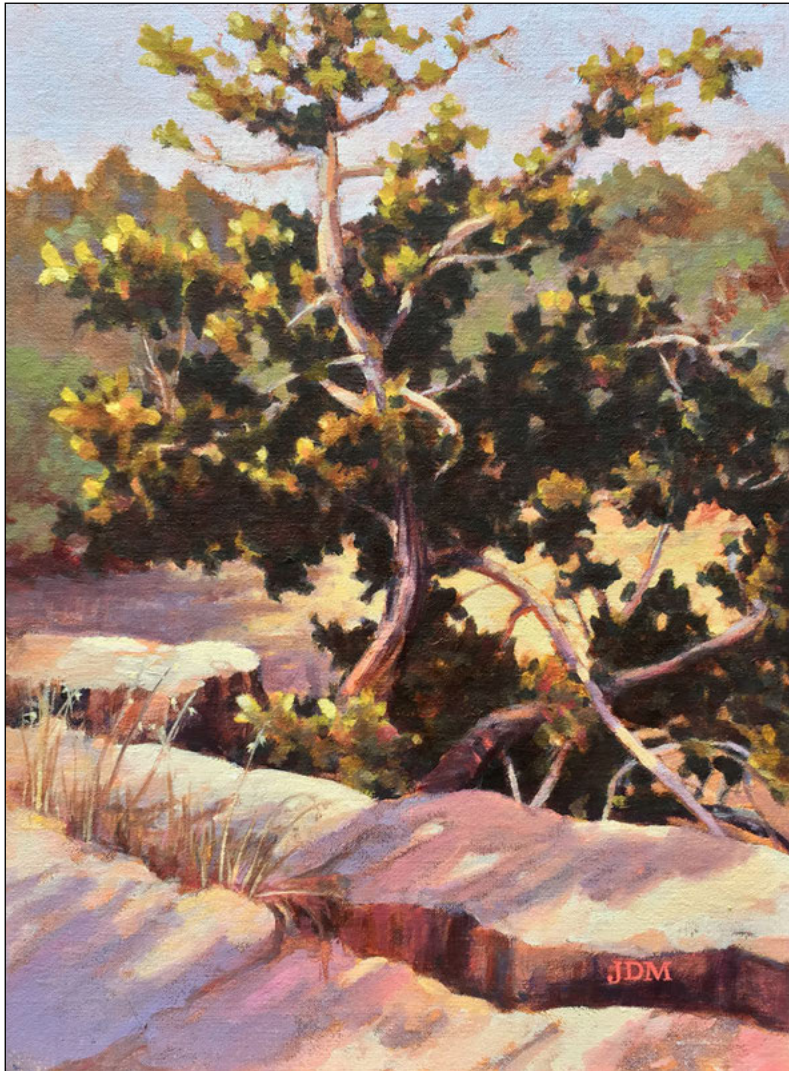


# BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

October 4, 2017 • Volume 56, No. 40



*Defiant* by John Meister (see page 3)

Purple Sage Gallery (Old Town, Albuquerque),  
Warren Fine Art (Old Town, Albuquerque)

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## CLE Planner

*Upcoming programming  
from the  
Center for Legal Education*

DISTINGUISHED ACHIEVEMENT  
*Awards Dinner*  
— 2017 —

HONORING THE PAST | BUILDING THE FUTURE

**FRIDAY, OCTOBER 20**  
UNM STUDENT UNION BALLROOMS

6:00 PM: RECEPTION  
7:00 PM: DINNER & AWARDS

HONOREES



**Professor Barbara E. Bergman**  
*Director of Advocacy, University of Arizona  
James E. Rogers College of Law*



**The Honorable Michael D. Bustamante (Ret.)**  
*UNM School of Law Class of 1974*



**Professor James W. Ellis**  
*University Distinguished Professor of Law*

NEW

The **Alumni Promise Award** is new this year and honors a recent UNM Law School graduate who has contributed innovative or substantial service to the Law School, its students, or its community.

ALUMNI PROMISE  
AWARD HONOREE

**Shammara H. Henderson**  
*UNM School of Law Class of 2007*



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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

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## Meetings

### October

- 4**  
**Employment and Labor Law Section Board**  
Noon, State Bar Center
- 10**  
**Appellate Practice Section Board**  
Noon, teleconference
- 11**  
**Taxation Section Board**  
Noon, teleconference
- 11**  
**Animal Law Section Board**  
Noon, State Bar Center
- 12**  
**Public Law Section Board**  
Noon, Montgomery & Andrews, Santa Fe
- 12**  
**Business Law Section Board**  
4 p.m., teleconference
- 13**  
**Prosecutors Section Board**  
Noon, State Bar Center
- 15**  
**Young Lawyers Division Board**  
10 a.m., Taos Ski Valley
- 17**  
**Solo and Small Firm Section**  
11 a.m., State Bar Center

## Workshops and Legal Clinics

### October

- 4**  
**Civil Legal Clinic**  
10 a.m.–1 p.m.,  
Second Judicial District Court,  
Albuquerque, 1-877-266-9861
- 4**  
**Divorce Options Workshop**  
6–8 p.m., State Bar Center, Albuquerque,  
505-797-6003
- 6**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., First Judicial District Court,  
Santa Fe, 1-877-266-9861
- 13**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Bernalillo County  
Metropolitan Court, Albuquerque, 505-  
841-9817
- 18**  
**Family Law Clinic**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861
- 25**  
**Consumer Debt/Bankruptcy Workshop**  
6–9 p.m., State Bar Center, Albuquerque,  
505-797-6094

**About Cover Image and Artist:** John Meister graduated from the University of Texas at Austin with a B.A. in Art and began his career with 23 years in commercial graphic design and illustration, shifting to full-time painting in 2009. Living in New Mexico since 1990, he paints primarily in oils, both in his Albuquerque studio and en plein air and often explores ways to depict the unique character of the beautiful Southwest. When he feels that his "muse" is hiding, he first looks for it in an art museum or gallery. He is always inspired by those visual historians that came before and left behind something to admire. Meister volunteers with several art organizations, including Plein Air Painters of New Mexico, and he occasionally teaches at the New Mexico Art League in Albuquerque. His work can be found in collections across the Southwest. To view more of his work, visit [www.johnmeisterart.com](http://www.johnmeisterart.com).



# Notices

## COURT NEWS

### Supreme Court Law Library Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at <https://n10045.eos-intl.net/N10045/OPAC/Index.aspx>. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at [lawlibrary.nmcourts.gov](http://lawlibrary.nmcourts.gov) or by calling 505-827-4850.

#### Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

#### Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

### New Mexico Court of Appeals Gov. Susana Martinez Appoints Emil John Kiehne

On Sept. 22 Governor Susana Martinez announced the appointment of Emil John Kiehne of Los Lunas to the New Mexico Court of Appeals, filling the vacancy created by the retirement of Judge James Wechsler.

### N.M. Board of Legal Specialization Comments Solicited

The following attorney is 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.

*Employment and Labor Law*

Jeffery Lowry

### Second Judicial District Court Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon, Oct. 20, in the Chama Conference Room at the Ju-

## Professionalism Tip

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

I will strive to set a high standard of professional conduct for others to follow.

venile Justice Center, 5100 2nd Street NW, Albuquerque. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 841-7644 for more information.

### Eleventh Judicial District Court

#### Notice of Retirement

The Eleventh Judicial District Court announces the retirement of the Hon. Sandra Price effective Jan. 1, 2018. A Judicial Nominating Commission will be convened in Farmington in January to interview applicants for this vacancy. Further information on the application process can be found on the Judicial Selection website (<http://lawschool.unm.edu/judsel/index.php>), along with updates regarding this vacancy and the news releases.

### 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.

### Bernalillo County Metropolitan Court

#### Bonding Window New Hours

Effective Sept. 30, Bernalillo County Metropolitan Court's bonding window is open from 7 a.m.–10:30 p.m. Monday through Sunday. Bonds during "graveyard" hours are now longer accepted.

#### Court Closure Notice

The Bernalillo County Metropolitan Court will be closed on Oct. 27 for the Court's Annual Employee Conference. Misdemeanor custody arraignments and felony first appearances will not be held that day. The conference is sponsored by the New Mexico Judicial Education Center at the University of New Mexico and paid for by fees collected by state courts.

## STATE BAR NEWS

### Attorney Support Groups

- 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.)
- Nov. 6, 5:30 p.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

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

### Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners met at the State Bar Center in Albuquerque on Sept. 15. Action taken at the meeting was as follows:

- Approved the July 27 meeting minutes as submitted;
- Accepted the Aug. 2017 financials;
- Approved the audit proposal from CliftonLarsonAllen for a one-year contract with up to five one-year extensions;
- Approved the 2018 State Bar and New Mexico State Bar Foundation budgets;
- In response to a request from the Committee on Women and the Legal Profession, approved \$1000 towards a permanent fixture for Justice Pamela B. Minzner Outstanding Advocacy for Women Award recipients to be placed at the Court of Appeals building in Albuquerque;
- Approved the removal of former Executive Director Joe Conte as a signer on all State Bar and NMSBF bank accounts and CDs;
- Held an executive session to discuss the executive director search and a personnel issue;
- Following a presentation and a request for State Bar members to get involved



in the law related education program, Oyez, Oyez, Oh Yay! developed by the State Bar of Texas: approved placing a link on the State Bar's website to the State Bar of Texas LRE website to be used by New Mexico teachers and formed a committee to study the program further and make it specific to New Mexico;

- Received a request to participate in an unbundling conference scheduled for Oct. 26-27 in Denver, Colo., and took no action;
- Elected Gerald G. Dixon as president-elect of the State Bar, elected Ernestina R. Cruz as secretary-treasurer of the State Bar and the NMSBF, and elected Commissioner Pool as vice president of the NMSBF;
- Approved petitions for continuance from the Committee on Women and the Legal Profession, Historical Committee, Children's Law Section, Criminal Law Section, Employment and Labor Law Section, Indian Law Section and the Prosecutors Section;
- Received a request from Chief Justice Nakamura to update the Task Force on Women and the Legal Profession's 1990 Final Report on the Status of Women Attorneys in New Mexico and referred it to the State Bar's Committee on Women and the Legal Profession, which will also be updating the Gender Equality in the Courts Handbook; and
- Received the 2018 Board of Bar Commissioners meeting dates as follows: Feb. 23, May 18, Aug. 9 (in conjunction with the State Bar Annual Meeting), Oct. 12, and Dec. 13.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Dec. 7 meeting.

### **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.

### **Indian Law Section 2017 Indian Law Section Attorney Achievement Award**

The Indian Law Section has opened nominations for its annual Attorney Achievement Award which gives the Section an opportunity to recognize the amazing accomplishments of its members. Section membership includes some of the foremost Indian law practitioners in the country who have made important contributions to our profession and to our communities. The nominee for the Award must be a member of the Indian Law Section and the nomination must explain, in one page or less, the nature of the nominee's extraordinary achievements in Indian law and the nominee's contributions to the community. The deadline for nominations is 5 p.m., Oct. 27. The Award will be presented on Nov. 16. Send nominations to Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org). Visit [www.nmbar.org/IndianLaw](http://www.nmbar.org/IndianLaw) to view a roster of Section members. Recent recipients include Michael P. Gross and C. Bryant Rogers.

### **Intellectual Property Law Section**

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

Join the Intellectual Property Law Section from 8:45 a.m.-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 administra-

tive 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.

### **Natural Resources, Energy and Environmental Law Section**

#### **Nominations Open for 2017 Lawyer of the Year Award**

The Natural Resources, Energy and Environmental Law Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 15. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at [www.nmbar.org/NREEL](http://www.nmbar.org/NREEL). Nominations are due by Oct. 27 to Breanna Henley, [bhenley@nmbar.org](mailto:bhenley@nmbar.org).

### **Solo and Small Firm Section Fall Speaker Series Line-up**

The Solo and Small Firm Section's monthly luncheon presentations on unique law-related subjects continue on Oct. 17 with guest speaker Gene Grant, host of New Mexico in Focus. On Nov. 21, join Eric Sirotkin, a local lawyer who has taken a new direction in the last decade, who has written books on international law including North Korea (four trips there) and forgiveness commissions. And on Jan. 16, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last fifty years and the effects (if any) on American and international law. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org) to R.S.V.P.

## Young Lawyers Division Volunteer Needed for Taos Wills for Heroes

The YLD is seeking volunteer attorneys for its Wills for Heroes event for Taos first-responders from 9 a.m.-noon, Oct. 14, at Casa Encantada Realty, located at 7276 NM-518 in Ranchos De Taos. Volunteers should arrive at 8:15 a.m. for breakfast, orientation, and laptop set up. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve as witnesses and notaries. Contact YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com to volunteer.

## UNM Law Library Hours Through Dec. 16

### Building and 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)

## OTHER BARS Albuquerque Lawyers Club Understanding the Anti-donation Clause

Alan Hall and Dick Minzner of the Rodey Law Firm will present "Understanding the Anti-donation Clause" (1.0 G) at the next meeting of the Albuquerque Lawyers Club at 11:30 a.m., Oct. 4, at Seasons Rotisserie and Grill. Lunch will begin at 11:30 a.m. with the CLE to follow. For more information and to register, contact Yasmin Dennig at ydennig@sandia.gov or 505-844-3558.

## New Mexico Black Lawyers Association Sports and Entertainment Law CLE

The New Mexico Black Lawyers Association invites members of the legal community to attend its "Sports and Entertainment Law" CLE (5.0 G, 1.0 EP) from 8 a.m.–4:30

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Percent Paid	98.99%	98.99%

I certify that the statements made above are true and complete.

Evann Kleinschmidt, *Bar Bulletin* Managing Editor

p.m. on Nov. 17 at the State Bar Center. Registration is \$199 and the deadline to request a refund is Nov. 10. For more information, or to register online, visit [www.newmexicoblacklawyersassociation.org](http://www.newmexicoblacklawyersassociation.org).

## New Mexico Criminal Defense Lawyers Association The Notorious DWI Seminar

From Birchfield to field sobriety testing to use of science and experts, the New Mexico Criminal Defense Lawyers Association presents "The Notorious DWI Seminar" (6.0 G) on Oct. 27 in Albuquerque. The program will feature experienced attorneys and a segment by retired New Mexico Court of Appeals Judge Roderick Kennedy. This advanced CLE is packed with the latest information for lawyers' DWI practice. Visit [nmcdla.org](http://nmcdla.org) to join NMCDLA and register for this seminar.

## OTHER NEWS New Mexico Workers' Compensation Administration Notice of Public Hearing

The New Mexico Workers' Compensation Administration will conduct a public hearing on the adoption of new WCA Rules

at 1:30 p.m., Oct. 27, at the WCA, 2410 Centre Avenue SE, Albuquerque, NM 87106. The proposed rule amendments are available at [www.workerscomp.state.nm.us/](http://www.workerscomp.state.nm.us/). Written comments on the changes will be accepted until close of business on Oct. 27. The WCA proposes to repeal and replace Part 4 of Title 11, to implement new rules for the WCA e-filing system and make minor changes to the Health Care Provider and Mediation rules. The fee schedule has been updated as well.

## New Mexico Superintendent of Insurance Healthcare Road Show

New Mexico's Superintendent of Insurance and beWellnm invite the legal community to attend an in-depth discussion of changes to the health insurance marketplace for the 2018 plan year. These events will feature presentations by representatives of the Superintendent of Insurance, beWellnm, and insurance carriers offering coverage on the beWellnm marketplace. Presentations will include a preview of a new plan comparison tool and provider search tool. To view the complete schedule and to R.S.V.P. go to [www.bitly.com/osirsvp](http://www.bitly.com/osirsvp) or call 1-833-ToBeWell today to reserve your spot.

# Legal Education

## October

- |   |  |  |
|---|--|--|
| <p><b>4 Bankruptcy Law: The New Chapter 13 Plan</b><br/>3.1 G<br/>Live Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>            | <p><b>10 Estate Planning for Second Marriages</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>19 New Mexico DWI Cases: From the Initial Stop to Sentencing (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><b>4 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>     | <p><b>12 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>20 Death of Expertise: Skeptical Views of Scientific Evidence</b><br/>3.5 G, 2.5 EP<br/>Live Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>4 2016 Administrative Law Institute</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><b>12 Human Trafficking (2016)</b><br/>3.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>20 Ethics and Client Money: Trust Funds, Setoffs and Retainers</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                  |
| <p><b>4 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><b>12 Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)</b><br/>1.5 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>20 Annual Criminal Law Seminar</b><br/>10.0 G, 2.0 EP<br/>Live Seminar, Ruidoso<br/>El Paso Criminal Law Group, Inc.<br/>915-534-6005</p>  |
| <p><b>5 2017 Health Law Symposium</b><br/>6.0 G, 1.0 EP<br/>Live Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                  | <p><b>13-14 Family Law Institute: Heartburn Issues—How not to Commit Malpractice in Military Divorce and in Relocation Cases</b><br/>Total Possible CLE Credits: 10.0 G, 1.0 EP (plus an optional 1.0 EP)<br/>Live Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>24 Network of State and Federal Counsel Conference</b><br/>7.7 G, 2.0 EP<br/>Live Seminar, Santa Fe<br/>Davis and Henderson<br/>800-274-7280 x2816</p>                                       |
| <p><b>6 2017 Employment and Labor Law Institute</b><br/>5.0 G, 1.0 EP<br/>Live Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>    | <p><b>18 U.S. Patent and Trademark Office Comes to Albuquerque</b><br/>5.0 G<br/>Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>25 Drafting Contract Remedies</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |
| <p><b>6 Ethics, Disqualification and Sanctions in Litigation</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                         | <p><b>19 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>26 2016 Trial Know-How! (The Reboot)</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><b>9 Basic Practical Regulatory Training for the Electric Industry</b><br/>27.0 G<br/>Live Seminar, Albuquerque<br/>Center for Public Utilities NMSU<br/>business.nmsu.edu</p> | <p><b>19 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Seminar, Taos<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>26 2016 Real Property Institute</b><br/>4.5 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   |



## October

- |   |  |  |
|---|--|--|
| <p><b>26 Lessons Learned from the “Trial of The Century” (2017 Annual Meeting)</b><br/>1.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>27 Hot Topics in Adult Guardianship Law</b><br/>4.5 G, 1.5 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>31 2017 Americans with Disabilities Act Update</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>27 Craig Othmer Memorial Procurement Code Institute</b><br/>2.5 G, 1.0 EP<br/>Live Seminar, Santa Fe<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                | <p><b>27 The Notorious DWI Seminar</b><br/>6.0 G<br/>Live Seminar<br/>Albuquerque<br/>New Mexico Criminal Defense<br/>Lawyers Association<br/>info@nmcldla.org</p>               |  |

## November

- |  |   |   |
|--|---|---|
| <p><b>2 Drafting Lease Guarantees</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>7 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                      | <p><b>17 Sports and Entertainment Law</b><br/>5.0 G, 1.0 EP<br/>Live Seminar, Albuquerque<br/>New Mexico Black Lawyers<br/>Association<br/>www.newmexicoblacklawyers<br/>association.org/</p> |
| <p><b>2 The Duty to Consult With Tribal Governments</b><br/>2.3 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                   | <p><b>8 Litigation and Argument Writing in the Smartphone Age</b><br/>5.0 G, 1.0 EP<br/>Live Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>           | <p><b>28 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>         |
| <p><b>3 Local Tax Court Cases with National Implications Including the Mescalero Apache U.S. Tax Court Decision</b><br/>1.0 G<br/>Live Seminar, Las Cruces<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>9 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                      | <p><b>29 New Mexico Liquor Law for 2017 and Beyond</b><br/>3.5 G<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                 |
| <p><b>3 Ethics for Transactional Lawyers</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>9 Thriving or Surviving? Strategies for Well-being and Ethical Practice</b><br/>2.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>30 The Basics of Family Law</b><br/>5.2 G, 1.0 EP (plus an optional 1.0 EP)<br/>Webcast/Live Seminar, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>         |
| <p><b>3 Get Smart About Open Government Laws</b><br/>6.0 G<br/>Live Seminar, Albuquerque<br/>New Mexico Foundation for Open<br/>Government<br/>505-220-2820</p>  | <p><b>17 2016 Ethics, Confidentiality and the Attorney-Client Privilege Update</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                               |   |





# #SBNMGoesGreen

In August, interns with Keep Albuquerque Beautiful visited the State Bar Center to train staff on dos and don'ts for our new commercial recycling bin. While the State Bar has supported recycling at our facilities for many years now, the commercial bin will make it even easier for staff, members and others who use the building to do their part in keeping our planet and community healthy. Recycling is just one part of the State Bar's long-term green initiatives. In addition to recycling efforts, we're conducting an energy use audit and taking other green measures to save money and resources.



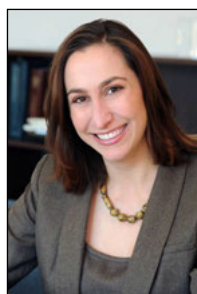
Keep Albuquerque Beautiful is an affiliate of Keep America Beautiful, whose mission is to inspire and educate people to take action every day to improve and beautify their community environment. Through a variety of national programs and initiatives with more than 600 community-based affiliates and partner organizations, KAB engages more than 5 million volunteers in an effort to end littering, improve recycling and beautify America's communities.

The State Bar of New Mexico encourages members to adopt a recycling policy and plan for their office, firm or even household! Below are a few links where you can find more information about recycling basics and programs in your community.

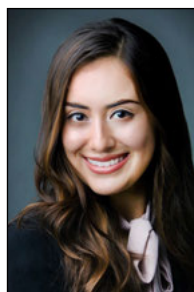
-  City of Albuquerque: <http://www.cabq.gov/solidwaste/>
-  Keep Albuquerque Beautiful: <http://keepalbuquerquebeautiful.com/Home.html>
-  New Mexico Recycling Coalition: <http://www.recyclenewmexico.com/>
-  Keep America Beautiful: <https://www.kab.org/home>
-  U.S. Environmental Protection Agency: <https://www.epa.gov/>



Customer Services/Facilities Assistant Andrea Watson puts the State Bar's new commercial recycling bin to work!



**Zoë E. Lees**, an associate with Modrall Sperling, has been named chair of the American Bar Association's Young Lawyers Division Committee on Infrastructure and Regulated Industries Law (autumn 2017–autumn 2018). She was also recently appointed to the Rocky Mountain Mineral Law Foundation's Young Professionals Committee (three year term). In her practice with Modrall Sperling, Lees focuses in energy, utilities, environmental law and litigation.



**Jazmine J. Ruiz** has joined Montgomery & Andrews, PA. Ruiz graduated from the University of New Mexico, *cum laude*, in 2013 and received her Juris Doctorate, *cum laude*, from UNM in 2016. During law school, Ruiz served as an editor of the *New Mexico Law Review*, a member of the Business Law Society and the president of the Mexican American Law Student Association of the University of New Mexico School of Law. Ruiz will focus on civil and commercial litigation and appeals.

#### Michael Schwarz Attorney at Law

*2018 Lawyers in America: Michael Schwarz* (civil rights and labor and employment law)

## In Memoriam



Former U.S. Senator **Pete V. Domenici**, the longest serving senator in New Mexico history, died of complications from abdominal surgery on Sept. 13 at the age of 85. Domenici, a fierce advocate for New Mexico, rose to prominence on the national political stage serving as the powerful chairman of the Senate Budget Committee during the tumultuous budget battles of the 1980s and 1990s. He was known as an expert on fiscal issues and served as President Reagan's point

man on Senate budget matters. He later served as chairman of the Senate Energy Committee where he championed nuclear energy and advanced scientific research. Pete Vichi Domenici was born in Albuquerque on May 7, 1932, to Cherubino and Alda (Vichi) Domenici. He helped his father run the family grocery business. He graduated in 1950 from St. Mary's High School in Albuquerque and graduated from the University of New Mexico in 1954. As an athlete, Domenici pitched for St. Joseph's college and then for the University of New Mexico where he was all-conference pitcher for two years. He went on to pitch one season for the Albuquerque Dukes, a farm club of the Brooklyn Dodgers, but gave it up because, he said, "my curve ball didn't have enough bite." He then taught mathematics at Garfield Junior High in Albuquerque before attending the University of Denver law school where he received a law degree in 1958. He entered Albuquerque politics and was elected to the city commission in 1966, eventually becoming mayor. In 1972, he ran successfully for the U.S. Senate, defeating Democrat Jack Daniels, 54-46. He would be reelected five more times before leaving the Senate in 2008 after being diagnosed with an incurable brain affliction. Senate Majority Leader Mitch McConnell said he knew Domenici "as smart, hard-working and dedicated—and as a strong advocate for his home state of New Mexico." Speaker of the House Paul Ryan called Domenici a "larger-than-life figure who clearly relished the chance to serve and get things done. I learned so much from him, not just on budget issues but also how to be truly committed to your craft. He remains a great inspiration to me." First elected to the U.S. Senate in 1972, Domenici served for six terms before retiring in 2008. Through the years, Domenici developed a reputation as a

straightforward legislator willing to work with colleagues and constituents from both sides of the aisle to achieve his legislative priorities. His conviction to honest budgeting led one colleague to suggest he suffered from "a case of terminal responsibility." Senator Edward M. Kennedy, Democrat of Massachusetts, once said: "There's no one in the Senate, or in the House of Representatives, that can make the case like Pete Domenici can, and make it as convincingly and as powerfully as he does. And whenever he does, the U.S. Senate just responds overwhelmingly." Considered a master legislative tactician, Domenici devoted much of his energy in the 1990s in working toward a balanced budget. After several failed attempts, the Senate approved the Balanced Budget Act of 1997, which led to the first balanced federal budget in 30 years in 1998, and it remained in balance through 2001. Domenici is credited with numerous legislative achievements over his 36 years of Senate service including helping to pass the Reagan tax cuts in 1982, the Paul Wellstone and Pete Domenici Mental Health Parity Act of 2008 (during which he partnered with Senator Kennedy), and passage of the "Megatons to Megawatts" program to secure fissionable materials following the breakup of the Soviet Union. A strong supporter of federal scientific research, Domenici was also one of the first members of Congress to recognize the potential significance of human genome research and worked to provide funding for the government's Human Genome Projects as early as 1987. Domenici was a ferocious advocate for New Mexico, using his seat on the Senate Appropriations Committee to successfully support needed projects throughout the state. He was a stalwart defender of the DOE national laboratories, Los Alamos and Sandia, among others, as well as military installations in New Mexico, working successfully to defeat efforts to close Kirtland and Cannon Air Force Bases. He is responsible for the location of the Federal Law Enforcement Training Center in Artesia. Throughout his career, Domenici advocated policies to diversify the New Mexico economy and create opportunities for growth. He assisted communities with economic development projects, and spearheaded small business development councils to promote job growth. He fought for years to establish a port-of-entry at Santa Teresa. He was a champion for the Character Counts education initiative in all New Mexico schools. Senator Domenici worked to protect and promote New Mexico's rich multicultural and



natural heritage. He authored the federal program for maintaining the historic acequia irrigation system. He spearheaded efforts to establish the Petroglyph National Monument and protect the Valles Caldera. In addition to working to protect the works of American Indian artists and craftsmen from counterfeiters, the Senator funded to establish the Hispanic Cultural Center and Museum in Albuquerque. His fierce devotion to his state resulted in many New Mexicans referring to him as "Saint Pete." Upon his retirement in 2007, one journalist suggested his fingerprints "are on every corner of New Mexico." Domenici was preceded in death by his parents and sisters, Mary Stratman, Karlene Guillon,

and Sister Marianella Domenici. Senator Domenici is survived by his sisters, Thelma Domenici and Rose Ann Domenici; wife of 59 years, Nancy Burk Domenici and their eight children: Lisa, Peter, Nella, Clare, David, Nanette, Paula and Helen. He also has a son, Adam Laxalt, who currently serves as the Attorney General of Nevada. Domenici has 15 grandchildren and three great-grandchildren. An active grandfather, he traveled around the country to attend sports events, performances, graduations, and weddings. He was a passionate Nationals and Lobos baseball fan. He loved dove and quail hunting in Southern New Mexico, as well as Sunday dinners with family and friends.

**Warren O. F. Harris**, age 76, a resident of Bosque, N.M., died Aug. 21. Harris was the son of Dr. Owen and Eleanor Harris. He completed Law School at the University of New Mexico. Harris served as the attorney for the New Mexico Livestock Board, New Mexico Director of Enforcement for the Security Division, chief deputy district attorney for the 13th Judicial District and retired as a

senior trial prosecutor for the Second Judicial District. He served on the Board of Directors for Santa Gertrudis Breeders International. Harris's loves were his wife, his family and his cattle. He is survived by his sister, Patricia, and brother-in-law, Roger Logenbach; in-laws, the Tapia family from Santa Fe, his adopted Sanchez Family, many nieces, nephews and adopted family members.



**Daniel A. Sisk**, the last-surviving "name" partner of Modrall, Sperling, Roehl, Harris & Sisk, died on Aug. 15 at the age of 90. A native New Mexican born in Albuquerque, Sisk graduated from high school at New Mexico Military Institute in 1945 and promptly enlisted in the U.S. Navy, serving in the Western Pacific and China. After World War II ended, Sisk studied two years at the University of New Mexico and transferred to Stanford University where

he graduated in 1950. He entered Stanford Law School with classmates William Rehnquist and Sandra Day O'Connor. Sisk had joined the Marine Corps Reserves after completing his Navy commitment, so when the Korean War heated up, he was called to active duty by the Marines at the end of his second year in law school. Sisk then served in Korea as a First Lieutenant and was discharged as a Captain, whereupon he re-entered Stanford Law School from which he graduated in 1954. He joined the Modrall Sperling Firm as its sixth lawyer and served as a firm partner for more than 40 years. In 1968, Sisk was appointed to the New Mexico Supreme Court (the answer to the trivia quiz question "Who among the 1950 Stanford Law School entering class was the first Supreme Court justice?" is "Daniel A. Sisk."). After his tenure on the Court, Sisk returned to Modrall Sperling where he

was an expert in banking law and other aspects of commercial law. He served as Chairman of the Board of Sunwest Financial Services for 15 years. Sisk had a strong sense of public service. He served as president of the Legal Aid Society of Albuquerque, director of the Albuquerque Bar Association, trustee of Sandia School, trustee of the Albuquerque Academy and trustee of the AT&SF Railroad Memorial Hospital. He was an Elder and Deacon of First Presbyterian Church where he was a member for over 75 years. For 20 years Dan and his wife, Kay, delivered meals for Meals on Wheels. A life-long sports fan, Sisk was a strong supporter of Lobo basketball and Albuquerque's professional baseball teams. Sisk was known for his legal scholarship and commitment to the law firm and its principles of integrity and service; he mentored many young lawyers, encouraging them to devote time to public service and to participate in State Bar and community organizations. He had a great sense of humor and was always ready to help others. Sisk was never heard to utter an unkind word about anyone and he treated everyone he met with openness, respect and dignity. Sisk was dearly loved by all members past and present of Modrall Sperling, who have been guided, and will continue to be guided, by his warm spirit and unwavering commitment to the firm and to the practice of law with integrity. The members of Modrall Sperling will cherish his memory and will be forever grateful to him for having improved our lives and the lives of many others.

# 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/BBCElectionNotice-Petition.pdf](http://www.nmbar.org/nmbardocs/aboutus/governance/BBCElectionNotice-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).



## *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)

### 3rd JUDICIAL DISTRICT:

#### Free Legal Fair

Oct. 27, 2017 from 10 am – 1 pm  
Third Judicial District Court  
(201 W. Picacho Avenue, Las Cruces, NM 88005)

### 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)  
1-2 pm: Expanding ADR in Civil & Domestic Relations  
Litigation (1.0 G)  
2-3 pm: Complying with the Disciplinary Board Rule 17-204  
(1.0 EP; presented by the Center for Legal Education)

### 12th JUDICIAL DISTRICT (LINCOLN):

#### Free Legal Fair

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

# Opinions

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

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

**Effective September 22, 2017**

## UNPUBLISHED OPINIONS

A-1-CA-35959	State v. A Garcia	Affirm/Reverse	09/18/2017
A-1-CA-36095	State v. J Head	Affirm	09/18/2017
A-1-CA-35044	State v. L Alonzo	Affirm	09/19/2017
A-1-CA-34862	State v. R Cook	Affirm	09/20/2017
A-1-CA-36380	State v. Nicole M	Reverse	09/20/2017
A-1-CA-34456	State v. T Woods	Affirm	09/21/2017

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

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## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

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Effective September 11, 2017:  
**Richard Andre Bachand**  
2120 Hoffman Drive, NE  
Albuquerque, NM 87110  
505-917-2138  
rabachand@gmail.com

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## CLERK'S CERTIFICATE OF ADMISSION

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On September 12, 2017:  
**Matthew E. Draper**  
Draper & Draper LLC  
325 Paseo de Peralta  
Santa Fe, New Mexico 87501  
505-570-4592  
505-570-4590 (fax)  
matthew.draper@draperllc.com

On September 19, 2017:  
**Shehade Fakhoury**  
517 Gold Avenue, SW, Unit 106  
Albuquerque, NM 87102  
661-210-9361  
shehade.fakhoury@gmail.com

On September 14, 2017:  
**Jessica L. Alsup**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
jessica.alsup@lopdmn.us

**Joshua J. Alt**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
joshua.alt@lopdmn.us

**Maxwell Joseph Kauffman**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
maxwell.kauffman@lopdmn.us

**Carlene Noel Miller**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
carlene.miller@lopdmn.us

**Isabella A. Pacheco**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
isabella.pacheco@lopdmn.us

**Tess E. Williams**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
tess.williams@lopdmn.us

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## CLERK'S CERTIFICATE OF CHANGE TO INACTIVE STATUS

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Effective September 4, 2017:  
**Clay Paulos**  
PO Box 550  
Roswell, NM 88202

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## CLERK'S CERTIFICATE OF INDEFINITE SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

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Effective **September 6, 2017**, the following attorney is **INDEFINITELY SUSPENDED** from the State Bar of New Mexico for a period of not less than 18 months pursuant to Rule 17-206(A)(3) NMRA:  
**Joshua R. Simms**  
JRSPC, LLC  
PO Box 50332  
1000 Eubank Blvd. NE  
Suite C (87112)  
Albuquerque, NM 87181-0332  
505-266-1415  
505-266-1416 (fax)  
josh@jrspcllc.com

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**Dated Sept. 20, 2017**

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

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**Hon. Timothy L. Aldrich**  
Sixth Judicial District Court  
PO Box 2339  
201 N. Cooper Street (88061)  
Silver City, NM 88062  
575-538-3250  
575-538-5894 (fax)

**Brooke Lynn Alexander Acosta**  
Brooke Lynn Law  
PO Box 503  
Loveland, CO 80539  
505-207-7337  
505-214-5093 (fax)  
brooke@brookelynnlaw.com

**Brandon Kee Bitsuie**  
Navajo Nation Department of  
Justice  
PO Box 3779  
Window Rock, AZ 86515  
928-871-6221  
928-871-6628 (fax)  
bbitsuie@navajo-nsn.gov

**Robert Ray Cheshire**  
NAVSEA Office of Counsel  
1333 Isaac Hull Avenue SE  
Washington Navy Yard, DC  
20376  
202-781-4878  
202-781-4579 (fax)  
robert.cheshire@navy.mil

**Sarah V. Coffey**  
New Mexico Legal Aid, Inc.  
301 Gold Avenue SW  
Albuquerque, NM 87102  
505-768-6125  
sarahc@nmlegalaid.org

**William Robert Consuegra**  
LMATA Government  
Services, Inc.  
11025 Dover Street  
Westminster, CO 80021  
303-410-4881  
william.consuegra@gmail.com

**Michael C. Crane**  
1190 Aspen Drive  
Logan, UT 84341  
435-770-7273  
michaelcrane@gmail.com

**R. Matthew Graham**  
R. E. Lopez & Associates, PC  
550 E. 15th Street, Suite 200  
Plano, TX 75074  
469-209-7727  
888-601-4934 (fax)  
mgraham@northtxlaw.com

**Alejandro Guerra**  
Law Office of Alejandro  
Guerra  
1510 N. Tenth Street, Suite A  
McAllen, TX 78501  
956-630-0291  
956-630-9712 (fax)  
alexguerra.law@gmail.com

**Melony Harper**  
N.M. Children, Youth and  
Families Department  
1031 Lambert Place NE  
Albuquerque, NM 87107  
505-470-2407  
melony.harper@state.nm.us

**Peter Haynes**  
City of Albuquerque Legal  
Department  
PO Box 2248  
One Civic Plaza NW (87102)  
Albuquerque, NM 87103  
505-768-4516  
phaynes@cabq.gov



## George F. Heidke

Office of the County Attorney  
520 Lomas Blvd. NW, 4th Floor  
Albuquerque, NM 87102  
505-839-8738  
505-242-0828 (fax)  
gheidke@bernco.gov

## Veronica L. Hill

San Carlos Apache Tribe,  
Office of the Prosecutor  
PO Box 992  
San Carlos, AZ 85550  
928-475-2397  
veronica.hill@scat-nsn.gov

## Jenica Jacobi

Rodey, Dickason, Sloan, Akin  
& Robb, PA  
PO Box 1888  
201 Third Street NW,  
Suite 2200 (87102)  
Albuquerque, NM 87103  
505-768-7222  
505-768-7395 (fax)  
jjacobi@rodey.com

## Jennifer Ruth James

University of New Mexico,  
Office of University Counsel  
1 University of New Mexico  
MSC09-5300  
Albuquerque, NM 87131  
505-272-4437  
jrjames@salud.unm.edu

## Jan-Michael T. Kwasniewski

Office of the Sixth Judicial  
District Attorney  
108 E. Poplar Street  
Deming, NM 88030  
575-546-6526  
575-546-0336 (fax)  
mkwasniewski@da.state.nm.us

## Martin Anthony Michael Lopez

Law Offices of the Public  
Defender  
419 W. Cain Street  
Hobbs, NM 88240  
575-263-2270  
martin.lopez@lopdm.us

## Henry C. Ma

AstraZeneca PLC  
1100 Park Place, Suite 300  
San Mateo, CA 94403  
650-670-8705  
henry.ma1@astrazeneca.com

## Cassandra R. Malone

Brownstein Hyatt Farber  
Schreck, LLP  
201 Third Street NW, Suite 1800  
Albuquerque, NM 87102  
505-724-9587  
505-244-9266 (fax)  
crrmalone@bhfs.com

## Seth D. Matus

Matus Law Office, PC  
979 Huntleigh Drive  
Naperville, IL 60540  
331-330-5700  
matuslawoffice@gmail.com

## Sean P. McAfee

The Law Office of Sean P.  
McAfee  
6739 Academy Road NE,  
Suite 350  
Albuquerque, NM 87109  
505-235-7899  
smcafeelaw@gmail.com

## Hon. Shannon Murdock

Seventh Judicial District  
Court  
PO Box 78  
903 N. Fifth Street  
Estancia, NM 87016  
505-384-2974  
505-384-2229 (fax)

## Jaya M. Rhodes

U.S. District Court-District of  
New Mexico  
333 Lomas Blvd. NW, Suite 760  
Albuquerque, NM 87102  
505-348-2178  
jaya\_rhodes@nmd.uscourts.gov

## Janice Burt Schryer

2645 Fairway Drive  
Las Cruces, NM 88011  
575-386-6572  
dschryer04@msn.com

## Joshua David Schwartz

New Mexico Court of Appeals  
PO Box 2008  
237 Don Gaspar Avenue  
(87501)  
Santa Fe, NM 87504  
505-827-4843  
505-827-4946 (fax)  
coajds@nmcourts.gov

## Alexis G. Terriquez

Jones, Skelton & Hochuli, PLC  
40 N. Central Avenue,  
Suite 2700  
Phoenix, AZ 85004  
602-263-7301  
aterriquez@jshfirm.com

## Laure van Heijenoort

Walker & van Heijenoort, PC  
6508 Poza Rica NW  
Los Ranchos, NM 87107  
505-242-2800  
505-242-4242 (fax)  
lvh@wvhn.net

## William G. Walker

Walker & van Heijenoort, PC  
6508 Poza Rica NW  
Los Ranchos, NM 87107  
505-242-2800  
505-242-4242 (fax)  
wm@wvhn.net

## Francella M. Wright

Wright Consulting  
PO Box 35426  
Albuquerque, NM 87176  
505-347-8674  
francellawright@gmail.com

## Maria Elia Castro

814 Walter Street SE  
Albuquerque, NM 87102  
505-699-1869  
castro9385@gmail.com

## Merrie Chappell

Merrie Chappell Law PC  
PO Box 21333  
Albuquerque, NM 87154  
505-289-1922  
505-289-1932 (fax)  
mc@merrielaw.com

## Daniel J. Monte

1370 Thunder Ridge Road  
Santa Fe, NM 87501  
505-204-8449  
djmonte@me.com

## Ashley Kay Tellier

U.S. Army Corps of Engineers  
4101 Jefferson Plaza NE  
Albuquerque, NM 87109  
505-342-3305  
505-342-3287 (fax)  
ashley.k.tellier@usace.army.mil

## Robert William Becker

(rbecker@ylawfirm.com)  
**Matthew L. Connelly**  
(mconnelly@ylawfirm.com)

## Sean E. Garrett

(sgarrett@ylawfirm.com)

## Michael S. Jahner

(mjahner@ylawfirm.com)

## Megan L. Kuhlmann

(mkuhlmann@ylawfirm.com)

## Michael Russell

(mrussell@ylawfirm.com)

## Joseph Patrick Turk

(jturk@ylawfirm.com)

## April D. White

(awhite@ylawfirm.com)

## Joseph B. Wosick

(jwosick@ylawfirm.com)

## Terrance P. Yenson

(tyenson@ylawfirm.com)  
YLA, PC  
4908 Alameda Blvd. NE  
Albuquerque, NM 87113  
505-266-3995  
505-268-6694 (fax)

Dated Sept. 22, 2017

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

### Matthew Barceau

Holt Mynatt Martinez, PC  
PO Box 2699  
1660 Hickory Loop (88005)  
Las Cruces, NM 88004  
575-524-8812  
575-524-0726 (fax)  
mib@hmm-law.com

### Gordon E. Bennett

Office of the Seventh Judicial  
District Attorney  
PO Box 706  
903 N. Fifth Street  
Estancia, NM 87016  
505-384-2800  
505-384-2390 (fax)  
gbennett@da.state.nm.us

### Marcus J. Blais

Office of the Governor  
490 Old Santa Fe Trail,  
Room 400  
Santa Fe, NM 87501  
505-476-2200  
505-476-2207 (fax)  
marcus.blais@state.nm.us

### Hon. Steven Blankinship

Twelfth Judicial District  
Court  
1000 New York Avenue  
Alamogordo, NM 88310  
575-437-7310

### Peter L. Bloodworth

11 W. Gutierrez #3276  
Santa Fe, NM 87506  
505-920-9146  
bloodworthlaw@att.net

### Ramon M. Carrillo

Office of the First Judicial  
District Attorney  
PO Box 2041  
327 Sandoval Street (87501)  
Santa Fe, NM 87504  
505-428-6983  
rcarrillo@da.state.nm.us

### Susan J. Carter

8815 Fairbanks Road NE  
Albuquerque, NM 87112  
505-297-8786  
susancarter13@yahoo.com

### Margaret Coffey-Pilcher

PO Box 3758  
Lawton, OK 73502  
580-713-9780  
maggiecp@msn.com

### Margaret Jayne Crabb

Office of the Second Judicial  
District Attorney  
520 Lomas Blvd. NW  
Albuquerque, NM 87102  
505-222-1014  
505-241-1014 (fax)  
mcrabb@da2nd.state.nm.us

### Alfred D. Creecy

City of Albuquerque Legal  
Department  
PO Box 2248  
One Civic Plaza NW (87102)  
Albuquerque, NM 87103  
505-768-4654  
505-768-4525 (fax)  
acreecy@cabq.gov

### Gabrielle Lynn Dorian

7909 Rio Grande Blvd. NW  
Los Ranchos, NM 87114  
505-417-5101  
gldorian@gmail.com

### Jama E. Fisk

N.M. Taxation and Revenue  
Department  
PO Box 630  
1100 S. St. Francis Drive  
(87505)  
Santa Fe, NM 87504  
505-827-0739  
505-827-0684 (fax)  
jama.fisk2@state.nm.us

### Thomas B. Fitzwater

PO Box 391  
Waukee, IA 50263  
651-788-1556  
thomas.b.fitzwater@gmail.com

### Jenessa Nicole Garay

Davis Miles McGuire  
Gardner, PLLC  
320 Gold Avenue SW #1111  
Albuquerque, NM 87102  
505-948-5050  
jgaray@davismiles.com

### Katharine F. Griffing

110 Circle Drive  
Santa Fe, NM 87501  
917-684-1263  
katharinegriffing@gmail.com

### Jane J. Handley

Office of the Fourth Judicial  
District Attorney  
PO Box 2025  
1800 New Mexico Avenue  
Las Vegas, NM 87701  
505-425-6746  
505-425-9372 (fax)  
jhandley@da.state.nm.us

### Daniel Josiah Harper

Davis, Gerald & Cremer  
PO Box 2796  
400 W. Illinois, Suite 1400  
(79701)  
Midland, TX 79702  
432-687-0011  
432-687-1735 (fax)  
djharper@dgclaw.com

### Alan V. Heinz

Michael Armstrong Law  
220 Adams Street SE, Suite B  
Albuquerque, NM 87108  
505-890-9056  
alanheinzarmstronglaw@gmail.com

### Kevin P. Holmes

Holmes Law Firm  
510 Slate Avenue NW  
Albuquerque, NM 87102  
505-433-1947  
kevin@holmesnm.com

### Michele Huff

154 Anya Road  
Corrales, NM 87048  
650-248-3314  
mhuff9@earthlink.net

### Terry L. Hull

127 Valverde, Unit E  
Taos, NM 87571  
575-770-9937  
hullterry@ymail.com

### Brianna M. Jagelski

Sanders & Parks  
3030 N. Third Street, Suite 1300  
Phoenix, AZ 85012  
302-532-5612  
brianna.jagelski@sandersparks.com

### Lisa B. Jenkins

Lisa B. Jenkins & Associates  
1097 Central Avenue  
Tularosa, NM 88352  
574-551-0423  
lbjenkins@lbjlaw.onmicrosoft.com

### Laurie McFarland

2475 S. Ammon Road  
Ammon, ID 83406  
208-419-1824

### Elizabeth V. McGrath

1615 Bayita Lane NW  
Albuquerque, NM 87107  
505-238-1187  
evmcgrathnm@gmail.com

### Deborah L. Moore

Morris Law Firm  
901 Lomas Blvd. NW  
Albuquerque, NM 87102  
505-242-4529  
505-242-7040 (fax)  
dmoore970@comcast.net

### Camille A. Pedrick

Cordell & Cordell  
6565 Americas Parkway NE,  
Suite 900  
Albuquerque, NM 87110  
505-444-7110  
cpedrick@cordellllaw.com

### Stephen Douglas Ralph

Ray, McChristian & Jeans, PC  
6000 Uptown Blvd. NE,  
Suite 307  
Albuquerque, NM 87110  
505-212-8020  
505-212-0140 (fax)  
sralph@rmjfirm.com

### Roxie P. Rawls-De Santiago

Rebecca Kitson Law  
7301 Indian School Road NE,  
Suite B  
Albuquerque, NM 87110  
505-508-4015  
505-717-1069 (fax)  
rds@rkitsonlaw.com

### Adnan K. Raza

901 W. Alameda Street  
Santa Fe, NM 87501

### Stephanie Marie Salazar

Pueblo of Isleta  
PO Box 699  
Isleta, NM 87022  
505-869-9713  
505-869-7598 (fax)  
poi06081@isletapueblo.com

### Christopher Elias Solis

2270-D Wyoming Blvd. NE,  
PMB #188  
Albuquerque, NM 87112  
574-275-1604  
cesolisndu@gmail.com

**Michelle E. Strong**  
N.M. Department of Health  
PO Box 26110  
1190 S. St. Francis Drive  
(87505)  
Santa Fe, NM 87502  
505-476-3547  
505-827-2930 (fax)  
shelley.strong2@state.nm.us

**Jessica Renee Terrazas**  
Ortiz & Zamora, Attorneys at  
Law, LLC  
2011 Botolph Road, Suite 200  
Santa Fe, NM 87505  
505-986-2900  
505-986-2911 (fax)  
jessica@ortiz-zamora.com

**William Bahe Townley**  
McCarthy & Holthus, LLP  
6501 Eagle Rock Avenue NE,  
Suite A-3  
Albuquerque, NM 87113  
505-219-4900  
wtownley@mccarthyholthus.  
com

**Jenna R. Yanez**  
131 Ridgcrest Drive  
Santa Fe, NM 87505  
505-573-4042  
jenna.yanez@gmail.com

**Morris J. Chavez**  
SaucedoChavez, PC  
PO Box 30046  
800 Lomas Blvd. NW,  
Suite 200 (87102)  
Albuquerque, NM 87190  
505-338-3945  
505-338-3950 (fax)  
mo@saucedochavez.com

**Timothy E. Flynn**  
3505 Spotted Horse Trail  
Austin, TX 78739  
575-494-2032  
tflynn68@gmail.com

**Ryan Harrigan**  
SaucedoChavez, PC  
PO Box 30046  
800 Lomas Blvd. NW,  
Suite 200 (87102)  
Albuquerque, NM 87190  
505-338-3945  
505-338-3950 (fax)  
rharrigan@saucedochavez.com

**Robert Koeblitz**  
New Mexico Litigation  
Group, LLC  
PO Box 8444  
Albuquerque, NM 87198  
505-228-8880  
robert@nmlitigation.com

**Jessica Eaves Mathews**  
Leverage Legal Group  
317 Commercial Street NE,  
3rd Floor  
Albuquerque, NM 87102  
888-505-5838  
jessica@leverallegalgroup.com

**Linda M. Quezada**  
4503 Compound North Ct.  
NW  
Albuquerque, NM 87107  
505-228-9498  
lmquezada@comcast.net

**Daniel M. Rosales Jr.**  
Davis Graham & Stubbs LLP  
1550 Seventeenth Street,  
Suite 500  
Denver, CO 80202  
303-892-9400  
dan.rosales@dgsllaw.com

**Joe M. Tenorio**  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302  
303-447-8760  
tenorio@narf.org

**Phillip A. White**  
2340 N. Cramer Street, Unit  
403  
Milwaukee, WI 53211  
phllp@hotmail.com

**Donna K. Baslee**  
**Robert Suzanne Batley**  
**Jan B. Gilman-Tepper**  
**Sandra Dene Morgan Little**  
**Randy Wayne Powers Jr.**  
**Sheryl Lynn Saavedra**  
**Little, Gilman-Tepper &**  
**Batley PA**  
316 Osuna Road NE, Suite A  
Albuquerque, NM 87107  
505-246-0500  
505-246-9953 (fax)

**David C. Kramer**  
Law Office of  
David C. Kramer, LLC  
PO Box 4662  
Albuquerque, NM 87196  
505-545-8105  
505-715-4884 (fax)  
david.c.kramer@comcast.net

**Alexis Rollinger**  
PO Box 1065  
Tijeras, NM 87059  
505-697-0825  
505-212-2233 (fax)  
alexisrollingeresq@gmail.com

**Audy Sciumbato**  
Sciumbato Law Office, PC  
PO Box 1655  
145 W. Third Street  
Hereford, TX 79045  
806-364-2626  
audie.sciumbato@scium-  
bato-law.com

**Mark L. Stout**  
Stout & Stout Lawyers  
3319-A N. Grimes  
Hobbs, NM 88240  
575-393-1555  
mark@stoutnm.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 October 04, 2017**

## PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:

*There are no proposed rule changes currently open for comment.*

## RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2017 NMRA:

Effective Date

### Rules of Civil Procedure for the District Courts

1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

### Rules of Civil Procedure for the Magistrate Courts

2-112	Public inspection and sealing of court records	03/31/2017
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### Rules of Civil Procedure for the Metropolitan Courts

3-112	Public inspection and sealing of court records	03/31/2017
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### Civil Forms

4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017

### Rules of Criminal Procedure for the District Courts

5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information 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
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## 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
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## 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	09/11/2017
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## Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at <http://www.nmcompcomm.us>.



From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-059**

No. 34,576 (filed April 24, 2017)

ARTURO VALERIO,  
Plaintiff-Appellant,

v.

SAN MATEO ENTERPRISES, INC.,  
Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**

JAMES T. MARTIN, District Judge

FREDERICK H. SHERMAN  
Deming, New Mexico  
for Appellant

CASEY B. FITCH  
HOLT MYNATT MARTÍNEZ P.C.  
Las Cruces, New Mexico  
for Appellee

**Opinion**

**Linda M. Vanzi, Chief Judge**

{1} Plaintiff Arturo Valerio appeals from the district court's final order dismissing his complaint pursuant to Rule 1-041(B) NMRA. Valerio raises six issues on appeal: (1) whether the district court erred in denying his motion to withdraw an admission he made in discovery; (2) whether the district court erred in denying joinder of real parties in interest and therefore lacked jurisdiction over the matter; (3) whether the district court erred in granting partial summary judgment on three of Valerio's claims; (4) whether the district court erred by dismissing claims not raised in Defendant San Mateo Enterprises, Inc.'s (San Mateo) motion for summary judgment; (5) whether the district court erred in excluding certain evidence during trial; and (6) whether the district court erred in not modifying the scheduling order so as to permit Valerio to amend his complaint. We affirm.

**BACKGROUND**

{2} This lawsuit stems from the parties' 2012 contract for the purchase and sale of one million pounds of dehydrated chile peppers. Valerio grows and harvests chile peppers. San Mateo is a dehydration chile plant that purchases, processes, and dehydrates different varieties of chile. Pursuant to the parties' contract and practice, Valerio would deliver raw chile peppers to San Mateo, which would then wash, dehydrate, weigh, and pay for them.

{3} It is San Mateo's practice to issue truck tickets to every incoming load of

chile. The ticket records the "name of the grower, type of chile, the number of full boxes received, and empty boxes sent to the grower." San Mateo provides each grower with specialized empty boxes for the transportation of the chile peppers, which it tracks on paperwork titled "In/Out Log." The In/Out Log records "the ticket numbers and dates of deliveries received by [the] drivers, the number of empty boxes sent with the drivers, number of full boxes received . . . , and the type of [chile] peppers delivered." After processing and dehydration, San Mateo provides the grower an estimated per-box dehydrated weight for prior deliveries. This latter weight is an estimate provided as a courtesy to help growers track picking costs. Because the cost of transportation is borne by each grower, it is in the grower's financial interest to transport the chile peppers contracted for in as few trips as possible.

{4} According to Valerio, he was told that the weights listed on the In/Out Logs after the chile peppers were dehydrated were accurate, rather than merely estimates as claimed by San Mateo. In 2012 Valerio provided chile seeds to farmers to grow the chile peppers; he then returned at harvest time to pick, transport, and deliver the chile. Throughout the 2012 picking season, Valerio made periodic payments to the farmers based on the weights indicated on the In/Out Logs. Valerio contends that San Mateo knew that he was relying on these weights in order to pay his debts to the farmers.

{5} San Mateo's records reflect that, prior to the beginning of the 2012 season, Valerio received advance payments totaling \$90,250. Valerio did not dispute below that he received these advance payments. San Mateo's records further reflect that these advance payments were subtracted from the last payment it made to Valerio on December 26, 2012, reducing that payment in half.

{6} Toward the end of the 2012 season, Valerio's harvest ran out and he started purchasing chile peppers grown and picked by other farmers. Those chile peppers were delivered to Valerio in sacks at a weigh station in Mexico, where he was able to obtain weight slips indicating their raw weight. The weighing process was as follows: a truck would be weighed with San Mateo's empty boxes already on it, the truck would then drive off the scale, the boxes on it would be filled with chile peppers delivered to the weigh station by the farmers who grew and picked them, and the truck would then be weighed again.

{7} The Mexican weight tickets were the only records of raw weight for any of the chile peppers Valerio delivered to San Mateo. Valerio did not weigh any of his own harvest because the chile peppers were loaded onto the trucks in the fields and into empty boxes as they were picked. San Mateo also did not weigh any of the raw chile peppers it received because payment was to be determined based on dehydrated weights only. The parties disagreed as to whether or not dehydrated weight can be determined from raw weight.

{8} Also toward the end of the 2012 season, San Mateo stopped providing Valerio with weights on the In/Out Logs. Valerio asserts that he called San Mateo because he needed this information in order to pay some of his farmers and that he told San Mateo the boxes were averaging over 200 pounds each. When he received the last payment, Valerio's bookkeeper—who was unaware of the advance payments—calculated that the amount paid actually translated to an average of 81 pounds per box instead of 200 pounds per box. This lawsuit resulted from that discrepancy.

{9} Valerio's complaint alleged debt and money due, breach of contract, breach of the covenant of good faith and fair dealing, fraud, and unconscionable trade practices. Valerio voluntarily dismissed the unconscionable trade practices claim. The district court subsequently granted San Mateo's motion for summary judgment on all but the breach of contract claim, which

October–  
December  
2017

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**Gender and Justice (2016 Annual Meeting)** 1.0 EP

**Ethics for Government Attorneys (2017)** 2.0 G

**New Mexico DWI Cases from the Initial Stop to Sentencing; Evaluating your Case (2016)** 3.0 G

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## Missed a class earlier this year or last fall? Get caught up at the State Bar Center with Live Replays!

These programs are in person at the State Bar Center and qualify for live credits. Browse the full list of offerings on our website!

### Oct. 12

**Human Trafficking (2016)** 3.0 G

1–4 p.m.  
\$145 Standard Fee

**Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)** 1.5 EP

12:30–2 p.m.  
\$80 Standard Fee

### Oct. 19

**Practical Succession Planning for Lawyers (2017)** 2.0 EP

2–4 p.m.  
\$109

### Oct. 26

**2016 Trial Know-How (The Reboot)** 5.0 G 1.0 EP

9 a.m.–4:20 p.m.  
\$249

**Lessons Learned from the “Trial of the Century” Relevant to Rule-of-Law Issues of Today (2017 Annual Meeting)** 1.0 G

9:30–10:30 a.m.  
\$55

# Featured CLEs



Presented live at the State Bar Center in Albuquerque.



Some courses can also be attended remotely by Live Webcast.



## 2017 Employment and Labor Law Institute

Friday, Oct. 6 • 9 a.m.–4 p.m.

\$249 *Employment and Labor Law Section members, government and legal services attorneys and Paralegal Division members*  
\$279 *Standard and Webcast Fee*

**Co-sponsor:** *Employment and Labor Law Section*

This program will include a discussion on EEOC hot topics, 2017 labor update, information security issues, ethics/professionalism and much more!

5.0 G

1.0 EP







Three ways to register!

## Heartburn Issues: How Not to Commit Malpractice in Military Divorce, Military Retirement and Relocation Cases

2017 New Mexico Family Law Institute

Friday, Oct. 13 • 8:30 a.m.–5:30 p.m. and  
Saturday, Oct. 14 • 9:30 a.m.–4:10 p.m.

Possible

10.0 G

1.0 EP



### Both Days

\$439 Two-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members  
\$469 Two-day Standard and Webcast Fee

### Friday Only – 5.0 G, possible 1.0 EP

\$279 One-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members  
\$309 One-day Standard and Webcast Fee

### Saturday Only – 5.0 G

\$209 One-day fee for Family Law Section members, government and legal services attorneys, and Paralegal Division members  
\$239 One-day Standard and Webcast Fee

**Co-sponsor:** Family Law Section

How do we approach military divorce, military retirement and relocation? What do we need to know to successfully represent our clients in these cases, especially given the significant recent changes surrounding military retirement? Those questions and many others will be answered at the 2017 New Mexico Family Law Institute. The Family Law Section is pleased to welcome featured speaker, Mark Sullivan, a frequent speaker at military and family law programs and is an annual lecturer on family law at the Army JAG School and the Naval Justice School. Sullivan is a member of the American Academy of Matrimonial Lawyers, the Family Law Sections of the North Carolina Bar Association and the American Bar Association, the Judge Advocates Association and the Reserve Officers Association. He is a retired colonel in the U.S. Army Reserve. The updated edition of his book, *The Military Divorce Handbook*, will be available for purchase at the CLE.

**This CLE qualifies for a total possible 10.0 General and 2.0 EP. In order to receive 2.0 EP credits, you must attend 4:30 p.m. session on Friday “How to Comply with Disciplinary Board Rule 17-204.” Attendees that have taken the Disciplinary Board Trust Accounting course separately will not be eligible to receive additional ethics/professionalism credit during this program and attendance is optional.**

## At the Hyatt Regency Hotel, Albuquerque



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

Wednesday, Oct. 18 • 8:45 a.m.–4:45 p.m.

\$130 Attorneys

\$25 Non-attorneys

Free for law students

**Co-sponsor:** Intellectual Property Law Section

5.0 G



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.



*Do you know someone who might be interested in these courses?*

Non-State Bar members and non-attorneys are encouraged to attend!

Reduced rates apply to most programs for those not seeking CLE credit.





## Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence

Friday, Oct. 20 • 9 a.m.–4:30 p.m.

*\$249 Government and legal services attorneys and Paralegal Division members  
\$279 Standard and Webcast fee*

3.5 G

2.5 EP



This program directly addresses the New Mexico Supreme Court's "scrivener" fallacy when assessing machine generated evidence. The question of "witness" cognitive bias as they relate to the linguistic environment in which they work and the linguistic disconnection between lawyers and their witnesses is also a topic for discussion. The basics of hair testing for drugs is fraught with much misinformation, and will be the subject of discussion by the toxicologist who worked on Lady Diana's death investigation. Last, the news of the Baby Gard case out of Great Britain concerning the extent to which to which extraordinary medical measures to keep a child alive, are ethically warranted or even permissible. This program will also discuss the paradox of woefully inadequate funding for public defender experts against the constitutional mandate for adequate assistance of counsel. Attendees will see how scientific thought is generated and evaluated for use in court. The methods of skeptically evaluating the quality of scientific evidence and the procedures by which it is used in the law are applicable to civil and criminal attorneys alike.



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## Craig Othmer Memorial Procurement Code Institute

*Live only at the New Mexico State Personnel Office, Auditorium*

Friday, Oct. 27 • 8:15 a.m.–Noon

*\$104 Public Law Section members, government and legal services attorneys and Paralegal Division members  
\$140 Standard Fee*

**Co-sponsor:** Public Law Section

Lawrence Maxwell (New Mexico State Purchasing, New Mexico General Services Department) will guide attendees through procurement basics and elaborate on current statutory and regulatory subjects including anticipated legislative proposals relating to procurements and forthcoming administrative rules. Jennifer Bradley (City of Albuquerque Legal Department) will explain procurement processes for the City of Albuquerque and highlight specific and potential distinctions relating to local government procurements as compared to State Procurements. Carolyn Wolf, Esq., Ramona Martinez (City of Albuquerque) Dennis Ritschel (Los Alamos National Laboratory), and moderator Andrea Salazar bring expertise in procurement processes and associated ethical considerations at the local, state, and federal level. Attendees will get guidance on common ethical considerations and issues in the context of government procurements.

*Join the Public Law Section for its Annual Section Meeting, immediately following the program!*

2.5 G

1.0 EP



## Fall Elder Law Institute – Hot Topics in Adult Guardianship Law

Friday, Oct. 27 • 8:30 a.m.–4:15 p.m.

*\$249 Employment and Labor Law Section members, government and legal services attorneys and Paralegal Division members  
\$279 Standard and Webcast Fee*

**Co-sponsor:** Elder Law Section

Join the Elder Law Section for the full-day CLE, which will include an overview of the newly revisited Uniform Guardianship Act, a report on the New Mexico Adult Guardianship Study Commission and more.

4.5 G

1.5 EP





## The Duty to Consult with Tribal Governments: Law, Practice and Best Practices

Thursday, Nov. 2 • 9 a.m.–12:30 p.m.

*\$129 Early bird fee (live attendance only; registration must be received by Oct. 6)*

*\$155 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members*

*\$185 Standard and webcast fee*

2.3 G

1.0 EP



### **Co-sponsor:** Indian Law Section

The Indian Law Section's annual program will explore an example of successful consultation between the Acoma Pueblo and Kinder Morgan, discuss the role of the government attorney in government-to-government consultations, and include a review of the ethical rules that apply to New Mexico attorneys participating in consultations with tribal governments. Times and prices are coming soon!



## 2017 Alternative Dispute Resolution (ADR) Institute

Friday, Nov. 3

**Co-sponsor:** ADR Committee

Don't miss the ADR Committee's annual program, presented by Stephen Kotev, conflict resolution consultant, and Laura Bassein, of the University of New Mexico School of Law! *Credit hours are coming soon.*



## Litigation and Argument Writing in the Smartphone Age

Wednesday, Nov. 8 • 9 a.m.–4:10 p.m.

*\$209 Early bird fee (live attendance only; registration must be received by Oct. 10)*

*\$249 Government and legal services attorneys, and Paralegal Division members*

*\$279 Standard and webcast fee*

5.0 G

1.0 EP



Argument is the core of almost all legal writing. Yet computers have fundamentally changed the way everyone—including a judge—reads and absorbs arguments and information. This course focuses on the new and profound shifts litigators and others must now make to ensure their written prose is both more accessible and persuasive. Although designed with the specific challenges of litigators in mind, this program will benefit lawyers and other legal professionals of all experience levels who want to improve their legal writing and editing skills.



## Strategies for Well-Being and Ethical Practice

Thursday, Nov. 9 • 10:15 a.m.–12:15 p.m.

*\$75 Early bird fee (live attendance only; registration must be received by Oct. 9)*

*\$89 Government and legal services attorneys and Paralegal Division members*

*\$109 Standard fee*

*\$125 Webcast fee*

2.0 EP



**Co-sponsor:** Lawyers and Judges Assistance Program

Legal professionals experience much higher rates of depression, anxiety and substance abuse than the general population. Building a toolbox of effective strategies for coping with stress and knowing how to access outside resources is essential to reducing the incidence of mental health and substance abuse problems among our members. This session examines how the high-stress nature of the legal profession can lead to personal and professional issues and explores science-based strategies for improving well-being and professionalism.



## New Mexico Liquor Law for 2017 and Beyond

3.5 G

Wednesday, Nov. 29 • 9 a.m.–1:15 p.m.

*129 Early bird fee (live attendance only; registration must be received by Oct. 30)*  
*\$155 Government and legal services attorneys and Paralegal Division members*  
*\$195 Standard and webcast fee*



This new CLE program will include a discussion on the New Mexico Liquor Control Act, the new Alcohol and Gaming Division rules for internet sales, tasting permits and amended rules covering restrictions on alcohol sales and minors on premises. The program will also discuss liquor service in New Mexico and offer tips on how to beat the Alcohol and Gaming Division prosecutor at a hearing.



## The Basics of Family Law

Thursday, Nov. 30 • 8:30 a.m.–5 p.m.

*\$239 Early bird fee (live attendance only; registration must be received by Oct. 30)*  
*\$239 Co-sponsoring section members, government and legal services attorneys and Paralegal Division members*  
*\$295 Standard and webcast fee*

**Co-sponsor:** Family Law Section

Possible  
additional  
1.0 EP

5.2 G

1.0 EP



Basics of Family Law will cover in-depth practical information for attorneys embarking on a family law practice, currently practicing in the area of family law or looking to add family law to their current practice. The program will discuss the family law case process, relevant statutes and rules, check lists to ensure all steps are being followed in the case, forms, billing models and much more. This program is designed to refine, enhance or offer new skills in the practice of family law.

***In order to receive 2.0 EP credits, you must attend 4 p.m. session on "Complying with Disciplinary Board Rule 17-204." Attendees that have taken the Disciplinary Board Trust Accounting course separately will not be eligible to receive additional ethics/professionalism credit during this session and attendance is optional.***

*Registration and payment must be received prior to the program date. A \$20 late fee will be incurred when registering the day of the program. This fee applies to live registrations and does not apply to live webcasts, webinars or live replays.*

## More Opportunities to Attend the Disciplinary Board's Required Trust Accounting CLE



## Complying with the Disciplinary Board Rule 17-204

*\$55 Standard Fee*  
*\$65 Webcast Fee*

1.0 EP



Topics include:

- Proper operation of trust accounts
- Identification of records that must be maintained
- Best and prohibited practices for operating a trust account and accepting retainers
- Recording trust transactions in general and client ledgers
- Reconciling trust account ledgers with bank statements

Effective December 31, 2016, the New Mexico Supreme Court adopted modifications to Rule 17-204 NMRA, which is the rule pertaining to attorney trust accounts. Among other things, the rule requires that once every three years all licensed New Mexico attorneys, with very limited exceptions as set forth in the Rule, take a one-hour trust accounting course approved by the New Mexico Disciplinary Board. Currently, the State Bar of New Mexico Center for Legal Education is the only approved course provider. Please see below for upcoming opportunities to attend the required ethics course. For more information, lawyers should carefully read Rule 17-204 NMRA.

### Upcoming dates and times:

Oct. 12 • 9–10 a.m.  
 Oct. 19 • 9–10 a.m.

Nov. 7 • 9–10 a.m.  
 Nov. 9 • 9–10 a.m.

Nov. 28 • 9–10 a.m.

# Mark Your Calendar

Save the date for these exciting programs down in your calendar and stay tuned for further details including credit hours, presenters and prices.

## Business Law Institute

Nov. 15

## Probate Institute

Nov. 16

## Annual Paralegal Division CLE

Dec. 1

## Legal Malpractice Potpourri

Dec. 4

## Back by Popular Demand!

## Trials of the Century III

Dec. 5

*Presented by Todd Winegar*

## Real Property Institute

Dec. 6

## Family Law from a New Judge's Perspective

Dec. 7

## Immigration Law Institute

Dec. 8

## Ethicspalooza

Dec. 11

## Trial Practice Section CLE

Dec. 14

## Natural Resources, Energy and Environmental (NREEL) Institute

Dec. 15

## Back by Popular Demand!

## Mock Meeting of the Ethics Advisory Committee

Dec. 18

## Back by Popular Demand!

## Social Media as Investigative Research and Evidence

Dec. 27

*Presented by Carol Levitt, Esq., and Mark Rosch*

## Oil and Gas

Dec. 28

## Supreme Court Case Update

Dec. 29

## The Ethics of Lawyer Advertisements Using Social Media

Dec. 29

## CLE REGISTRATION FORM

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**Mail:** Center for Legal Education, PO Box 92860, Albuquerque, NM 87199

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Program Cost \_\_\_\_\_ IMIS Code \_\_\_\_\_

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was tried to the bench in October 2014. At the conclusion of Valerio's case, San Mateo moved for judgment on the merits pursuant to Rule 1-041(B). The district court granted San Mateo's motion, finding that Valerio did not admit any contract into evidence or otherwise establish the elements of an enforceable agreement, and that he had not shown any evidence of damages entitling him to relief. This appeal followed.

#### DISCUSSION

{10} As a preliminary matter, San Mateo argues that Valerio waived appellate review of any and all issues in this case because Valerio does not challenge the district court's dismissal of his complaint under Rule 1-041(B). Rule 1-041(B) provides, in relevant part, as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 1-052 NMRA.

{11} At the close of Valerio's case in chief, San Mateo moved for dismissal and the motion was granted. San Mateo now asserts that waiver occurred because "[n]owhere in his brief does Valerio seek review of the [d]istrict [c]ourt's final ruling dismissing the case with prejudice under Rule 1-041[.]"

{12} San Mateo misunderstands the role that reversible error plays in our appellate review process. A party is not required to challenge the merits of the lower court's ultimate decision for this Court to address alleged reversible errors along the way; if this Court finds that reversible error occurred at any point, we will set aside the judgment. See *Anderson v. Welsh*, 1974-NMCA-120, ¶ 28, 86 N.M. 767, 527 P.2d 1079 ("All error is not reversible. Reversible error occurs where the substantial rights of the adverse party have been affected. Otherwise no judgment shall be reversed by reason of such error."

(citation omitted)). Here, Valerio asserts that, leading up to and during the trial, the district court committed various reversible errors as stated above. Under these circumstances, with regard to the district court's dismissal of the action, our rules of appellate procedure merely require that the brief in chief include "a precise statement of the relief sought[.]" which it does. Rule 12-213(A)(5) NMRA (current version at Rule 12-318(A)(5) NMRA). Consequently, we proceed to address the issues raised by Valerio on appeal.

#### Motion to Withdraw Admission

{13} Valerio's first argument on appeal is that the district court erred in denying his motion to withdraw an admission he made in response to a written discovery request. Specifically, San Mateo's request for admission number two asked Valerio to either admit or deny whether "all payments from San Mateo . . . to . . . Valerio in the year 2012 accurately reflect the amounts owed to . . . Valerio based upon the weight of the chile delivered after dehydration with 3%-7% moisture." Valerio responded to this request for admission by placing an "X" next to the option for "Admit" and further stating that "[t]he last payment failed to account for approximately 14 loads of chile that . . . Valerio delivered." More than a year later and after the close of discovery, Valerio filed a motion seeking the court's permission to withdraw this admission as "improvident" and to allow an amended "truthful response" to the request. In particular, Valerio sought to withdraw the admission "in order to allow [Valerio] to prove that [San Mateo had] not accounted for the chile purchased and [had] underpaid [Valerio]." In other words, Valerio sought to change his admission from the 14 loads to challenging the amount paid for the full one million pounds of chile peppers that the parties had contracted for. After a hearing, the district court denied Valerio's motion. At trial, the district court accepted the original admission as established and limited Valerio's claim to the 14 loads of chile alleged in the admission not to have been paid for.

{14} Under Rule 1-036(B) NMRA, the district court "may permit withdrawal or amendment [of an admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." As the language of the rule makes clear, the burden is on the

party opposing withdrawal—in this case San Mateo—to "satisfy the court" that it would be prejudiced by the amendment. *Id.* Moreover, when interpreting the federal counterpart to our rule, federal courts have held that the prejudice contemplated is not simply that the party would have to prove the fact previously admitted, but that it "relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." *Brook Vill. N. Assocs. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982).

{15} In its oral ruling denying Valerio's motion, the district court held that San Mateo would be prejudiced if withdrawal was allowed. The court noted that the case was already on a trial docket, discovery was closed, and the prejudice to San Mateo would be too great as it would have to conduct burdensome last-minute discovery with respect to the Mexican weight tickets, including deposing foreign witnesses. We review this decision for abuse of discretion. See *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985) (holding that the denial of a motion to withdraw or amend an admission under the substantially identical Fed. R. Civ. P. 36(b) is reviewed for abuse of discretion); *Century Bank v. Hymans*, 1995-NMCA-095, ¶ 12, 120 N.M. 684, 905 P.2d 722 (holding that authority interpreting a "substantially identical" federal rule of civil procedure "can be persuasive in the absence of contrary New Mexico precedent").

{16} "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). Here, the district court's ruling that San Mateo would be prejudiced was supported by the fact that the trial was two weeks away, discovery was closed and, more importantly, that the discovery would have to be conducted in a foreign country. Even if San Mateo would not have suffered prejudice, however, reversal on this issue is not warranted because any alleged error was harmless.

In civil litigation, error is not grounds for setting aside a verdict unless it is inconsistent with



substantial justice or affects the substantial rights of the parties. An error is harmless unless the complaining party can show that it created prejudice. We compel the reversal of errors for which the complaining party provides the slightest evidence of prejudice and resolve all doubt in favor of the complaining party. [At the same time, we will not set aside a judgment based on mere speculation that [the error] influenced the outcome of the case.

*Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-025, ¶¶ 26-27, 129 N.M. 436, 10 P.3d 115 (internal quotation marks and citations omitted). In his brief in chief, Valerio claims that he was prejudiced by the denial of his motion because “thereafter [San Mateo’s] motion for summary judgment was granted as to all but one issue as supported largely by [Valerio’s] admissions.” Our review of the record on appeal reveals that this assertion is incorrect and misconstrues the district court’s rulings with regard to San Mateo’s summary judgment motion. While the district court relied on various other admissions made by Valerio, it did not rely on the admission here at issue, i.e., Valerio’s response to request for admission number two, for the simple fact that San Mateo itself did not rely on that admission in its motion for summary judgment. The district court granted summary judgment on Valerio’s claims for debt and money due, breach of the covenant of good faith and fair dealing, and fraud as a matter of law, and denied summary judgment as to the breach of contract claim because there existed a question of fact as to how much chile was delivered and how much was paid for. Valerio offers no argument as to how the dismissed claims would have survived summary judgment as a matter of law had he been allowed to withdraw this particular admission, which was based solely on the specific number of loads of chile peppers Valerio delivered to San Mateo in 2012. Accordingly, the district court’s order denying Valerio’s motion to withdraw his admission, thereby limiting the dispute to the last 14 loads, was of no consequence to its decision to grant in part San Mateo’s motion for summary judgment.

{17} In his reply brief, Valerio further argues that he was prejudiced because his “admissions conceded and limited the core elements and extent of damages[.]”

and that “[a]llowing the admissions to be withdrawn[] would have permitted for the action to be resolved on the merits for more than just the 14 loads of chile.” However, Valerio presents no argument as to how he would have been able to prove breach of contract and damages with respect to all loads delivered in 2012 when he was unable to do so with respect to the last 14 loads, and Valerio has directed this Court to no evidence in the record on appeal to suggest that he would have been able to contradict San Mateo’s evidence of the dehydrated weight of any of his chile in 2012. See *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (“An assertion of prejudice is not a showing of prejudice.”); see also *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (“We will not review unclear arguments, or guess at what [a party’s] arguments might be.”). We refuse to speculate on the issue of prejudice, *Kennedy*, 2000-NMSC-025, ¶ 27, and hold that Valerio has failed to demonstrate reversible error on appeal in this context.

#### **Lack of Jurisdiction**

{18} Valerio next argues that the district court’s dismissal should be reversed for lack of jurisdiction because it denied joinder of real parties in interest. Specifically, Valerio claims that his business partner and bookkeeper, Elisabet Sanchez, and the several farmers who raised the crops of chile peppers here at issue were indispensable parties who should have been joined by San Mateo. Valerio offers virtually no support for this argument. Additionally, more than twenty-five years ago, our Supreme Court held that “the test of indispensability [is not] jurisdictional” and overruled precedent to the contrary. *C.E. Alexander & Sons, Inc. v. DEC Int’l, Inc.*, 1991-NMSC-049, ¶ 8, 112 N.M. 89, 811 P.2d 899; see also *Sims v. Sims*, 1996-NMSC-078, ¶ 53, 122 N.M. 618, 930 P.2d 153 (“The absence of an indispensable party in New Mexico is no longer considered . . . a jurisdictional defect.”). The district court did not lack jurisdiction in this matter.

#### **Partial Summary Judgment**

{19} Valerio’s third argument on appeal is that the district court “erred in granting summary judgment where facts were disputed.” Valerio argues that the district court erred (1) in failing to recognize a fiduciary relationship between the parties, and (2) in failing to hold that there were genuine issues of material fact as to whether San Mateo’s records were ac-

curate. We construe these arguments as challenges of the district court’s summary dismissal of his claims for debt and money due and breach of the implied covenant of good faith and fair dealing.

{20} Valerio also asserts that there were genuine issues of material fact with regard to “detrimental reliance on [San Mateo’s] representations as to the weights before and after dehydration[.]” Although unclear, we construe this argument as a claim for equitable estoppel and decline to address it because it was not raised below. See *Capo v. Century Life Ins. Co.*, 1980-NMSC-058, ¶ 16, 94 N.M. 373, 610 P.2d 1202 (listing the essential elements of equitable estoppel, including “reliance upon the conduct of the party estopped . . . and . . . action based thereon of such a character as to change [one’s] position prejudicially”); *McCauley v. Tom McCauley & Son, Inc.*, 1986-NMCA-065, ¶ 73, 104 N.M. 523, 724 P.2d 232 (holding that the plaintiff was barred from raising equitable estoppel for the first time on appeal).

{21} Valerio further appears to argue that there were genuine issues of material fact as to “the meanings of terms of the contract, specifically the accounting practices and dehydration process.” Given that Valerio’s breach of contract claim survived summary judgment, there is no adverse ruling to review or actual relief that can be afforded, so we decline to address this issue. See *Pernell v. Pernell*, 1979-NMCA-008, ¶ 6, 92 N.M. 490, 590 P.2d 638 (noting that New Mexico appellate courts do not decide questions if no actual relief can be afforded).

{22} “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.” *City of Albuquerque v. BPLW Architects & Eng’rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. “However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment.” *Id.* “The movant need only make a prima facie showing that he is entitled to summary judgment. Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits.” *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113

N.M. 331, 825 P.2d 1241 (citation omitted). “[T]he party opposing summary judgment has the burden to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact.” *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶ 10, 146 N.M. 179, 207 P.3d 1156 (internal quotation marks and citation omitted).

### 1. Fiduciary Duty

{23} With respect to Valerio’s argument that the district court erred in granting summary judgment to San Mateo on the fiduciary duty claim, we disagree. The complaint alleged that Valerio had been “unable to determine the debt and money due without a proper accounting of actual delivery weights by [San Mateo].” The complaint further alleged that Valerio had requested but had been denied such an accounting. In his response to San Mateo’s motion for summary judgment, Valerio argued that San Mateo had “admitted [that it] was acting as a fiduciary for [Valerio]” and had an “obligation . . . to account as plead.” Although unclear, we construe Valerio’s claim for debt and money due as a claim for breach of fiduciary duty. See *Fate v. Owens*, 2001-NMCA-040, ¶ 25, 130 N.M. 503, 27 P.3d 990 (“[A] fiduciary[] is required to fully disclose material facts and information relating to [the fiduciary relationship] . . . even if the [one to whom the duty is owed] ha[s] not asked for the information. . . . The duty of disclosure is a hallmark of a fiduciary relationship.” (internal quotation marks and citations omitted)).

We determine whether a particular defendant owes a [fiduciary] duty to a particular plaintiff as a question of law, and as such, de novo. . . . [A] fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.

*Moody v. Stribling*, 1999-NMCA-094, ¶¶ 17-18, 127 N.M. 630, 985 P.2d 1210 (internal quotation marks and citations omitted). Relationships where a fiduciary duty has been recognized include those between insurer and insured, testator and beneficiary, investment advisor and client, physician and patient, attorney and client, real estate broker and principal, and business partners. See *id.* ¶ 17. “Because a fiduciary owes the highest degree of loyalty to those who are entrusted to him or her,

contracts entered into between a fiduciary and beneficiary are suspect.” *Id.* ¶ 33.

{24} On the other hand, “a buyer-seller relationship [ordinarily] is not fiduciary in nature[.] . . . An essential feature and consequence of a fiduciary relationship is that the fiduciary becomes bound to act in the interests of its beneficiary and not itself. Obviously, this dynamic does not inhere in the ordinary buyer-seller relationship.” *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 56, 133 N.M. 669, 68 P.3d 909 (alterations, internal quotation marks, and citation omitted); see *Cont’l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 44, 115 N.M. 690, 858 P.2d 66 (holding that a commercial agreement, “albeit heavily tilted in favor of [the defendant],” does not by itself give rise to a fiduciary relationship), *limited on other grounds by Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 2, 147 N.M. 157, 218 P.3d 75.

{25} Valerio’s only argument as to why the contract at issue in this case should be treated as creating a fiduciary duty on the part of San Mateo is that he had to trust San Mateo to accurately record and report the dehydrated weights of the chile peppers he delivered. Valerio cites no authority recognizing a fiduciary relationship under similar circumstances, and we assume that none exists. See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that, absent cited authority to support an argument, we assume that no such authority exists).

{26} We further agree with the California Supreme Court that one party to a contract’s inability to monitor the other party’s performance of its contractual obligations and the resultant need to trust that the same will be performed as agreed are insufficient, without more, to create a fiduciary relationship. In *City of Hope National Medical Center v. Genentech, Inc.*, for example, the court declined to find a fiduciary relationship between a biotech company and a medical research center premised on the center’s need to rely on the truth of the company’s representations regarding royalty payments in exchange for exclusive rights of the center’s patents and other property. 181 P.3d 142, 149-50 (Cal. 2008). The court observed that a car owner “must rely on the truth of the garage operator’s representations about what repairs are needed and how they should be done . . . [but that] no court has ever held or suggested, as far as we know, that in this situation the garage operator

owes fiduciary duties to the car owner.” *Id.* at 152. Similarly, in *Wolf v. Superior Court*, the court refused to recognize a fiduciary relationship between an author and a company where the author had assigned the rights to a novel to the company in exchange for contingent compensation from its commercial exploitation, while the company retained exclusive control over all financial records and information pertaining to any revenue received therefrom. 130 Cal. Rptr. 2d 860, 864 (2003) (“Every contract requires one party to reposit an element of trust and confidence in the other to perform.”). Likewise, without more we decline to impose the onerous duties of a fiduciary relationship in the typical buyer-seller context.

{27} In a similar vein, Valerio argues that San Mateo was his fiduciary because it acted as a bailee with regard to the chile peppers he delivered. This argument was not preserved in the district court and was made for the first time in Valerio’s reply brief. As such, we refuse to address it on appeal. See *Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, ¶ 30, 123 N.M. 170, 936 P.2d 852 (rejecting liability theories not presented to the district court in response to the defendant’s motion for summary judgment and raised for the first time in the plaintiffs’ reply brief).

### 2. Good Faith and Fair Dealing

{28} We turn next to whether the district court erred in granting summary judgment to San Mateo on Valerio’s claim for breach of the implied covenant of good faith and fair dealing. “The breach of [the implied covenant of good faith and fair dealing] requires a showing of bad faith or that one party wrongfully and *intentionally* used the contract to the detriment of the other party.” *Cont’l Potash, Inc.*, 1993-NMSC-039, ¶ 64 (emphasis added). Negligent conduct is insufficient to constitute breach of the covenant; rather, the requisite showing is of “wrongful and intentional affronts to the other party’s rights, or at least affronts where the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party.” *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 31, 118 N.M. 203, 880 P.2d 300, *limited on other grounds by Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 7, 135 N.M. 106, 85 P.3d 230. Therefore, in order to defeat summary judgment on this count, Valerio had to present some evidence that the weights San Mateo reported to him either prior to or at the time of payment

were not only wrong, but intentionally so. Based on the evidence discussed below, we conclude that Valerio did not meet this burden on summary judgment.

{29} Before Valerio had to make any showing as to factual issues, San Mateo, as the movant, had the burden of establishing the absence of a material issue of fact and making a *prima facie* showing that it was entitled to summary judgment as a matter of law. See *Goodman v. Brock*, 1972-NMSC-043, ¶ 8, 83 N.M. 789, 498 P.2d 676. “By a *prima facie* showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” *Id.*

{30} San Mateo’s motion for summary judgment asserted that there was no evidence of bad faith on its part or that it made any misrepresentations to Valerio. The motion was supported by documentary evidence demonstrating that during 2012, (1) the parties had a contract for one million pounds of dehydrated chile; (2) Valerio delivered a total of 5,170 boxes of raw chile; (3) the total dehydrated weight of the chile delivered equaled 941,772 pounds; (4) Valerio’s average dehydrated weight per box was 182 pounds; (5) prior to the beginning of the season, Valerio received advances in the amount of \$90,250; (6) Valerio was paid within 30 days of each delivery for all chile peppers delivered through December 20, 2012; and (7) the last payment he received on December 26, 2012, equaled the remaining amount owed to him minus the amount of the advances he had previously received.

{31} San Mateo further provided the affidavit of its secretary and shareholder of more than twenty years, Rosie Lack, who stated that she had personal knowledge of its operations; that San Mateo does not weigh raw chile as raw weight is immaterial; that each grower’s dehydrated chile is weighed in 1000-pound batches on scales certified by the New Mexico Department of Agriculture; that these weights are recorded in its documentation; and that Valerio was paid accordingly. Lack’s affidavit further provided that, in addition to providing growers with exact dehydrated weights at the time of payment, San Mateo tries to provide estimated average box weights on the paperwork it uses to track its boxes throughout the season as a courtesy to help growers estimate picking costs. San Mateo’s motion also included Valerio’s responses to requests for admissions and answers to interrogatories, in which he admitted that he did not know—and had no

independent records of—the dehydrated weight of the chile peppers he delivered to San Mateo in 2012. This evidence was sufficient for San Mateo to meet its burden of making a *prima facie* showing of no misrepresentation on its part, intentional or otherwise.

{32} In his response, Valerio produced documentary evidence of the raw weight of some of the chile peppers he delivered to San Mateo, which the district court accepted as sufficient to raise a factual issue with respect to dehydrated weight as evidenced by its denial of summary judgment on Valerio’s breach of contract claim. Relevant to the issue of bad faith, Valerio asserted that Lack verbally told Valerio that the last 14 loads averaged over 200 pounds per box after dehydration, but the payment Valerio received for these boxes translated to an average of 81 pounds per box; the apparent implication being that, given the great disparity in weights, San Mateo must have intentionally misrepresented the dehydrated weight of these loads of chile peppers. In support of these assertions, Valerio provided the affidavit of Sanchez, in which she offered no explanation as to how she reached the number of 81 pounds per box, such as whether or not the deduction of \$90,250 in advances was taken into account. Without some evidence that her calculation was correct, Valerio was not entitled to any inference based on this number. See *Goodman*, 1972-NMSC-043, ¶ 10 (“The inferences, which the party opposing the motion for summary judgment is entitled to have drawn from all the matters properly before and considered by the trial court, must be reasonable inferences.”).

{33} Further, in his response to San Mateo’s request for admission number nineteen, which was included with the motion for summary judgment, Valerio stated, consistent with San Mateo’s documentation, that he was paid based on an average dehydrated weight of 182 pounds per box for all boxes delivered in 2012. Valerio’s response offered no argument or evidence to support the inference that Lack’s alleged statement that the last 14 loads averaged 200 pounds per box was inconsistent with an ultimate average of 182 pounds per box when all 5,170 boxes were taken into account. As such, Valerio’s evidence did not support an inference of bad faith by San Mateo. See *id.*; see also *Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 29, 294 P.3d 1276 (“To survive a motion for summary judgment, the non-moving party may

not rely upon mere allegations, but rather must set forth specific facts showing that there is a genuine issue for trial.” (internal quotation marks and citation omitted)).

{34} In her affidavit, Sanchez further stated that Lack told Valerio that the weights provided on the paperwork for tracking San Mateo’s boxes were accurate rather than estimates with the understanding that Valerio would use these weights to pay the farmers who produced the chile peppers he delivered to San Mateo, the apparent implication being that Lack knowingly caused him financial harm. This testimony likewise does not support an inference of bad faith. During the hearing on San Mateo’s motion, Valerio argued that Lack’s estimates understated the weight of the chile peppers received. Therefore, even if Valerio relied on these numbers to pay the farmers, doing so was not to his financial detriment, as his payments were lower—not higher—than what was due.

{35} Lastly, during the hearing on the motion, Valerio argued that San Mateo should have either utilized a weight scale with a printer and produced a ticket demonstrating the dehydrated weight of his product, or taken a picture of the screen of its weight scale each time it weighed his product. However, “[m]erely asserting that [San Mateo] failed to take action that might have been beneficial to [Valerio] does not show bad faith.” *Cont’l Potash, Inc.*, 1993-NMSC-039, ¶ 66.

{36} As the non-moving party, the burden was on Valerio to come forward with admissible evidence showing that a material disputed factual issue existed with respect to bad faith. See *Archunde v. Int’l Surplus Lines Ins. Co.*, 1995-NMCA-110, ¶ 22, 120 N.M. 724, 905 P.2d 1128. Finding no evidence in the record on appeal from which to reasonably infer bad faith, we affirm the district court’s partial grant of summary judgment on this issue.

#### **Summary Judgment Regarding Claims Not Challenged in Motion**

{37} Valerio contends that the district court erred in granting summary judgment on issues that were not addressed in San Mateo’s motion. Specifically, Valerio asserts that the district court summarily dismissed a claim of unconscionability/adhesion and a claim of conversion. There is nothing in the record on appeal, however, to support Valerio’s assertion; rather, the record establishes that these claims were not before the district court, and thus no summary judgment could have been, or was, entered with respect to them.

{38} Specifically, during docket call held two days before the hearing on the motion for summary judgment, the district court rejected Valerio's draft pretrial order because it contained these two new theories of liability. In so doing, the court unequivocally stated that the time for amending the pleadings had passed and that no new or additional theories would be permitted (as discussed in more detail below, this ruling was not error). Contrary to the court's clear directive, the next day Valerio filed a motion to amend the complaint seeking to add these two theories. The court orally denied this motion on the day of trial, stating that it had previously held that no amendments would be permitted. It follows that the court had not previously dismissed these claims on summary judgment.

#### Exclusion of Evidence

{39} Valerio's fifth claim on appeal is that the district court erred in excluding Lack's deposition testimony, taken in her capacity as San Mateo's corporate designee under Rule 1-030(B)(6) NMRA, and the Mexican weight tickets. While the brief in chief also states that the weight tickets from the United States customs scales were erroneously excluded, Valerio offers no argument or authority in support of this assertion; therefore, we do not address it. *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed").

{40} At trial, Valerio moved into evidence portions of Lack's deposition, and San Mateo objected in part because Lack was present and available to testify. The district court ruled that the objection would be sustained unless Valerio waited until Lack testified. Rather than call Lack as his next witness, however, Valerio rested his case.

{41} Pursuant to Rule 1-032(A) NMRA, [a]t the trial . . . any part or all of a deposition, so far as admissible under the Rules of Evidence applied *as though the witness were then present and testifying*, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions: . . . (2) the deposition of . . . a person designated under Subparagraph (6) of Paragraph B of Rule 1-030 . . . to testify on behalf of a public or private corporation, partnership

or association . . . which is a party *may be used by an adverse party for any purpose*.[.]

(Emphasis added.) Given the plain language of the rule that at trial an adverse party may use the deposition of a corporate party's Rule 1-030(B)(6) designee for any purpose and "as though the witness were then present and testifying," the district court's ruling was clearly erroneous. Rule 1-032(A); see *Crimm v. Missouri Pac. Ry. Co.*, 750 F.2d 703, 708-09 (8th Cir. 1984) (holding that, under the substantially identical language of Fed. R. Civ. P. 32(a)(2), the trial court erred in excluding the deposition of the opposing party's managing agent because the deponent "was to be called later in the trial").

{42} On appeal, San Mateo argues that the error was harmless. We have previously held that "the complaining party on appeal must show the erroneous . . . exclusion of evidence was prejudicial in order to obtain a reversal." *Cumming v. Nielson's, Inc.*, 1988-NMCA-095, ¶ 28, 108 N.M. 198, 769 P.2d 732. In response, Valerio asserts that he was forced to wait to use the deposition testimony until Lack "was called to testify. . . . However, when she was not called to testify, her deposition was not permitted to be admitted, to the substantial injustice of [Valerio's] case." Valerio fails to explain why he did not call Lack to the stand in his case in chief. To the extent his position is that he was precluded from doing so by the district court, there is nothing in the record on appeal to support this suggestion.

{43} In interpreting the parallel Fed. R. Civ. P. 32(a)(2), "[f]ederal appellate courts have held that the exclusion of deposition evidence is harmless if the material matters covered in the deposition *are covered, or could have been covered*, at trial." *Crimm*, 750 F.2d at 709 (emphasis added). We are persuaded by this precedent. See *Hymans*, 1995-NMCA-095, ¶ 12 (holding that authority interpreting a "substantially identical" federal rule of civil procedure "can be persuasive in the absence of contrary New Mexico precedent"). Therefore, we hold that, because (1) Valerio could have covered the excluded testimony by calling Lack to the stand and questioning her about it, and (2) he could have introduced the deposition testimony at issue at that time per the court's ruling, the error was harmless, and reversal on this ground is not warranted.

{44} As to the Mexican weight tickets, Valerio argues that they should have been

admitted as his business records. San Mateo contends that this issue was not preserved for appellate review. Our review of the record reveals that at trial, Valerio argued unsuccessfully that these weight tickets should be admitted because they were kept in the regular course of his business by Sanchez, their custodian. Therefore, we hold that the issue was preserved and review for abuse of discretion. *Roark v. Farmers Grp., Inc.*, 2007-NMCA-074, ¶ 20, 142 N.M. 59, 162 P.3d 896.

{45} It is undisputed that the Mexican weight tickets were not generated or created by Valerio's business; rather, they were issued by a different entity—a weigh station located in Mexico and used by Valerio to weigh some of the chile peppers he delivered to San Mateo in 2012. Valerio cites several cases for the proposition that the witness testifying for the purpose of laying a foundation for the business records exception need not have created the record at issue. However, Valerio offers no authority to support his position that the business records exception applies to records not created by the *business* to which the exception is sought to be applied. "We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority." *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2. Rule 11-803(6) NMRA states that both keeping *and making* the records at issue must be a regular practice of *the same* business. As such was not the case with respect to the Mexican weight tickets, we hold that the district court did not abuse its discretion in excluding these documents.

#### Scheduling Order

{46} Valerio's final argument on appeal is that "the district court committed reversible error in allowing manifest injustice by refusing to modify the scheduling order to promote fairness." San Mateo takes the position that this issue was not preserved below. "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the [district] court on the same grounds argued in the appellate court." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717. Our review of the record on appeal reveals that Valerio preserved this issue when he raised it during docket call on October 6, 2014, at which time Valerio argued that he should be permitted to amend the complaint to add claims revealed during discovery. Valerio argued to the district court that, because the deadline for amendments of the pleadings



was shorter than the discovery deadline, the scheduling order unreasonably precluded any claims discovered during that process. The district court rejected this argument as “misleading” because discovery had closed two months prior, stating that Valerio should not have waited until docket call to seek amendment. We review this denial of Valerio’s oral motion to modify the scheduling order for abuse of discretion. *See Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, ¶ 62, 331 P.3d 942.

{47} Pursuant to Rule 1-016(B) NMRA, “[a] scheduling order shall not be modified except by order of the court upon a showing of good cause.” Valerio’s counsel argued below that, by the time he was retained in this matter, while discovery was still open, the deadline to amend the pleadings had already passed, partly due to the court’s delay in ruling on his previous counsel’s motion to withdraw. Counsel offered no explanation, however, as to why

he then waited until two months after the close of discovery and only fifteen days before the trial date to seek modification. Given that the district court was offered no cause—good or otherwise—for this delay, we hold that it did not abuse its discretion in refusing to modify its scheduling order only days before trial. *See Reaves v. Bergsrud*, 1999-NMCA-075, ¶ 13, 127 N.M. 446, 982 P.2d 497 (“An abuse of discretion occurs when the [district] court’s ruling is against the facts, logic, and circumstances of the case or is untenable or unjustified by reason.”).

{48} We are mindful of the fact that, in effect, the district court’s ruling was a denial of a request to amend the complaint, as well as of our prior holding that, “even if a party does not consent to amendment, the [district] court is required to allow it freely if the objecting party fails to show he or she will be prejudiced.” *Crumpacker v. DeNaples*, 1998-NMCA-169, ¶ 17, 126

N.M. 288, 968 P.2d 799. In the present case, San Mateo did not consent to the amendment below, but the district court did not explicitly require a showing of prejudice. We nevertheless affirm because *Crumpacker* further held that a denial may be premised on an “apparent . . . reason—such as undue delay,” *id.* ¶ 18 (internal quotation marks and citation omitted), and Valerio does not develop on appeal a challenge to the district court’s decision on this basis.

#### CONCLUSION

{49} For the foregoing reasons, we affirm the district court’s ruling in favor of San Mateo.

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

**LINDA M. VANZI, Chief Judge**

#### WE CONCUR:

**JAMES J. WECHSLER, Judge**  
**M. MONICA ZAMORA, Judge**

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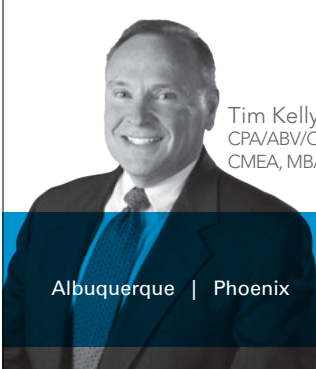
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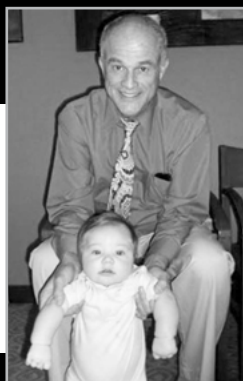
*Following the luncheon, two (2) complimentary 1 hour Continuing Legal Education sessions will be offered:*

- 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**.





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#### 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.

#### 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.

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City of Albuquerque Assistant City Attorney position is available within the Municipal Affairs Division of the Legal Department for an attorney with 5+ years of experience in representing local governmental entities or state agencies. The position will be responsible for providing legal advice and counsel to assigned City departments and boards, including representation before state and federal courts and at administrative hearings. Strong writing skills and ability to multi-task required. Salary will be based upon experience. Please submit resume to attention of "Municipal Affairs Division Attorney Application" c/o Ramona Zamir-Gonzalez, Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or rzamir-gonzalez@cabq.gov. Application deadline is October 10, 2017.

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### Attorney

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 Torrance County (Estancia). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary range: \$50,000 - \$69,122. 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.

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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

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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

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### Assistant Attorney General III

The Office of the New Mexico Attorney General is recruiting for an Assistant Attorney General III position and a Traffic Safety Resource Prosecutor in the Special Prosecutions Division in Criminal Affairs. The job postings and further details are available at [www.nmag.gov/human-resources.aspx](http://www.nmag.gov/human-resources.aspx).

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The Associate Attorney will review pleadings, assist with task and workflow management, work with pleadings and accompanying paperwork and provide professional legal assistance, advice and counsel with respect to collections and creditor's rights. Moreover, the position may require research and analysis of legal questions. The position will also entail court appearances, often on a daily basis. The position has a high level of responsibility within established guidelines, but is encouraged to exercise initiative. The position is part of a growing team of attorneys across several states, and is located in Albuquerque, New Mexico. Please email your resume directly to Tonia Martinez at [tonia.martinez@mjfirm.com](mailto:tonia.martinez@mjfirm.com)

### Hearing Officer or Judge Pro Tempore Services

The Thirteenth Judicial District Court is requesting proposals (RFP) #2018-0002-1 for Hearing Officer or Judge Pro Tempore Services in Cibola County. This is the first amendment to RFP 2018-0002. The full RFP can be found at: <https://thirteenth-districtcourt.nmcourts.gov> This RFP was initially issued on August 25, 2017, and the amendment issued on September 20, 2017. The deadline for submissions is October 25, 2017 at noon (12:00 pm) MST. Offerors who submitted proposals under RFP 2018-0002 need not resubmit to be considered under this amendment. All questions should be directed to Karl Reifsteck at [berdkwr@nmcourts.gov](mailto:berdkwr@nmcourts.gov) or by calling 505-865-2404.

### Attorney Associate

The Third Judicial District Court in Las Cruces is accepting applications for a permanent full-time, Attorney Associate. Requirements include admission to the NM State Bar plus a minimum of three years experience in the practice of applicable law, or as a law clerk. Under general direction, as assigned by a judge or supervising attorney, review cases, analyze legal issues, perform legal research and writing, and make recommendations concerning the work of the Court. For a detailed job description, requirements and application/resume procedure please refer to <https://www.nmcourts.gov/careers.aspx> or contact Briggett Becerra, HR Administrator Senior at 575-528-8310. Deadline for submission is: October 20, 2017.

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