court can make regarding inquiries and questions occurring during jury deliberations, it is about whether our Supreme Court wants us to make these interpretations on a case-by-case basis.

{21} Although the district court may have made a reasonable and adequate inquiry regarding the basis for the jury’s alleged deadlock on Count 1, that inquiry was made during the time that deliberations were still ongoing and it failed to

fulfill the polling requirements of Rule 5-611(D) after jury deliberations were completed. The only question resolved after the jury completed its deliberations established that “there [was] no possibility for juror agreement on Count 1.” A specific inquiry regarding the primary offense of CSCM and the lesser included offense of battery was not addressed after deliberations ceased. Any confusion or ambiguity regarding possible changes in the jury’s position that may have occurred during the final thirty-five minutes of deliberation on Count 1 was not resolved by the required post-deliberation polling of the jury.

{22} If our Supreme Court mandated that the district court is required to remove any potential for confusion or ambiguity regarding which offenses a jury has deadlocked over, then post-deliberation polling under Rule 5-611(D) is not optional. If there is room for this Court to resolve confusion or ambiguity regarding which offenses a jury has deadlocked over, without post-deliberation polling, then the majority has adequately identified one potential exception to Rule 5-611(D). I believe that any exception to the polling requirement under Rule 5-611(D) must be left to our Supreme Court and should not be made by this Court. *See Alexander v. Delgado*, 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d 778 (“The general rule is

that a court lower in rank than the court which made the decision invoked as a precedent cannot deviate therefrom and decide contrary to that precedent, irrespective of whether it considers the rule laid down therein as correct or incorrect.” (internal quotation marks and citation omitted)). “This [C]ourt is bound by [S]upreme [C]ourt rules.” *Shain v. Birnbaum*, 1991-NMCA-092, ¶ 5, 112 N.M. 700, 818 P.2d 1224; *see State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶¶ 20-22, 135 N.M. 375, 89 P.3d 47 (confirming that the Court of Appeals remains bound by Supreme Court precedent but is invited to explain any reservations that it may harbor, with one exception allowing for a review of uniform jury instructions that have not previously been ruled upon by the Supreme Court).

{23} As a result, I do not agree with the majority’s deviation from our Supreme Court’s rule. Polling under Rule 5-611(D) is a requirement after all jury deliberations have ceased and are completed. Any modification in the “shall poll the jury” requirement set forth in Rule 5-611(D) must be left to the discretion of our Supreme Court and is not a discretionary matter that this Court should undertake on the basis of inference, technicality, or substance over form.

**TIMOTHY L. GARCIA, Judge  
(dissenting).**

Order Extra Directories!

## 2017-2018 Bench & Bar Directory



Members ..... \$50/copy  
Nonprofit Organization/  
Government Entities ..... \$55/copy  
Other ..... \$60/copy

Price includes tax.  
\$3.50 for postage per copy. Orders may  
be picked up to avoid mailing charge.

Order form available at  
[www.nmbar.org](http://www.nmbar.org)



**Got one of these? Does your client?**



**We need to talk . . .**

**Certified Documentation • Estate/Trust Valuation  
Divorce Settlement • Donations • Insurance Settlement  
Diminished Value • Misrepresented Sale**



**Auto Appraisal Group Inc.**

800-848-2886

[www.autoappraisal.com](http://www.autoappraisal.com)

**Data-driven Valuation Services**

**Local Service—Jim Dobier—505.573.1551**

Reach thousands in the legal community and  
capitalize on the specialized readership of each issue!

## NEW MEXICO Lawyer



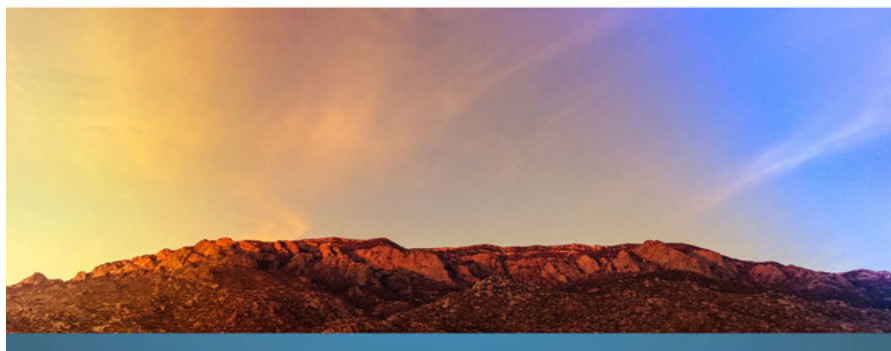
Advertise in the November  
*New Mexico Lawyer*  
Focusing on Employment  
and Labor Law

The deadline for advertising submissions is Oct. 20.

Contact Marcia Ulibarri,  
[mulibbarri@nmbar.org](mailto:mulibbarri@nmbar.org), 505-797-6058.



SANTA FE  
ALBUQUERQUE  
LOS ALAMOS



## INVESTING WHERE IT MATTERS

The LANB Wealth Strategies Division is a diverse  
and specialized group of professionals available  
to assist you with all of your financial goals and  
needs. We provide objective investment advice,  
create individualized portfolios, and develop  
customized solutions to meet your financial and  
investment objectives.

**IOLTA's**

**Trusts, Estates, &  
Conservatorships**

**Investment Services**

**Private Client Services**

Securities and insurance products are offered through Cetera Investment Services LLC (doing insurance business in CA as  
CFGIS Insurance Agency), member FINRA/SIPC. Advisory services are offered through Cetera Investment Advisers LLC.  
Neither firm is affiliated with the financial institution where investment services are offered. Wealth Management Services  
are: Not FDIC/NCUSIF Insured / Not Bank Guaranteed / May Lose Value / Not a Bank Deposit / Not Insured by any Federal  
Government Agency

**Los Alamos National Bank**

Telephone: 505.662.5171

Toll Free: 800.684.5262

LANB.com  
MEMBER FDIC Equal Housing Lender



# FORENSIC ACCOUNTING & LITIGATION SUPPORT SERVICES

For thorough, accurate and defensible case analysis and expert reports, rely on REDW's experienced experts.

*Lost Profits and Economic Damage Calculations • Fraud Examinations and Analysis • Forensic Accounting for Breach of Contract, Business Disputes and Marital Dissolutions • Business Valuations and Equipment Appraisals • Complex Accounting and Financial Issues • Insurance Claims Analysis • Expert Witness Testimony*




Tim Tribe, CPA/CFF, CFE, CICA

Ed Street, CPA/ABV/CFF, CVA

**REDW**<sub>LLC</sub>  
CPAs | Business & Financial Advisors  
505.998.3200 | redw.com

Albuquerque | Phoenix

## Professional Development Package



Still buying one CLE class at a time?

**BAM!**


Get unlimited CLE courses!

Two packages available!

- Up to **15 CLE credits\*** and **Unlimited Audit**
- Complimentary or discounted Annual Meeting registration\*
- Concierge service (invaluable)\*
- Credits filed (invaluable)

*\*Depending on the chosen package.*

For more information, and to purchase the Professional Development Package, contact **Marian Chavez** at **505-797-6059** or **mchavez@nmbar.org**.

 **STATE BAR**  
of NEW MEXICO  
CENTER FOR LEGAL EDUCATION

## Business Solutions for Legal Professionals

- Business Checking
- Business Visa Credit Cards
- IOLTAs



888-342-8766 | useaglefcu.org

## eNews

Advertise in our award winning weekly email newsletter!






Delivered every Friday morning, eNews is a great way to get your business noticed.


### Features

- Quick-glance format
- Ads have premium "above the fold" placement
- Winner of the 2016 NABE Luminary Award for Excellence in Electronic Media
- Affordable

Contact Marcia Ulibarri, at 505-797-6058 or email [mulibbarri@nmbar.org](mailto:mulibbarri@nmbar.org)

LIKE  
Follow  
TWEET  
Share  
Comment  
Connect

 **STATE BAR**  
of NEW MEXICO

[www.nmbar.org](http://www.nmbar.org)

# Expertise. Accuracy. Credibility.

From the boardroom to the courtroom, rely on the forensic and litigation expertise at Atkinson to deliver results that are on time and on target.

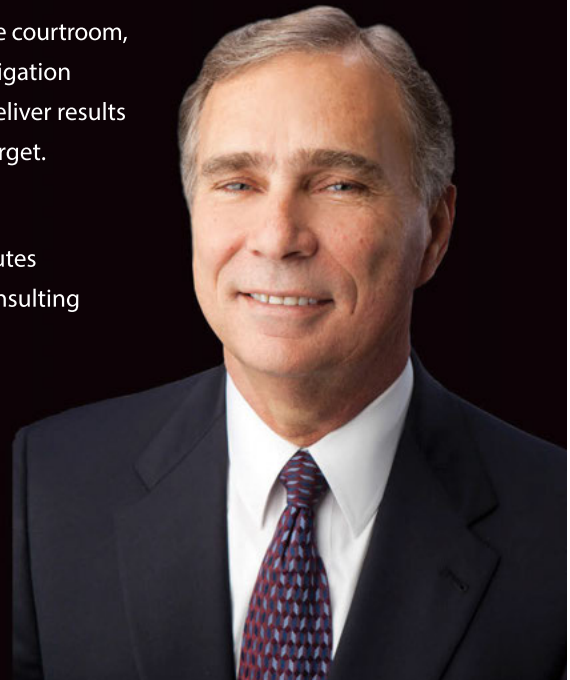
Litigation Services  
Partner/Shareholder Disputes  
Forensic Accounting & Consulting  
Valuation Services

**atkinson**

Certified Public Accountants

[atkinsoncpa.com](http://atkinsoncpa.com)  
albuquerque  
505 843-6492

Henry South,  
CPA, CVA



## Digital Print Center

Quality, **full-color** printing.  
Local service with fast  
turnaround.



Business Cards • Letterhead  
Envelopes • Booklets  
Brochures • Calendars  
Greeting Cards • Invitations  
and much more!

For more information, contact  
Marcia Ulibarri at 505-797-6058  
or [mulibarri@nmbar.org](mailto:mulibarri@nmbar.org)  
Ask about **YOUR** member discount!



**STATE BAR**  
of NEW MEXICO  
DIGITAL PRINT CENTER

## SAVE THE DATE

### Please join the **Eighth Judicial District Pro Bono Committee and Volunteer Attorney Program**

*for a Luncheon and CLE Opportunity*

**Thursday, October 19, 2017 at the Taos Country Club**

**Lunch from 11:30 AM – 1 PM, CLEs from 1 – 3 PM**

Come and meet with the Judges to discuss local court issues, new mediation and self-help programs, and learn about opportunities for attorneys to participate in pro bono activities with the Court.

*Following the luncheon, two (2) complimentary 1 hour Continuing Legal Education sessions will be offered:*

- **1 – 2 PM: Expanding ADR in Civil & Domestic Relations Litigation**, presented by Chief Judge Jeff McElroy (8<sup>th</sup> Judicial District Court); John Hughes, Esq.; David Levin, Esq.; and Barbara Kazen, Esq. (1 Gen. Credit)
- **2 – 3 PM: Complying with the Disciplinary Board Rule 17-204**, presented by Jane Gagne, Esq. through the Center for Legal Education. (1 E/P Credit)

Please contact **Lauren Felts-Salazar** at [taodlmf@nmcourts.gov](mailto:taodlmf@nmcourts.gov) by October 16, 2017 if you would like to attend the **Luncheon and/or "Expanding ADR" CLE**. Please contact the **Center for Legal Education** at (505)797-6020 if you would like to attend **"Complying with the Disciplinary Board Rule 17-204" CLE**.

## CREATIVE MEDIATIONS

www.creativemediations.com

heckert@swcp.com

505-480-8580

### Do you have a case you need mediated:

- That can't support \$300/hour?
- That has non-monetary issues that need attention?
- That you'd like to have mediated in 2 – 6 weeks?

**Creative Mediations** is the mediation/settlement facilitation arm of Hope Eckert, Attorney at Law LLC, offering these assets:

- Flexible fee structures depending on the needs of the case;
- Prompt settings;
- 15+ years litigation experience in both criminal and civil cases, representing both plaintiffs and defendants;
- Professional (UNM) mediator training and experience (currently a mediator for the Metro Court Mediation Program); and
- Master's degree (M.S.) focused on counseling

Creative Mediations is happy to help facilitate resolution for any cases, with special emphasis on civil cases under \$100,000 that may have non-monetary issues that also need to be addressed.



## YOUR TRUST, OUR DUTY

Since 1994, we have been working with traditional, non-traditional and modern families.

We are bonded, insured, and comply with New Mexico laws and fiduciary standards.



**HERITAGE TRUST**

LOCAL • INDEPENDENT • TRUE

www.htrust.com | 800.850.7775



## TERRI SAUER BEACH

HOME BEGINS HERE

An experienced attorney. Now a successful Realtor. Terri can help you whether you want to buy or sell a home.

505.250.6411

terri.beach@cblegacy.com



Associate Broker



LEGACY  
505.292.8900

## Alice T. Lorenz Lorenz Law

Certified Appellate Specialist

**38 Years Experience  
Accepting Referrals**

505.247.2456

alice@alorenzlaw.com

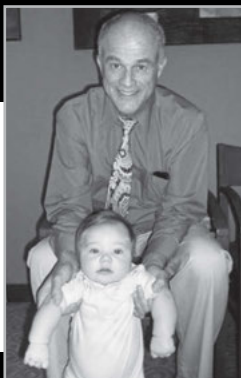
## ATTORNEY ALFRED SANCHEZ

*alfredsanchez.com*

Gratefully accepting referrals  
in bankruptcy, foreclosures &  
mortgage modifications.

*Grandpa, the one to trust.*

**Albuquerque 242-1979**



## MURIEL McCLELLAND

### *Family Law*

SETTLEMENT FACILITATION  
SPECIAL MASTER  
MEDIATION  
ARBITRATION

34 YEARS EXPERIENCE

(505) 433-2081

e-mail: murielmcc@aol.com



**Peter Brill, J.D.**

*Over 3 decades of construction experience*

**Mediation, Settlement  
Expert Witness Testimony  
Litigation Support**

**www.pbicc.com**

T: (505) 795-7807 • E: pbrill@pbicc.com

**Caren I. Friedman  
APPELLATE SPECIALIST**

505/466-6418

cf@appellatecounsel.info

— **MEDIATION** —  
**JOHN B. POUND**



*45 years experience trying  
cases throughout New Mexico,  
representing plaintiffs  
and defendants*

- American College of Trial Lawyers
- American Board of Trial Advocates
- Will mediate cases anywhere in New Mexico— no charge for travel time

**505 Don Gaspar, Santa Fe**

**505-983-8060**

**jbpsfnm@gmail.com**

**Walter M. Drew**

**Construction Defects Expert**

*40 years of experience*

*Construction-quality disputes  
between owners/contractors/  
architects, slip and fall, building  
inspections, code compliance,  
cost to repair, standard of care*

**(505) 982-9797**

**waltermdraw@gmail.com**

— **JOHN W. LAWIT** —

**Immigration Law  
Immigration Malpractice**

*39 Years of Experience*

**We've reopened and gladly accepting  
referrals by appointment only**

**517 Gold Ave SW**

**Albuquerque, NM 87102**

**(505)206.4222**

**jwl@lawitlaw.com**

**David Stotts**

**Attorney at Law**

**Business Litigation  
Real Estate Litigation**

**242-1933**

**A Civilized Approach to  
Civil Mediation**

*We facilitate  
communication and  
promote understanding*

**Karen S. Mendenhall**

**The Mendenhall Firm, P.C.**

**(505) 243-3357**

**KarenM@Mendenhallfirm.com**



**Planit Computer Services**

**On Site Service  
No Contracts  
No Monthly Fees  
Competitive Rates**

**References Available Upon Request**

**505-275-6858**

**david@planitnm.com**



## CONSTRUCTION LAWYER

**Alan M. Varela**

• Contractor cases at CID  
• Dispute Resolution for property owners  
30 years of experience  
avarela@romerolawfirm.com • (505) 345-9616

No need for another associate  
*Bespoke lawyering for a new millennium*  
**THE BEZPALKO LAW FIRM**  
*Legal Research and Writing*  
(505) 341-9353  
www.bezpalkolawfirm.com

## IRS PROBLEM RESOLUTION

**Daniel J. Herbison, Esq.**

NM Attorney/Former CPA

(505) 266-6549 • dan@abqtax.com

## California Attorney

10+ years of experience in litigation and transactional law in California. Also licensed in New Mexico. Available for associations, referrals and of counsel.

**Edward M. Anaya**

(415) 300-0871 • edward@anayalawsf.com

## JANE YOHALEM

**Appeals Specialist**

(505) 988-2826 • jbyohalem@gmail.com

## EXPERIENCED + PROMPT

Legal Research and Writing

**MAUREEN S. MOORE**

575-613-5339

www.attorneymaureen.com



**The Company You Keep®**  
www.newyorklife.com

**Anthony Gallegos, J.D. LUTCF**  
Financial Services Professional

Agent  
New York Life Insurance Company  
6565 Americas Parkway NE, Suite 500  
Albuquerque, NM 87110  
**880-2082**

Registered Representative  
for NYLIFE Securities LLC (Member  
FINRA/SIPC), a Licensed Insurance Agency  
6565 Americas Parkway NE  
Ste 500 • Albuquerque, NM 87110  
505 888-2000



## Associate Attorney

McGinn, Carpenter, Montoya & Love, P.A. seeks an associate attorney with excellent brief-writing and discovery management skills. Please send a resume and writing sample to MCMLAdmin@mcginnlaw.com. All inquiries will be kept confidential.

## Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

## Associate Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking two associate attorneys with 1-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pre-trial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Prefer attorney licensed in New Mexico and Texas but will consider applicants only licensed in Texas. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to bb@hmm-law.com.

## Attorney at Law

**(1-4 years of experience)**

Giddens, Gatton & Jacobus, P.C., a dynamic and growing law firm in Albuquerque, NM, has an immediate opening for an attorney with 1-4 years of experience to join its bankruptcy, commercial litigation, real estate and personal injury practice. The successful candidate will be talented and ambitious with excellent academic performance. Attorney to interact with clients and provide advice, legal research, writing, drafting pleadings and briefs, and prepare for court and or make supervised court appearances. Must thrive in a team environment and believe that client service is the most important mission of an attorney. Skills and abilities: Excellent oral and written interpersonal & communication skills; Strong analytical, logical reasoning and research skills; Strong organizational and time management skills; Strong customer service and personal service orientation; Strong knowledge of the law and legal precedence; Ability to use Lexis, MS Office and other computer programs. TO APPLY: Please email cover letter, resume, law school transcript, writing sample and references to Denise DeBlasie-Gallegos, at giddens@giddenslaw.com. DO NOT CONTACT OUR OFFICE DIRECTLY BY PHONE; EMAIL ONLY.

## Attorney

The Albuquerque office of Lewis, Brisbois, Bisgaard & Smith LLP is seeking a high energy attorney with a minimum of two years of litigation defense experience to join our General Liability Practice Group. Applicants must have exceptional writing skills and experience analyzing files, researching and briefing, and taking and defending depositions. In addition to two years of litigation defense experience, successful candidates must have credentials from an ABA approved law school, and must currently be licensed to practice in NM. This is a great opportunity to work in a collegial local office of a national firm. Please submit a cover letter, resume with salary history, and two writing samples via email to stephanie.reinhard@lewisbrisbois.com.

# Classified

## Positions

### Full-Time Staff Attorney

New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Workers' Rights Team, which fights to improve pay and working conditions for hardworking low-income New Mexicans. Required: Law degree and license; minimum three years of civil litigation experience; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; detail-orientation. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your interests in social justice and workers' rights to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, former recipients of public assistance, or people who have grown up in poverty are especially encouraged to apply.

### Deputy District Attorney

Immediate opening for HIDTA- Deputy District Attorney in Deming. Salary DOE: between \$50,000 - \$60,000 w/benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us Or call 575-388-1941

### Assistant U.S. Attorney - 3 positions

The U.S. Attorney's Office for the District of New Mexico is recruiting for an Assistant U.S. Attorney (AUSA) in the Albuquerque office. The attorney selected will be working in the Organized Crime Drug Enforcement Task Force Section. The attorney selected will handle prosecutions of a wide variety of federal offenses, with an emphasis on the prosecution of narcotics crimes. Prosecutions of narcotics offenses include enforcement of Title 21 and cases involving organizations responsible for the trafficking of heroin, marijuana, cocaine, methamphetamine and other controlled substances. Qualifications: Applicants must possess a J.D. degree, be an active member, in good standing, of a bar (any jurisdiction), and have at least three (3) years post-J.D. experience. Preferred Qualifications: Hiring preference will be given to applicants with prior felony trial experience and those that have demonstrated the ability to handle complex cases from the initial investigative stage through trial. Salary Information: AUSA pay is administratively determined based, in part, on the number years of professional attorney experience. The range of pay for this position is \$52,329 - \$136,874 plus locality pay. The complete vacancy announcement may be viewed at <https://www.justice.gov/usao/career-center>, or at <http://www.usajobs.gov/> (USA Jobs), all applicants must apply through USA Jobs or email their resume to USANM.HR@usdoj.gov.

The U.S. Attorney's Office for the District of New Mexico is recruiting for an Assistant U.S. Attorney (AUSA) in the Albuquerque office. The attorney selected will be working in the Indian Country Crimes Section. The attorney selected will handle prosecutions of a wide variety of federal offenses, with an emphasis on the prosecution of Indian Country crimes. Qualifications: Applicants must possess a J.D. degree, be an active member, in good standing, of a bar (any jurisdiction), and have at least one (1) year post-J.D. experience. Preferred Qualifications: Hiring preference will be given to applicants with prior felony trial experience and those that have demonstrated the ability to handle complex cases from the initial investigative stage through trial. Salary Information: AUSA pay is administratively determined based, in part, on the number years of professional attorney experience. The range of pay for this position is \$52,329 - \$136,874 plus locality pay. The complete vacancy announcement may be viewed at <https://www.justice.gov/usao/career-center>, or at <http://www.usajobs.gov/> (USA Jobs), all applicants must apply through USA Jobs or email their resume to USANM.HR@usdoj.gov.

The U.S. Attorney's Office for the District of New Mexico is recruiting for an Assistant U.S. Attorney (AUSA) in the Las Cruces office. The attorney selected will be working in the Criminal Division and will handle prosecutions of a wide variety of federal offenses. Qualifications: Applicants must possess a J.D. degree, be an

active member, in good standing, of a bar (any jurisdiction), and have at least one (1) year post-J.D. experience. Preferred Qualifications: Hiring preference will be given to applicants with prior felony trial experience and those that have demonstrated the ability to handle complex cases from the initial investigative stage through trial. Salary Information: AUSA pay is administratively determined based, in part, on the number years of professional attorney experience. The range of pay for this position is \$52,329 - \$136,874 plus locality pay. The complete vacancy announcement may be viewed at <https://www.justice.gov/usao/career-center>, or at <http://www.usajobs.gov/> (USA Jobs), all applicants must apply through USA Jobs or email their resume to USANM.HR@usdoj.gov.

### Associate University Counsel

This position is within UNM's Office of University Counsel. The Office of University Counsel is seeking an experienced attorney to provide legal counsel to the institution covering broad range of higher education and other legal issues. Areas of practice will include research, intellectual property and technology transfer, trademarks, IT agreements, and providing training to University departments and personnel as needed. This position will report to the University Counsel and will entail working with all areas of the University, including mid-level and senior university officials as well as faculty/academic leaders. Prior experience representing public institutions with educational and/or research missions is highly preferred. Candidates must be able to work in a fast-paced environment where advice and counsel leads to client-oriented solutions. This position requires interaction with a variety of University constituents and the successful candidate will demonstrate an ability to build relationships and inspire confidence. The University of New Mexico is committed to hiring and retaining a diverse workforce. We are an Equal Opportunity Employer, making decisions without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class. TO APPLY: For complete information including closing dates, minimum requirements, and instructions on how to apply for this or any UNM position please visit our website at <http://UNMJobs.unm.edu>, or call (505) 277-6947, or visit our HR Service Center at 1700 Lomas NE, Suite 1400, Albuquerque, NM 87131. EEO/AA

### Assistant Attorney General Positions

The Office of the New Mexico Attorney General has multiple attorney openings for an Assistant Attorney General positions in its Open Government Division in Santa Fe. A copy of the job posting and further details available at [www.nmag.gov/human-resources.aspx](http://www.nmag.gov/human-resources.aspx) or by emailing Division Director Sally Malavé at [smalave@nmag.gov](mailto:smalave@nmag.gov). Applications reviewed immediately on a rolling basis until positions are filled.

### New Mexico State University College of Business Department of Finance Bill and Sharon Sheriff Endowed Chair in Entrepreneurship

Funded through a generous gift provided by Bill and Sharon Sheriff, applications are being sought for the Bill and Sharon Sheriff Endowed Chair in Entrepreneurship. This is a (non-tenure track) College Full Professor position with the Bill and Sharon Sheriff Endowed Chair in Entrepreneurship, whose responsibilities will span the academic year and begin August 2018. The term of the Endowed Chair will be three years with eligibility for renewal. The primary responsibility of the Chair holder will be service and outreach in order to develop entrepreneurial resources for the advancement of New Mexico and the region, as well as working closely with New Mexico State University's Arrowhead Center (<http://arrowheadcenter.nmsu.edu>). Arrowhead Center was created by NMSU to be an engine for sustainable economic development, ultimately improving the quality of life for all New Mexicans. In addition, the Chair holder will teach five courses related to entrepreneurship and a related field per academic year. The applicant to the Endowed Chair must possess a graduate degree in business or a related field (Masters or Doctorate), or a Juris Doctorate from a regionally accredited school, with a preference for AACSB accreditation. In addition, the Chair holder will be responsible for maintaining his or her AACSB qualifications (i.e., Scholarly Practitioner, Instructional Practitioner, Scholarly Academic, or Practitioner Academic). Chair holder will have a demonstrated track record of expertise in any area of entrepreneurship that will allow for him or her to provide strong leadership and expertise toward the goal of cultivating a spirit of entrepreneurship among New Mexicans. Application Procedure: Online application must be submitted by January 10, 2018. For complete job description, qualifications and application process visit: <http://jobs.nmsu.edu/postings/29291>. Offer contingent upon verification of eligibility for employment in the United States. New Mexico State University is an EEO/Affirmative Action Employer.

### Senior Trial Attorney

Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Socorro County (Socorro). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary range: \$59,802 - \$74,753. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.



### Legal Director

The American Civil Liberties Union (ACLU) of New Mexico seeks an enterprising Legal Director to lead its litigation and legal advocacy program. The ACLU of New Mexico pursues impact litigation and legal advocacy in order to defend and expand the civil rights guaranteed by our federal and state constitutions, including criminal justice, police practices, First Amendment rights, reproductive freedom, LGBTQ rights, and immigrants' rights. For the full position announcement and how to apply: <https://www.aclu-nm.org/en/jobs/legal-director> Position is open until filled, preference given to applications received by October 15, 2017.

### Legal Assistant

Downtown defense law firm seeks legal assistant committed to providing the highest quality service to clients. Excellent salary and benefits. The position requires daily calendaring, word processing, working with opposing counsel staff, court staff, and clients routinely. Must be able to multitask and handle large case load. Litigation experience a must, with a good understanding of the deadlines required by the Rules of Civil Procedure. Please e-mail your resume to [akeith@stiffaw.com](mailto:akeith@stiffaw.com).

### Staff Attorney – Litigation

The Albuquerque office of Brownstein Hyatt Farber Schreck is seeking a staff attorney to join our commercial litigation team. Candidates should have a proven track record in legal research and drafting of pleadings, memos, and briefs. Excellent academic performance, strong writing and analytical skills, interpersonal skills and the ability to work in a team environment required. Qualified candidates should submit a cover letter, resume and transcript to Jamie Olberding, Director of Attorney Recruiting and Integration, at [jolberding@bhfs.com](mailto:jolberding@bhfs.com). EOE

### Attorney Position

Attorney position available with uptown law firm that strongly emphasizes a strong work/life balance for its employees. General civil practice with primary focus on domestic relations. 2+ years' experience preferred. Excellent benefits including health, dental, life, disability, and 401(k). Partnership track opportunities available. Salary DOE. Send resume and salary requirements to [bryanf@wolfandfoxpc.com](mailto:bryanf@wolfandfoxpc.com).

### Litigation Legal Secretary

Butt Thornton & Baehr PC has an opening for an experienced litigation legal secretary (5+ years). Must be well organized, and have the ability to work independently. Excellent typing/word processing skills required. Generous benefit package. Salary DOE. Please send letter of interest and resume to [gejohnson@btblaw.com](mailto:gejohnson@btblaw.com)

### Senior Operations Manager

This position is within UNM's Office of University Counsel. The Office of University Counsel is seeking an organized, detail-oriented individual with experience in the legal field to manage department operations. This position, under direct supervision of the University Counsel, must oversee administrative aspects of the office including strategic planning for the office, budgeting and financial planning; developing and implementing office protocols; supervising administrative staff; management of personnel matters; and basic IT support, including case management software. The University of New Mexico is committed to hiring and retaining a diverse workforce. We are an Equal Opportunity Employer, making decisions without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, veteran status, disability, or any other protected class. TO APPLY: For complete information including closing dates, minimum requirements, and instructions on how to apply for this or any UNM position please visit our website at <http://UNMJobs.unm.edu>, or call (505) 277-6947, or visit our HR Service Center at 1700 Lomas NE, Suite 1400, Albuquerque, NM 87131. EEO/AA

### Personal Injury Paralegal

Law Offices of Samuel Kane, LLC is seeking a fulltime personal injury paralegal with at least six years of experience. Must be able to do liens, subrogations, draft responses for disclosures, and trial preparation. Candidates should have excellent writing and research skills, and the ability to work independently. Please submit a resume and salary requirements to [sam\\_kane@yahoo.com](mailto:sam_kane@yahoo.com) or call Jessica at 575-636-0302.

## Positions Wanted

### Legal Assistant for Hire

PI, Ins. Def., CV Litigation, WC, Transcription, Odyssey-CM/ECF, Prepare/Answer Discovery, Med. Rec. Repts, Notary. MS Office, Calendar, Hard-Working, Attn to detail, Strong work ethic. In ABQ or RR only. Please email me for resume, salary requirements at 'legalassistantforhire2017@gmail.com.'

## Services

### Briefs, Research, Appeals—

Leave the writing to me. Experienced, effective, reasonable. [cindi.pearlman@gmail.com](mailto:cindi.pearlman@gmail.com) (505) 281 6797

## Office Space

### Office Space for Lease:

Excellent office space for lease. Southwest style. Huge professional office (20'x 16'), part of private law office suite. Complete with: conference room, waiting area, break room, and restrooms. Ample parking for clients. Quick freeway access. Close to courthouses. Quite setting with Courtyard entrance and mature landscaping. Viga ceilings and adobe walls. \$1,350/month (includes rent, utilities, and grounds maintenance). Contact Carol or Nina at (505) 246-1669.

### Shared Uptown Office Space for Rent

Newly renovated executive offices for rent in shared professional office in Uptown area. Assistant work stations available if needed. Furnished options exist. Includes use of 3 conference rooms, reception services to greet guests and accept documents, copier, fax machine, kitchen/break room, utilities, janitorial services, exterior signage, and alarm service. Convenient access to I-40. Plenty of free parking. Starting from \$750/mo. Call Bryan at (505) 268-7000.

### Uptown Shared Office Space Available

Rental space includes large window office and interior office for assistant, phones, fax, internet, copy machine, janitorial service, etc. Access to 2 conference rooms, large waiting area, kitchenette and garage parking. Class A space. Contact Nina at 505-889-8240 for details.

## Miscellaneous

### Want To Purchase

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

### Search For Will:

Decedent: Edmundo (Edmund) Luis Trujillo; Place of Residence: Rio Rancho, NM; Date of Death: 1/23/2017; Age: 79 years. If located, please contact Jeff Romero, Attorney at Law, (505) 244-0274.



# Get It Right. Get Official Laws.

GET ON THE SAME PAGE AS THE NEW MEXICO COURTS AND LEGISLATURE.



## NMOneSource.com®

OFFICIAL • EXCLUSIVE • ONLINE



A lawyer, as a member of the legal profession, is a representative of clients and an officer of the courts. Lawyers should seek the highest professional skill in zealous advocacy for their clients. Skill requires tools. NMOneSource.com® is the New Mexico legal research tool used by the New Mexico Supreme Court and the statewide judiciary. Our New Mexico judges rely on it in chambers and on the bench for access to the official annotated statutes, court rules and appellate court opinions on their effective dates, a unique standard upheld by the New Mexico Compilation Commission. Lawyers would be well served to get it right and use official laws.”

- Honorable Edward L. Chávez, Justice, New Mexico Supreme Court

**LEARN MORE TODAY! [www.nmcompcomm.us/nmonesourcecom.htm](http://www.nmcompcomm.us/nmonesourcecom.htm)**



**New Mexico Compilation Commission**

*The Official Legal Publisher of the State of New Mexico*

[www.nmcompcomm.us](http://www.nmcompcomm.us) • 505.827.4821 • 866.240.6550



# Rodey Law Firm

is very pleased to announce that

## Jenica L. Jacobi

has joined the firm.

Jenica L. Jacobi  
jjacobi@rodey.com  
505.768.7222

Ms. Jacobi's practice focuses on real estate and municipal law. She is experienced in handling local government matters, zoning and development issues, eminent domain, sales and leases of real property, probate, foreclosures, and liquor licenses.

Prior to joining the Rodey Law Firm, Ms. Jacobi was a Managing Assistant City Attorney for the City of Albuquerque, overseeing all general counsel and transactional work for the City. While with the City, Ms. Jacobi advised the City Council, Environmental Planning Commission, Zoning Hearing Examiner, and other boards and commissions.

**RODEY**

*L a w*

505.765.5900

[www.rodey.com](http://www.rodey.com)

*Offices in Albuquerque and Santa Fe*