

# BAR BULLETIN

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*Refresh*, by Joan McMahon (see page 3)

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## Meetings

### November

- 1**  
**Employment and Labor Law Section Board**  
Noon, State Bar Center
- 7**  
**Health Law Section Board**  
9 a.m., teleconference
- 8**  
**Taxation Section Board**  
11 a.m., teleconference
- 8**  
**Children's Law Section Board**  
Noon, Juvenile Justice Center
- 9**  
**Elder Law Section Board**  
Noon, State Bar Center
- 9**  
**Public Law Section Board**  
Noon, Montgomery & Andrews, Santa Fe
- 9**  
**Business Law Section Board**  
4 p.m., teleconference
- 14**  
**Bankruptcy Law Section Board,**  
Noon, U.S. Bankruptcy Court
- 14**  
**Committee on Women and the Legal Profession**  
Noon, Modrall Sperling, Albuquerque

## Workshops and Legal Clinics

### November

- 1**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 1**  
**Divorce Options Workshop**  
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003
- 10**  
**Civil Legal Clinic**  
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817
- 15**  
**Family Law Clinic**  
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861
- 16**  
**Common Legal Issues for Senior Citizens Workshop**  
10–11:15 a.m., Chaves County J.O.Y. Center, Roswell, 1-800-876-6657
- 17**  
**Common Legal Issues for Senior Citizens Workshop**  
10–11:15 a.m., First Judicial District Court Jury Room, Santa Fe, 1-800-876-6657

**About Cover Image and Artist:** Joan McMahon seeks to capture the joy she experiences in sharing her life with an extended family of animal members. Her watercolors radiate the inner light of her subject animals. McMahon decided that her artwork should “pay it forward” for the animals that inspire it. With the sales of her art, McMahon donates to animal rescue and welfare organizations. More of her work can be viewed at [www.joansart.com](http://www.joansart.com).

# Notices

## COURT NEWS

### New Mexico Supreme Court Commission on Access to Justice Commission Meeting

The next meeting of the Commission on Access to Justice is noon–4 p.m., Nov. 3 at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at [www.nmcourts.gov](http://www.nmcourts.gov).

### 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.

### First Judicial District Court Mass Reassignment

Effective Nov. 1 a mass reassignment of all Division II cases previously assigned to Judge Sarah M. Singleton except cases:

1. D101CV200300668
2. D101CV201300014
3. D101CV201302328
4. D101CV201400793
5. D101CV201402535
6. D101CV201501232
7. D101CV201600290
8. D101CV201600603
9. D101CV201602176
10. D101CV201700176

will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. Hon. Gregory S. Shaffer has been appointed to fill the vacancy in Division II of the First Judicial District. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Nov. 15 to challenge or excuse Judge Gregory S. Shaffer pursuant to Rule 1-088.1.

## Professionalism Tip

### With respect to parties, lawyers, jurors, and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

### Eleventh Judicial District Court Judicial Vacancy

A vacancy on the Eleventh Judicial District Court will exist as of Jan. 2, 2018 due to the retirement of Hon. Sandra Price effective Jan. 1, 2018. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the Eleventh Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/application.php>. The deadline for applications is 5 p.m., Jan. 10, 2018. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Eleventh Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 25, 2018, to interview applicants in Farmington. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

### 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 no longer accepted.

### San Diego Homeless Court Symposium

Learn from Steve Binder, an attorney for the San Diego Public Defenders Office, about the Public Defenders' successful and long-standing Homeless

Court Program. Binder started Homeless Court as part of a service fair for homeless veterans called "Stand Down" and the specialty court has evolved into a monthly docket that broadens the definition of homelessness and addresses outstanding charges that can otherwise perpetuate the homelessness cycle. Hear how this life-changing program is making waves nationwide. Attend at 1 p.m., Nov. 3, at the Bernalillo County Metropolitan Court 2nd Floor Jury Room, 401 Lomas Blvd NW, Albuquerque NM. For more information, call 505-938-4274. This event is hosted by the Bernalillo County Metropolitan Court Outreach Court Team.

### U.S. District Court for the District of New Mexico Court Closure

The U.S. District Court for the District of New Mexico will be closed Nov. 23–24 for the Thanksgiving holiday. Court will resume on Monday, Nov. 27. After-hours access to CM/ECF will remain available as regularly scheduled. Stay current with the United States District Court for the District of New Mexico by visiting the Court's website at [www.nmd.uscourts.gov](http://www.nmd.uscourts.gov).

## STATE BAR NEWS

### Attorney Support Groups

- Nov. 6, 5:30 p.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Nov. 13, 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#.

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



## 2018 Budget Disclosure Deadline to Challenge Expenditures

The State Bar of New Mexico Board of Bar Commissioners (BBC) has completed its budgeting process and finalized the 2018 Budget Disclosure, pursuant to the State Bar Bylaws, Article VII, Section 7.2, Budget Procedures. The budget disclosure is available in its entirety on the State Bar website at [www.nmbar.org](http://www.nmbar.org) on the financial information page under the About Us tab. **The deadline for submitting a budget challenge is on or before noon, Nov. 30, 2017,** and the form is provided on the last page of the disclosure document.

The BBC will consider any challenges received by the deadline at its Dec. 7, 2017, meeting.

### Address challenges to:

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

Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque, NM 87109.

### ADR Committee ADR Institute Pre-Show

Contained within the Japanese martial art of "Aikido is *Atemi*"—a strike used to unbalance or distract. This ADR Institute Pre-Show workshop will explore the concept of verbal *Atemi* through stories taken from the conflict resolution text, "Sweet Fruit from the Bitter Tree: 61 Stories of Creative & Compassionate Ways out of Conflict" by Mark Andreas. Join Aikido black belt and conflict resolver Stephen Kotev as he explores how to apply verbal *Atemi* to high-conflict situations at 6 p.m., Nov. 2, at the State Bar Center. Kotev and Laura Bassein will discuss the Association for Conflict Resolution's ADR Safety Planning-Recommended Guidance and relevant case scenarios, ethical issues and skill building interactions for practitioners across the spectrum of ADR practice on Nov. 3 at the ADR Institute. Attendance is free at the ADR Institute Pre-Show. Register online at <https://form.jot-form.com/72894594403971>. Visit [www.nmbar.org/CLE](http://www.nmbar.org/CLE) to register for the ADR Institute.

### Board of Bar Commissioners New Mexico Access to Justice Commission

The Board of Bar Commissioners will make two appointments to the New Mexico Access to Justice Commission for three-year terms. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico wishing to serve on the Commission should send a letter of interest and brief resume by Nov. 17 to Kris Becker at [kbecker@nmbar.org](mailto:kbecker@nmbar.org) or fax to 505-828-3765.

### Committee on Women and the Legal Profession Professional Clothing Closet

Does your closet need some cleaning? The Committee on Women seeks gently used, dry cleaned, dark colored professional clothing donations for its professional clothing closet. Individuals who want to donate to the closet may drop off donations at the West Law Firm, 40 First Plaza NW, Suite 735 in Albuquerque, during business hours or to Committee Co-chair Laura Castille at Cuddy &



### New Mexico Lawyers and Judges Assistance Program

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Attorneys/Law Students

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Judges 888-502-1289

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

McCarthy, LLP, 7770 Jefferson NE, Suite 102 in Albuquerque. Individuals wishing to look for a suit can stop by the West Law Firm during business hours or call 505-243-4040 to set up a time to visit the closet.

### Indian Law Section Call for Donations: First Annual Indian Law Section Silent Auction

The Indian Law Section seeks donations for the First Annual Silent Auction to be held in conjunction with the Section's Annual CLE, "The Duty to Consult with Tribal Governments: Law, Practice and Best Practices" and Annual Meeting on Nov. 2 at the State Bar Center. Artwork or photography, jewelry, gift certificates for a business, restaurant or spa service, and more are accepted. Donations are tax deductible as provided by law and donors will be recognized on the Section's website. The Silent Auction will benefit the Section's Bar Preparation Scholarship Fund, which assists law school graduates in their efforts to prepare for and take the New Mexico Bar Exam. To donate, contact Delilah Tenorio in Albuquerque at [dmt@stetsonlaw.com](mailto:dmt@stetsonlaw.com) or Kathryn S. Becker in Santa Fe at [Kathryn.becker@state.nm.us](mailto:Kathryn.becker@state.nm.us).

### Real Property, Trust and Estate Section Division Meetings Open to Section Membership

To more effectively promote its activities, the Real Property, Trust and Estate Section established two divisions in 2014: the Real Property Division and the Trust and Estate Division. The RPTE Board of Directors overseeing the divisions will meet on the following dates: Real Property Division: noon-1 p.m., Dec. 6, during the

Real Property Institute; Trust and Estate Division: 8-8:30 a.m., Nov. 16, during the Probate Institute. At the meetings, members will be updated about recent rule changes and brainstorm activities for the remainder of 2017 and beginning of 2018. Meals will be provided during the meetings. R.S.V.P. to Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org). If you cannot attend the meeting but would like to provide suggestions of what you would like to see from the divisions this year, or have questions generally, contact Real Property Division Chair Charles Price at [cprice@cpricelaw.com](mailto:cprice@cpricelaw.com) or Trust and Estate Division Chair Greg MacKenzie at [greg@hurleyfirm.com](mailto:greg@hurleyfirm.com).

### Senior Lawyers Division Annual Meeting of Membership

The Senior Lawyers Division invites Division members to its annual meeting of membership to be held at 4 p.m., Nov. 14, at the State Bar Center. Members of the SLD include members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more. During the annual meeting of membership, members will have the opportunity to meet with members of the SLD Board of Directors and learn more about the activities of the Division. The meeting will last an hour and attendees are welcome to stay for the Attorney Memorial Scholarship Reception following the annual meeting.

### Attorney Memorial Scholarship Reception

Four UNM School of Law third-year students will be awarded a \$2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The reception will be held from 5:30-7:30 p.m., Nov. 14, at the State Bar Center. All State Bar members, UNM School of Law faculty, staff, and students and family and colleagues of the deceased are welcome to attend. A list of attorneys being honored can be found at [www.nmbar.org/SLD](http://www.nmbar.org/SLD) under "Attorney Memorial Scholarship." Contact Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org) to notify the SLD of a member's passing and to provide current contact information for surviving family members and colleagues.

## UNM SCHOOL OF LAW 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.
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### *Holiday Closures*

Nov. 24–25 (Thanksgiving)

## Women's Law Caucus Justice Mary Walters 2018 Honoree Nomination

Each year, the Women's Law Caucus at the University of New Mexico School of Law chooses an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. The Women's Law Caucus is currently soliciting nominations for the 2018 recipient of the Award. To nominate an inspiring woman, submit the following information to Erin Phillips at [phillier@law.unm.edu](mailto:phillier@law.unm.edu) by Dec. 1. Include: nominee name and firm/organization/title; a description of why that person should receive the award; if that nominee is chosen, would you be willing to introduce them; and the nominator's name and email/phone so we can contact you for more information.

## OTHER BARS Albuquerque Bar Association November Luncheon and CLE

The Albuquerque Bar Association's next membership luncheon will be Nov. 7 at the Hyatt Regency Albuquerque. Kevin Washburn, UNM School of Law, will present "Sovereign Land: American Indian Tribes Today" from noon–1 p.m. (arrive at 11:30 a.m. for networking). After the luncheon from 1:15–2:15 p.m., Andrew Cloutier, Hinkle Shanor, LLP, will present "Fracking" (1.0 G). Register online at [www.abqbar.org](http://www.abqbar.org).

## Raise a Glass: Honoring the Women of the Bar

Join the Albuquerque Bar Association for the 2017 Raise a Glass Wine Pairing. Enjoy food and conversation as the Albuquerque legal community gathers to honor the female presidents of the Albuquerque

Bar Association. Spread across the venue, four courses of pairings are thoughtfully curated to accentuate the notes in the wine and create a social atmosphere. Guests will have the chance to walk away with an enticing bottle for their enjoyment from the wine pull. The event is at 6 p.m., Nov. 11, at the Hyatt Regency Albuquerque. Individual tickets, tables and sponsorships are available. R.S.V.P. by Oct. 27 to 505-842-1151 or [tbeckmann@abqbar.org](mailto:tbeckmann@abqbar.org).

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

## OTHER NEWS Elias Law

### Annual Turkey Giveaway

Annually, Elias Law gives out 500 free turkeys to low income families in Albuquerque's South Valley. This year's Turkey Giveaway will take place at 10 a.m., Nov. 18, at Elias Law located at 111 Isleta Blvd SW, Albuquerque. The firm seeks donations of food and water for those waiting in line and canned goods to accompany the turkeys. Volunteer assistance is also needed to hand out turkeys and to help those in need to their car with their groceries. To donate or volunteer, contact Nathan Cowan at [cowann@abogadoelias.com](mailto:cowann@abogadoelias.com) or 505-888-8888.

## Trojan Horse Method Women-only Training in Albuquerque

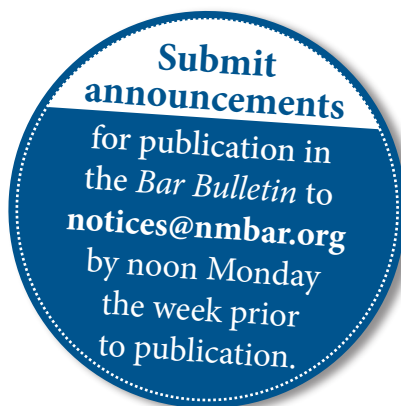
The Trojan Horse Method training is coming to Albuquerque for its first women-only event on Nov. 2-5 at Hotel Parq Central. Trojan Horse's mission is to train, mentor and assist trial lawyers as they commit to the process of becoming winning trial lawyers. The method takes attendees out of their comfort zone in order to aid the development of the highest level of skills required to obtain justice.

Attendees will learn how to discover the emotional core of their case and transport juries into the truth—not the manufactured truth—by the insurance carriers and prosecutors. Visit <https://events.bizzabo.com/thm47> for more information and to register.

### State of New Mexico Workers' Compensation Administration Notice of Destruction of Records

In accordance with NMAC 11.4.4.9 (Q)-Forms, Filing and Hearing Procedures: Return of Records—the New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2011, excluding causes on appeal. The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque, NM, 87106 and can be picked up until Nov.

30. For further information, contact the Workers' Compensation Administration at 505-841-6028 or 1-800-255-7965 and ask for Heather Jordan, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.



### ADDRESS CHANGES

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

#### Supreme Court

Web: [supremecourt.nmcourts.gov](http://supremecourt.nmcourts.gov)

Email: [attorneyinfochange@nmcourts.gov](mailto:attorneyinfochange@nmcourts.gov)

Fax: 505-827-4837

Mail: PO Box 848  
Santa Fe, NM 87504-0848

#### State Bar

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

Email: [address@nmbar.org](mailto:address@nmbar.org)

Fax: 505-797-6019

Mail: PO Box 92860  
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# Legal Education

## November

- |  |   |   |
|--|---|---|
| <p><b>2 Drafting Lease Guarantees</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>3 Ethics for Transactional Lawyers</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                  |
| <p><b>2 The Duty to Consult with Tribal Governments: Law, Practice and Best Practices</b><br/>2.3 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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 Government<br/>505-220-2820</p>   | <p><b>9 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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                     |
| <p><b>2 Annual Seminar</b><br/>3.5 G<br/>Live Seminar, Santa Fe<br/>Santa Fe Estate Planning Council<br/>505-988-4776</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/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>        |
| <p><b>2 Foundational Workshop - THM 47</b><br/>26.4 G<br/>Live Seminar, Albuquerque<br/>Trojan Horse LLC<br/>307-851-3980</p>  | <p><b>7 28th Annual Appellate Practice Institute (2017)</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>9 Essentials of Music Copyright Law with Ethics</b><br/>5.0 G, 1.0 EP<br/>Live Seminar, Albuquerque<br/>Rock N Roll Law<br/><a href="http://www.rocknrolllaw.com">www.rocknrolllaw.com</a></p>  |
| <p><b>2 USFN Member Education Retreat</b><br/>3.0 G, 1.5 EP<br/>Live Seminar, Santa Fe<br/>USFN America's Mortgage Banking Attorneys<br/><a href="http://www.usfn.org">www.usfn.org</a></p>  | <p><b>7 Moderated Q &amp; A – Lessons Learned from the “Trial of the Century” Relevant to the Rule-of-Law Issues of Today (2017 Annual Meeting)</b><br/>1.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>15 2017 Business Law Institute</b><br/>4.5 G, 1.5 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p><b>3 2017 ADR Institute Is Your Dispute Resolution Safe?—Issues to Consider in Meditation and Other ADR Processes</b><br/>4.0 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>7 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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>16 2017 Probate Institute</b><br/>6.3 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                | <p><b>7 Drugs in the Workplace (2016)</b><br/>2.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></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 Association<br/><a href="http://www.newmexicoblacklawyersassociation.org/">www.newmexicoblacklawyersassociation.org/</a></p> |

## November

- |   |  |  |
|---|--|--|
| <p><b>20 2017 Tax Symposium</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></p>         |
| <p><b>20 3rd Annual Symposium on Diversity and Inclusion—Diversity Issues Ripped From the Headlines (2017)</b><br/>5.0 G 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>28 Attorney vs. Judicial Discipline (2017)</b><br/>2.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                            | <p><b>29 2017 ECL Solo and Small Business Bootcamp Parts I and II</b><br/>3.4 G 2.7 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>     |
| <p><b>27 32nd Annual Bankruptcy Year in Review (2017)</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>28 Federal and State Tax Updates (2017 Tax Symposium)</b><br/>3.5 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                  | <p><b>29 Health Law Symposium (2017)</b><br/>6.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                 |
| <p><b>27 Copy That! Copyright Topics Across Diverse Fields (2016 Intellectual Property Law Institute)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>     | <p><b>28 2017 Employment and Labor Law Institute</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                     | <p><b>29 Human Trafficking (2016)</b><br/>3.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>  |
| <p><b>28 Estate Planning, Current Developments and Hot Topics</b><br/>1.0 G<br/>Live Seminar, Albuquerque<br/>Bessemer Trust<br/>713-803-2843</p>   | <p><b>28 2017 Family Law Institute (Day 1)</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></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/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |

## December

- |   |  |   |
|---|--|---|
| <p><b>1 Specialized Areas of Law for Lawyers and Paralegals—Annual Paralegal Division CLE</b><br/>5.0 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>1 Navajo Law Seminar</b><br/>6.0 G, 2.0 EP<br/>Live Seminar, Albuquerque<br/>Sutin Thayer and Browne<br/><a href="http://www.sutinfirm.com">www.sutinfirm.com</a></p>                        | <p><b>4 Indemnity and Insurance in Real Estate</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>           |
| <p><b>1 Office Leases: Drafting Tips and Negotiating Traps</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>   | <p><b>4 Legal Malpractice Potpourri</b><br/>1.5 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>5 “HEMS”—Defining Distribution Standards in Trusts</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |

# FALL SWEARING IN CEREMONY

## *Welcomes New Attorneys*

By Evann Kleinschmidt

On Oct. 16, almost 160 new attorneys were sworn in at the Kiva Auditorium in Albuquerque, surrounded by their family, friends and new colleagues. After signing the historic roll book, the new attorneys gathered in the auditorium to receive advice and congratulations from bar leaders and the justices of the New Mexico Supreme Court.

State Bar President Scotty A. Holloman recalled the many swearing in ceremonies he's attended over the years. Holloman encouraged the new admittees to get involved with the State Bar and their local bar associations, saying "This is your organization." Alison Block-Chavez, State Bar Young Lawyers Division delegate to the American Bar Association House of Delegates, and Tomas Garcia, chair of the State Bar YLD, also spoke about more of the benefits of finding a community in the legal community. The State Bar and ABA YLD organizations hold opportunity for lawyers to meet new people, help the community and find continuing education. Finally, Briggs Cheney of the Lawyers and Judges Assistance Program cautioned the audience about addiction and outlined how JLAP can assist lawyers who suffer from the disease.



Before administering the oath, the name of each applicant was read aloud. Applicants can choose to have a special movant who will advocate on their behalf. Movants included spouses, friends, colleagues and family members.



Next, the justices of the Court present had the opportunity to impart some wisdom on the new attorneys. Justice Barbara J. Vigil read from a eulogy read at U.S. Supreme Court Justice Thurgood Marshall's funeral. She hoped that the new attorneys would remember Justice Marshall and his accomplishments through their career and "move forward with vision, courage, determination and a sense of purpose" to make the legal profession and the world a better place.

Justice Charles W. Daniels congratulated the new admittees on this milestone and mentioned that the event is one of the truly transformative events each of them will go through. Justice Edward L. Chávez mentioned how grateful he is for the "mere accident of being born in America." He asked that each new lawyer have pride in our country, see the greatness in it and strive for even more greatness which, as lawyers, they now have an even greater power to do.

Finally, Chief Justice Judith K. Nakamura asked that each person consider carefully their reputation. In a community as small as New Mexico's each should take care in building and maintaining it. The most important thing, she said, is to demonstrate civility, respect and professionalism.







## *Welcome to the Profession!*

The State Bar of New Mexico congratulates everyone sworn in as well as their family and friends.  
For more photos, visit [www.nmbar.org/photos](http://www.nmbar.org/photos).



*Fourth Annual*  
*Senior Lawyers Division*  
**ATTORNEY MEMORIAL  
SCHOLARSHIP PRESENTATION  
AND RECEPTION**

Tuesday, Nov. 14 • 5:30-7:30 p.m.  
State Bar Center



Four UNM School of Law third-year students will be awarded a \$2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The Senior Lawyers Division invites all State Bar members and UNM School of law faculty, staff and students to attend.

A list of attorneys being honored can be found at [www.nmbar.org/SLD](http://www.nmbar.org/SLD) under "Attorney Memorial Scholarship." Contact Breanna Henley at [bhenley@nmbar.org](mailto:bhenley@nmbar.org) to R.S.V.P., to notify the SLD of a member's passing and to provide current contact information for surviving family members and colleagues.



# 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 October 20, 2017**

## **PUBLISHED OPINIONS**

A-1-CA-34014	State v. K Tidey	Affirm/Reverse/Remand	10/17/2017
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## **UNPUBLISHED OPINIONS**

A-1-CA-35923	State v. M Smith	Affirm	10/16/2017
A-1-CA-35980	State v. Walters	Affirm	10/16/2017
A-1-CA-36054	State v. T Barber	Affirm	10/16/2017
A-1-CA-36150	State v. B Daly	Dismiss	10/16/2017
A-1-CA-36174	S Lea v. P Kearny	Affirm	10/16/2017

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  
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Dated Oct. 23, 2017

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From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-063**

No. A-1-CA-34867 (filed May 31, 2017)

WILLIAM SHAWN CATES and BOBBY CHERESPOSY,  
on behalf of themselves and all others similarly situated,  
Plaintiffs-Appellants,

v.

MOSHER ENTERPRISES, INC.,  
Defendant-Appellee/Third-Party Plaintiff,

v.

FLINTCO WEST, INC.,  
Third-Party Defendant.

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

NAN G. NASH, District Judge

SHANE C. YOUTZ  
STEPHEN CURTICE  
JAMES A. MONTALBANO  
YOUTZ & VALDEZ, P.C.  
Albuquerque, New Mexico  
for Appellants

WAYNE E. BINGHAM  
BINGHAM, HURST & APODACA, P.C.  
Albuquerque, New Mexico  
for Appellee

**Opinion**

**Jonathan B. Sutin, Judge**

{1} Plaintiffs William Shawn Cates and Bobby Cheresposy, on behalf of themselves and all others similarly situated, appeal, contending that the district court erred in determining that it did not have jurisdiction to entertain their private action under the Public Works Minimum Wage Act (the Act), NMSA 1978, §§ 13-4-10 to -17 (1937, as amended through 2011). Plaintiffs sought to recover from Defendant Mosher Enterprises, Inc. wages for 2009 work that they allege were incorrectly based on the 2008 prevailing wage determined by the Department of Workforce Solutions (the Department). The district court determined that the Act did not confer a private right of action and dismissed Plaintiffs' action for lack of jurisdiction, without prejudice, so that Plaintiffs could pursue their administrative remedies. We hold that the Legislature intended to create a private right of action under the Act.

**BACKGROUND**

{2} Plaintiffs sued, alleging that they and others similarly situated were not compensated the appropriate wage rate for all hours worked on a renovation project for the University of New Mexico. A class was

certified, and each party filed a motion for summary judgment as to liability. During the hearing on the parties' motions for summary judgment, the district court raised sua sponte the question of whether the Act provided for a private right of action. Plaintiffs argued that "the intent of the [L]egislature was to make [a] provision for a private right of action." Plaintiffs referenced a ruling from a different district court judge determining that there was a private right of action under the Act and represented that "[i]t is one of those legal issues . . . that parties to these cases don't litigate anymore." Plaintiffs explained that it was "generally accepted that there is a private right of action."

{3} Following the hearing, the district court issued a letter to counsel expressing concern about whether the Act permits a private action for damages without first exhausting administrative remedies. And the court invited supplemental briefing on the question. After supplemental briefing, the court determined that, unlike the New Mexico Minimum Wage Act, the Act does not confer a private right of action. The court reasoned that the "[Act] contemplates an administrative procedure and directs the Director to make the initial determination of [the Act] violations and

the subsequent reference for appropriate legal action. The [Act] provides an appeal process of the Director's decision, first to the Labor and Industrial Commission and then to the District Court." (Citations omitted.) The court dismissed the case without prejudice to allow Plaintiffs the opportunity to pursue their administrative remedies before bringing the case before the district court. This appeal followed.

**DISCUSSION**

{4} At the heart of the controversy are statutory provisions that, with apologies for the length of the quoted material, we fully set out here. Section 13-4-14 reads:

A. The director shall certify to the contracting agency the names of persons or firms the director has found to have disregarded their obligations to employees under the . . . Act and the amount of arrears. The contracting agency shall pay or cause to be paid to the affected laborers and mechanics, from any accrued payments withheld under the terms of the contract or designated for the project, any wages or fringe benefits found due to the workers pursuant to the . . . Act. The director shall, after notice to the affected persons, distribute a list to all departments of the state giving the names of persons or firms the director has found to have willfully violated the . . . Act. No contract or project shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership or association in which the persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of the persons or firms. A person to be included on the list to be distributed may appeal the finding of the director as provided in the . . . Act.

B. If the accrued payments withheld under the terms of the contract, as mentioned in Subsection A of this section, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages or fringe benefits required pursuant to the . . . Act, the laborers and mechanics shall have the right of action or intervention or both against the contractor



or person acting as a contractor and the contractor's or person's sureties, conferred by law upon the persons furnishing labor and materials, and, in such proceeding, it shall be no defense that the laborers and mechanics accepted or agreed to less than the required rate of wages or voluntarily made refunds. The director shall refer such matters to the district attorney in the appropriate county, and it is the duty and responsibility of the district attorney to bring civil suit for wages and fringe benefits due and liquidated damages provided for in Subsection C of this section.

C. In the event of any violation of the . . . Act or implementing rules, the contractor, subcontractor, employer or a person acting as a contractor responsible for the violation shall be liable to any affected employee for the employee's unpaid wages or fringe benefits. In addition, the contractor, subcontractor, employer or person acting as a contractor shall be liable to any affected employee for liquidated damages beginning with the first day of covered employment in the sum of one hundred dollars (\$100) for each calendar day on which a contractor, subcontractor, employer or person acting as a contractor has willfully required or permitted an individual laborer or mechanic to work in violation of the provisions of the . . . Act.

D. In an action brought pursuant to Subsection C of this section, the court may award, in addition to all other remedies, attorney fees and costs to an employee adversely affected by a violation of the . . . Act by a contractor, subcontractor, employer or person acting as a contractor.

(Citation omitted.) We note Plaintiffs' care to highlight Subsections (A) and (B) of Section 13-4-14 are comparable to sections of the federal Davis-Bacon Act (Davis-Bacon), 40 U.S.C. § 3144 (2013), which read as follows:

(a) Payment of wages.--

(1) In general.--The Secretary of Labor shall pay directly to laborers and mechanics

from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics under this subchapter.

(2) Right of action.--If the accrued payments withheld under the terms of the contract are insufficient to reimburse all the laborers and mechanics who have not been paid the wages required under this subchapter, the laborers and mechanics have the same right to bring a civil action and intervene against the contractor and the contractor's sureties as is conferred by law on persons furnishing labor or materials. In those proceedings it is not a defense that the laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(b) List of contractors violating contracts.--

(1) In general.--The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors.

(2) Restriction on awarding contracts.--No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest until three years have elapsed from the date of publication of the list.

Our Supreme Court has similarly noted the parallels between Subsections (A) and (B) of the Act and the Davis-Bacon legislation. See *Mem'l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 26, 129 N.M. 677, 12 P.3d 431. Subsections (C) and (D) of the Act, however, have no Davis-Bacon counterpart. Federal cases split on whether a private right of action exists under Davis-Bacon, with the majority holding against a private right of action. Compare *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 676 (9th Cir. 1998) (recognizing that Davis-Bacon "does not create

a private cause of action for employees"), with *McDaniel v. Univ. of Chicago*, 548 F.2d 689, 695 (7th Cir. 1977) ("In sum, we hold that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute.").

{5} On appeal, Plaintiffs argue that: (1) the Act, unlike Davis-Bacon, "clearly contemplates" a private right of action, as evidenced by the fact that the Act includes language making violators liable to employees and allowing employees to recover attorney fees; (2) employees are not required to exhaust administrative remedies prior to pursuing a private right of action; and (3) the district court erred in concluding that it lacked jurisdiction to hear this case. Because we hold that there is a private right of action that is separate and distinct from any administrative remedies in the Act, we need not and do not address Plaintiffs' second and third arguments regarding exhaustion of administrative remedies and jurisdiction, which would only be relevant if Plaintiffs' access to the district court were somehow contingent on an administrative process.

{6} Plaintiffs acknowledge that many courts have concluded there is no private right of action under Davis-Bacon, but they rely on our Legislature's departure from Davis-Bacon in enacting Subsections (C) and (D) of the Act. Plaintiffs contend that these subsections reflect an intent to create a private right of action that is different from the remedial scheme in federal law.

{7} In addition to their position that a private right of action is expressly provided for in the statute, Plaintiffs turn to factors in *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 31, 346 P.3d 1136, that are used to evaluate whether to imply a private right of action. These factors are:

(1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member? (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy? and (3) Would a private remedy either frustrate or assist the underlying purpose of the legislative scheme?

(Alteration, internal quotation marks, and citation omitted.) These factors stem from *Cort v. Ash*, 422 U.S. 66, 78 (1975), and we will refer to them as the *Cort* factors.

{8} Plaintiffs assert that there can be no dispute that they were members of a class for whose "special benefit" the statute was enacted. And they assert that under the

remaining two *Cort* factors, the Legislature, in Subsection (D), expressly allowed a court to award attorney fees and costs to an employee adversely affected in an action under Subsection (C), and also, Subsection (C) provides that a contractor “shall be liable to any affected employee[.]” See § 13-4-14(C), (D). Plaintiffs indicate that, in an administrative process handled by the administrative agency, the employee would have no right to recover attorney fees and that reading the Act so as not to allow for a private right of action would render Subsection (D) superfluous.

{9} Defendant argues that no private right of action exists, because the Act “does not expressly allow a private right” of action and because “there is no basis to imply a private right of action where the Legislature intended the only remedies to come through the administrative process.” Defendant notes that the Act was modeled after Davis-Bacon and lists federal cases holding that Davis-Bacon does not provide a private right of action. See, e.g., *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 85 (2d Cir. 2003) (recognizing that Davis-Bacon does not provide an aggrieved employee with a private right of action for unpaid wages and stating that “the great weight of authority indicates that it does not” confer such a right for back wages); *JWJ Contracting Co.*, 135 F.3d at 676 (same); *United States ex rel. Glynn v. Capeletti Bros., Inc.*, 621 F.2d 1309, 1313-14 (5th Cir. 1980) (same); see also *Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 26 (stating that the Act is modeled after Davis-Bacon). According to Defendant, employees making claims pursuant to the Act, like Davis-Bacon claimants, must follow the administrative process provided by the Act and not attempt to circumvent the Act based on provisions they do not like.

{10} According to Defendant, Plaintiffs’ argument regarding Section 13-4-14(D) that because an employee would not have attorney fees if there were no private right of action, therefore they may file suit under Section 13-4-14(C), is “illogical.” Defendant’s point, to the contrary, is that a party can incur attorney fees pursuing administrative remedies as easily as it can by filing a lawsuit. Moreover, Defendant argues, while fee provisions in statutes have led some courts to infer a private right of action, others have held that it is a sign that no remedy exists outside of adminis-

trative relief, citing for support *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005), which states, “At best, the absence of any private right of action language . . . and the presence of the fee provision render the [National Historic Preservation Act] ambiguous on the cause of action point. Without explicit language, such an ambiguity can hardly be converted into an implied right of action.”

{11} In analyzing and responding to Plaintiffs’ argument that a private right of action may be implied under the *Cort* factors, Defendant assumes, for purposes of this appeal, only that Plaintiffs come within the first *Cort* factor. But Defendant asserts that “this is not determinative, as the Legislature has many different ways to protect classes of people aside from giving them private enforcement rights[.]” citing *Capeletti Bros.*, 621 F.2d at 1313, as “[r]ecognizing that Congress intended [Davis-Bacon] to benefit laborers and mechanics, however, [Davis-Bacon] does not establish that Congress intended additionally that [it] would be enforced through private litigation.”

{12} Defendant asserts that the second *Cort* factor “definitively speaks against an implied right of action, because the Legislature has already refused to add one.” Defendant explains that in 2005, Senate Bill 634 was introduced, proposing amendments to Section 13-4-14<sup>1</sup> that included a new Subsection (D), which read: “In addition to all other remedies, an employee adversely affected by a violation of the . . . Act by a contractor, subcontractor, employee or a person acting as a contractor shall have a private right of action for damages, attorney fees and reasonable costs.” (Emphasis added.) However, a Senate committee struck the language that would have conferred a private right of action, and the bill passed without that language. According to Defendant, “Senate Bill 634 shows that in this context, as in others, the Legislature will provide an express damages remedy if it wants to[.]” citing the New Mexico Minimum Wage Act that specifies a private right of action for its violation. See NMSA 1978, § 50-4-26(D) (2013). Defendant concludes that the committee’s explicit rejection of a private right of action “should conclude the inquiry into its intended scope.” In a supplement to its answer brief, Defendant also directed this Court to House Bill 335, 53rd Leg., 1st Sess. (N.M. 2017), which again sought to amend

Section 13-4-14(D) to include the phrase “private right of action[.]” According to Defendant, “The proposed amendments to the [Act] contained in HB 335 once again establish that the [Act] applicable to the instant appeal contains no private right of action.” The phrase “private right of action” was once again removed in House Judiciary Committee Substitute for House Bill 335, 53rd Leg., 1st Sess. (N.M. 2017), and was never voted on by the Legislature.

{13} Turning to the third *Cort* factor, Defendant asserts that “the underlying purpose of the legislative scheme indicates that the Legislature did not intend to allow workers to bring suit.” Defendant argues that the Act “carefully balances the interests of contractors and their employees”; that the contractor “is able to work approximate labor costs into its bid, while the worker enjoys the government’s help in collecting the prevailing wage”; and that to imply “a private right of action to sue for [Act] wages would destroy this careful balance.” Defendant similarly makes this “balance” argument in the form of a due process claim. According to Defendant, the process by which the Department investigates claims prudently balances the rights of workers and contractors, and to allow Plaintiffs to skip this measured practice or to create a private right of action where none exists, would deny Defendant the due process it is afforded in the determination and appeal process.

{14} We review interpretation of statutory provisions de novo. *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶ 29, 146 N.M. 179, 207 P.3d 1156 (“Whether a private right of action can be implied from a statute is a question of law that we review de novo.”); see also *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69 (“Statutory interpretation is a question of law, which we review de novo.”).

{15} Because the Act lacks the clarity necessary for an express private right of action, we focus on the implication based on the *Cort* factors. See *Yedidag*, 2015-NMSC-012, ¶ 31 (stating that the “determination of whether to imply a private cause of action is influenced by [the *Cort*] factors”). The parties do not dispute that, for the purposes of this appeal, the Act was enacted for the purpose of benefitting Plaintiffs, as required under the first *Cort* factor; we therefore focus on the second and third *Cort* factors.

<sup>1</sup>Although Defendant states that the relevant amendment was made to Section 13-4-11, the at-issue amendment was to Section 13-4-14. We correct this error as needed throughout this opinion.

{16} The second *Cort* factor requires us to consider whether the Legislature intended to create or deny a remedy and calls upon traditional statutory construction tools requiring that we “look[] first to the plain language of the statute[.]” *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (internal quotation marks and citation omitted).

{17} Here, we hold that the plain language of Section 13-4-14(C) and (D) evidences legislative intent to create a private right of action that is separate and distinct from the administrative scheme in Section 13-4-14(A) and (B). Subsection (C) states that an “employer . . . shall be liable to any affected employee for the employee’s unpaid wages” and “shall be liable to any affected employee for liquidated damages[.]” Section 13-4-14(C) (emphasis added). Subsection (D) specifically points to “an action brought pursuant to Subsection C” and indicates that “the court may award . . . attorney fees and costs to an employee adversely affected[.]” Section 13-4-14(D). Plain language in these subsections contemplates a private right of action in which an employer can be liable to an employee for unpaid wages and attorney fees, separate from the administrative scheme contained in Subsections (A) and (B).

{18} Defendant’s proffered interpretations of Subsection (D)—i.e., that an employee could incur attorney fees through the administrative process or that a district attorney pursuing a claim as required by Subsection (B) could recover attorney fees under Subsection (D)—are not persuasive.<sup>2</sup> The language of Subsection (D) specifically references an action brought pursuant to Subsection (C) and allows for an award of attorney fees to an employee. We are not convinced that a district attorney could collect attorney fees, given the statutory restrictions on their pay. See NMSA 1978, § 36-1-7 (1968) (“No district attorney shall receive to his own use any salary, fees or emoluments other than the salary and per diem and travel allowances prescribed by law.”). We “read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole.” *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14, 121 N.M. 764, 918 P.2d 350. We do not read any provision of a statute in a way

that would render another provision of the statute “null or superfluous.” *State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939; see also *Katz v. N.M. Dep’t of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530, 624 P.2d 39 (“A statute must be construed so that no part of the statute is rendered surplusage or superfluous.”). To read Subsection (D) as part of the administrative scheme contained in Subsections (A) and (B) would require us to ignore the express cross-reference to Subsection (C). This could lead to an absurd result where attorney fees are permitted under the Act but not actually recoverable. We thus reject Defendant’s proffered interpretations and hold that Section 13-4-14(D) contemplates a private right of action.

{19} We are also not persuaded by Defendant’s argument that the history of Senate or House bills involving the inclusion or removal of the phrase “private right of action” provides evidence that the Legislature specifically intended to deny a private right of action. As noted in *Regents of University of New Mexico v. New Mexico Federation of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 962 P.2d 1236, “[u]nlike some states, we have no state-sponsored system of recording the legislative history of particular enactments. [The appellate courts] do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.” Further, during oral argument in this matter, both parties provided equally plausible ways of interpreting the history of the proposed bills. To favor one interpretation over the other would require this Court to engage in exactly the type of speculation as to legislative intent that is disfavored.

{20} Finally, to the extent either party attempts to make an argument regarding the similarities or differences of the Act as compared to Davis-Bacon, we are unable to divine any meaning or application to the present case. The fact that Davis-Bacon is different from the Act is clear and undisputed.

{21} Because we reject Defendant’s arguments as to legislative intent and because we hold that the plain language of Section

13-4-14(C) and (D) evidences legislative intent to create a private right of action under the Act, we hold that the second *Cort* factor favors Plaintiffs.

{22} The third *Cort* factor, which requires us to determine whether an implied cause of action furthers or frustrates the purpose of the Act, also favors Plaintiffs. In *Tatsch Construction, Inc.*, our Supreme Court held that the purpose behind the Act was remedial, that remedial statutes ought to be read broadly, and that the Act should be read “broadly so as to effectuate the intent of the [L]egislature.” 2000-NMSC-030, ¶ 26. We hold that broadly interpreting the Act to imply a private right of action under Subsections (C) and (D) would further the remedial purpose of the Act, rather than frustrate it. Conversely, limiting employees to the administrative remedies under Subsections (A) and (B) would be overly narrow and would frustrate the broad remedial purpose of the Act. Although Defendant argues that the Act carefully balances the interests of contractors and their employees, that implying a private right of action would destroy this careful balance, and that destroying that balance has due process implications, Defendant provides no authoritative support for those positions. We decline to address unsupported and undeveloped arguments on appeal. See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (holding that arguments unsupported by citations to authority will not be reviewed); see also *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that included no explanation of the party’s argument and no facts that would allow the claim to be evaluated).

{23} Because the *Cort* factors all weigh in favor of Plaintiffs’ assertion of a private right of action, we hold that there is an implied private right of action.

#### CONCLUSION

{24} We reverse the district court’s dismissal of Plaintiffs’ complaint and remand for proceedings consistent with this opinion.

{25} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

MICHAEL E. VIGIL, Judge

<sup>2</sup>We also note that at oral argument defense counsel represented that, under the Act, the district attorney pursuing a wage claim as required by Subsection (B) does so as the private attorney of an employee. We see no basis for that statement. If, however, it were true, and the district attorney is not acting on behalf of the State or some other governmental entity, but rather as an employee’s private attorney, it would further support the position that there is a private right of action under the Act.



From the New Mexico Court of Appeals

**Opinion Number: 2017-NMCA-064**

No. A-1-CA-35161 (filed June 5, 2017)

MICHAEL GZASKOW and FRANCOISE BECKER,  
Plaintiffs-Appellants,  
v.

PUBLIC EMPLOYEES RETIREMENT BOARD and EACH MEMBER OF THE BOARD  
IN HIS OR HER OFFICIAL CAPACITY,  
Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

FRANCIS J. MATHEW, District Judge

RONALD J. VANAMBERG  
VANAMBERG, ROGERS, ABEITA &  
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for Appellants

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NEW MEXICO PUBLIC EMPLOYEES  
RETIREMENT ASSOCIATION  
Santa Fe, New Mexico  
for Appellees

CHARLES H. RENNICK  
ROBLES, RAEL & ANAYA, PC  
Albuquerque, New Mexico

**Opinion**

**Henry M. Bohnhoff, Judge**

{1} In 2011, Plaintiff Michael Gzaskow retired from employment with the State of New Mexico and began receiving retirement pension benefits pursuant to the Public Employees Retirement Act (the Act), NMSA 1978, §§ 10-11-1 to -142 (1987, as amended through 2016). At the time of his retirement he was divorced, but he named Plaintiff Francoise Becker to receive retirement benefits in the event of his death; a few months after his retirement, Gzaskow married Becker. In late 2014, shortly before he took an extended overseas trip with Becker, Gzaskow executed and delivered to the Public Employees Retirement Association (PERA) a form that exercised a “one-time irrevocable option to deselect” Becker as his survivor beneficiary and designate his daughter, Sabrina Gzaskow (Daughter), as the survivor beneficiary. Following his return from the trip, Gzaskow advised PERA that the deselection of Becker and designation of Daughter was a mistake and requested that the action be voided. PERA declined to do so, taking the position that the action was not reversible. Gzaskow and Becker (collectively, Plaintiffs) then brought

suit in district court (the Complaint) against the Public Employees Retirement Board (PERB), which is responsible for administering PERA, asserting a right to cancellation of the deselection of Becker as survivor beneficiary and seeking declaratory, injunctive, and equitable relief. PERB moved to dismiss the Complaint for lack of subject matter jurisdiction, arguing that Plaintiffs had failed to exhaust the administrative remedy afforded under the Act. The district court granted PERB’s motion to dismiss and Plaintiffs now appeal. We affirm.

**I. BACKGROUND**

**A. The Act**

{2} Through the Act, the New Mexico Legislature has established a program whereby employees of the State of New Mexico and other public agencies may receive retirement pensions. Participating employees are “members” of PERA and earn the right to receive a pension by meeting various age and service credit requirements. *See* §§ 10-11-2(M), -3(A); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 5, 117 N.M. 346, 871 P.2d 1352. The Act establishes PERB to administer the Act and manage the retirement pension program and PERA. Section 10-11-130.

{3} When a member who qualifies for a pension retires, he or she must elect one of

four payment options or “Forms.” Section 10-11-116(A). The Forms of Payment are set forth in Section 10-11-117. Under Form of Payment A, the “[s]traight life pension,” the retiree receives a monthly payment and upon his or her death the payments cease. Section 10-11-117(A). Under Form of Payment B, “[l]ife payments with full continuation to one survivor beneficiary,” the retiree receives a reduced monthly payment, but upon his or her death a survivor beneficiary will receive the same payment until the survivor’s death. Section 10-11-117(B). Under Form of Payment C, “[l]ife payment[s] with one-half continuation to one survivor beneficiary,” the retiree receives a reduced monthly payment in an amount greater than that received under Form of Payment B, and upon his or her death a survivor beneficiary will receive one-half of that payment. Section 10-11-117(C). Under Form of Payment D, “[l]ife payments with temporary survivor benefits for children,” the retiree receives a reduced monthly payment, and upon his or her death each “declared eligible child” of the retiree is paid a share of the retiree’s monthly payment until death or age twenty-five, whichever occurs first. Section 10-11-117(D). Form of Payment A is the default payment option if the retiree is not married at the time of retirement and does not elect another form of payment; Form of Payment C is the default payment option if the retiree is married at the time of retirement and does not elect another form of payment. Section 10-11-116(A) (1), (2). Under each of the Forms of Payment, the pension payments are calculated to have the same overall “actuarial present value” as Form of Payment A. Section 10-11-116(B).

{4} In addition to selecting a form of payment (other than Form of Payment A), when a member retires he or she will name the survivor beneficiary (or beneficiaries, in the case of more than one declared eligible child under Form of Payment D). Section 10-11-116(A). If the member is married, PERA must obtain the spouse’s written consent to the election of form of payment as well as the designation of survivor beneficiary; in the absence of such consent, the election and designation are not effective. *Id.*

{5} “An election of form of payment may not be changed after the date the first pension payment is made.” *Id.* Further, after the date of the first pension payment, the survivor beneficiary (or beneficiaries) may not be changed except as provided

in Section 10-11-116(C), (D), and (E). Subsection C provides that a retiree who is being paid under Form of Payment B or C with his or her spouse as the designated survivor beneficiary may, upon becoming *divorced*, elect to have future payments made under Form of Payment A. Alternatively, Subsection D provides that a retiree who is being paid under Form of Payment B or C may, upon the *death* of his or her designated survivor beneficiary, “exercise a one-time irrevocable option” to designate another individual as the survivor beneficiary. Subsection E provides that a retiree who is being paid under Form of Payment B or C with a living, designated, survivor beneficiary other than his or her spouse or former spouse “may exercise a one-time irrevocable option to deselect the designated beneficiary” and either designate another survivor beneficiary or have future payments made under Form of Payment A. Section 10-1-116(E).

{6} While a PERA member is employed, his or her spouse ordinarily acquires a community property interest in the member’s pension benefit. *See generally* NMSA 1978, § 40-3-8(B) (1990) (defining community property); *Ruggles v. Ruggles*, 1993-NMSC-043, ¶¶ 14-32, 116 N.M. 52, 860 P.2d 182 (discussing divorcing spouses’ community property interest in employer-sponsored retirement plans); *cf. Martinez v. Pub. Emps. Ret. Ass’n*, 2012-NMCA-096, ¶¶ 28-36, 286 P.3d 613 (discussing parameters of widowed spouse’s statutory interest in PERA survivor benefits). The Act recognizes a spouse’s interests in PERA benefits in various ways. First, as mentioned above, Section 10-11-116(A)(2) provides that if a member who is married at the time of his or her retirement does not designate another form of payment, the default is Form of Payment C, life payment with one-half continuation to one survivor beneficiary, with the member’s spouse as the survivor beneficiary. Second, again as stated above, Section 10-11-116(A) provides that if the member is married, the consent of member’s spouse is necessary to an election of the form of payment and designation of any survivor beneficiary other than the spouse. Third, Section 10-11-136 provides that, at the time of divorce, the court handling the divorce may provide for a division of the marital community’s interest in the PERA pension and other benefits. {7} Section 10-11-120 addresses denials of claims for benefits under the Act. Benefit claimants shall be notified in writing, with explanation, of a denial of a claim for benefits. Following receipt of the notice,

[a] claimant may appeal the denial and request a hearing. The appeal shall be in writing filed with the association within ninety days of the denial. . . . The retirement board shall schedule a de novo hearing of the appeal before the retirement board or, at the discretion of the retirement board, a designated hearing officer or committee of the retirement board within sixty days of receipt of the appeal. A final decision on the matter being appealed shall be made by the retirement board.

Section 10-11-120(A). Regulations promulgated by the PERB authorize representation by legal counsel, limited discovery including depositions as authorized by the hearing officer, issuance of subpoenas to compel the production of documents and attendance of witnesses, direct and cross examination of witnesses under oath, and transcription of the hearing by a court reporter. 2.80.1500.10(C)(2), (3), (5) NMAC. A dissatisfied claimant may appeal a final decision of PERB pursuant to the provisions of NMSA 1978, Section 39-3-1.1 (1999), which generally provides for record review of administrative agency decisions. Section 10-11-120(B). *See, e.g., Johnson v. Pub. Emps. Ret. Bd.*, 1998-NMCA-174, ¶ 10, 126 N.M. 282, 968 P.2d 793. (“Appeals from decisions of the Board denying disability retirement benefits are reviewed on the record made before the Board.”).

#### B. Factual History

{8} The Complaint alleges the following: Gzaskow retired from employment as a physician with the State of New Mexico on January 1, 2011. At that time Gzaskow was divorced. On his PERA retirement application form he selected Form of Payment C and designated Becker as his survivor beneficiary. Plaintiffs were then married on April 15, 2011. Prior to the marriage, Plaintiffs entered into a pre-nuptial agreement: they agreed that Becker would be the designated survivor beneficiary with respect to Gzaskow’s PERA benefits, but that she would distribute to Gzaskow’s children a portion of any such benefits that she received.

{9} From time to time thereafter, Plaintiffs took extended trips. Gzaskow claims that he spoke with PERA personnel and discussed with them how to address his retirement benefits in the event both he and Becker were to die while on these trips. Gzaskow claims that he was told that

he could pay PERA a \$100 fee and have his benefits provisionally recalculated on the assumption that, pursuant to Section 10-11-116(E)(1), he deselected Becker as survivor beneficiary and designated Daughter as the new survivor beneficiary. Gzaskow also claims that he was told that if he and Becker both died while on a trip, Daughter would become the beneficiary if the recalculation had been done. Gzaskow had his benefits provisionally recalculated several times: each time PERA would prepare and provide to Gzaskow a form to accomplish the deselection and new designation. The form would show the recalculated pension and survivor benefit payments for Gzaskow and Daughter: because Daughter was younger than Becker, and in accordance with the requirement in Section 10-11-116(E)(1)(b) that the pension benefit’s overall actuarial present value remain the same, Gzaskow’s new pension payment would be a reduced amount. The form stated in bold font:

**This one-time change to a new beneficiary or change to Form of Payment A is Irrevocable.**

....

**I have read and understand that this is a one-time removal and selection of a new beneficiary or selection of Form of Payment A. By choosing one of the options above, this will change my beneficiary or payment option until my death or the death of my beneficiary.**

When preparing for extended travel, Gzaskow would execute and give the form to Daughter, with the understanding that she would deliver it to PERA in the event he and Becker died during their travels.

{10} In October 2014, Plaintiffs planned a trip to Vietnam. Gzaskow repeated the process of having PERA recalculate his retirement benefits if he deselected Becker and designated Daughter as the new survivor beneficiary. This time, however, Gzaskow not only signed the form on October 14, 2014, but also—he claims, mistakenly—delivered it to PERA.

{11} On November 20, 2014, while Plaintiffs were in Vietnam, PERA sent Gzaskow a letter, acknowledging receipt of the deselection of Becker and new designation of Daughter as Gzaskow’s survivor beneficiary. The letter restated Gzaskow’s reduced pension payment that had been set forth on the form that he had signed and delivered to PERA. The monthly payment was approximately \$1,700 less than his pre-October 14, 2014 pension benefit. Upon returning from the trip and

reading the letter, Gzaskow notified PERA that there was a mistake, that he had not intended to make the deselection of Becker and the new designation of Daughter, and requested that the change be canceled. Gzaskow alleges that PERA personnel knew that Gzaskow was attempting to protect himself should he and Becker die in a common incident by repeatedly initiating the process of deselecting Becker, and that he did not intend to replace Becker as the survivor beneficiary if she was still alive. Gzaskow asserted that under his pre-nuptial agreement with Becker, Becker could not be removed as his survivor beneficiary, and as a result of his mistake he was in breach of that agreement. Gzaskow also provided PERA with an affidavit signed by Daughter renouncing the beneficiary designation. However, PERA declined to cancel the deselection of Becker and designation of Daughter as the new survivor beneficiary. PERA took the position that, Gzaskow having delivered the executed form to PERA, the action was irrevocable, and that under the Act and the regulations PERB had promulgated to implement the Act, nothing could be done to reverse the deselection.

### C. Procedural History

{12} Following an exchange of correspondence between counsel for the parties, Plaintiffs filed the Complaint in the First Judicial District Court in Santa Fe, New Mexico on March 30, 2015. The Complaint alleged the facts set forth above, and then articulated five counts that seek overlapping relief. Distilled to its essence, the Complaint asserts the following:

(1) Pursuant to Section 10-11-116(A), discussed above, Becker's consent was a necessary predicate to any deselection of her as Gzaskow's survivor beneficiary. Because she did not give her consent, the court should declare Gzaskow's deselection was void and canceled, and that Gzaskow's pre-October 14, 2014 pension benefit should be restored.

(2) A PERB regulation, 2.80.1100.11 NMAC, identifies a number of documents (e.g., a statement as to whether the previous beneficiary is still living, a copy of the new beneficiary's

birth certificate, and certain divorce proceeding documents) that must accompany the delivery of a deselection form. Because Gzaskow did not provide these documents to PERA on October 14, 2014, the court should declare the deselection void and canceled, and Gzaskow's pre-October 14, 2014 pension benefit should be restored.

(3) Alternatively, because the deselection form was signed by mistake, Plaintiffs will suffer severe prejudice if the mistake is not remedied, and because PERA would not be prejudiced by returning to the pre-October 14, 2014 survivor designation, the court should exercise its equity jurisdiction and enjoin PERA to return Becker to her pre-October 14, 2014 status as Gzaskow's survivor beneficiary and restore Gzaskow's pre-October 14, 2014 retirement benefits.

{13} PERB initially responded to the Complaint by moving to dismiss for lack of subject matter jurisdiction based on Plaintiffs' failure to exhaust their administrative remedies under Section 10-11-120. PERB subsequently filed an answer to the Complaint as well. In PERB's memorandum of law in support of its motion to dismiss and its answer, PERB disputed a number of Plaintiffs' factual allegations: whether Gzaskow had spoken with PERA personnel about provisionally signing a beneficiary deselection form to address the possibility that he and Becker both could die during their travels; whether the paperwork listed in 2.80.1100.11 NMAC was provided to PERA; fundamentally, whether Gzaskow's October 14, 2014 execution and delivery of the deselection form was a mistake, i.e., whether he in fact intended to take that step; and whether PERA would be financially impacted by voiding and canceling of the deselection.

{14} Plaintiffs responded in opposition to the motion to dismiss, generally articulating two arguments. First, Plaintiffs argued that PERB lacked authority to grant an equitable remedy to Gzaskow because it is a quasi-judicial administrative agency, and that the exhaustion of administrative

remedies does not apply to claims over which an administrative agency lacks jurisdiction. Second, Plaintiffs argued that their claim was properly brought under the Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15 (1975). They cited, as authority for exempting such claims from the exhaustion requirement, *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171 P.3d 300, and the Declaratory Judgment Act.

{15} Plaintiffs also moved for summary judgment. In that motion, Plaintiffs advanced their substantive arguments that underlie the Complaint: Gzaskow's declaration was invalid because Becker did not give her consent and the documentation specified in 2.80.1100.11 NMAC did not accompany the deselection form. Alternatively, because the deselection form was signed by mistake, Plaintiffs will suffer severe prejudice if the mistake is not remedied, and because PERA would not be prejudiced by returning to the pre-October 14, 2014 survivor designation, the court should exercise its equity jurisdiction and enjoin PERA to return Becker to her pre-October 14, 2014 status as Gzaskow's survivor beneficiary and restore Gzaskow's pre-October 14, 2014 pension benefit.

{16} PERB responded in opposition to Plaintiffs' summary judgment motion, again disputing Plaintiffs' version of the facts as well as reiterating the same legal positions that it first signaled in its motion to dismiss. In particular, PERB argued that, because persons who become spouses after retirement have no community property interest in the pension benefit, Section 10-11-116(A)'s spousal consent requirement is intended to, and should be construed to, extend only to persons who are spouses prior to the member's retirement. It pointed out that PERB's regulations reflect this construction. See 2.80.1100.11(C) NMAC (explaining that spousal consent is required for post-retirement selection of new beneficiary only if retired member was married at the time of retirement and remains married to that person).<sup>1</sup> PERB also argued that the question of whether it has the authority to grant equitable relief was moot, because Plaintiffs had not articulated a legal claim upon which their request for equitable relief is based. PERB asserted that the equitable relief Plaintiffs requested,

<sup>1</sup>This construction of the scope of Section 10-11-116(A)'s spousal consent requirement presumably is the answer to the question why PERB ever permitted Gzaskow to use Section 10-11-116(E) to deselect Becker in the first place, given that Becker had been his spouse since April 2011. But the question remains why Gzaskow thought he could engage in the deselection exercise, given his claimed literal understanding of the provision to apply broadly to any person who is a spouse at the time of the deselection.



that Gzaskow's change of beneficiary be rescinded and his original benefit amount be reinstated, would be granted by PERB only upon a proper legal showing which, PERB went on to argue, Plaintiffs had not articulated.

{17} The district court heard the motions together. It granted PERB's motion to dismiss and denied, as moot, Plaintiffs' motion for summary judgment. Plaintiffs timely filed their notice of appeal.

## II. DISCUSSION

### A. The Doctrine of Exhaustion of Administrative Remedies and

#### *Smith v. City of Santa Fe's*

#### Declaratory Judgment Exception

{18} The New Mexico Constitution broadly grants district courts original jurisdiction to hear "all matters and causes not excepted in this constitution[.]" N.M. Const., art. VI, § 13. However, based on separation of powers considerations and due respect for the executive branch, our Supreme Court repeatedly has determined that district courts lack subject matter jurisdiction where the plaintiff has failed to exhaust available administrative remedies. See *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42, 243 P.3d 746 (stating that the doctrine of separation of powers is implicit to our Supreme Court's reasoning in its cases "addressing the relationship between administrative proceedings and declaratory judgment actions"). "Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Smith*, 2007-NMSC-055, ¶ 26 (alteration, internal quotation marks, and citation omitted); accord, *State Racing Comm'n v. McManus*, 1970-NMSC-134, ¶ 17, 82 N.M. 108, 476 P.2d 767 (reversing district court issuance of writ of prohibition); *Associated Petroleum Transp., Ltd. v. Shepard*, 1949-NMSC-002, ¶ 12, 53 N.M. 52, 201 P.2d 772 ("The plaintiffs are required to exhaust such remedies as are accorded them by the law before resorting to the courts.").

{19} In *Smith*, our Supreme Court noted several previously-recognized exceptions to the exhaustion of administrative remedies rule. The exhaustion doctrine (1) "does not apply in relation to a question which, even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact";

and (2) "exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which are vain and futile." 2007-NMSC-055, ¶ 27 (internal quotation marks and citations omitted). The court also addressed, however, whether to recognize a new exception to the rule for actions brought pursuant to the Declaratory Judgment Act. The court noted that, the "Declaratory Judgment Act is a special proceeding that grants the district courts the 'power to declare rights, status and other legal relations whether or not further relief is or could be claimed' " and that it is "intended to be liberally construed and administered as a remedial measure." *Smith*, 2007-NMSC-055, ¶ 13 (quoting Section 44-6-2). The court noted in particular that, pursuant to Section 44-6-4, the Declaratory Judgment Act specifically authorizes district courts to construe and determine the validity of statutes and local laws. *Smith*, 2007-NMSC-005, ¶ 14. On the basis of these considerations the court recognized a declaratory judgment exception to the exhaustion of administrative remedies rule for declaratory judgment actions: "[the p]laintiffs' decision to use a declaratory judgment action as their method for challenging the [c]ity's authority to regulate the permitting of domestic water wells appears to fall well within the perimeters of what the Declaratory Judgment Act was intended to encompass." *Smith*, 2007-NMSC-055, ¶ 15. See also *Rainaldi v. Pub. Emps. Ret. Bd.*, 1993-NMSC-028, ¶¶ 3, 4, 115 N.M. 650, 857 P.2d 761 (holding that the district court had jurisdiction under N.M. Const. art. VI, § 13, and §§ 44-6-4, -13, to hear suit for declaration of rights to retirement benefits).

{20} Importantly, however, our Supreme Court then immediately qualified the declaratory judgment exception:

That said, however, we must remain mindful of some important limitations on the use of declaratory judgment actions to review the propriety of administrative actions. In particular . . . , we caution against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administra-

tive level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.

Accordingly, a declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity.

*Smith*, 2007-NMSC-055, ¶¶ 15-16. See also *New Energy Econ.*, 2010-NMSC-049, ¶ 12 ("[W]hen the matter at issue (1) is purely legal, (2) requires no specialized agency fact-finding, and (3) there is no exclusive statutory remedy, it is a proper matter for a declaratory judgment action and does not require exhaustion of administrative remedies.").

### B. Plaintiffs Must Exhaust

#### Their Administrative Remedy Under the Act

{21} Plaintiffs argue that, because they seek declaratory relief, the exception recognized in *Smith* exempts them from exhausting the administrative remedy under Section 10-11-120(B). They argue as well that PERB has only quasi-judicial authority, which does not encompass equitable remedies, and therefore they are free to pursue that relief as well in district court. We are not persuaded.

#### 1. Standard of Review

{22} "Whether a court has jurisdiction to hear a particular matter is a question of law that we review de novo." *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶ 13, 346 P.3d 1164. This proposition, however, begs the question how a district court is to resolve a challenge to its jurisdiction. The answer depends on whether or not the challenge is fact-based:

In reviewing a facial [i.e., non-fact-based] attack on the complaint, a district court must accept the allegations in the complaint as true. In contrast, in a factual attack, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations.

....

When the challenge is factual, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts[.]

*South v. Lujan*, 2014-NMCA-109, ¶¶ 8-9, 336 P.3d 1000 (alterations, internal quotation marks, and citation omitted). See also *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 9, 310 P.3d 631 (stating that on purely facial challenge to jurisdiction, the court will accept as true all material allegations of the complaint), *rev'd on other grounds by* 2017-NMSC-007, 388 P.3d 977.

{23} This standard of review necessarily must be modified in the context of a motion to dismiss for lack of subject matter jurisdiction based on failure to exhaust administrative remedies, because, as will be discussed below, one of the relevant factors that enters into the exhaustion analysis is whether there are disputed fact issues. As to that factor, Plaintiff's challenge effectively remains purely facial: Plaintiff's contention is simply that the pleadings and other papers in the record do not reveal a fact dispute. With the possible exception of futility (which has not been asserted in this proceeding), the other factors that enter into the jurisdictional analysis—whether the administrative agency itself lacks jurisdiction, whether agency expertise would assist the agency in resolving the dispute, the exclusivity of the statutory scheme for review of administrative decisions, or other procedural or substantive limitations on review—are all facial as well. See *Smith*, 2007-NMSC-055, ¶¶ 15, 26. Thus, our review, though *de novo*, is facial and limited to the record. We need not resolve any factual contentions.

## 2. Section 10-11-120 Provides an Exclusive Remedy for the Denial of Benefits Under the Act

{24} Section 10-11-120 authorizes a benefit claimant to pursue an administrative appeal before PERB, followed by a judicial appeal before the district court, in the event his or her benefit claim is denied. As a threshold issue, Plaintiffs contend that their claims do not involve a denial of benefits, because the issue is whether Becker was effectively deselected as a survivor beneficiary and whether, even if effective, the deselection nevertheless should be reversed. We think Plaintiffs' reading of Section 10-11-120 is too narrow; it grants appeal rights to all benefit claimants, not

just members, so it encompasses Becker as well as Gzaskow. Further, PERA's action not only has denied Becker her contingent interest in receiving a survivor benefit, but, more immediately—as a consequence of the deselection—Gzaskow's current monthly pension payment has been reduced by approximately \$1,700. Both consequences constitute benefit denials, and therefore Section 10-11-120 affords Plaintiffs a remedy.

{25} The question under *Smith*, however, is whether Section 10-11-120's scheme for the review of administrative decisions is *exclusive*. *Smith*, 2007-NMSC-055, ¶¶ 15, 27. "The exclusivity of any statutory administrative remedy turns on legislative intent." *Barreras v. N.M. Corr. Dep't.*, 2003-NMCA-027, ¶ 9, 133 N.M. 313, 62 P.3d 770. The absence of explicit language stating that the remedy is exclusive is not dispositive. *Id.* ¶ 11. Rather, we will look to "the comprehensiveness of the administrative scheme, the availability of judicial review, and the completeness of the administrative remedies afforded." *Id.* The test ultimately is whether the administrative remedy is "plain, adequate, and complete." *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 14, 124 N.M. 479, 952 P.2d 474.

{26} Particularly when the procedural provisions of 2.80.1500.10 NMAC (the validity of which Plaintiffs do not question) are considered, Section 10-11-120's administrative appeal scheme is comprehensive. It generally grants PERB authority to review and, if appropriate, rectify PERA benefit denials. As stated above, the statutory appeal is open to all persons who might claim a benefit and encompasses all agency actions that would operate to deny benefits. In the absence of any constraining language, we also understand that PERB would possess full authority to act to reverse, or otherwise remedy, agency actions to the extent permitted by the Act itself.

{27} Section 10-11-120 also provides for judicial review pursuant to NMSA 1978, Section 39-3-1.1 (1999). Compare *State ex rel. Regents of E. N.M. Univ. v. Baca*, 2008-NMSC-047, ¶¶ 13, 22, 144 N.M. 530, 189 P.3d 663 (stating that the Procurement Code grants specific statutory rights to judicial review of bid protest decision), and *Barreras*, 2003-NMCA-027, ¶ 13 (stating that the "State Personnel Act makes express provision for judicial review of [State Personnel Board] decisions"), with *Chavez*, 1998-NMCA-004, ¶ 18 (noting that Municipal Code does not provide for

judicial review of municipal personnel board decisions).

{28} Finally, the administrative remedy under Section 10-11-120 is complete. As is discussed below, to the extent the Act would permit cancellation or other reversal of the deselection of Becker as Gzaskow's survivor beneficiary, PERB would possess authority to take that action, and a court acting under its equitable jurisdiction could provide no further remedy. Thus, not only is the administrative remedy complete, any judicial remedy would be redundant and thus unnecessary.

{29} For these reasons, therefore, we believe that Plaintiffs have a remedy under Section 10-11-120 to challenge PERA's refusal to reverse the deselection of Becker as Gzaskow's survivor beneficiary, and that such remedy is exclusive.

## 3. Fact Questions Are Present

{30} In its order dismissing the Complaint, the district court found that, "Plaintiffs' claims require factual determinations that should be made within the hearing process provided at the administrative level." We agree that multiple disputed issues of material fact constitute an additional reason why Plaintiffs must exhaust their administrative remedies.

{31} First, in the Complaint, Plaintiffs alleged that Gzaskow had discussed with PERA personnel the idea of preparing, dating, and signing—but not delivering to PERA and instead leaving with Daughter—before they left on an extended trip, a provisional or contingent deselection of Becker as his survivor beneficiary and designation of Daughter as the new survivor beneficiary. The suggestion is that PERA acquiesced in, if not encouraged, a tactic that could significantly enhance the aggregate monetary benefit paid to Gzaskow's family over time in the event both he and Becker were to die on the trip: if that were to occur, Daughter could deliver the document, which had been executed prior to Gzaskow's death, and claim survivor benefits that otherwise would never be paid due to Becker's concurrent death. PERA disputed this claim of consultation, as well as Plaintiffs' additional claim that PERA would not be prejudiced by cancellation of the deselection. Resolution of these issues may be material to construction of Section 10-11-116(E), see *Helman*, 1994-NMSC-023, ¶¶ 19-20 (explaining that a statute will not be interpreted literally if such construction is unreasonable), as well as any request for cancellation to the extent that it might call for the exercise of discretion.

{32} Second, Plaintiffs alleged that Gzaskow had not delivered with his signed deselection form the other documentation specified in 2.80.1100.11 NMAC. PERA disputed this claim, arguing that those facts were yet to be established by Plaintiffs. Resolution of this dispute in favor of Plaintiffs was the basis for one of their claims of entitlement to cancellation of the deselection.

{33} Third, and most fundamentally, the factual lynchpin of Plaintiffs' claim of entitlement to cancel and void the deselection of Becker and designation of Daughter as survivor beneficiary was the notion that his execution and delivery of the document to PERA was a mistake, i.e., that at the time Gzaskow signed and delivered the document he did not intend to accomplish the deselection. PERA also disputed this contention.

{34} PERB is no less well positioned to resolve these disputed factual issues than the district court. For this reason as well, *Smith's* declaratory judgment exception for the exhaustion doctrine is not available to Plaintiffs.

### C. Plaintiffs' Remaining Arguments

#### 1. PERB's Equity Jurisdiction

{35} Citing *AA Oilfield Service, Inc. v. New Mexico Corp. Comm'n*, 1994-NMSC-085, ¶ 18, 118 N.M. 273, 881 P.2d 18 (recognizing that an agency possessed only quasi-judicial powers which did not encompass the authority to grant equitable remedy), and *Leonard v. Payday Professional/Bio-Cal Co.*, 2008-NMCA-034, ¶ 12, 143 N.M. 637, 179 P.3d 1245 (concluding that Worker's Compensation Judge did not have authority to issue injunctions under the Worker's Compensation Act), Plaintiffs argue that PERB has only "quasi-judicial" powers and lacks authority or jurisdiction to grant equitable relief. Because *Smith* recognizes claims over which the administrative agency lacks jurisdiction as exempt from the exhaustion requirement, 2007-NMSC-055, ¶ 27, Plaintiffs urge that the district court erred in dismissing their

claim for injunctive relief against PERA.

{36} We can assume for purposes of discussion that PERB lacks the power to grant an equitable remedy. However, Plaintiffs overlook a threshold consideration that moots the point.

{37} The key question in this case is whether, under the language of Section 10-11-116(E), the Legislature has authorized reversal—whether articulated as cancellation, rescission or otherwise—of a deselection on grounds of mistake or, indeed, any grounds. If the answer is yes, then PERB can grant such a remedy pursuant to Section 10-11-120(A). In taking such action PERB could not be characterized as "enjoining" PERA to do anything: PERB exercises ultimate control and authority over PERA, i.e., PERA personnel effectively act on behalf of, and in the name of, PERB. Section 10-11-130. Therefore, if on appeal PERB were to reverse the 2015 denial of Plaintiffs' request to cancel the deselection, PERB effectively would only be reconsidering its own institutional decision, the same as any other decision that it might make to reverse a previous PERA denial of benefits. In other words, if Section 10-11-116(E) permits reversal of mistaken deselections, then Section 10-11-120 provides an adequate legal remedy that precludes Plaintiffs' claim for injunctive relief by the district court.<sup>2</sup> *Dydek v. Dydek*, 2012-NMCA-088, ¶ 53, 288 P.3d 872 ("[E]quity will not act if there is a complete and adequate remedy at law." (internal quotation marks and citation omitted)).

{38} Alternatively, if under Section 10-11-116(E) the Legislature has not authorized reversal of a mistaken deselection, then the courts have no more authority—equitable or otherwise—to reverse the deselection than that which PERB statutorily possesses. That is, if Section 10-11-116(E) is construed to not permit reversal of a deselection, then as a matter of law there could be no equitable cause of action to accomplish the same result.

{39} That a court may not exercise an equitable remedy to accomplish a goal

that a statute has foreclosed is well recognized by courts throughout the United States. In *Immigration & Naturalization Service v. Pangilinan*, 486 U.S. 875, 882-83 (1988), the United States Supreme Court reversed the Ninth Circuit Court of Appeals' decision to use equitable authority to confer citizenship upon two Filipino citizens who had served in the United States armed forces during World War II in contravention of a federal statute explicitly setting a cutoff date by which the two individuals should have applied for citizenship, but did not. The *Pangilinan* court stated, "[I]t is well established that 'courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" *Id.* at 883 (alteration omitted) (quoting *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893)). The *Pangilinan* court continued, "A [c]ourt of equity cannot . . . create a remedy in violation of law." *Id.* (quoting *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873)). Specifically, *Pangilinan* stated that the power to grant citizenship had not been conferred upon the federal courts as a generally applicable equitable power. *See* 486 U.S. at 883-84. Instead, because a federal statute dictates how a person may be naturalized, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these [Congressional] limitations." *Id.* at 885.

{40} Similarly, in *Westerman v. United States*, the Eighth Circuit Court of Appeals applied the equitable principle that equity follows the law, stating, "Well over a century has passed since American jurisprudence definitively established that 'courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" 718 F.3d 743, 752 (8th Cir. 2013) (alteration omitted) (quoting *Hedges*, 150 U.S. at 192). The Eighth Circuit decided that

<sup>2</sup> Because an agency would never enjoin itself as opposed to simply reverse its decision, it is illogical to argue the lack of equitable jurisdiction as a means of circumventing the requirement to exhaust administrative remedies: the agency can provide a sufficient administrative remedy whether or not it lacks authority to grant injunctive relief. An exception might exist, however, where the administrative agency is addressing one party's relative rights and obligations as against another party. *See, e.g., AA Oilfield Serv., Inc.*, 1994-NMSC-085 (common carrier opposed competing common carrier's application for transfer of certificate of public convenience and necessity); *Leonard*, 2008-NMCA-034 (addressing worker's pursuit of worker compensation benefits against employer and insurer). Only in that situation, not present here, might the first party have reason to seek equitable relief.

We also observe that most any challenge to an administrative agency's decision may be articulated in terms of a request for injunctive relief. If one can circumvent administrative remedies simply by seeking the court's order enjoining the agency to reverse its decision, the exception will swallow the rule. For that reason as well, we would not expect injunctive relief to be a frequent basis for not exhausting administrative remedies.



because the Internal Revenue Service's rights to "maximize the treasury's collection of unpaid liabilities by applying undesignated employment tax payments first toward non-trust fund taxes and then by recovering unpaid trust fund taxes from the person (Westerman) responsible for their underpayment" were "clearly defined and established by law, equity has no power to change or unsettle those rights[.]'" *Id.* (quoting *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853)). See generally 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 425, at 188-90 (5th ed. 1941) ("Equity follows the law, in the sense of obeying it, conforming to its general rules and policy, whether contained in the common or the statute law. . . . Courts of equity may no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute[.] . . . Wherever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules.").

{41} New Mexico courts have embraced the same principle. In *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶¶ 3, 32, 123 N.M. 526, 943 P.2d 560, this Court declined to utilize "the court's power of equity" to affirm the district court's refusal to enforce non-consent penalty provisions of an operating agreement to drill oil and gas wells. *Nearburg* acknowledged that while it is within the discretion of the district court to decide whether equitable relief should be granted, "such discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law." *Id.* ¶ 32 (alteration omitted) (quoting *Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-

039, ¶ 26, 115 N.M. 690, 858 P.2d 66). This Court also has observed, in declining to endorse the exercise of equitable powers to override express contractual deadlines for renewing a commercial lease, that "[e]quity jurisdiction has never given the judiciary a roving commission' to do whatever it wishes in the name of fairness or public welfare." *United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 19, 134 N.M. 725, 82 P.3d 535 (quoting *In re Adoption of Francisco A.*, 1993-NMCA-144, ¶ 88, 116 N.M. 708, 866 P.2d 1175). Therefore, if under Section 10-11-116(E), the Legislature has not authorized reversal of a mistaken deselection, neither PERB (acting pursuant to its authority under Section 10-11-120) nor this Court (acting pursuant to either legal or equitable authority) may reverse the deselection.

{42} We conclude that PERB has authority under Section 10-11-120 to address the statutory interpretation question in the first instance and determine whether a member's mistaken deselection of a survivor beneficiary may be reversed. If Plaintiffs disagree with PERB's decision, they will remain free to pursue an appeal to the district court under Section 39-3-1.1. For the present, however, it is clear that Plaintiffs must exhaust their administrative remedy. We express no opinion on the substantive question.

## 2. Invalidation of the Deselection Ab Initio

{43} In their pleadings Plaintiffs claim not only that the deselection of Becker and designation of Daughter as new survivor beneficiary should be reversed, but also that the deselection was void ab initio because: (1) Becker never gave her consent; and (2) documents required by

2.80.1100.11 NMAC did not accompany the deselection form. The two claims are analytically separate: even if under Section 10-11-116(E) a deselection, if mistaken but otherwise valid, may not be reversed, that would not necessarily preclude a determination that conditions precedent prevented the deselection from ever taking effect. Indeed, the second claim logically should be addressed first, because if the deselection was null and void, then there is no need to address whether it can be reversed.

{44} These, too, are questions that PERB may address during any Section 10-11-120 appeal, with the opportunity for review by the district court on appeal. That is, on these questions as well, Plaintiffs must exhaust their administrative remedy. We express no opinion on the issue, including the subsidiary questions whether Becker has any property interest in a survivor benefit, whether the spousal consent language in Section 10-11-116(A) applies only to pre-retirement spouses, and whether the failure to submit with the deselection form any of the documentation described in 2.80.1100.11 NMAC would operate to void the deselection.

## III. CONCLUSION

{45} We affirm the district court's dismissal of Plaintiffs' Complaint on grounds that they must exhaust the administrative remedy afforded them pursuant to Section 10-11-120.

{46} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge  
JAMES J. WECHSLER, Judge



CHAPMAN AND PRIEST  
P. C.

We celebrate with and congratulate our partner and friend, **STEPHEN M. SIMONE**, on his induction to the Roehl Circle of Honor for Trial Lawyers. This honor acknowledges Steve's many bench and complex jury trials, as well as his work as an expert witness in insurance matters, and his successful private mediation practice. Steve is rated AV preeminent with Martindale-Hubbell and is listed as a Southwest Super Lawyer.

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**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

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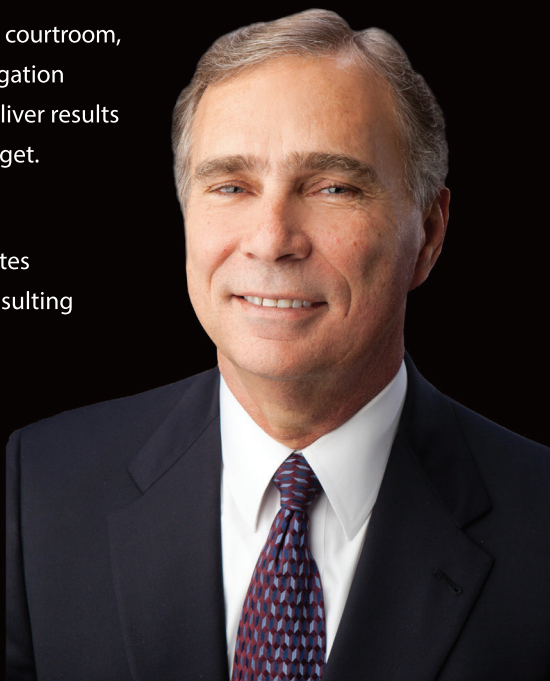
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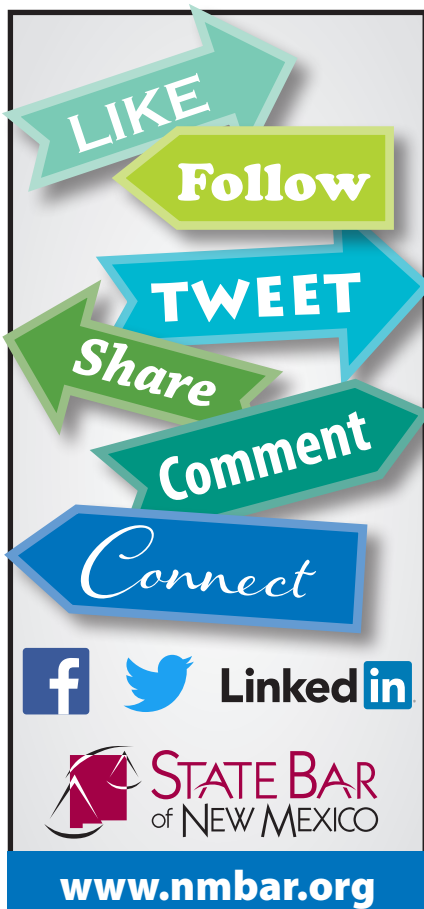


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Albuquerque Law Firm seeking a full time nurse paralegal, with a minimum of 5 years of experience. Experience is preferred in general civil practice, including medical malpractice defense, personal injury and civil rights. Candidates should have excellent writing and research skills, the familiarity to read and summarize medical records, draft and answer discovery, complete deposition prep and the ability to work independently. Prior nursing experience along with paralegal certificate or degree is preferred. Competitive salary and benefits. All inquiries will be kept confidential. Submit resume to: [jertsgaard@parklawnm.com](mailto:jertsgaard@parklawnm.com)

### Paralegal Wanted

Albuquerque Law Firm seeking a full time paralegal, with a minimum of 3 to 5 years of experience. Experience is preferred in general civil practice, including medical malpractice defense, personal injury and civil rights. Candidates should have excellent writing and research skills, and the ability to work independently. A paralegal certificate or degree is preferred. Competitive salary and benefits. All inquiries will be kept confidential. Submit resume to: [jertsgaard@parklawnm.com](mailto:jertsgaard@parklawnm.com)

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