

BAR BULLETIN

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October Gold, by Barbara Meikle (see page 3)

Barbara Meikle Fine Art

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Meetings

December

- 6**
Employment and Labor Law Section Board
Noon, State Bar Center
- 7**
Alternative Methods of Dispute Resolution Committee: Steering Committee
10 a.m., teleconference
- 8**
Prosecutors Section Board
Noon, State Bar Center
- 10**
Young Lawyers Division Board
10 a.m., State Bar Center
- 12**
Appellate Practice Section Board
Noon, teleconference
- 13**
Children's Law Section Board
Noon, Juvenile Justice Center
- 13**
Taxation Section Board
Noon, teleconference
- 14**
Business Law Section Board
4 p.m., teleconference

Workshops and Legal Clinics

December

- 6**
Civil Legal Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861
- 6**
Divorce Options Workshop
6–8 p.m.,
State Bar Center, Albuquerque,
505-797-6003
- 6**
Consumer Debt/Bankruptcy Workshop
6–9 p.m.,
State Bar Center, Albuquerque,
505-797-6094
- 8**
Civil Legal Clinic
10 a.m.–1 p.m.,
Bernalillo County Metropolitan Court,
Albuquerque,
505-841-9817
- 20**
Family Law Clinic
10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque,
1-877-266-9861

About Cover Image and Artist: Barbara Meikle is an artist who paints the simple world outside of her door in Tesuque, N.M. Meikle has been an artist from childhood, sketching the horses she loved and took care of in order to ride. True to her art, in college she earned a bachelor's degree in painting and printmaking at the University of Denver and studied watercolor at Cambridge University in England. Her dream was always to make her living as an artist and in 1990, she returned to New Mexico to pursue that dream. Meikle's art may project peace and harmony exemplified as a colorful burro or explode in the riot of energy of galloping horses. Enveloping skies of yellow, pink and white may hover over a majestic dark blue mountain that smolders with mystery, or stalks of prayerful flowers may reach for distant stars in an attitude of happy reverence. For more of her work, visit Barbara Meikle Fine Art in Santa Fe or www.meiklefineart.com.

Notices

COURT NEWS

New Mexico Supreme Court Board of Legal Specialization Comments Solicited

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

Appellate Practice
Jane B. Yohalem

Workers' Compensation Law
Evie Jilek

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 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 Investiture Ceremony for Judge Gregory S. Shaffer

Members of the State Bar are cordially invited to attend the investiture ceremony and reception for Judge Gregory S. Shaffer, First Judicial District Court, Division II, at 5 p.m., Dec. 15, at the Judge Steve Herrera Judicial Complex, 225 Montezuma Ave., Santa Fe. A reception will immediately follow at Hotel St. Francis, 210 Don Gaspar Ave., Santa Fe. R.S.V.P. for the reception to Jessica Cooper at 505-690-6291 or keepjudgeshaffer@comcast.net. Attending

Professionalism Tip

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

I will give all cases deliberate, impartial and studied analysis and consideration.

justices and judges are asked to bring their robe.

Second Judicial District Court Destruction of Exhibits

Pursuant to 1.21.2.617 FRRDS (Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy exhibits filed with the Court, the criminal cases for the years of 1979 to the end of 2001 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Jan. 29, 2018. Those who have cases with exhibits, should verify exhibit information with the Special Services Division, at 505-841-6717, from 10 a.m.–2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Third Judicial District Court Mass Reassignment

Effective Dec. 18, a mass reassignment of all Division VIII cases previously assigned to Judge Fernando R. Macias will occur pursuant to NMSC Rule 23-109. Judge Conrad F. Perea has been appointed to fill the vacancy in Division VIII. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 27 to challenge or excuse Judge Conrad F. Perea pursuant to Rule 1-088.1.

Judicial Notice of Retirement

The Third Judicial District Court announces the retirement of Judge Fernando R. Macias effective Jan. 6, 2018. A Judicial Nominating Commission will be convened in Las Cruces on Feb. 1, 2018 to interview applicants for this vacancy. Further information on the application process can be found on the Judicial Selection website <http://lawschool.unm.edu/judsel/index.php>, along with updates regarding this vacancy and the news releases.

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 Closure Notice

The Metropolitan Court will be closed from 11 a.m.–1:30 p.m. on Dec. 13 for the Court's annual holiday lunch.

U.S. Courts Library Holiday Open House

The U.S. Courts Library will host a holiday open house on Dec. 13. The Library encourages all state and federal bar members to stop by between 10 a.m. and 5 p.m. to meet the staff, enjoy some cookies and punch, peruse the newly relocated and renovated collection and discover how the Library can become an integral part of your legal research team. The Library is on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. Usual

hours of operation are 8 a.m.–noon and 1–5 p.m., Monday through Friday. For more information, call 505-348-2135.

STATE BAR NEWS

Attorney Support Groups

- Dec. 11, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Feb. 5, 2018, 5:30 p.m.
First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. The January meeting will be skipped due to the New Year's Day holiday.)

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

Board of Bar Commissioners

Meeting Agenda

10 a.m., Dec. 7,

New Mexico Supreme Court, Santa Fe

1. Approval of Sept. 15 Meeting Minutes
2. Finance Committee Report
3. Financials
4. Executive Committee Report
5. Executive Session
6. Access to Justice Commission Appointments
7. Bylaws and Policies Committee Report and Recommendations
8. Legal Research Committee Report and Recommendation
9. Lawyer/Client Fee Disputes—Mediation/Fee Arbitration Program
10. SOPA (Secure Odyssey Public Access) Report
11. President Report
12. President-elect Report
13. Interim Executive Director Report and State Bar Newsletter
14. Bar Commissioner District and Division (SLD, YLD and PD) Reports
15. New Business

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 & 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.

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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OTHER BARS

American Bar Association

Commission on Lawyer

Assistance Programs

Twitter Chat on Problem Gambling

On Dec. 13, the ABA Commission on Lawyer Assistance Programs will host a live Twitter chat on "Problem Gambling in the Legal Profession" from 1–2 p.m. EST. @ABACoLAP and special guests will discuss the consequences of problem gambling in the legal profession, signs and symptoms that might indicate a person may have a gambling problem, how to get help or refer someone else to help, and ways law schools and law firms can better address problem gambling. Follow along by tracking tweets with hashtag #GamblingHelp4Lawyers and participate with questions and comments by using #GamblingHelp4Lawyers in your tweets. More information can be found at www.americanbar.org/groups/lawyer_assistance/events_cle/gambling-twitter-chat.html.

New Mexico Criminal Defense Lawyers Association

Two Chances to Fulfill Ethics Requirements

The New Mexico Criminal Defense Lawyers Association will be hosting two end-of-year CLEs to help members fulfill their ethics/professionalism requirements. "Suppress It! 4th Amendment, Eyewitness ID & Ethics" (4.0 G, 2.0 EP) will be held Dec. 8 in Albuquerque. "Cross Examination, Ethics & Professionalism" (4.0 G, 2.0 EP) will be held Dec. 15 in Las Cruces. Civil attorneys are welcome to attend the ethics sessions for either CLE! Come learn



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ADDRESS CHANGES

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

Supreme Court

Web: supremecourt.nmcourts.gov

Email: attorneyinfochange@nmcourts.gov

Fax: 505-827-4837

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

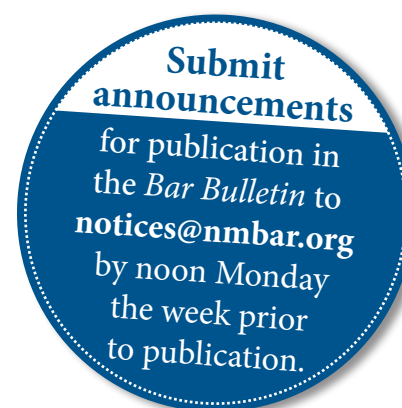
State Bar

Web: www.nmbar.org

Email: address@nmbar.org

Fax: 505-797-6019

Mail: PO Box 92860
Albuquerque, NM 87199



about implicit gender bias and how we can correct it, as well as an hour on defender wellness and how we can take better care of ourselves as professionals. Visit www.nmcdla.org to register and renew membership dues for 2018 today.

Legal Education

December 2017

- | | | |
|---|---|--|
| <p>4 Legal Malpractice Potpourri
1.5 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>6 Annual Winter Meeting and Seminar
11.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Municipal League
www.nmml.org</p> | <p>8 Civil Rights
5.4 G
Live Seminar, Albuquerque
New Mexico Defense Lawyers
Association
www.nmdla.org</p> |
| <p>4 Ethicspalooza: Ethical Issues of Using Social Media and Technology in the Practice of Law (2016)
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 Tech Toch, Tech Tock: Social Media and the Countdown to Your Ethical Demise (2016)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Wage Theft in New Mexico
3.0 G, 1.0 WP
Live Seminar, Roswell
New Mexico Hispanic Bar
Association
www.nmhba.net</p> |
| <p>4 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence
3.5 G, 2.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>4 28th Annual Appellate Practice Institute (2017)
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>7 Law and Policy for Neighborhoods
10.0 G, 1.0 EP
Live Seminar, Santa Fe
Santa Fe Neighborhood Law Center
www.sfnlc.com</p> | <p>11 2017 Ethicspalooza: Conflicts of Interest
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>4 Indemnity and Insurance in Real Estate
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)
5.0 G, 2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 2017 Ethicspalooza: Civility and Professionalism
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 Trials of the Century III
4.0 G, 2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Complying with the Disciplinary Board Rule 17-204
1.0 EP
Live Seminar, Las Cruces
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>11 2017 Ethicspalooza: Ethically Managing your Practice
1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>5 “HEMS”—Defining Distribution Standards in Trusts
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>8 Suppress It! 4th Amendment, Eyewitness ID and Ethics
4.0 G, 2.0 EP
Live Seminar, Albuquerque
New Mexico Criminal Defense
Lawyers Association
www.nmcdla.org</p> | <p>11 2017 Ethicspalooza: The Disciplinary System
2.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>6 2017 Real Property Institute
6.0 G, 1.0 EP
Live Webcast/Live Seminar,
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | | |

December 2017

- | | | |
|--|--|---|
| <p>12 Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct
1.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>14 WCA Winter Seminar
4.0 G, 2.0 EP
Live Seminar, Albuquerque
Workers Compensation Administration of New Mexico
www.wcaofnm.com</p> | <p>19 The Cyborgs are Coming! The Cyborgs are Coming! The Ethical Concerns with the Latest Technology Disruptions
3.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>12 What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Emerging Problems and Solutions in Environmental Enforcement (2017 Natural Resources, Energy and Environmental Law Institute)
5.5 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>19 Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics
3.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>12 2017 Family Law Institute Day 1
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>15 Cross Examination, Ethics and Professionalism
4.0 G, 2.0 EP
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org</p> | <p>19 Eight Things Killing Your Law Firm and How to Stop Them
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>12 Legal Ethics for In-House Counsel
1.0 EP
Live Seminar, Los Alamos
Los Alamos National Laboratory
www.lanl.gov/source/orgs/lc/</p> | <p>15 Last Chance: Best of the Best Seminar
4.2 G, 1.0 EP
Live Seminar, Santa Fe
New Mexico Trial Lawyers Foundation
www.nmtla.org</p> | <p>19 Storytelling for Lawyers: A Narrative Approach to Success
5.0 G, 1.0 EP
Live Seminar, Albuquerque
William Bernhardt Writing Programs
www.superiorlegalwriting.com</p> |
| <p>13 2017 Probate Institute
6.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Mock Meeting of the Ethics Advisory Committee
2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Speech Recognition: Using Dragon Legal in a Law Practice
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>13 2017 Family Law Institute Day 2
5.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 Tech Toch, Tech Tock: Social Media and the Countdown to Your Ethical Demise (2016)
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 2017 Employment and Labor Law Institute
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>14 Trial Know-How! (The Rush to Judgment) 2017 Trial Practice Section Annual Institute
4.0 G, 2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>18 2017 Health Law Symposium
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> | <p>20 Fall Elder Law Institute—Hot Topics in Adult Guardianship Law (2017)
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org</p> |
| <p>14 Legal Ethics of Trusts
1.0 EP
Live Seminar, Albuquerque
New Mexico Bank and Trust
www.nmb-t.com</p> | | |



New Inductees to the Roehl Circle of Honor for Trial Lawyers

Jerry J. Roehl • Thomas A. Sandenaw • Janet K. Santillanes • Stephen M. Simone



*Tom Sandenaw, Steve Simone,
Janet Santillanes and Jerry Roehl*

On Nov. 1, four new attorneys were inducted into the Roehl Circle of Honor. The Circle of Honor is named after the late Joseph E. Roehl who is known as one of the “premier trial lawyers of our generation” said John Cooney who spoke of Mr. Roehl. New attorneys are inducted into the circle each year to honor his memory and commitment to the trial lawyer community. As has become a tradition, the new inductees get the night off from speaking and are introduced by one of their peers.

Bruce D. Hall introduced the first inductee, Joe Roehl’s own son Jerrald J. Roehl who is an associate with the Roehl Law Firm PC in Albuquerque. Hall noted one of Jerry’s most important qualities: how he understands that lawyers hold their clients lives in their hands. Hall explained that many of the previous inductees worked together to nominate Jerry for the Circle of Honor this year. “It exists because of you and it’s a labor of love,” he said, “Your father is proud tonight.”

Thomas A. Sandenaw was introduced by Thomas Overstreet. Born in Montana, Sandenaw truly has the pioneer spirit. Montana is known as Big Sky Country. When someone is from Montana “the sky is the limit” means a little bit more, said Overstreet.

The next inductee, Janet K. Santillanes was introduced by her daughter Olivia Neidhardt who described her as dedicated, passionate and an advocate. Neidhardt painted a picture of her mother’s journey through law school who did so while raising a family all while making UNM School of Law history as the first woman to graduate at the top of her class.

Finally, David Frizzell introduced Stephen M. Simone. Frizzell noted how easily Simone connects with juries—He is able to identify with them and they identify with him. In addition, Simone truly cares about the profession and is proud to say he’s a lawyer.

Congratulations to all the new inductees!

For more photos, visit www.nmbar.org/photos.



THANK

You

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **CONSUMER DEBT BANKRUPTCY WORKSHOP.**

Thank you for your professionalism, time and service to the community in New Mexico.

Ron Holmes
Mike Daniels
Al Schimmel

Arun Melwani
Erik Thunberg
Don Provencio

Dan Behles
Mike Lash
Matthew Gandert

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Opinions

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

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

Effective November 17, 2017

PUBLISHED OPINIONS

A-1-CA-36015	NM Law Group v. P Byers	Affirm	11/15/2017
A-1-CA-35307	State v. D Lewis	Reverse/Remand	11/16/2017

UNPUBLISHED OPINIONS

A-1-CA-36210	State v. E Happy	Affirm	11/13/2017
A-1-CA-36322	State v. D Madrid	Affirm	11/13/2017
A-1-CA-35949	State v. G Mackay	Affirm	11/14/2017
A-1-CA-36270	J Padilla v. J Muniz	Affirm	11/14/2017
A-1-CA-36280	O Aguirre v. P Aguirre	Affirm	11/14/2017
A-1-CA-35362	State v. D Gee	Affirm	11/15/2017
A-1-CA-36286	State v. R Gallagher	Affirm	11/16/2017

Effective November 24, 2017

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

A-1-CA-33812	State v. L Velarde	Affirm/Vacate/Remand	11/20/2017
A-1-CA-35505	State v. J Pendergast	Affirm	11/20/2017
A-1-CA-35879	State v. P Apodaca	Affirm	11/20/2017
A-1-CA-36522	State v. J Rojas	Affirm	11/20/2017
A-1-CA-35874	City of Roswell v. F Lucero	Reverse/Remand	11/21/2017
A-1-CA-35875	City of Roswell v. F Lucero	Reverse/Remand	11/21/2017
A-1-CA-35943	State v. A Ellis	Vacate/Remand	11/21/2017
A-1-CA-36373	J Trujillo v. AFSCME	Affirm	11/21/2017
A-1-CA-36484	CYFD v. Christina L	Affirm	11/21/2017
A-1-CA-36507	CYFD v. Michelle S	Affirm	11/21/2017

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective November 29, 2017

PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:					
<i>There are no proposed rule changes currently open for comment.</i>					
RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2017 NMRA:					
			Effective Date		
Rules of Civil Procedure for the District Courts					
1-015	Amended and supplemental pleadings	12/31/2017	4-402	Order appointing guardian ad litem	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017	4-602	Withdrawn	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017	4-602A	Juror summons	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017	4-602B	Juror qualification	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017	4-602C	Juror questionnaire	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017	4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
1-088	Designation of judge	12/31/2017	4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017	4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017
1-121	Temporary domestic orders	12/31/2017	Domestic Relations Forms		
1-125	Domestic Relations Mediation Act programs	12/31/2017	4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017	4A-201	Temporary domestic order	12/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017	4A-209	Motion to enforce order	12/31/2017
Rules of Civil Procedure for the Magistrate Courts			4A-210	Withdrawn	12/31/2017
2-105	Assignment and designation of judges	12/31/2017	4A-321	Motion to modify final order	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017	4A-504	Order for service of process by publication in a newspaper	12/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017	Rules of Criminal Procedure for the District Courts		
Rules of Civil Procedure for the Metropolitan Courts			5-105	Designation of judge	12/31/2017
3-105	Assignment and designation of judges	12/31/2017	5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
3-112	Public inspection and sealing of court records	03/31/2017	5-123	Public inspection and sealing of court records	03/31/2017
3-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017	5-204	Amendment or dismissal of complaint, information and Indictment	07/01/2017
Civil Forms			5-211	Search warrants	12/31/2017
4-223	Order for free process	12/31/2017	5-302	Preliminary examination	12/31/2017
			5-401	Pretrial release	07/01/2017
			5-401.1	Property bond; unpaid surety	07/01/2017
			5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
			5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
			5-403	Revocation or modification of release orders	07/01/2017
			5-405	Appeal from orders regarding release or detention	07/01/2017
			5-406	Bonds; exoneration; forfeiture	07/01/2017
			5-408	Pretrial release by designee	07/01/2017
			5-409	Pretrial detention	07/01/2017

5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017	7-406	Bonds; exoneration; forfeiture	07/01/2017
5-802	Habeas corpus	12/31/2017	7-408	Pretrial release by designee	07/01/2017
Rules of Criminal Procedure for the Magistrate Courts			7-409	Pretrial detention	07/01/2017
6-105	Assignment and designation of judges	12/31/2017	7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017	7-506	Time of commencement of trial	07/01/2017
6-202	Preliminary examination	12/31/2017	7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017	7-606	Subpoena	12/31/2017
6-207	Bench warrants	04/17/2017	7-703	Appeal	07/01/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017	Rules of Procedure for the Municipal Courts		
6-207.1	Payment of fines, fees, and costs	12/31/2017	8-112	Public inspection and sealing of court records	03/31/2017
6-208	Search warrants	12/31/2017	8-202	Probable cause determination	12/31/2017
6-304	Motions	12/31/2017	8-206	Bench warrants	04/17/2017
6-401	Pretrial release	07/01/2017	8-206.1	Payment of fines, fees, and costs	04/17/2017
6-401.1	Property bond; unpaid surety	07/01/2017	8-207	Search warrants	12/31/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017	8-304	Motions	12/31/2017
6-403	Revocation or modification of release orders	07/01/2017	8-401	Pretrial release	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017	8-401.1	Property bond; unpaid surety	07/01/2017
6-408	Pretrial release by designee	07/01/2017	8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-409	Pretrial detention	07/01/2017	8-403	Revocation or modification of release orders	07/01/2017
6-506	Time of commencement of trial	07/01/2017	8-406	Bonds; exoneration; forfeiture	07/01/2017
6-506	Time of commencement of trial	12/31/2017	8-408	Pretrial release by designee	07/01/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017	8-506	Time of commencement of trial	07/01/2017
6-506	Time of commencement of trial	12/31/2017	8-506	Time of commencement of trial	12/31/2017
6-703	Appeal	07/01/2017	8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
Rules of Criminal Procedure for the Metropolitan Courts			8-506	Time of commencement of trial	12/31/2017
7-105	Assignment and designation of judges	12/31/2017	8-703	Appeal	07/01/2017
7-113	Public inspection and sealing of court records	03/31/2017	Criminal Forms		
7-202	Preliminary examination	12/31/2017	9-207A	Probable cause determination	12/31/2017
7-203	Probable cause determination	12/31/2017	9-301A	Pretrial release financial affidavit	07/01/2017
7-207	Bench warrants	04/17/2017	9-302	Order for release on recognizance by designee	07/01/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017	9-303	Order setting conditions of release	07/01/2017
7-208	Search warrants	12/31/2017	9-303A	Withdrawn	07/01/2017
7-304	Motions	12/31/2017	9-307	Notice of forfeiture and hearing	07/01/2017
7-401	Pretrial release	07/01/2017	9-308	Order setting aside bond forfeiture	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017	9-309	Judgment of default on bond	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017	9-310	Withdrawn	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017	9-513	Withdrawn	12/31/2017
			9-513A	Juror summons	12/31/2017
			9-513B	Juror qualification	12/31/2017

9-513C	Juror questionnaire	12/31/2017	13-2401	Legal malpractice; elements	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017	13-2402	Legal malpractice; attorney-client relationship	12/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017	13-2403	Legal malpractice; negligence and standard of care	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017	13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
9-809	Order of transfer to children's court	12/31/2017	13-2405	Duty of confidentiality; definition	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017	13-2406	Duty of loyalty; definition	12/31/2017
Children's Court Rules and Forms			13-2407	Legal malpractice; attorney duty to warn	12/31/2017
10-161	Designation of children's court judge	12/31/2017	13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017	13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
10-166	Public inspection and sealing of court records	12/31/2017	13-2410	Legal malpractice; expert testimony	12/31/2017
10-169	Criminal contempt	12/31/2017	13-2411	Rules of Professional Conduct	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017	13-2412	Legal malpractice; attorney error in judgment	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017	13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017	13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017	13-2415	Legal malpractice; collectability - No instruction drafted	12/31/2017
10-612	Request for court interpreter	12/31/2017	Uniform Jury Instructions - Criminal		
10-613	Cancellation of court interpreter	12/31/2017	14-240	Withdrawn	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017	14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
Rules of Appellate Procedure			14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
12-202	Appeal as of right; how taken	12/31/2017	14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017	14-251	Homicide; "proximate cause"; defined	12/31/2017
12-205	Release pending appeal in criminal matters	07/01/2017	14-1633	Possession of burglary tools; essential elements	12/31/2017
12-210	Calendar assignments for direct appeals	12/31/2017	14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017	14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
12-307.2	Electronic service and filing of papers	08/21/2017	14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
12-313	Mediation	12/31/2017	14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017	14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017	14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017
Uniform Jury Instructions - Civil					
13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017			

Rule-Making Activity <http://nmsupremecourt.nmcourts.gov>

14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017	16-803	Reporting professional misconduct	12/31/2017
			Rules Governing Discipline		
14-4205	Money laundering; definitions	12/31/2017	17-202	Registration of attorneys	07/01/2017
14-5130	Duress; nonhomicide crimes	12/31/2017	17-202	Registration of attorneys	12/31/2017
Rules Governing Admission to the Bar			17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017
15-103	Qualifications	12/31/2017	Rules for Minimum Continuing Legal Education		
15-104	Application	08/04/2017	18-203	Accreditation; course approval; provider reporting	09/11/2017
15-105	Application fees	08/04/2017	Code of Judicial Conduct		
15-301.1	Public employee limited license	08/01/2017	21-004	Application	12/31/2017
15-301.2	Legal services provider limited law license	08/01/2017	Supreme Court General Rules		
Rules of Professional Conduct			23-106	Supreme Court rules committees	12/31/2017
16-100	Terminology	12/31/2017	23-106.1	Supreme Court rule-making procedures	12/31/2017
16-101	Competence	12/31/2017	Rules Governing the New Mexico Bar		
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017	24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017
16-106	Confidentiality of information	12/31/2017	Rules Governing Review of Judicial Standards Commission Proceedings		
16-108	Conflict of interest; current clients; specific rules	12/31/2017	27-104	Filing and service	07/01/2017
16-304	Fairness to opposing party and counsel	12/31/2017	Local Rules for the Thirteenth Judicial District Court		
16-305	Impartiality and decorum of the tribunal	12/31/2017	LR13-112	Courthouse security	12/31/2017
16-402	Communications with persons represented by counsel	12/31/2017			
16-403	Communications with unrepresented persons	12/31/2017			
16-701	Communications concerning a lawyer's services	12/31/2017			

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

Certiorari Granted, August 24, 2017, No. S-1-SC-36580

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-071

No. A-1-CA-34897 (filed June 28, 2017)

BETTY E. ULLMAN, for herself and others similarly situated,
Plaintiff-Appellee,

v.

SAFeway INSURANCE COMPANY,
Defendant-Appellant,
and
RICHARD BAILEY,
Defendant.

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

FRANCIS J. MATHEW, District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} This matter comes to us on interlocutory appeal from the denial of Safeway Insurance Company's motion for summary judgment seeking dismissal of class action claims. Safeway sought to prove that its insurance documents were legally adequate to support its rejections of claims of class members to uninsured and underinsured motorist (UM/UIM) benefits. The district court certified that the case involved "a controlling question of law as to which there is [a] substantial . . . difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation." The court

identified that controlling question as "whether Safeway has complied with New Mexico law in obtaining waivers of [UM/UIM] coverage insurance, including stacked coverage, from its insureds."

{2} Safeway asks this Court to (1) rule that Safeway obtained valid rejections of UM/UIM coverage in compliance with New Mexico law; (2) reverse the order denying Safeway's class-related motion for summary judgment; and (3) remand with instructions to dismiss the class claims with prejudice and de-certify the class because "a ruling on the certified question in Safeway's favor means that the alleged violation of law that grounds the class definition and class claims does not exist, leaving no common question appropriate for class litigation." We hold that Safeway

obtained valid rejections of UM/UIM coverage in compliance with New Mexico law. We further hold that, on remand, the district court is to address any remaining class-related issues or concerns.

I. THE CLASS

{3} In pursuit of class certification in an action against Safeway, Plaintiff Betty E. Ullman stated the certified class to be:

All New Mexico residents, who are all Safeway policyholders or insureds under any Safeway policy issued, or reissued, in New Mexico where that Safeway policy did not provide the maximum amount of [UM/UIM] coverage allowed by law and for which Safeway did not obtain a valid waiver/rejection of UM/UIM coverage with limits equal to the limits of liability coverage. An invalid waiver/rejection of UM/UIM coverage is one which did not include an offer of UM/UIM limits up to the liability limits and a disclosure of premium amount for each available level of coverage, including stacked coverage.

Ullman's claims and the class membership are based on Ullman's assertion of legally inadequate Safeway UM/UIM documentation affecting all policyholders in the class.

II. STANDARD OF REVIEW

{4} In the district court, Ullman argued that the issue was whether Safeway's uniform documentary language complied with New Mexico law, and for that reason, the particular circumstances surrounding an ultimate rejection, including the means in which the rejection was obtained, were immaterial. Whether the documents met the legal requirements for offering and obtaining waivers of UM/UIM coverage and for stacking of benefits is a legal question resolved by interpretation of applicable statutory, regulatory, and case law, calling for de novo review. *See Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 13, 147 N.M. 678, 228 P.3d 462; *Wilkeson v. State Farm Mut. Auto Ins. Co.*, 2014-NMCA-077, ¶ 6, 329 P.3d 749.

{5} The question whether language in a document *meaningfully* informs a customer regarding the insurance offered requires this Court "to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles[.]" *State v. Attaway*, 1994-NMSC-011, ¶ 6, 117 N.M. 141, 870 P.2d 103 (internal quotation marks and citation omitted). Like the

concept of reasonableness, the concept of meaningful involves the exercise of reasoned and evaluative judgment as to concepts inherently factual yet in need of appellate court de novo review. *See id.* ¶ 9 (discussing “rules and tests, based as they are on careful balancing of the underlying constitutional values,” serving as “a proxy for reasonableness, generally applicable, but inherently factual[.]” yet “extend[ing] beyond fact-finding and implicat[ing] an assessment of broader legal policies . . . entrust[ed] to the reasoned judgment of the appellate courts of this state”); Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. App. Prac. & Process, No. 1, at 129 (Spring 2005) (“[E]valuative determinations involve the judging of a person’s conduct or belief. This is typically done by applying a standard like ‘reasonable’ or ‘fair’ that conveys to the decision-maker that he or she is judging according to a community standard.”). In such instances, appellate courts are free to conclude that, as a matter of policy, the issue should be reviewed de novo in the interests of judicial administration. *Attaway*, 1994-NMSC-011, ¶¶ 6-8; Warner, *supra*, at 109-12, 118, 130-31. Thus, it is for this Court to determine whether the documents were legally adequate to meaningfully inform Ullman of required insurance information. For the purposes of our de novo review, it is to be understood that Ullman received the critical documents.

III. THE LEGAL REQUIREMENTS

A. UM/UIM Coverage and Rejection of Coverage

{6} UM/UIM coverage and rejection of coverage are subjects of NMSA 1978, Section 66-5-301 (1983), and its implementing regulation, 13.12.3.9 NMAC. Section 66-5-301 reads:

A. No motor vehicle or automobile liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person and for injury to or destruction of property of others arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in New Mexico with respect to any motor vehicle registered or principally garaged in New Mexico unless coverage is provided therein or supplemental thereto in minimum limits for bodily injury or death and for injury to or destruction of

property as set forth in Section 66-5-215 NMSA 1978 and such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured’s policy, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, and for injury to or destruction of property resulting therefrom, according to the rules and regulations promulgated by, and under provisions filed with and approved by, the superintendent of insurance.

B. The uninsured motorist coverage described in Subsection A of this section shall include underinsured motorist coverage for persons protected by an insured’s policy. For the purposes of this subsection, “underinsured motorist” means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured’s uninsured motorist coverage. . . .

C. The uninsured motorist coverage shall provide an exclusion of not more than the first two hundred fifty dollars (\$250) of loss resulting from injury to or destruction of property of the insured in any one accident. The named insured shall have the right to reject uninsured motorist coverage as described in Subsections A and B of this section; provided that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer.

The regulation states: “The rejection of the provisions covering damage caused by an uninsured . . . motor vehicle as required in writing by the provisions of Section

66-5-301 . . . must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance.” 13.12.3.9 NMAC; *see Romero v. Dairyland Ins. Co.*, 1990-NMSC-111, ¶ 8, 111 N.M. 154, 803 P.2d 243 (“An insured may reject [UM] coverage, but the rejection must satisfy the regulations promulgated by the superintendent of insurance.”).

{7} In *Montano v. Allstate Indemnity Co.*, 2004-NMSC-020, ¶¶ 17, 20, 135 N.M. 681, 92 P.3d 1255, our Supreme Court charted a “new course” in UM/UIM law, which, among other rulings, required insurers in multiple-vehicle policies to “declare the premium charge for each of the . . . coverages” as a means of ensuring that consumers get what they pay for. In *Progressive Northwestern Insurance Co. v. Weed Warrior Services*, 2010-NMSC-050, ¶¶ 8, 14-15, 149 N.M. 157, 245 P.3d 1209, our Supreme Court required that insurers offer UM/UIM coverage that includes “the maximum amount statutorily available” equal “to the liability limits of the policy[.]” Further, the Court explained the insured’s choice to purchase any lower amount functions as a rejection of that maximum amount of coverage statutorily possible. *Id.* ¶ 14.

{8} With respect to obtaining valid rejections of UM/UIM coverage, several New Mexico Supreme Court cases have stated what constitutes compliance, starting with *Romero*, 1990-NMSC-111, and then later *Marckstadt*, 2010-NMSC-001, and *Jordan v. Allstate Insurance Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214. *Romero* explained that “[t]he rejection must be made a part of the policy by endorsement on the declarations sheet, by attachment of the written rejection to the policy, or by some other means that makes the rejection a part of the policy so as to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived.” 1990-NMSC-111, ¶ 8. Further, under *Romero*, “[p]roviding affirmative evidence of the rejection of the coverage comports with a policy that any rejection of the coverage be knowingly and intelligently made.” *Id.* ¶ 9. And UM/UIM coverage will be read into the policy “when a rejection of such coverage does not comply with [the] regulation[.]” *Id.*

{9} In *Marckstadt*, our Supreme Court clarified that “an insurer must obtain a written rejection of UM/UIM coverage . . . in order to exclude it[.]” but that “neither the statute nor the regulation requires that

the insured's written rejection be signed[.]" and "the written rejection itself need not be made part of the policy." 2010-NMSC-001, ¶ 4; *see id.* ¶¶ 23-26, 32. The Court further clarified that "the rejection which the regulation requires to be in writing must be the *act* of rejection described in the statute and not the *evidence* of that act mandated by the regulation itself." *Id.* ¶ 22. *Marckstadt* explained that this requirement assures "that the insured is sufficiently informed before rejecting coverage, alerting the insured to the importance of the decision, and providing clear evidence of a decision to reject[.]" *Id.* ¶ 21. The *Marckstadt* Court stated, "[W]e cannot hold that the regulation may only be satisfied by the attachment of the written rejection provided to the insurer by the insured[.]" *id.* ¶ 25, and that "other forms of notification could function equally well to clearly and unambiguously call to the attention of the insured the fact that such coverage has been waived." *Id.* (internal quotation marks and citation omitted). In sum, under *Marckstadt*, "the insurer must obtain a written rejection from the insured, . . . the written rejection need not be signed or attached to the policy[.]" and the regulation "requires that some evidence of the insured's written rejection of UM/UIIM coverage must be made part of the policy by endorsement, attachment, or some other means that calls the insured's attention to the fact that such coverage has been waived." *Id.* ¶ 26.

{10} Almost a year after *Marckstadt*, *Jordan* decided that the "Court's repeated pronouncements" in *Marckstadt* and *Romero*, "indicate[d] that insurers continue[d] to offer UM/UIIM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice." *Jordan*, 2010-NMSC-051, ¶ 20. The Court therefore proceeded to "prescribe workable requirements for a valid and meaningful rejection of UM/UIIM coverage in amounts authorized by statute." *Id.* The Court stated:

When issuing an insurance policy, an insurer must inform the insured that he or she is entitled to purchase UM/UIIM coverage in an amount equal to the policy's liability limits and must also provide the corresponding premium charge for that maximum amount of UM/UIIM coverage. The premium cost for the minimum amount of UM/UIIM coverage allowed by Section 66-5-301(A)

must also be provided, as well as the relative costs for any other levels of UM/UIIM coverage offered to the insured. The insured must be informed that he or she has a right to reject UM/UIIM coverage altogether. Providing the insured with a menu of coverage options and corresponding premium costs will enable the insured to make an informed decision about the level of UM/UIIM coverage he or she wants to purchase and can afford and will minimize uncertainty and litigation with regard to the coverage that the insured has obtained.

Id. ¶ 21. More recently, in *Whelan v. State Farm Mutual Automobile Insurance Co.*, 2014-NMSC-021, ¶ 25, 329 P.3d 646, our Supreme Court confirmed *Montano*'s having imposed a requirement "that insurers disclose the premium costs for each available level of stacked coverage as a means of guaranteeing that consumers can knowingly exercise their statutory rights to UM/UIIM coverage." And *Whelan* further confirmed that "*Jordan* followed *Montano* by requiring similar premium disclosure as to the premium charges corresponding to each available [UM/UIIM] option[.]" *Whelan*, 2014-NMSC-021, ¶ 25 (internal quotation marks and citation omitted). {11} *Jordan* sets out the consequences stemming from an insurer's failure to abide by the requirements.

If an insurer does not (1) offer the insured UM/UIIM coverage equal to his or her liability limits, (2) inform the insured about premium costs corresponding to the available levels of coverage, (3) obtain a written rejection of UM/UIIM coverage equal to the liability limits, and (4) incorporate that rejection into the policy in a way that affords the insured a fair opportunity to reconsider the decision to reject, the policy will be reformed to provide UM/UIIM coverage equal to the liability limits.

Jordan, 2010-NMSC-051, ¶ 22.

B. Stacking

{12} Stacking rules were substantially clarified in *Montano*, 2004-NMSC-020, and were also discussed in *Jordan*, 2010-NMSC-051. *Montano* addressed "whether an insurance company effectively precluded its insured from stacking the policy limits of all of his vehicles insured under

the policy for his [UM] claim[.]" where the plaintiff insured four vehicles under a policy, paid a single premium for UM coverage, and limited stacking to two coverage limits. 2004-NMSC-020, ¶¶ 1, 3-4, 6. The plaintiff asked the Court to declare all anti-stacking clauses void as against public policy, and alternatively, that he be permitted to stack four coverage limits under the circumstances. *Id.* ¶ 7. Our Supreme Court did not expand its public policy favoring stacking to require stacking in all cases, stating, "[w]e have always understood stacking to be the remedy for an ambiguous contract or the charging of multiple premiums." *Id.* ¶ 9. And after reviewing prior cases, the Court stated that it had "never held that anti-stacking clauses violate public policy when unambiguous and when only one premium has been charged for the coverage." *Id.* ¶ 15. The Court explained that to declare all anti-stacking clauses void as against public policy

would expand the public policy in favor of stacking beyond what [the] earlier cases have declared it to be. Our public policy in support of stacking, rather, has always been tied to the notion that it is unfair not to allow stacking *when multiple premiums are paid* or when the policy is otherwise ambiguous. It would thus be an expansion of that policy to also require stacking when the policy clearly only charges a single premium and unambiguously precludes stacking. We decline to modify our case law in order to expand our expression of the public policy underlying stacking.

. . . Further, requiring stacking in all cases on a take-it-or-leave-it basis would reduce the freedom of the parties to contract for less coverage and thus their freedom to decide how much coverage they can afford. This could frustrate, rather than advance, the legislative intent behind the UM statute. . . . [and] . . . result in some lower-income insureds who own multiple vehicles being effectively "priced out" of UM coverage.

Id. ¶¶ 15-16.

{13} Stacking is not a statutorily mandated UM coverage level but "a judicially-created doctrine[.]" *Id.* ¶ 17; *Wilkeson*, 2014-NMCA-077, ¶ 8 ("In New Mexico,

stacking is ‘a judicially-created doctrine’ that has arisen in cases in which our Supreme Court has needed to determine whether insurance policy limitations of liability provisions restrict or permit stacking.” (quoting *Montano*, 2004-NMSC-020, ¶ 17). Because the “traditional case-by-case ambiguity analysis has proved unworkable” and “[b]earing in mind that [stacking] is a judicial doctrine,” the *Montano* Court determined that a “new approach” was needed “to protect the reasonable expectations of insureds and to ensure that they get what they pay for.” 2004-NMSC-020, ¶ 17. Taking “guidance” from a concurrence in an out-of-state decision stating that stacking should be treated as “extra coverage for which the parties have contracted,” and also from Section 66-5-301(A) and (C), the Court “discern[ed] a solution to the seemingly inherent ambiguities in anti-stacking clauses: an insurance company should obtain written rejections of stacking in order to limit its liability based on an anti-stacking provision.” *Montano*, 2004-NMSC-020, ¶¶ 18-19 (internal quotation marks and citation omitted); see also *Whelan*, 2014-NMSC-021, ¶ 1 (confirming *Montano* as requiring insurers to “obtain explicit written rejections of stacking in order to limit their statutory obligations”). {14} The Court in *Montano* illustrated its holding:

[I]n a multiple-vehicle policy insuring three cars, the insurer shall declare the premium charge for each of the three UM coverages and allow the insured to reject, in writing, all or some of the offered coverages. Thus, hypothetically, in the case of a \$25,000 policy, if the premium for one UM coverage is \$65, two coverages is an additional \$60, and three coverages \$57 more, the insured who paid all three (for a total premium of \$182) would be covered up to \$75,000 in UM bodily injury coverage. However, the insured may reject, in writing, the third available coverage and pay \$125 for \$50,000 of UM coverage; or the insured may reject, in writing,

the second and third coverages and pay \$65 for \$25,000 of UM coverage; or the insured may reject all three UM coverages. In any event, the coverage would not depend on which vehicle, if any, was occupied at the time of the injury. Thus, the insured’s expectations will be clear, and an insured will only receive what he or she has paid for.

2004-NMSC-020, ¶ 20. The Court followed with: “In all future cases, an insurance policy that complies with this requirement will avoid the conclusion we now draw from the history of stacking litigation in this State, namely, that anti-stacking clauses are almost inherently ambiguous and are no longer effective at precluding stacking. With written waivers, insureds will know exactly what coverage they are receiving and for what cost[.]” *Id.* ¶ 21. Having “set forth the policy language requirements for future stacking cases,” the Court relied on its “traditional ambiguity analysis” to resolve the case, reasoning that “it would be inequitable to apply [the new requirements] against [the insurer] before it has had an opportunity to alter its policy language[.]” *Id.* ¶ 22. Applying that analysis, the Court held that the plaintiff was “entitled to stack his four coverages” because the policy did not meet the requirements “for a truly unambiguous policy[.]” *Id.* ¶¶ 27-28.

{15} In regard to the phrase “rejections of stacking” in *Montano*, as we state later in this opinion, because an insurer has no duty to offer or explain stacking to a customer, we construe the phrase “rejections of stacking” to mean rejection of UM/UM coverage which, if valid, necessarily precludes court-imposed stacking.¹ *Id.* ¶ 19. Thus, where stacking is not otherwise lawfully precluded, UM/UM coverages that have not been rejected can be stacked. There exists no required express stacking rejection independent of coverage rejection.

IV. SAFEWAY’S DOCUMENTS

RELATING TO UM/UM COVERAGES AND REJECTION OF COVERAGES

{16} Several documents used in Ullman’s insurance purchase appear in the record.

Safeway’s documents include the following forms: Application, Selection/Rejection, Endorsement Page, Declarations Page, and the standard form policy. Also in the record are insurance agency forms used by the insurance agency in the process of contracting for the insurance with Ullman. The parties agree that the critical and operative documents on the issue of legal adequacy are the Safeway documents and that the agency’s documents are not relevant on the issue of legal adequacy. We nevertheless set out the agency’s documents that were signed by Ullman so that the reader has a full understanding of what Ullman had before her.

A. New Mexico Automobile Insurance Application

{17} Ullman signed a New Mexico Automobile Insurance Application form on November 12, 2011. The application asks the insured to “please read” certain matters set out in the application, one of which reads, in part, “I understand that I have only the coverages indicated in Section 5. All of the coverages shown in Section 5 have been explained. I understand the various coverages and that I have only those coverage [sic] which have been completed. I have rejected all coverages not completed in Section 5.” Under Section 5, “Coverages,” the document states, “No coverage unless checked or premium shown[.]” The application shows bodily injury limits of \$25,000/\$50,000 for each insured vehicle, listing the premium amount of \$79.00 for each. And the application has a location for the limits and premiums for UM/UM coverage, as to which each vehicle shows “rejected.” Ullman signed the completed application on November 12, 2011.

B. UM/UM Coverage Selection/Rejection Form

{18} Ullman signed an “Uninsured/Underinsured Motorist Coverage Selection/Rejection Form” on November 12, 2011. This selection/rejection form at the outset informs the insured of the following:

New Mexico [l]aw requires that all policies provide [UM/UM] Coverage of at least \$25,000 per person, \$50,000 per accident, and [UM] Property Damages . . .

¹ This Court’s opinion in *Arias v. Phoenix Indemnity Insurance Co.*, 2014-NMCA-027, __P.3d__, appears to discuss rejection of coverage and rejection of stacking as two different concepts, but the Court ultimately and correctly concluded that absent a valid rejection of UM/UM coverage as to multiple vehicles, the law “demands stacking of coverage[.]” *Id.* ¶ 15. We stated:

Having extended . . . the availability of UM/UM coverage as a matter of law, we also include per-vehicle stacking. We believe that, in the absence of a rejection of coverage altogether, the coverage that must be extended is the full measure accorded [the plaintiff] by the default positions afforded by law. This includes UM/UM coverage generally, specifically to be stacked as to each of [the] insured vehicles.

Id.

limits of at least \$10,000 unless you specifically reject such coverage in writing. [UM] Coverage provides that if you suffer bodily injury or sickness including death, resulting from an accident with a person who does not carry liability insurance, and that driver is at fault, you may make a claim against your own insurance company for general and special damages. [UIM] Coverage protects you from a driver who has insurance, but in an amount less than your [UM] Coverage.

You have a right to purchase [UM/UIM] coverage in an amount up to your policy's liability limit, or you may reject the coverage entirely. The limit may not exceed your liability coverage limits. If you make no UM/UIM choices below, you will receive UM/UIM at the liability limits shown on your policy declarations.

The selection/rejection form gave Ullman the opportunity to purchase UM/UIM coverage at the bodily injury limits or to reject that coverage. The document has blank spaces for selection of bodily injury limits in a certain coverage amount that correlate with the available UM/UIM coverage option for a particular total premium cost per vehicle. That is, immediately below the first two advisory provisions, the form has a place for insertion of the bodily injury limits chosen by the insured, with an additional location for insertion of the corresponding available UM/UIM coverage option chosen for the policy, including the total premium cost per vehicle. The bodily injury limit chosen by Ullman was shown to be \$25,000/\$50,000, and the available UM/UIM coverage option was shown to be \$25,000/\$50,000 per person/per occurrence, with a total premium cost for the UM/UIM available option of \$52.00, or \$0.29 per day, per vehicle.

{19} Different, separate options then appear on the selection/rejection form in regard to UM/UIM coverage for the insured to consider and choose by marking the choice with an "X" on a blank line. Those options relating to each insured vehicle are:

I wish to purchase UM/UIM Coverage in the amount of \$25,000/50,000.

....

I wish to REJECT UM/UIM . . . Coverage[] entirely and understand that my policy will not contain [this] Coverage[].

The first option set out above has no "X" placed in the blank spaces for her two vehicles. Instead, an "X" appears for each of Ullman's vehicles with respect to her "wish to REJECT UM/UIM . . . Coverage[] entirely and understand[ing] that [her] policy will not contain [that] Coverage[]." {20} The selection/rejection form ends just before the signature line with the following:

I understand and agree that selection of any of the options indicated above shall apply on this policy and on all future renewals of such policy, and on all endorsements because of a change in vehicle or coverage, or because of an interruption of coverage. If I decide to select another option at some future time, I must notify the Company in writing.

MUST BE SIGNED. DO NOT SIGN UNTIL YOU HAVE READ AND UNDERSTOOD YOUR SELECTIONS.

Ullman signed this completed form on November 12, 2011.

C. Declaration Page/Renewal Certificate

{21} A Declaration Page/Renewal Certificate form shows that it was processed on November 12, 2011. This declaration page has a location to show the insured's bodily injury limits and premiums for each insured vehicle, as well as spacing for the insured's limits and premiums for UM coverage if that coverage were selected for either vehicle. The form also tells the insured to "[k]eep [the form] in your car at all times as proof of your insurance." The declaration page shows "rejected" under UM bodily injury coverage. This information is preceded by the statement, "Coverage is provided where a Limit of Liability and a Premium are indicated." The form states that "THE ENTIRE POLICY CONTRACT INCLUDES THIS DOCUMENT, THE APPLICATION, THE POLICY AND ANY ENDORSEMENTS."

D. Endorsement Page of Personal Automobile Insurance Policy

{22} The effective date of the Endorsement Page of Personal Automobile Insurance Policy is shown as January 4, 2012. This endorsement page is virtually identical to the declarations page. It states that it is "[a]ttached to and forming part of [the Ullman] policy[.]" Different from the declarations page, the bodily injury premiums are not shown, and nothing is shown in the UM bodily injury coverage

for either vehicle. The form also states that "THE ENTIRE POLICY CONTRACT INCLUDES THIS DOCUMENT, THE APPLICATION, THE POLICY AND ANY ENDORSEMENTS."

E. New Mexico Automobile Policy

{23} The New Mexico Automobile Policy indicates that it is an April 1, 2009 form. The policy states that its provisions "WITH THE APPLICATION, DECLARATIONS PAGE AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THIS POLICY." Under "INSURING AGREEMENT," the policy states:

For the **policyholder's** payment of premiums and fees in amounts we require and subject to all of the terms and conditions of this policy, **we** agree to provide the coverages the **policyholder** has selected. These selections are shown in the enclosed Declarations, which are a part of this policy contract. The selected coverages in this policy apply only to occurrences while this policy is in force. Renewal premiums must be paid in advance.

The policy has a section titled "UNINSURED MOTORISTS" that sets out the parties' "Coverage Agreement." Under "Limits and Conditions of Payment Amounts Payable for Uninsured Motorists Losses," the policy states, "Our obligation to pay Uninsured Motorists—**Bodily Injury** losses is limited to the amounts per person and per occurrence in the Declarations."

V. THE AGENCY'S DOCUMENTS

A. Automobile Coverage Form

{24} An "Automobile Coverage Form" provides for bodily injury liability insurance and UM/UIM insurance limits selected or not selected by the insured. This form shows the liability limits choices of "BI—\$25k/50k, \$50k/100k, \$100k/300k, Other" and separately lists the same choices for UM limits. Liability limits designated "BI—\$25k/50k" is circled, and nothing is circled for UM limits. Ullman signed this document on November 12, 2011.

B. Albuquerque Insurance World, Inc. "Dear Customer" Reminder

{25} An Albuquerque Insurance World, Inc. "Dear Customer" form instructs the insured to "carefully" review the form, "ask questions on anything" the insured does not "completely understand," and then sign. The document states the following as two of sixteen items the insured is to read:

"3. IS THE COVERAGE WHAT YOU ORDERED AND IN THE AMOUNTS YOU ORDERED?" and "4. IF YOU REJECTED [UM] COVERAGE, ARE YOU CLEAR ON HOW THE COVERAGE WOULD HAVE BENEFITED YOU? WE STRONGLY RECOMMEND THIS COVERAGE." Above the signature, the form states, "I HAVE READ EACH ITEM ABOVE AND UNDERSTAND HOW EACH ONE AFFECTS ME. I AM ALSO RECEIVING A COPY OF THIS FORM FOR MY RECORDS." Ullman signed this document on November 12, 2011.

C. "Dear Insured" Reminder

{26} A "Dear Insured" form tells the insured, among other things, that "It is important that you obtain your policy in the mail and review it to be sure all drivers, vehicles, and coverages that you desire to be included on your policy are included. If you do not receive your policy please call us." Ullman signed this document on November 12, 2011.

VI. ULLMAN'S VIEWS

A. Contentions as to Genuine Issues of Material Fact

{27} Ullman contends in her answer brief that, in denying Safeway's motion for summary judgment, the district court did not decide whether the forms were legal but instead denied the motion for summary judgment because of genuine issues of material fact. She further states that a factual basis existed for a jury to find that Safeway did not properly inform insureds about premium costs corresponding to available levels of coverage, did not assess whether Safeway advised Ullman and similarly situated insureds of the maximum UM/UIM coverage available, and did not properly incorporate rejection of UM/UIM coverage into her policy. And she explains that "a jury has not rendered any factual findings as to whether Safeway violated its legal obligations to its insureds." Ullman further points out that discovery should be allowed to proceed in the district court as to what documents Ullman received or did not receive. And she raises the question whether rejection was called to the attention of the insured, citing *Arias v. Phoenix Indemnity Insurance Co.*, 2009-NMCA-100, ¶ 13, 147 N.M. 14, 216 P.3d 264, which cites to *Romero*, 1990-NMSC-111, ¶ 8, as having emphasized an insurer's need to clearly and unambiguously call the rejection to the insured's attention.

B. Contentions as to UM/UIM Coverages

{28} In her answer brief, Ullman argues: (1) that Safeway's policy had no language

advising her of the "full range of options in purchasing UM/UIM coverage and the corresponding costs associated with each option"; (2) that Safeway's "rejection form and endorsements did not advise an insured of the extent or maximum amount of UM/UIM coverage being offered, and did not advise of the costs corresponding to the available coverages"; (3) that Safeway's "purported rejection was not attached, endorsed, stamped or otherwise made a part of the policy, as required by law, where the endorsement does not advise the insured that UM/UIM coverage has been rejected"; (4) that Ullman's purported rejection was not incorporated into her policy "in a manner that called attention to the fact that she was not receiving the benefits of UM/UIM coverage"; (5) that no evidence was provided to Ullman of a "rejection by endorsement, attachment, or some other means that calls the insured's attention to the fact that UM/UIM coverage has been waived"; and (6) that Safeway's endorsement page and policy booklet, which consisted of the "limited information . . . provided to . . . Ullman, . . . say[] nothing as to whether . . . Ullman was offered or rejected any UM/UIM coverage."

C. Contentions as to Stacking

{29} Ullman contends in her answer brief that Safeway's "policy language provided [her] with no meaningful explanation that in purchasing liability coverage she was entitled to purchase stacked (or aggregated) coverage[.]" and "[t]o the contrary, and contrary to New Mexico law, [Safeway's] policy specifically advises insureds that stacking of UM/UIM coverage is never available regardless of the number of vehicles insured." She argues that, under *Montano*, insurers cannot exclude stacked UM/UIM coverage from a policy unless the insurer obtains a written waiver/rejection of stacking.

{30} Ullman states that the New Mexico-specific application Safeway provides to its insureds states that if the insured selected UM/UIM coverage "there will be no stacking or combining of coverage afforded to more than one auto under [the] policy[.]" specifically quoting a form that does not appear to be one that was used in Ullman's purchase. Ullman further states that the policy booklet misrepresents stacked coverage by asserting that stacked UM/UIM coverage is never available on a multi-vehicle policy.

{31} Ullman argues that Safeway "exacerbates" the stacking-related deficiency by its general failure "to provide any information

regarding the maximum amount of UM/UIM coverage available on the two vehicles under her policy." She spends a significant part of her answer brief discussing stacking, as though it is her primary contention.

VII. SAFEWAY'S VIEWS

{32} In showing that its documentation complies with New Mexico law, Safeway takes pains to set out what each document states. Having set out earlier in this opinion what the relevant documents show and state, we see no reason to further discuss Safeway's descriptions. Stacking, however, needs to be discussed.

{33} Safeway asserts that *Montano* "plainly did not declare anti-stacking language illegal, let alone even suggest that insureds have a right to stack coverages in every circumstance." See *Rodriguez v. Windsor Ins. Co.*, 1994-NMSC-075, ¶ 21, 118 N.M. 127, 879 P.2d 759 ("We do not declare that it is impossible for an insurance company to issue [UM] coverage that is immune to stacking."), modified on other grounds by *Montano*, 2004-NMSC-020, ¶ 1. Safeway states that there exists "no requirement to explain stacking law, much less advise the insured of a per se entitlement to stack separate coverages in every circumstance." Safeway adds the following:

Jordan adopted *Montano*'s "menu" in its requirements for offering and obtaining waivers of UM coverage. [*Jordan*.] 2010-NMSC-051, ¶ 24. But it required no more than that the insurer declare each level of statutorily available UM coverage and corresponding premium. *Id.* ¶ 2 (requiring "a rejection of UM/UIM coverage equal to the liability limits" and that "insurers must provide the insured with the premium charges corresponding to each available option for UM/UIM coverage so that the insured can make a knowing and intelligent decision to receive or reject the full amount of coverage to which the insured is statutorily entitled"); *id.* ¶ 20 (stating "workable requirements for a valid and meaningful rejection of UM/UIM coverage in amounts authorized by statute"); *id.* ¶ 21 ("[A]n insurer must inform the insured that he or she is entitled to purchase UM/UIM coverage in an amount equal to the policy's liability limits and must also provide the

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Message from the YLD Chair



This has been an incredible year for the Young Lawyers Division. With the dedication and hard work of our program chairs and young lawyer volunteers, we increased our member service offerings this year in an effort to increase member participation. We hosted a regional American Bar Association Young Lawyers conference in Albuquerque, offered continuing legal education programming at tremendous value, and introduced Lunch with Judges, a program to bring young lawyers together with members of the New Mexico judiciary in an informal setting. The YLD also continued to expand long-running community service programs, including Constitution Day, the Law Day Call-in Program, and the Veterans Legal Clinics.

With support from the State Bar Paralegal's Division, we produced hundreds of wills, advanced healthcare directives, and power of attorney documents for emergency first responders in Albuquerque, Rio Rancho, Roswell, Farmington and Taos through our Wills for Heroes Program.

Now in its tenth year of operation, Wills for Heroes was recognized at this year's State Bar Annual Meeting as the Outstanding Legal Program of the Year. Fittingly, longtime Wills for Heroes volunteer and program chair, Spencer Edelman, was also recognized as Outstanding Young Lawyer of the Year. Spencer's individual recognition is a reminder that the YLD's public and member service programs are made possible only because of the tremendous efforts of our member volunteers. If you are new to the YLD this year, or if you have not yet had a chance to participate in a YLD program, I urge you to join us!

As my year as YLD Chair draws to a close, I'm excited for the year ahead. I know that the YLD Board, led by incoming Chair Sean FitzPatrick, will continue to drive the Division forward with fresh ideas, exciting member service programming, and, as always, passion to serve our community. I am honored to have served New Mexico's young lawyers and the State Bar and I hope to see you at the next YLD event!

Sincerely,

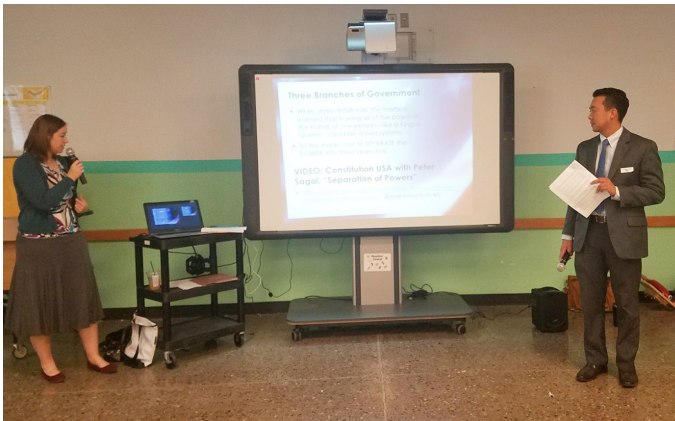
Tomas Garcia

Program Updates

Constitution Day



Judge Advocate Office from Holloman Air Force Base presenting to Holloman Middle School



Attorneys Shasta Inman and Billy Jimenez presenting at Chaparral Elementary in Albuquerque



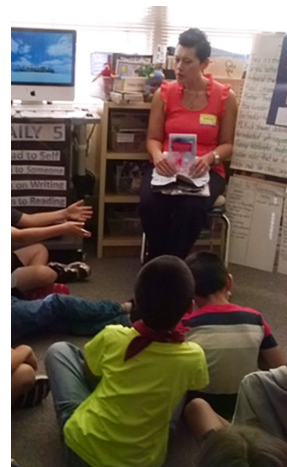
Attorneys Noah Gelb, Sophie Asher, Darin McDougall, Emily Powers, and Painted Sky fifth grade teacher Matthew Bazan presenting at Painted Sky Elementary in Albuquerque

During the week of September 11-15, 131 attorneys from across the state participated in Constitution Day presentations for 84 fifth grade classrooms in front of approximately 5,200 students in the YLD's annual Constitution Day celebration.

Of particular note, the Judge Advocate Office at Holloman Air Force Base created an interactive exercise where each student was asked to sign one of two bills, acting as the legislative branch of the U.S. government. First Lieutenant Fabiani Duarte (49th WG JA Legal Assistance Chief) said, "I really enjoyed seeing the students consider which bill they would sign and then formulate arguments with their friends at the cafeteria tables for why their initiative had greater merits than their opponents'. I can confidently say we saw some budding lawyers and paralegals at Holloman Middle School."

Las Cruces attorney, John D. Watson, created a puzzle with each piece marked either as "E" – Executive Branch; "L" – Legislative Branch; or "J" – Judicial Branch, stating "the lesson I wanted to get across was that it would take all of the students, working together, to complete the puzzle and make it work. Ms. Deschamps (the teacher) relayed that the children have continued to take the puzzle apart and put it back together in the several weeks since my presentation. I had a wonderful time with the students and at least a couple of the students appear to have had a very 'strong' take away lesson about their upcoming future."

***This event was a great success!
The YLD wishes to thank all who participated.***



Attorney Kara Shair-Rosenfeld presenting at Los Ranchos Elementary in Los Ranchos De Albuquerque

#Fit2Practice

The YLD's new Fit to Practice program is an extension of the American Bar Association's Fit to Practice health and wellness initiative. The ABA's program, popularized by its online presence of **#Fit2Practice**, is designed to promote long term health in lawyers by focusing on fitness, nutrition, sleep and mental health.

The New Mexico Fit to Practice program, headed by Sean FitzPatrick, held two events this fall. In September, the YLD held a CLE program focused on mental health, substance abuse and physical fitness with presenters Latisha K. Frederick, Jill Anne Yeagley and Ben Sherman. That same weekend the YLD sponsored over 20 law students and attorneys to participate in the Albuquerque Chips and Salsa 5k Run/Walk to help promote physical fitness. With Fit to Practice's great turnout at the Chips and Salsa 5k, the YLD is planning to continue to bring fitness and wellness training to New Mexico attorneys.



Tish Frederick, Jill Anne Yeagley and Ben Sherman present to CLE attendees at the UNM School of Law

Law Camp a Success

The YLD successfully continued its collaboration with the University of New Mexico, New Mexico Hispanic Bar Association and Engaging Latino Communities for Education to co-sponsor the 2017 Law Camp for rising New Mexico 6th and 7th Graders. The five-day residential camp held in June featured a large proportion of female attendees (18 girls and 6 boys) during the camp's 15th year of organization. Participants visited law firms, the U.S. Attorney's Office and stayed on campus at UNM to gain valuable exposure to college life. The camp culminated with a mock trial performed by the participants in front of Bernalillo Metro Court Chief Judge Edward L. Benavidez. Generous donations from law firms and the community continue to allow organizers to make Law Camp free to its participants.

Law Day Call-in Program

The YLD hosts this event once per year on the Saturday closest to Law Day, May 1st. This year, we held the event on April 29. Attorneys volunteered their time to take calls from residents throughout the state, seeking legal advice in various areas of the law. We provided assistance to Spanish speakers as well. This year, we had two call centers: one in Albuquerque and one in Roswell. Through the help of our volunteers the YLD assisted 189 callers in the Albuquerque center and 49 callers in the Roswell center. We appreciate all of our attorneys and staff who volunteered their time to this event.



Lunch with Judges

In addition to programs in Roswell and Santa Fe, on July 11, over 30 young lawyers shared lunch with Justice Charles W. Daniels of the New Mexico Supreme Court and Second Judicial District Court judges Alan M. Malott, Briana Zamora and Jane C. Levy at the Modrall Sperling Law Firm in Albuquerque. The program provided young lawyers with an opportunity to talk with judges in an informal and small group setting. The lawyers and judges talked about practicing law, practicing before the judges and general advice for young lawyers' professional development. This great program will continue to give young lawyers and judges an opportunity to share knowledge and promote professionalism.



Lawyers and judges enjoy lunch and discussion at the Albuquerque Lunch with Judges Program in July.

2017 Summer Fellowships

The YLD is privileged to assist UNM School of Law students with summer fellowships, which allow them to afford to work in public interest legal clerkships. For 2017, fellowships were awarded to Lenaya Montoya and Deshawnda Chaparro.

The YLD wishes to thank the State Bar for its investment in our future attorneys and our public interest sector.

This summer I had the opportunity to intern at the Department of Health Office of General Counsel. I got to work alongside some amazing attorneys who guided my educational experience during the internship. While working at DOH, I was able to apply what I have learned in law school to assist the attorneys and brief multiple divisions of the DOH on various legal issues. I attended state commitment hearings in Las Vegas, New Mexico and learned about behavioral health treatment options in NM. I was also very fortunate to be able attend a rulemaking session alongside my supervising attorney where I got to see the inner workings of rulemaking process.

My experience at the DOH was incredible! I was very fortunate to be able to work in such a friendly and welcoming environment alongside wonderful attorneys and administrative staff. This experience has helped me grow not only as a law student, but as a future attorney. This experience has encouraged me to continue my journey to become an advocate for better mental health and substance use treatment options here in New Mexico.

I would like to thank the Young Lawyers Division and the State Bar of New Mexico for awarding me this fellowship. It is thanks to their support and encouragement that I was able to work at the Department of Health Office of General Counsel this summer.

Thank you!

-Lenaya Montoya
Juris Doctor Candidate, UNM School of Law Class of 2018

Veteran's Legal Clinic

VA Clinic

The YLD, in collaboration with the Veteran's Administration and the New Mexico Veteran's Memorial, continued its Veteran's Civil Justice Initiative this year. Through these clinics, hundreds of veterans with a variety of legal issues were able to get consultations with experienced attorneys and if resolution was not possible, referrals to civil legal service providers or pro bono representation. Additionally, through community partners at each clinic such as United South

Broadway, the Volunteer Attorney Program, Goodwill, Roadrunner Food Bank, the New Mexico Department of Veteran's Affairs and others, veterans in need can receive help for housing, employment and other social issues. This program could not exist without the help of volunteer attorneys and paralegals. Thanks to all who helped in 2017 and the YLD hopes even more can help us meet the demand next year!

UNM School of Law Mentorship Program

Every year the YLD pairs law students with young lawyers as part of the YLD/UNM School of Law mentorship program. The popularity of this program continued this year with over 100 participants in the program. In September, lawyers and law students descended upon UNM School of Law to network and enjoy some BBQ. This kickoff event is the springboard for the mentorship program and participants reconvened for the annual Holiday Happy Hour at Backstreet Grill in Old Town.

SCHOOL OF LAW **Mentorship Program**

These hosted events allow law students to get the inside scoop and practical tips on what it will be like to go through law school and enter the job market in a few short years. Future events will include the Mock Interview program and coordination with the YLD's new Fit2Practice programming.



YLD Mentorship Holiday Happy Hour

Wills for Heroes



2017 was a banner year for the Wills for Heroes program. Wills for Heroes provides wills for first responders, police officers, and their spouses throughout the state. The YLD held 5 events in 2017 in Albuquerque, Rio Rancho, Farmington, Roswell, and Taos. This year, 44 dedicated volunteers donated 271 hours of time to complete 146 wills that the YLD estimates would have cost \$67,750.00 to draft outside of the program. In July, Wills for Heroes was honored as the Outstanding Legal Program of the Year by the State Bar of New Mexico. The YLD is grateful to every volunteer attorney and paralegal who generously gave their time, energy, and talents to Wills for Heroes this year and looks forward to continuing this great program in the years to come.



Volunteers for a Wills for Heroes program held in Farmington in July



YLD Board members pose with the program's Outstanding Legal Service Program Award

New Mexico YLD hosts ABA YLD Mountain West States Regional Summit

The New Mexico YLD hosted the American Bar Association YLD Mountain West States Regional Summit on March 30-April 1. Young lawyers from Colorado, Wyoming, Texas and Utah were welcome by the New Mexico YLD at Hotel Albuquerque for educational programming and networking events.

U.S. Bankruptcy judges for the District of New Mexico Robert Jacobitz and David Thuma kicked off programming with a mock trial demonstrating how lawyers may admit an exhibit and overcome hearsay objections during trial. Albuquerque attorney Steve Scholl continued the trial skills segment of the program by focusing on effective deposition skills. He showed young lawyers how to effectively use exhibits during depositions and how to successfully extract information from a deponent in preparation for trial.

Roberta Cooper Ramo, a remarkable trailblazer in the New Mexico and national legal community, began the second day of the conference with an introductory discussion about diversity and inclusion in the legal profession and in bar association leadership. Serving from 1995-1996, Ramo was the first woman to be elected president of the ABA and is the current, and first, woman president of the American Law Institute. She reminded attendees that every person is enriched by diversity and inclusion and emphasized that our nation is great because we understand that inclusion makes us better.

ABA leaders Mary Torres, Dan Acosta and Tommy Preston discussed opportunities within the ABA and the ABA's diversity and inclusion initiatives, including fellowships for young lawyers that provide ABA conference funding.

Aja Brooks, State Bar Board of Bar Commissioners; Keya Koul, University of San Francisco School of Law; and Heather Harrigan, UNM School of Law; discussed the importance of the State Bar of New Mexico's programs and efforts to further inclusion and diversity. Current successful programs include mentorship and support programming sponsored by affinity bar associations, the State Bar's Committee on Diversity in the Legal Profession and the Kellogg Grant awarded to the UNM School of Law to create an educational pipeline for diverse candidates seeking public service careers in the legal profession.

Stormy Ralstin, New Mexico State Bar Foundation director of legal services; Ruth Pregonzer, ECL program director; and Chief Judge Linda Vanzi of the New Mexico Court of Appeals discussed the Foundation's legal incubator program, Entrepreneurs in Community Lawyering. The program grew out of an increase of pro se litigants in our court system and the need for legal services at a reasonable rate. ECL helps new attorneys navigate the demands of running a business and learn to provide quality, affordable legal services to moderate-income clients in a way that is still profitable.



ABA leaders Dan Acosta, Mary T. Torres, Tommy Preston, and Roberto Ramo pose with 2017 YLD Chair Tomas Garcia



Sean FitzPatrick, Stormy Ralstin, Ruth Pregonzer, and Chief Judge Linda M. Vanzi prepare to share their insight on solo practice



Attendees from across the region got to know one another during program breaks

Chris Wharton, Utah YLD past president; Sam Houston, Texas Young Lawyers Association president; and Albuquerque solo attorneys Ben Sherman and Sean FitzPatrick shared ways they have succeeded as solo practitioners. Panelists agreed that investing in helpful technology software and case-management systems, avoiding unnecessary marketing traps that will increase your overhead, being careful not to take on too many cases that will not go forward, leveraging your network and having confidence and faith that it will work out are important to get started.

The final panel of the conference focused on Uniform Bar Exam reciprocity among Mountain West States. UNM School of Law Deans Sergio Pareja and Alfred Mathewson, UNM MALSA President Mish Miera-Rosete, NM Board of Bar Examiners Executive Director Sophie Martin, and NM BBE Chair Howard Thomas discussed New Mexico's participation in the UBE, the nationwide decline in bar passage rates and New Mexico's efforts to support students and increase success on the bar exam.

Attendees also participated in networking events at Casa Esencia, Q bar and local restaurants and attended a flamenco performance at the new Tablao Flamenco. Thank you to all who attended and represented our organization and wonderful state during the conference.



YLD Board member Billy Jimenez (left) welcomes law student attendees at the Welcome Reception



Spencer Edelman, Allison Block-Chavez and Vanessa Lemrond prepare for a fun conference ahead during the Welcome Reception

Update from the ABA Young Lawyers Division

The American Bar Association Young Lawyers Division saw a significant increase in the services provided by its Disaster Legal Services Program following hurricanes Irma and Harvey. The ABA YLD maintains an active role with the Federal Emergency Management Association to assist with the DLS Program in response to national disasters. Hundreds of volunteers continue to field thousands of calls from people in the Gulf Coast region, Puerto Rico and the U.S. Virgin Islands. If you are interested in volunteering or would like additional information, please visit https://www.americanbar.org/groups/young_lawyers/disaster_legal_services.html.

The ABA YLD has also announced its Home Safe Home initiative, which includes educational and outreach programs focused on domestic violence and abuse, and its Embracing Diversity Challenge, which invites YLD affiliates from around the county to submit program ideas aimed at increasing diversity in the legal profession.

corresponding premium charge for that maximum amount of UM/UM coverage”; *id.* ¶ 22 (“[I]nsurers have statutory obligations to offer UM/UM coverage up to the liability limits of the policy”); *id.* ¶¶ 25, 30; see *Progressive*, 2010-NMSC-050, ¶¶ 8, 14-15.

{34} Safeway finds support in holdings in the United States District Court for the District of New Mexico and the Tenth Circuit Court of Appeals rejecting the argument such as that made by Ullman “that a rejection of UM coverage is invalid under New Mexico law unless the rejection form contains an explanation of stacking and a calculation of total coverage amounts if statutorily available UM coverage levels were stacked.” See *Jaramillo v. Gov’t Emps. Ins. Co.*, No. 12-2108, 573 F. App’x 733 (10th Cir. 2014) (non-precedential).²

{35} Safeway points out that the *Jaramillo* complaint was filed as a putative class action, with allegations substantially similar to those made here. See *id.* at 737. The insurers moved for summary judgment, arguing that the insureds’ written rejection of UM/UM coverage complied with New Mexico law, and because all of the claims “stemmed from an allegedly improper denial of UM/UM benefits, the complaint was not viable.” *Id.* (emphasis omitted). The district court granted the insurers’ motion. *Id.* The court determined that the rejection form “clearly offered the opportunity to select UM/UM coverage in an amount equal to or lower than those selected bodily injury liability limits while also providing premium costs corresponding to each level of coverage” and that the insurers had incorporated the rejection into the policy. *Id.* (internal quotation marks and citation omitted). In denying the insureds’ motion to reconsider, the district court reaffirmed its view that the insurers’ form complied with New Mexico law as articulated in *Jordan*. *Jaramillo*, 573 F. App’x at 737-38.

{36} The plaintiffs argued on appeal to the Tenth Circuit Court of Appeals that the insurers’ “offer of UM/UM coverage was invalid for failure to make clear the amount of stacked UM/UM coverage available . . . or the corresponding cost of such coverage.” *Id.* at 739 (omission in original) (internal quotation marks omitted). The Tenth Circuit saw this argument

as dovetailing into the question “whether the district court erred in holding that under New Mexico law, an insurer is not required to inform the insured about premium costs corresponding to each available level of stacked UM/UM coverage.” *Id.* (alteration, internal quotations marks, and citation omitted). Addressing whether the insurance form was “invalid as a matter of law because it lacks a discussion or explanation of stacked UM/UM coverage[,]” the Tenth Circuit affirmed the district court’s conclusion that the form and coverage rejection satisfied New Mexico law. *Id.*

{37} Further, the Tenth Circuit rejected the insureds’ argument that the insurers’ “Option Form” was invalid “because it does not flesh out the nuances of stacked UM/UM coverage” as a “strained reading” of *Jordan* and *Montano*, neither of which required that UM/UM rejection forms must explain stacking. *Jaramillo*, 573 F. App’x at 741-42, n.7. *Jaramillo* explained that *Montano*’s “core holding” was that “‘an insurance company should obtain written rejections of stacking in order to limit its liability based on an anti-stacking provision’ in a policy.” *Jaramillo*, 573 F. App’x at 742 (quoting *Montano*, 2004-NMSC-020, ¶ 19). And *Jaramillo* stated that *Jordan* “did not comment on the question of stacking, and it did not explicitly forge a nexus between the new standard that it announced and the concept of stacking.” *Jaramillo*, 573 F. App’x at 743. Thus, rejecting the insureds’ treatment of “maximum amount of coverage” and “maximum stacked amount of coverage” as “fungible concepts,” *Jaramillo* explained that “*Jordan* makes clear that the ‘maximum amount’ contemplated is simply an amount equal to the policy’s liability limits,” and the court declined “to graft the crucial word ‘stacked’ onto its holding.” *Jaramillo*, 573 F. App’x at 744 n.9 (citing *Jordan*, 2010-NMSC-051, ¶ 21).

{38} *Jaramillo* further explained that *Jordan* required insurers to provide only the “‘premium charge for the maximum amount of UM/UM coverage’ (the maximum amount being ‘an amount equal to the policy’s liability limits’) as well as the ‘premium cost for the minimum amount of UM/UM coverage allowed by Section 66-5-301(A); and ‘the relative costs for any other levels of UM/UM coverage offered to the insured’—viz., the costs for a range of cover-

age between the minimum and maximum amounts.” *Jaramillo*, 573 F. App’x at 744 (alteration and footnote omitted) (quoting *Jordan*, 2010-NMSC-051, ¶ 21). *Jaramillo* concluded that “*Montano* does not stand for the proposition that the Option Form could only have been valid under New Mexico law if it had specifically mentioned the concept and effect of stacking coverage[,]” and further that “*Jordan* does not mandate—either explicitly or implicitly—that a rejection of UM/UM coverage equal to a policy’s liability limits is invalid without a ‘discussion’ or ‘explanation’ of stacking principles.” *Jaramillo*, 573 F. App’x at 746-47. *Jaramillo* also concluded that the insureds’ “rejection of UM/UM insurance could not have been invalid under New Mexico law simply because the Option Form did not tally up the stacked coverage amounts for the [insureds’] four vehicles—in other words, because it did not multiply each available level of coverage by four.” *Id.* at 748.

VIII. SETTING UM/UM REQUIREMENTS AGAINST THE DOCUMENTS

{39} This discussion sets the New Mexico legal requirements relating to UM/UM coverage and rejection against Safeway’s documents.

A. Requirements: An Insurer Must Inform Its Insured That the Insured Is Entitled to Purchase the Maximum Amount of UM/UM Coverage Statutorily Available; An Insurer Must Meaningfully Offer Its Insured the Same

{40} In *Progressive*, our Supreme Court required that insurers: (1) “‘meaningfully offer’ the maximum amount of UM/UM coverage permitted by the statute, e.g., the liability limits of the policy”; (2) offer UM/UM coverage that includes “the maximum amount statutorily available . . . [in an amount equal] to the liability limits of the policy”; and (3) after such an offer is made, the insured’s choice “to purchase any lower amount functions as a rejection of that maximum amount of coverage statutorily possible.” 2010-NMSC-050, ¶¶ 8, 14-15.

{41} Further, *Jordan*’s prescribed “workable requirements” set out earlier in this opinion are to be repeated, with emphasis on particular language. See 2010-NMSC-051, ¶ 20.

When issuing an insurance policy, an insurer must inform the

² “Unpublished decisions are not precedential, but may be cited for their persuasive value.” 10th Cir. R. 32.1(A); Fed. R. App. P. 32.1.

insured that he or she is entitled to purchase UM/UM coverage in an amount equal to the policy's liability limits and must also provide the corresponding premium charge for *that maximum amount* of UM/UM coverage. The premium cost for the *minimum amount* of UM/UM coverage allowed by Section 66-5-301(A) must also be provided, as well as the relative costs for *any other levels* of UM/UM coverage offered to the insured. The insured must be informed that he or she has a right to reject UM/UM coverage altogether. Providing the insured with a menu of coverage options and corresponding premium costs will enable the insured to make an informed decision about *the level* of UM/UM coverage he or she wants to purchase and can afford and will minimize uncertainty and litigation with regard to the coverage that the insured has obtained.

Id. ¶ 21 (emphasis added).

{42} Ullman interprets “maximum amount” in stacking terms, that is, Ullman argues that Safeway “exacerbates” the stacking-related deficiency by its general failure to provide meaningful information “regarding the maximum amount of UM/UM coverage available on the two vehicles under her policy.” Ullman complains that she is unable to “understand that if she chooses UM/UM coverage in the amount of \$25,000 per person and \$50,000 per accident on each of her two vehicles[,]” under stacking, she would have “\$50,000 per person and \$100,000 per accident in available UM/UM coverage.” We reject Ullman’s interpretation as not in accord with *Jordan*’s prescription.

{43} We agree with the analysis in *Jaramillo* that “*Jordan* makes clear that the maximum amount contemplated is simply an amount equal to the policy’s liability limits.” *Jaramillo*, 573 F. App’x at 744 n.9 (internal quotation marks omitted) (citing *Jordan*, 2010-NMSC-051, ¶ 21). Further, we agree with *Jaramillo* that *Jordan* requires insurers to provide only the “‘premium charge of the maximum amount of UM/UM coverage’ (the maximum amount being ‘an amount equal to the policy’s liability limits’)”; “the ‘premium cost for the minimum amount of UM/UM coverage allowed by Section 66-5-301(A)’”; and “‘the relative costs for any other levels of UM/

UM coverage offered to the insured’—viz., the costs for a range of coverage between the minimum and maximum amounts.” *Jaramillo*, 573 F. App’x at 744 (footnote omitted) (quoting *Jordan*, 2010-NMSC-051, ¶ 21). As highlighted by Safeway, Ullman misreads *Jaramillo*’s (and thus *Jordan*’s) wording of “*that maximum amount*” by stating “*the maximum amount*.” “[T]hat maximum amount” plainly refers to “UM/UM coverage in an amount equal to the policy’s liability limits[.]” *Jordan*, 2010-NMSC-051, ¶ 21; see *Jaramillo*, 573 F. App’x at 744 & n.9. As in *Jaramillo*, we will not graft stacking onto our view of *Jordan*. {44} After setting out the New Mexico requirement that insurers offer UM/UM coverage, the selection/rejection form explains to the insured: “You have a right to purchase [UM/UM] coverage in an amount up to your policy’s liability limit, or you may reject the coverage entirely. The limit may not exceed your liability coverage limits. If you make no UM/UM choices below, you will receive UM/UM at the liability limits shown on your policy declarations.” The declaration page shows the bodily injury limits Ullman chose and the premiums for those limits as to each insured vehicle. It further shows that Ullman rejected UM coverage. We hold that Safeway complied with the UM/UM legal requirement as to maximum insurance. Ullman was sufficiently made aware of the maximum amount statutorily available.

B. Requirements: An Insurer Must Inform Its Insured About the Premium Costs Corresponding to All Available Levels of Coverage; An Insurer Must Provide Its Insured With a Menu of Options and Corresponding Premium Costs That Will Enable the Insured to Make an Informed Decision About the Level of UM/UM Coverage the Insured Wants to Purchase and Can Afford

{45} The Safeway documents show that Ullman chose a \$25,000/50,000 level of bodily injury coverage, thereby limiting her to a \$25,000/50,000 level of UM/UM coverage. Safeway was obligated to provide the premium cost for these levels of coverage. See *Jordan*, 2010-NMSC-051, ¶¶ 21-22. The premium cost for the bodily injury level of coverage appeared in the application and the declaration page. The premium cost for the UM/UM coverage appeared in the selection/rejection form. We hold that Safeway was in compliance with the *Jordan* requirements.

{46} Although not briefed, in oral argument before this Court, Ullman argued that the selection/rejection form was ambiguous with respect to the information in regard to the UM/UM premium cost. Ullman asserted that only by adding language to the statement of the premium cost could the ambiguity be cleared up for legal adequacy. Thus, Ullman argued that the statement would have to read: “Based on your Bodily Injury Limit of: \$25,000/50,000 the available UM/UM Coverage option(s) for this policy are: \$25,000/50,000 (per person/per occurrence [sic]) with a total premium cost of \$52.00, or \$0.29 per day,” *on each vehicle for which you have selected UM/UM coverage*.

{47} Further, Ullman argued that, because there existed language in the standard form policy that can be read to be an anti-stacking clause, an inconsistency or ambiguity existed as to whether Ullman could receive the full benefit of the UM/UM offered in the selection/rejection form. We reject the contentions as a basis on which to reform Safeway’s documents to require UM/UM coverage and benefits.

C. Requirements: An Insurer Must Inform Its Insured of the Insured’s Right to Reject the UM/UM Coverage; An Insurer Must Obtain a Written Rejection; The Act of Rejection Must Assure That the Insured Is Sufficiently Informed of the Importance of the Decision, and There Is Clear Evidence of a Decision to Reject

{48} The selection/rejection form states, “You have a right to purchase [UM/UM] coverage in an amount up to your policy’s liability limit, or you may reject the coverage entirely. The limit may not exceed your liability coverage limits. If you make no UM/UM choices below, you will receive UM/UM at the liability limits shown on your policy declarations.” The selection/rejection form also contains language that permits the insured to reject UM/UM coverage. See *Jordan*, 2010-NMSC-051, ¶ 21. That part states, “I wish to REJECT UM/UM . . . Coverages entirely and understand that my policy will not contain these Coverages” and contains places in which an “X” is to be placed if the insured rejects coverages. Ullman’s completed form contains an “X” for rejection of UM/UM coverage for each vehicle. See *Jordan*, 2010-NMSC-051, ¶ 22; *Marckstadt*, 2010-NMSC-001, ¶¶ 4, 21-26.

{49} Furthermore, the application and the declaration page show that Ullman

rejected the coverage. And the selection/rejection form contains other options that show UM/UIM coverage that can be selected by the insured. The form states, “An ‘X’ indicates your current UM/UIM . . . selection(s).” The selection/rejection form contains a place for the insured’s signature. Ullman signed the form, constituting a written act of rejecting the UM/UIM coverage. *See Jordan*, 2010-NMSC-051, ¶ 22; *Marckstadt*, 2010-NMSC-001, ¶ 21.

{50} Further, the selection/rejection form contains the bodily injury limits that the insured has chosen and matches that with the available UM/UIM coverage along with the “total premium cost . . . per vehicle.” Ullman’s form shows that, based on her chosen limits of “\$25,000/50,000 the available UM/UIM coverage option for this policy” are “\$25,000/50,000 (per person/per occurrence) with a total premium cost of \$52.00, or \$0.29 per day, per vehicle.”

{51} In addition, the selection/rejection form contains at the outset the following informational material for the insured:

New Mexico Law requires that all policies provide [UM/UIM] Coverage of at least \$25,000 per person, \$50,000 per accident . . . unless you specifically reject such coverage in writing. [UM] Coverage provides that if you suffer bodily injury or sickness including death, resulting from an accident with a person who does not carry liability insurance, and that driver is at fault, you may make a claim against your own insurance company for general and special damages. [UIM] Coverage protects you from a driver who has insurance, but in an amount less than your [UM] Coverage.

{52} As well, the application specifically evidences rejection of UM/UIM coverage. Under Section 5 of this document, it states, “No coverage unless checked or premium shown.” The document has space for bodily injury limits and premium, as well as limits and premiums for UM coverage, for each insured vehicle. Ullman signed the application. The form in Section 5 contains the bodily injury liability limits of \$25,000/50,000, and the premium amount for that coverage for each insured vehicle, and shows “rejected” under the UM coverage for each. Above Ullman’s signature, the application asks the insured to read certain matters set out in the application, two of which read in part:

I understand that I have only coverages indicated in Section 5. All of the coverages shown in Section 5 have been explained. I understand the various coverages and that I have only those coverage [sic] which have been completed. I have rejected all coverages not completed in Section 5. . . .

. . . . I hereby acknowledge that I have received a completed copy of this application, the [UM/UIM] Coverage Selection/Rejection form, the policy, the declarations page and any endorsements, and I understand the coverage selections that I have made. I further understand that the entire policy contract includes this application, the policy, declarations page and any endorsements.

We hold that Safeway was in compliance with the aforementioned requirements.

D. Requirement: The Written Rejection Must Be Made a Part of the Policy By Endorsement on the Declarations Page; Attachment to the Policy or By Some Other Means That Makes the Rejection a Part of the Policy so as to Clearly and Unambiguously Call to the Attention of the Insured the Fact That Such Coverage Has Been Waived

{53} The document constituting the act of rejection need not be made a part of the policy, and it need not be attached to the policy. *See Marckstadt*, 2010-NMSC-001, ¶ 4. The insurer must “incorporate [the] rejection into the policy in a way that affords the insured a *fair opportunity* to reconsider the decision to reject[.]” *Jordan*, 2010-NMSC-051, ¶ 22 (emphasis added); *Romero*, 1990-NMSC-111, ¶ 8.

{54} The application, under “Fraud Statement,” states above the signature line:

I hereby acknowledge that I have received a completed copy of this application, the [UM/UIM] Coverage Selection/Rejection form, the policy, the declarations page and any endorsements, and I understand the coverage selections that I have made. I further understand that the entire policy contract includes this application, the policy, declarations page and any endorsements.

Ullman signed this document.

{55} The declaration page and the endorsement page each state “THE ENTIRE POLICY CONTRACT INCLUDES THIS DOCUMENT, THE APPLICATION, THE POLICY AND ANY ENDORSEMENTS.” The endorsement page, which is virtually identical to the declaration page, states that it is “[a]ttached to and forming part of [the Ullman] policy.” The policy states that its provisions “WITH THE APPLICATION, DECLARATIONS PAGE AND ENDORSEMENTS, IF ANY, ISSUED TO FORM A PART THEREOF, COMPLETE THIS POLICY.” We hold that Safeway complied with the aforementioned requirement.

IX. NO FACTUAL ISSUES EXIST

{56} The district court did not deny Safeway’s class summary judgment motion on the basis of the existence of genuine issues of material fact. The court instead ruled against Safeway on a controlling issue of law that the court certified to this Court—whether Safeway’s uniform documentation complied with New Mexico law in obtaining waivers of UM/UIM coverage, including stacked coverage. The court determined that there existed a substantial ground for difference of opinion. Ullman’s attempt to recharacterize issues of law into issues of fact fails on the merits and cannot overcome the legal nature of our inquiry. Indeed, Ullman’s class definition reflects her primary contention, and she pursued that contention in the district court. Also noteworthy is Ullman’s statement in a document that she filed following this Court’s grant of Safeway’s application for an interlocutory appeal in which Ullman stated that the “critical determination” was “whether Safeway’s standard policy documents and UM/UIM forms comply with New Mexico law,” and further, that “[t]he fact-specific circumstances surrounding any particular rejection are immaterial.” As well, in her answer brief, Ullman has not denied that she is seeking relief on the ground that Safeway’s documents were legally inadequate.

X. THE STATUS OF CLASS ACTION CERTIFICATION

{57} Safeway sought summary judgment seeking to dismiss the class action on the ground that its uniform documents were valid and legal as to all class member-insureds. The district court determined that “there [was] at least one issue common to all persons affected dealing with the application of New Mexico law to the uniform policy language Safeway uses in insurance contracts with New Mexico

residents.” Commonality can exist when alleged legal deficiencies in uniform documents are common to the defined class. In considering predominance under Rule 1-023(B)(3) NMRA, the district court stated:

Liability issues raised by this litigation are common to the class, and these common questions predominate over individual questions. The sole focus of the liability inquiry in this case is whether Safeway acted in accordance with its obligations pursuant to New Mexico law requiring insurers to obtain valid waivers of UM/UIM coverage, including stacked coverage. This question

predominates over any other issue raised in this litigation. . . .

All members of the class own standard Safeway automobile insurance policies in which the operative language is uniform.

{58} Thus, in certifying the class, the district court presumably determined that the class was appropriate because the documents were the same or essentially the same for all class-member insureds. Our determination in this appeal that the uniform documents are legal and valid as a matter of law and in compliance with New Mexico law would appear to constitute a determination common to and predominating the class. Based on the foregoing, Safeway asks us to overturn the

district court’s certification of the class. We leave that issue for the district court on remand.

XI. CONCLUSION

{59} We hold that Safeway’s forms complied with New Mexico law in all respects as to what is required for a valid rejection of UM/UIM coverage, including stacking. We reverse the district court’s determination to the contrary and remand to the district court for whatever further proceedings may be required.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

Certiorari Denied, August 23, 2017, No. S-1-SC-36579

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-072

No. A-1-CA-35507 (filed June 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BOBBY SAIZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY

DREW D. TATUM, District Judge

HECTOR H. BALDERAS,
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ROBERT E. TANGORA
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for Appellant

Opinion

Jonathan B. Sutin, Judge.

{1} Defendant appeals from the district court's judgment and sentence, convicting him of conspiracy to commit drug trafficking by distribution. Defendant argues: (1) the evidence was insufficient, and (2) the district court improperly admitted a hearsay text message into evidence under the exclusion for statements made by a co-conspirator, pursuant to Rule 11-801(D) (2)(e) NMRA. We must decide whether the State sufficiently proved its theory that Defendant was the middleman in a conspiracy to sell methamphetamine to an undercover agent and a confidential informant, where the drug transaction did not occur, the drugs were never seen, the co-conspirator was never seen or verified, and the bulk of the State's evidence consisted of Defendant's assurances that the transaction would take place. Concerned with the State's heavy reliance on Defendant's extrajudicial statements to prove the conspiracy, we asked the parties to brief the application of the modified trustworthiness rule, New Mexico's modern corpus delicti rule. *See State v. Weisser*, 2007-NMCA-015, ¶ 16, 141 N.M. 93, 150 P.3d 1043 (stating that the goal of both the corpus delicti rule and the trustworthiness

standards is to "ensure that individuals are not convicted of crimes [on the basis of unreliable confessions when those crimes] did not in fact occur"), *abrogated on other grounds as recognized by State v. Bregar*, 2017-NMCA-028, ¶ 49, 390 P.3d 212.

{2} We hold that the corroboration requirements of the modified trustworthiness rule do not apply to Defendant's statements made pre-crime and in the course of the crime. Considering Defendant's statements as proof of the conspiracy, we hold that the evidence was sufficient. We also are not persuaded that the text message constituted hearsay offered to prove the truth of any assertion in the statement. We affirm.

BACKGROUND

{3} Undercover Officer Waylon Rains testified that he and a confidential informant (CI) arranged to meet with Defendant, who was to act as the middleman to facilitate the purchase of four ounces of methamphetamine for \$4,800. Officer Rains has been in law enforcement for nineteen years, a lieutenant with the Clovis Police Department for eleven years, and was undercover investigating narcotic crimes and a supervisor in a five-county drug task force on the day in question. The CI was qualified as a credible and reliable resource five years before the incident, had

been working continuously since then on hundreds of cases, and had never provided law enforcement with wrong information that might have damaged his credibility. {4} Officer Rains and the CI were in contact with Defendant for about two weeks leading up to the incident at issue. Previous transactions were scheduled but did not occur because Defendant was not able to convince a third party to broker a transaction in a manner consistent with the drug task force policy. The drug task force refused to "front" the money for a drug purchase before the drugs were present and refused to trust a person to leave from view with the money and return with the drugs. After several failed attempts at brokering the deal, Officer Rains and the CI received multiple phone calls from Defendant, who was contacting them to let them know he had found a third party who was willing to bring the methamphetamine to them and complete the exchange at one location. For this transaction, Defendant asked Officer Rains and the CI to come to his house, bring the money, and then Defendant would call the third party to bring the methamphetamine.

{5} When Officer Rains and the CI showed up at Defendant's home in an unmarked vehicle, Defendant came out, and they showed him a "flash roll" of cash to demonstrate their ability and willingness to pay for the methamphetamine. Defendant used his cell phone and spoke to someone he referred to as "Gilbert," who Defendant said was his cousin. He returned to the vehicle and said that Gilbert wanted them to drive to Gilbert's house and complete the transaction there. Because Officer Rains wanted to control as much of the deal as possible to minimize the risk to himself and the CI, he refused to go to a stranger's house. Officer Rains suggested they could complete the transaction in the parking lot of a nearby convenience store because it was close to Defendant's house and Gilbert's house, who was said to have lived in the trailer park behind the convenience store. Defendant got back on his cell phone, walked away, and then returned to the vehicle and reported that the proposed arrangement was not satisfactory to Gilbert. After all negotiations were complete, they finally agreed that Officer Rains and the CI would take Defendant to the trailer park a block or so away from Gilbert's residence; Defendant would go to the residence, get one ounce of meth, and bring it back to the car; the officer would give Defendant the

money; then, Defendant would go back to the residence and bring the remaining three ounces to the officer and the CI to complete the transaction.

{6} Officer Rains, the CI, and Defendant drove together in the vehicle to a side street in the trailer park and parked about a block away from the residence. Defendant left the vehicle, walked to the residence, knocked on the door, and talked to a person who opened the door and whom the officer and the CI could not see or hear. Defendant returned to the vehicle and stated that Gilbert was on his way and that they could complete the deal shortly. In an effort not to give the appearance of an undercover law enforcement operation, Officer Rains told Defendant they had a time limit, they were tired of messing around, and that if the deal was not going to happen, then they would leave and get the drugs elsewhere. Defendant remained outside the vehicle after arriving at the trailer park, walking between the yard of Gilbert's home and the yard next door, and was on and off his cell phone numerous times outside of the officer's hearing range. During the thirty to forty minutes that they were at the trailer park, Defendant told Officer Rains that the reason for the delay was that Gilbert had people in the neighborhood doing countersurveillance to see if there was any law enforcement in the area. Shortly thereafter, a white Ford truck came driving up very slowly from the same direction in which the officer's vehicle was facing, passed the officer's vehicle, continued toward Gilbert's home where Defendant was located, slowed down even more when it came close to Defendant, and then accelerated around the corner. Defendant returned to Officer Rains' vehicle, reported that everything was fine, and that it was Gilbert in the truck that just passed by them. Defendant did not say why Gilbert did not stop or if he would come back.

{7} Officer Rains testified that he was concerned that something had gone wrong that had aborted the transaction, so he alerted the cover team—stationed throughout the area that had been monitoring his conversations through listening devices—to attempt to stop a white Ford truck in the area. Officer Rains did not catch the license plate, had little description to offer, and could not see anyone in the truck. Within two to three minutes, other agents stopped a white Ford truck in the vicinity, but Officer Rains could not say whether it was the same truck. In the search of the truck that

was stopped, no drugs were found, and no one in the truck was named Gilbert.

{8} Back at the trailer park, Officer Rains told Defendant that he was tired of waiting and asked Defendant if he wanted a ride back to his house. Defendant agreed and asked if they could stop at a store so Defendant could buy some cigarettes. On their way to the store, Defendant received a text message on his cell phone, which had a shattered, unreadable screen and was set to speak the content of text messages as they came in. The voice text said, "You better not be fl[]ing me over, prim." Officer Rains explained during his testimony that "prim" is short for "primo," which is Spanish for "cousin."

{9} Also while on the way to the store, Officer Rains alerted the rest of the team to stop his own undercover vehicle and arrest Defendant for conspiracy. After Officer Rains, the CI, and Defendant pulled into the store's parking lot, Defendant got out, started walking toward the store, and the other agents intercepted Defendant; Officer Rains and the CI left. Among those agents was Sergeant Rafael Aguilar of the Clovis Police Department, who testified that Defendant was confused and agitated by his arrest for conspiracy, continually yelling that there was no conspiracy and that he was there to get methamphetamine for himself and would pay for it later.

{10} The jury found Defendant guilty of the sole charge of conspiracy to commit trafficking by distribution. Defendant appealed.

DISCUSSION

{11} On appeal, Defendant argues that the evidence was insufficient and that the voice text was improperly admitted hearsay. We requested that the parties brief the application of the modified trustworthiness rule to Defendant's extrajudicial statements made to Officer Rains and the CI to assist our review of the sufficiency of the evidence to support his conviction. See, e.g., *State v. Pietrzak*, 41 P.3d 1240, 1245 (Wash. Ct. App. 2002) (explaining that the corpus delicti rule serves as both a rule of evidence and a means to challenge the evidence "to protect a defendant from the possibility of an unjust conviction based upon a false confession" (internal quotation marks and citation omitted)); see also *Bregar*, 2017-NMCA-028, ¶¶ 45-49 (addressing the corpus delicti argument in the context of the sufficiency challenge). In response to our request, Defendant contends that there was no proof independent of his statements that would corroborate

the truth of his statements or establish the corpus delicti of conspiracy. The State argues that the modified trustworthiness rule does not apply to Defendant's statements because they were made pre-crime and in the course of the crime. We agree with the State and begin our analysis with a discussion of the modified trustworthiness rule and then proceed to address the sufficiency of the evidence.

A. The Modified Trustworthiness Standard Does Not Affect Our Analysis of the Evidence

1. Development of the Modified Trustworthiness Standard

{12} In determining whether the corroboration requirements of the modified trustworthiness standard apply to Defendant's extrajudicial statements, we first examine its development from the corpus delicti rule and its purpose. "The term 'corpus delicti,' which literally means 'body of the crime,' refers to the evidence needed to establish that the charged crime was actually committed." *Weisser*, 2007-NMCA-015, ¶ 10 (quoting *Black's Law Dictionary* 369 (8th ed. 2004)). "The [traditional] corpus delicti rule provides that unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained *solely* on the extrajudicial confessions or admissions of the accused." *Id.* (alteration, internal quotation marks, and citation omitted). The prosecution can prove the corpus delicti of an offense by demonstrating by independent evidence "the fact that a harm or injury occurred and that the harm or injury was caused by a criminal act." *Id.* The two most cited purposes for the corpus delicti rule are (1) "to prevent the conviction of those who confessed to non-existent crimes as a result of coercion or mental illness[.]" and (2) to "promot[e] better police work by requiring the prosecution to prove its case without the aid of confessions." *Id.* ¶ 14 (internal quotation marks and citations omitted).

{13} The traditional corpus delicti rule came under scrutiny for not sufficiently serving its purposes and permitting the guilty to escape punishment and doing so without a constitutional basis. See *State v. Wilson*, 2011-NMSC-001, ¶ 10, 149 N.M. 273, 248 P.3d 315 (noting the widely expressed "concern that the corpus delicti rule was turning into a doctrinal obstacle whereby the guilty can escape punishment" (emphasis, alterations, internal quotation marks, and citation omitted), *overruled on other grounds by State v.*

Tollardo, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. Rev. 385, 387 (1993) (“No court has ever held that the rule is constitutionally grounded.”). In response to these shortcomings, the United States Supreme Court replaced the corpus delicti rule with the “trustworthiness” doctrine, which requires corroboration of the trustworthiness of the defendant’s admissions or the essential facts in the defendant’s admissions to sustain a conviction based on those admissions. See *Weisser*, 2007-NMCA-015, ¶ 15 (citing *Opfer v. United States*, 348 U.S. 84, 93 (1954)). This rule, too, has been criticized as being “so malleable that almost any independent evidence of anything can serve to corroborate the confession or make it trustworthy.” *Id.* ¶ 16 (internal quotation marks and citation omitted).

{14} New Mexico courts have also rejected the corpus delicti rule. See *State v. Paris*, 1966-NMSC-039, ¶¶ 9-13, 76 N.M. 291, 414 P.2d 512. The standard that was adopted by our Supreme Court in *Paris* was less than clear, however, and was inconsistently applied for decades. See *Weisser*, 2007-NMCA-015, ¶¶ 17-25 (explaining the lack of clarity in the *Paris* opinion and the inconsistency with which it was applied). Ultimately, this Court and our Supreme Court agreed that New Mexico has rejected both doctrines in their original forms and adopted a modified trustworthiness rule that combines the standards: “an extrajudicial statement may be used to establish the corpus delicti where the statement is shown to be trustworthy and where there is some independent evidence to confirm the existence of the alleged loss or injury.” *Weisser*, 2007-NMCA-015, ¶ 18 (emphasis added); see *Wilson*, 2011-NMSC-001, ¶¶ 13, 15 (confirming that *Weisser* states the appropriate modified trustworthiness standard used in New Mexico and acknowledging that its application has been inconsistent and unclear). Our review of the corpus delicti jurisprudence shows that few jurisdictions have adopted the hybrid standard that governs in New Mexico. See *United States v. Lopez-Alvarez*, 970 F.2d 583, 592 (9th Cir. 1992) (expressing the court’s belief, not expressed by other circuit courts, that United States Supreme Court case law after *Opfer* has resurrected the requirement that the government present independent proof that a crime occurred in addition to

the corroboration required for the facts in the defendant’s statements); *State v. Lucas*, 152 A.2d 50, 61 (N.J. 1959); *State v. Bishop*, 431 S.W.3d 22, 54 (Tenn. 2014) (citing the New Jersey Supreme Court’s opinion in *Lucas* and our Supreme Court’s opinion in *Wilson* as the two previous cases that adopted the modified trustworthiness standard).

{15} Unfortunately, the unclear development of the modified trustworthiness standard in New Mexico suggests an inconsistent application of the standard and provides us with little understanding of the reasons underlying the decision to afford greater protection for defendants against their own statements as opposed to nearly the entire country. What we glean from our Supreme Court’s opinion in *Paris* is that the Court believes confessions “stand high in the probative hierarchy of proof[,]” and therefore, greater safeguards are appropriate and the hybrid approach strikes the better balance between assuring that confessions are true and preventing the guilty from escaping punishment. 1966-NMSC-039, ¶ 11 (quoting *Lucas*, 152 A.2d at 61).

2. The Modified Trustworthiness Standard Does Not Apply to Defendant’s Statements

{16} Many jurisdictions have adopted the view that their own corroboration requirements for admissions and confessions apply only to post-crime statements or confessions, and not to statements or admissions made before or during the commission of the crime. See, e.g., *Opfer*, 348 U.S. at 90; *Warszower v. United States*, 312 U.S. 342, 347 (1941); *Gov’t of V.I. v. Hoheb*, 777 F.2d 138, 141-42 (3d Cir. 1985); *United States v. Soteras*, 770 F.2d 641, 644 n.4 (7th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 537 (6th Cir. 1984); *United States v. Head*, 546 F.2d 6, 9 (2d Cir. 1976); *United States v. Kaechele*, 466 F. Supp. 2d 868, 890-91 (E.D. Mich. 2006); *People v. Chan*, 26 Cal. Rptr. 3d 878, 886 (Cal. Ct. App. 2005); *State v. Johnson*, 821 P.2d 1150, 1162 (Utah 1991); *Pietrzak*, 41 P.3d at 1245-46. This corroboration exception for pre-crime and course-of-crime statements is based on a 1941 United States Supreme Court case stating that the need for corroboration of extrajudicial statements protects against convictions based on false confessions alone and that where such statements are “made prior to the crime [the] danger does not exist” because “[t]hey contain none of the inherent weaknesses of confessions or admissions after the fact.” *Warszower*, 312

U.S. at 347. Courts subsequently expanded the *Warszower* exemption for pre-crime statements to statements made during the commission of the crime. See, e.g., *Hoheb*, 777 F.2d at 142 (listing four cases that extended the holding of *Warszower* to apply to statements made during the course of a conspiracy). In *Hoheb*, the Federal Circuit court contrasted “confessions induced or coerced during police investigations, or on other involuntary statements made during that stressful and confused time” with “admissions made while the crime is in progress[, which] bear none of these indicia of unreliability.” *Id.* Our review of the relevant case law reveals that it is the majority position to treat pre-crime and course-of-crime statements as falling outside of corroboration requirements. See, e.g., *Johnson*, 821 P.2d at 1162 (characterizing the view that statements made prior to or during the commission of a crime do not need corroboration as “the majority position” and adopting it as “sound policy”). Not all cases however, have followed the principle in *Warszower* and its progeny. See *United States v. Bryce*, 208 F.3d 346, 355-56 (2d Cir. 1999) (requiring corroboration for unknowingly wiretapped statements and creating, without any authority, two categories of statements made in the course of a crime and not requiring corroboration for only one category—those in the nature of self-corroborating statements, which did not include the wiretapped statements); *United States v. Marshall*, 863 F.2d 1285, 1286-87 (6th Cir. 1988) (stating that the corroboration requirement is only for post-offense statements, but nevertheless, the court required corroboration for statements made to an undercover agent in the course of the crime); *United States v. Muskovsky*, 863 F.2d 1319, 1324-25 (7th Cir. 1988) (acknowledging that the defendant could not be convicted of conspiracy based solely on his own uncorroborated admissions made after the conspiracy ended); *United States v. O’Connell*, 703 F.2d 645, 647 (1st Cir. 1983) (stating that whether “*Opfer*’s corroboration requirement is limited to admissions made after the completion of the crime and made to a government agent” is a question that “has split the courts,” listing cases taking different approaches and refusing to take a position because there was adequate independent corroboration); *United States v. Northrup*, 482 F. Supp. 1032, 1037-38 (D. Nev. 1980) (explaining that the Ninth Circuit has taken internally inconsistent approaches to

the timing of the statements and to whom they are made and holding that statements made by a conspirator to an investigator in the life of the conspiracy but after the termination of the conspirator's participation in the conspiracy required corroboration); *United States v. Hallman*, 594 F.2d 198, 201 (9th Cir. 1979) ("[T]he corroboration rule applies only to confessions or admissions made in the course of the commission of the offense or in the course of investigation."); *United States v. Tourine*, 428 F.2d 865, 867-68 (2d Cir. 1970) (concluding that there was sufficient corroboration for statements unknowingly made in the presence of an undercover officer, but not acknowledging the case law that exempts such statements from corroboration). We do not conclude that these cases have articulated a compelling or unifying theory for deviating from the majority approach. {17} New Mexico case law does not address the timing of extrajudicial statements relative to our incarnations of the corpus delicti rule, nor does our law discuss application of the corroboration exception to pre-crime and course-of-crime statements. We observe that the majority position views statements made prior to and in the course of the crime as bearing none of the indicia of unreliability as post-crime confessions and that there is little need for independent proof that the crime occurred as a safeguard against a conviction for an imagined crime where the defendant's statements at issue were made in the course of the crime. *See Johnson*, 821 P.2d at 1162-63. We have found no out-of-state cases suggesting that the modified trustworthiness standard is inconsistent with the majority approach.

{18} We also observe that, as a practical matter in the current case, it makes a strained analysis to separate Defendant's conspiratorial statements made pre-crime or in the course of the crime from the independent evidence of his actions and the circumstances that would corroborate the statements and establish the corpus delicti of the offense. This difficulty is especially pronounced for the crime of conspiracy, which is an inchoate crime with no tangible injury and requires no proof of an act in furtherance of the conspiracy. *See State v. Gallegos*, 2011-NMSC-027, ¶ 59, 149 N.M. 704, 254 P.3d 655; *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 ("An overt act is not required and the crime of conspiracy is complete when the felonious agreement is reached." (internal quotation marks and citation omitted)).

{19} Based on these considerations, we adopt the majority position and hold that Defendant's pre-crime and course-of-crime statements are not subject to the modified trustworthiness standard. Therefore, in this case, the offense of conspiracy may be proved through Defendant's statements without the need for independent, corroborative evidence of the truthfulness of the statements or that the crime occurred. *See, e.g., Kaechele*, 466 F. Supp. 2d at 891 (stating that the defendant's statements made during the course of the criminal activity "require no independent corroboration in order to provide a sufficient basis for a jury's determination of his guilt").

{20} Next we assess the sufficiency of the evidence to support Defendant's conviction for conspiracy to traffic methamphetamine by distribution, considering Defendant's statements as part of the substantive proof of the offense.

B. The Evidence Was Sufficient to Convict Defendant of Conspiracy

{21} Defendant argues that the evidence did not establish a conspiracy to distribute drugs because Defendant did not receive money from Officer Rains, no drugs were ever produced or verified, and no co-conspirator was ever seen, identified, or verified. Rather, Defendant asserts that the testimony shows that he "was attempting to game Officer Rains and the [CI] to score drugs for himself." The State contends the physical absence of the drugs and co-conspirator are immaterial because the evidence shows Defendant was working with another person to arrange the sale of methamphetamine and that there was an agreement to do so. The State also contends that Defendant's claim that he was "gaming" the officer makes little sense in light of the arrangements and that, in any event, the jury was free to reject Defendant's self-serving explanation. We agree with the State that the evidence was sufficient.

1. Standard of Review for Sufficiency of the Evidence

{22} When assessing the sufficiency of the evidence, the appellate courts "view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Samora*, 2016-NMSC-031, ¶ 34, 387 P.3d 230 (internal quotation marks and citation omitted). We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We then

determine whether "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Garcia*, 2016-NMSC-034, ¶ 15, 384 P.3d 1076 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Largo*, 2012-NMSC-015, ¶ 30, 278 P.3d 532 (internal quotation marks and citation omitted).

2. Conspiracy

{23} To find Defendant guilty of conspiracy, the State was required to prove to the jury beyond a reasonable doubt that "[D]efendant and another person by words or acts agreed together to commit trafficking of methamphetamine" and that "[D]efendant and another person intended to commit trafficking of methamphetamine[.]" *See UJI 14-2810 NMRA; see also NMSA 1978, § 30-28-2(A)* (1979). "The gist of conspiracy under the statute is an agreement between two or more persons to commit a felony." *Gallegos*, 2011-NMSC-027, ¶ 25 (internal quotation marks and citation omitted); *see id.* ¶ 1 (applying "for the first time our unit of prosecution analysis from double jeopardy jurisprudence to multiple conspiracy convictions"). "It is the agreement constituting the conspiracy which the statute punishes." *Id.* ¶ 25 (internal quotation marks and citation omitted). "[A] conspiracy is complete when the agreement is reached." *Id.* ¶ 45 (internal quotation marks and citation omitted). The criminal objective of the agreement need not be achieved in order for a conspiracy conviction to stand, and thus it is also an inchoate crime designed to permit intervention before the underlying illegal activity is complete. *See id.* ¶ 59. It is also considered a continuing crime that can expand or mature over time and add criminal objectives or members without changing the fundamental nature of the agreement. *See id.* ¶ 46. As a continuing crime, "[i]t ends only when the purposes of the conspiracy have been accomplished or abandoned." *Id.* (internal quotation marks and citation omitted). At its core, "[c]onspiracy was criminalized to address the special and continuing dangers incident to group activity" with illegal objectives. *Id.* ¶ 59 (internal quotation marks and citation omitted).

{24} Due to the typically clandestine nature of conspiracies, the prosecution's proof of a conspiracy is seldom direct

evidence of the agreement. *See id.* ¶ 45. Usually the jury must “infer the existence of an agreement based on the defendant’s conduct and surrounding circumstances, which raises at least the specter of conviction by guess and speculation.” *Id.*

3. Analysis of the Evidence

{25} Unlike a more typical conspiracy case that requires us to assess the inferences that may be drawn from the circumstantial evidence, the main evidence of the agreement in the current case was direct evidence—Defendant’s statements, assuring Officer Rains and the CI of the existence of an agreement to sell them methamphetamine, and his actions attempting to achieve the sale—and there was little supporting circumstantial evidence. The jury’s verdict demonstrates that it credited Defendant’s statements with truth and rejected the “gaming” defense that Defendant had imagined the conspiracy to obtain drugs for himself. As an appellate court, we will “not invade the jury’s province as fact-finder by second-guessing the jury’s decision concerning the credibility of witnesses, reweighing the evidence, or substituting [our] judgment for that of the jury.” *Garcia*, 2016-NMSC-034, ¶ 15 (alterations, internal quotation marks, and citation omitted). To be consistent with our standard of review, we do not adopt Defendant’s theory of the evidence and will not indulge in inferences based on the absence of the drugs and co-conspirator from the evidence that would support Defendant’s version of events. *See State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (“Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant’s version of the facts.” (internal quotation marks and citation omitted)); *Rojo*, 1999-NMSC-001, ¶ 19 (same); *see also Samora*, 2016-NMSC-031, ¶ 34 (stating that the appellate courts “view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict” (internal quotation marks and citation omitted)). Assuming the truth of Defendant’s statements, we proceed to assess the evidence that supports the finding of an agreement between Defendant and another person to sell methamphetamine.

{26} After a few failed attempts to broker a drug transaction, Defendant contacted Officer Rains, working undercover, to report that he had found a third party who was willing to meet the officer’s require-

ment to bring the methamphetamine in order to complete the exchange at one location. Defendant and Officer Rains arranged to meet at Defendant’s residence and then proceeded with the plan. After Officer Rains and the CI went to Defendant’s residence and showed Defendant the purchase money, Defendant used his cell phone to call his cousin, Gilbert, the third party to the plan. Defendant reported that Gilbert would not come to his house and instead proposed that Officer Rains and Defendant go to Gilbert’s residence for the transaction. The officer refused this proposal, explaining in his testimony that he could not exercise the desired level of control within that environment. For purposes of a conspiracy agreement, it is immaterial that the officer did not agree to this transaction, because neither a law enforcement officer nor a government agent can be a co-conspirator. *See Pennell*, 737 F.2d at 536 (“[P]roof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction.”). The agreement must be shown to exist between the defendant and a non-governmental agent. *See, e.g., United States v. Jones*, 765 F.2d 996, 1002 (11th Cir. 1985) (explaining that the agreement between the undercover narcotics agent and the defendant could not support the conspiracy, rather, it needed to be established between the defendant and other non-governmental participants in the plan).

{27} In addition to Defendant’s assurances that Gilbert was willing and able to provide the drugs, once all parties to the transaction appeared to have reached an agreement on the location, there was some circumstantial evidence of the existence of the co-conspirator. Defendant’s actions appeared to be those of a person attempting to broker and execute a clandestine drug deal by continually talking on the phone in a secretive manner, pacing, waiting, renegotiating, and changing locations. Defendant explained that Gilbert had people countersurveillance the neighborhood for law enforcement, and then shortly thereafter, a white Ford truck passed the renegotiated location in a suspiciously slow manner and then sped off, which suggested that the occupants of the truck were present to observe the scene. Defendant assured Officer Rains and the CI that everything was fine because Gilbert was in that truck. Also, after the truck passed by, the evidence showed that Defendant had received a voice text saying, “You better

not be fl[]ing me over, prim.” Indulging inferences in favor of the verdict, we infer from the circumstances that this message was from Gilbert, and it could imply an intent to complete the transaction with cautious optimism that it would take place without incident. Again, the fact that Officer Rains abandoned the plan before the transaction was achieved is not relevant to whether the conspiratorial agreement was reached between Defendant and Gilbert. *See Gallegos*, 2011-NMSC-027, ¶¶ 45, 59 (explaining that conspiracy is an inchoate crime for which the illegal objective need not be achieved and is complete when the agreement is reached); *see also Jones*, 765 F.2d at 1002 (same).

{28} Additionally, the co-conspirator does not need to have been convicted or charged or even specifically identified in order to sustain a conspiracy conviction. *See State v. Gonzales*, 2008-NMCA-146, ¶ 11, 145 N.M. 110, 194 P.3d 725 (holding that where surveillance footage showed a grainy depiction of several people burglarizing a store and the jury believed that the defendant was one of them, the fact that the other burglars were not identified or proved to have any relationship to the defendant did not undermine his conspiracy to burglarize conviction); *see also State v. Verdugo*, 1969-NMSC-008, ¶ 9, 79 N.M. 765, 449 P.2d 781 (holding that the dismissal of charges against the co-conspirator did not preclude the defendant’s conspiracy conviction).

{29} We also observe that an agreement on the specific details of the conspiratorial agreement need not be reached or proved and that the agreement may mature over time without changing the nature of the agreement or the essential illegal objective. *See Gallegos*, 2011-NMSC-027, ¶ 46. New Mexico case law has stated that “[w]hile common design is the essence of a conspiracy, this fact may be established by evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of the offense.” *State v. Deaton*, 1964-NMSC-062, ¶ 6, 74 N.M. 87, 390 P.2d 966. “A mutually implied understanding is sufficient so far as combination or confederacy is concerned, and the agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose.” *Id.*

{30} We are persuaded that the supporting circumstantial evidence, though less

substantial than the direct evidence, is legally sufficient to prove an agreement to traffic drugs and an intent to do so. We recognize the warnings from our Supreme Court to be circumspect in identifying a criminal conspiracy, at least for double jeopardy purposes, in light of the malfeasability of its definition. *See Gallegos*, 2011-NMSC-027, ¶ 47. *Gallegos* cautioned courts to be mindful of the inherent dangers in the “looseness and pliability” of conspiracy and to be vigilant in defining a conspiracy, which is often inferred from the circumstances, and which “raises at least the specter of conviction by guess and speculation.” *Id.* ¶¶ 44-45, 47 (internal quotation marks omitted). Although the State’s evidence gives rise to these concerns, it provided sufficient proof of the elements. In accordance with our standard of review to accept the jury’s findings where there is supporting evidence and to ignore all contrary evidence and inferences, we affirm Defendant’s conviction.

C. The Voice Text Was Not

Inadmissible Hearsay

{31} In his final claim of error, Defendant argues that the district court wrongfully admitted evidence of the voice text that was spoken from his cell phone as a non-hearsay statement offered against the party-opponent “made by the party’s co-conspirator during and in furtherance of the conspiracy[.]” under Rule 11-801(D)(2)(e). As we stated earlier in this opinion, Officer Rains testified that the voice text read aloud, “You better not be fl[]ing me over, prim.” The district court overruled Defendant’s objection to the admission of the voice text, determining that the State laid a sufficient foundation that “prim” is short for “primo,” which means “cousin” in Spanish, and that the voice text was reasonably inferred to be from Gilbert, Defendant’s purported cousin and co-conspirator.

{32} Defendant argues that the foundation was inadequate, relying on *State v. Farris*, 1970-NMCA-067, ¶¶ 9-10, 81 N.M. 589, 470 P.2d 561, for the proposition that a statement by a co-conspirator can be admitted only where the evidence has demonstrated a common purpose or design between the alleged co-conspirator and the defendant; the statement, alone, cannot

establish the conspiracy. *But see, e.g., State v. Zinn*, 1987-NMSC-115, ¶¶ 32-33, 106 N.M. 544, 746 P.2d 650 (stating that “the foundational requirement of proof of a conspiracy by independent evidence need not be met at the time the [prosecution] offers the co-conspirator’s statement[.]” because the district court may rule on the condition that the prosecution establish the conspiracy by independent evidence). {33} “We review the admission of hearsay evidence for an abuse of discretion.” *State v. King*, 2015-NMSC-030, ¶ 23, 357 P.3d 949 (internal quotation marks and citation omitted). We begin by determining whether the voice text was hearsay. *See id.* ¶¶ 23-32 (determining first that the officer’s testimony recounting the defendant’s statement was hearsay offered into evidence for its truth to establish self-defense and then proceeding to decide that the statement does not fall within any hearsay exception).

{34} “Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.” *Id.* ¶ 24 (internal quotation marks and citation omitted); *see* Rule 11-801(C). “‘Statement’ means a person’s oral assertion, written assertion, or nonverbal conduct, *if the person intended it as an assertion.*” Rule 11-801(A) (emphasis added). “By definition, then, statements or conduct which are non-assertive are not hearsay.” *Jim v. Budd*, 1987-NMCA-079, ¶ 10, 107 N.M. 489, 760 P.2d 782. In *Jim*, this Court held that where the challenged, extrajudicial statement was a direction made by the plaintiff to the defendant—“let the gates down against the chain”—the statement was “not an assertion that would either be true or false.” *Id.* ¶ 13 (internal quotation marks omitted). We held that where the statement was “not offered for the truth of the words uttered . . . [but r]ather . . . offered to show [that the plaintiff was] in control of the procedure and that he knew what he was doing[.]” the statement was not hearsay. *Id.* ¶¶ 11, 13. We further held that, to the extent that assertions may be implied by the statement, implied assertions are not hearsay. *Id.* ¶¶ 11-12.

{35} The statement at issue in the current case is an implied expression of skepticism about Defendant’s intentions or actions, and/or it is an implied warning or an

implied threat of an undefined consequence. Like the directive by the plaintiff in *Jim*, which was not used to prove the truth of the matter asserted, the statement here, “You better not be fl[]ing me over, prim[.]” was not offered to prove the truth of the matter asserted. The statement is relevant and offered into evidence because the statement was made to Defendant at the time and under the circumstances that it was made to Defendant. *See State v. Aragon*, 1973-NMCA-102, ¶ 7, 85 N.M. 401, 512 P.2d 974 (“A statement made may be admitted merely to prove that it was made and not to prove that it is true.”); *see also State v. Toney*, 2002-NMSC-003, ¶ 3, 131 N.M. 558, 40 P.3d 1002 (holding that the defendant’s command to another person to leave the victim at the river was not hearsay because it was not an assertion and it “was offered not for its truth but for the fact that it was made”).

{36} Because we are not persuaded that the voice text was an intended assertion that was being offered for the truth of the matter asserted, we hold that the statement, as used, did not constitute hearsay. Therefore, we need not address whether the statement was properly admitted under the hearsay exclusion for a statement made by a co-conspirator during and in furtherance of the conspiracy under Rule 11-801(D)(2)(e). *See State v. Flores*, 2010-NMSC-002, ¶ 44, 147 N.M. 542, 226 P.3d 641 (explaining that the appellate courts may uphold a district court’s admission of an extrajudicial statement if the ruling is right for any reason under the hearsay rules).

CONCLUSION

{37} For the foregoing reasons, we hold that sufficient evidence supports Defendant’s conviction for conspiracy to commit drug trafficking by distribution and that the district court did not abuse its discretion by admitting the voice text. The district court’s judgment and sentence are affirmed.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

HENRY M. BOHNHOFF, Judge

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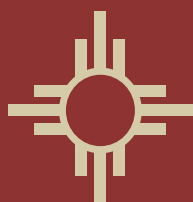
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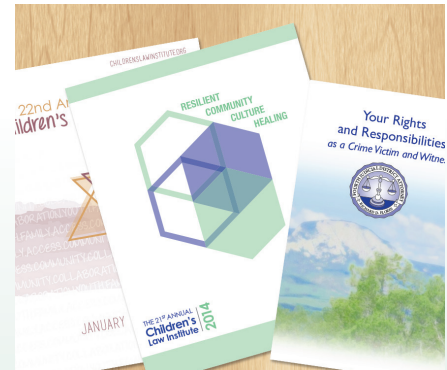
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