Official Publication of the State Bar of New Mexico

Bar Bulletin

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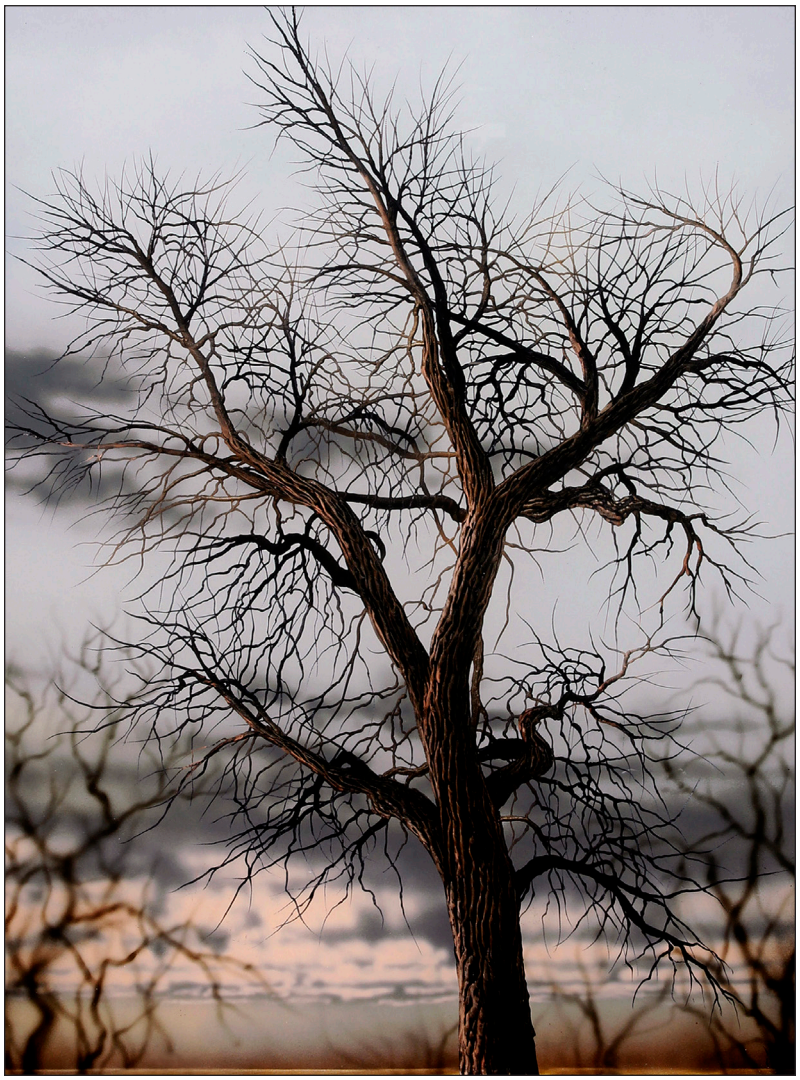

Slivers, by Christopher Owen Nelson Waxlander Gallery, Santa Fe

Inside This Issue

Stand Out *from the* Crowd

Profile Your Firm or Business in the *Bar Bulletin*!

Upgrade your marketing strategy and expose more than 8,000 members of the legal profession to your products, services, or start-up. Purchase an insert in the *Bar Bulletin*, the State Bar's weekly publication and take advantage of our loyal readership.

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STATE BAR of NEW MEXICO

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STATE BAR of NEW MEXICO

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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Christopher Owen Nelson's work has been strongly focused in the greater southwestern region. As a Colorado native, he studied fine arts at Rocky Mountain College of Art and Design. He combines elements of his skills like painting, construction and song writing to tell his story. Recently, Nelson's achievements in the arts have been featured in several national publications including: *Western Art Collector*, *Luxe Interiors and Design*, *Western Art and Architecture*, *Santa Fean* magazine and *American Art Collector*. To view more of his work, visit www.chrisnelsonfineart.com.

Notices

Court News

New Mexico Supreme Court Commission on Access to Justice

Meeting Notice

The next meeting of the Commission on Access to Justice is noon–4 p.m., Jan. 5, 2018, at the State Bar Center in Albuquerque. Interested parties from the private bar and the public are welcome to attend. Further information about the Commission is available at Access to Justice at nmcourts.gov.

Supreme Court Law Library

Hours and Information

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

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

New Mexico Court of Appeals

Announcement of Vacancies

Two vacancies will exist on the Court of Appeals due to the retirement of Hon. Jonathan B. Sutin, effective Dec. 29, and Hon. Timothy L. Garcia, effective Feb. 2, 2018. Inquiries regarding the details or assignment of these judicial vacancies should be directed to the administrator of the court. Alfred Mathewson, chair of the Appellate Court Judicial Nominating Commission, invites applications for these positions 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 at lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., Jan. 8, 2018. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Appellate Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 17, to interview applicants for the position at the Supreme Court Building, 237 Don Gaspar Avenue in Santa Fe. 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.

Professionalism Tip

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

I will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

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 defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Third Judicial District Court

Announcement of Vacancy

A vacancy in the Third Judicial District Court will exist due to the resignation of Hon. Judge Fernando R. Macias effective Jan. 6, 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 Third 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 at lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., Jan. 18, 2018. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Third Judicial District Court Judicial Nominating Commission will meet at 9 a.m., Feb. 1, 2018, to interview applicants for the position in Las Cruces. 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.

Mass Reassignment (Amended)

Effective Dec. 18 a mass reassignment of all Division VIII cases previously assigned to Judge Fernando R. Macias occurred pursuant to NMSC Rule 23-109, Judge Conrad F. Perea. 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.

Bernalillo County Probate Court

Holiday Closure Notice

The Bernalillo County Probate Court in accordance with the Bernalillo County Government holiday closure schedule will closed Jan. 1, 2018. The court will resume normal operating hours on Jan. 2, 2018.

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

Udall, Heinrich and Pearce Seek Applicants to Fill Upcoming Vacancy

On Nov. 30, Hon. Robert C. Brack announced his intention to assume senior status after 15 years of distinguished service on the federal bench. Judge Brack's announcement, effective July 25, 2018, will create a vacancy in Las Cruces, N.M., for a U.S. District Judge for the District of New Mexico. In accordance with their constitutional responsibility as senators to provide advice and consent with respect to federal appointments, U.S. Senators Tom Udall

and Martin Heinrich, with the assistance of U.S. Representative Steve Pearce, will recommend to the president a short list of qualified candidates for the position. Individuals who are interested in the position must complete and return an application no later than Dec. 31, 2017. Download the application and instructions at www.tomudall.senate.gov/news/press-releases/udall-heinrich-pearce-seek-applicants-to-fill-upcoming-vacancy-on-us-district-court.

State Bar News

Attorney Support Groups

- Jan. 8, 2018, 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

Commissioner Vacancy

Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties)

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 23, 2018, meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2018. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. The remaining 2018 Board meetings are scheduled for May 18 in Albuquerque, Aug. 9 at the Hyatt Regency Tamaya Resort in Bernalillo in conjunction with the State Bar of New Mexico Annual Meeting, Oct. 12 in Albuquerque, and Dec. 13 in Santa Fe. Members interested in serving on the Board should submit a letter of interest and resume to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765, by Feb. 9.

Appointments

New Mexico Legal Aid Board

The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid Board for three-year terms, with one of the appointments being a member of and recommended by the Indian Law Section. Members who want to serve on the Board should send a letter of interest and brief résumé by Jan. 10, 2018, to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

State Bar of New Mexico Access to Justice Fund Grant Commission

The Board of Bar Commissioners will make two appointments to the newly created State Bar of New Mexico ATJ Fund Grant Commission; the terms will be determined at the first meeting of the Commission. The ATJ Fund Grant Commission will solicit and review grant applications and award grants to civil legal services organizations consistent with the State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. Active status attorneys in New Mexico, not affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund, who are interested in serving on the Commission should send a letter of interest and brief resume by Jan. 10, 2018, to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Young Lawyers Division

Volunteers Needed for Homeless Legal Clinic in Albuquerque

The Homeless Legal Clinic returns to Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), in 2018 on Jan. 18, Feb. 15, March 15, April 19, May 17, June 21, July 19, Aug. 16, Sept. 20, Oct. 18, Nov. 15 and Dec. 13. Clinics are held at the Healthcare for the Homeless located at 1217 First Street NW. Volunteer attorneys are needed to staff the clinic, serve as an "information referral resource" and join the pro bono referral list. For those staffing the clinic or providing other services, a trained attorney will assist you until you feel comfortable by yourself. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients and how your help can make such a major difference in their lives. To volunteer, contact YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com.

New Mexico Lawyers and Judges Assistance Program

Helpandsupportareonlyaphonecallaway.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

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

Volunteers Needed for Rio Rancho Wills for Heroes

The YLD is seeking volunteer attorneys for its Wills for Heroes event for Rio Rancho first-responders from 9 a.m.-noon, Feb. 24, at Loma Colorado Main Library, located at 755 Loma Colorado Blvd NE in Rio Rancho. Volunteers should arrive at 8:15 a.m. for breakfast and orientation. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve at witnesses and notaries. Contact YLD Director-at-Large Billy Jimenez at billy.j.jimenez@gmail.com to volunteer.

Volunteers Needed for UNM Mock Interview Program

YLD is seeking volunteer attorneys to serve as interviewers for its annual UNM School of Law Mock Interview Program at

10:30 a.m., Saturday, Jan. 27, 2018, at the UNM School of Law. The mock interviews and coordinated critiques of résumés assist UNM law students with preparation for job interviews. Judges and attorneys from all practice areas, both public and private sectors, are needed. A brief training session will be held at 10 a.m. at the UNM School of Law preceding the interviews, and breakfast will be provided. To volunteer, sign-up at https://form.jotform.com/72126557703961 by Jan. 13.

UNM School of Law

Law Library Hours

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.

Other Bars

Albuquerque Lawyers Club

January Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its January lunch meeting. Vince Ward will present "*United States v. Chelsea Manning*: Government Leaks, National Security, and Why Chelsea's Case Should Matter To Us All." The lunch meeting will be held at noon, Jan. 3, 2018, at Seasons Restaurant. The cost is free to members and $30 non-members in advance or $35 at the door. For more information, e-mail ydennig@Sandia.gov or call 505-844-3558.

New Mexico Criminal Defense Lawyers Association

Law Office Management CLE

Join the New Mexico Criminal Defense Lawyers Association for "Ring in the New: Best Practices in Law Office Management" (4.2 G, 2.0 EP) on Jan. 26, 2018, in Albuquerque. Register at 505-992-0050 or info@nmcdla.org.

New Mexico Women's Bar Association

Henrietta Pettijohn Award Nominations

The New Mexico Women's Bar Association invites nominations for the annual Henrietta Pettijohn award, established by the NMWBA board to honor an attorney, female or male, who has, over the previous year(s), done an exemplary job of advancing the causes of women in the legal profession. Previous recipients include Julianna Koob and Hon. Monica Zamora (2013), Congresswoman Michelle Lujan Grisham (2014), Hon. Martha Vázquez (2015), Antonia Roybal-Mack (2016) and Wendy York and Shona Zimmerman (2017). Nominations along with a brief explanation as to why this attorney should be honored with the award should be sent to Peggy Graham at mgraham@pbwslaw.com by Dec. 29.

THANK *You*

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **DIVORCE OPTIONS WORKSHOP.** Thank you for your professionalism, time and service to the community in New Mexico.

Gretchen Mary Walther
Tiffany Oliver Leigh
Linda Helen Bennett
Maria Montoya-Chavez
Martha Kaser

A MESSAGE FROM YOUR State Bar President

Dear Members:

It has been my honor to serve as your president over the last year. 2017 was a landmark year for the State Bar of New Mexico. In addition to our regular programming and projects, we have seen much change and success.

In an incredible show of support and trust in the State Bar, the New Mexico Supreme Court has turned several regulatory functions back over to us. Minimum Continuing Legal Education will transition back to the State Bar. Your BBC officers and staff will be working diligently on a transition plan during the first months of the year. Additionally, the newly created State Bar ATJ Fund Grant Commission will now take over grant funding responsibility that the Supreme Court's Access to Justice Commission was responsible for. Finally, The State Bar will now receive funding from the Disciplinary Board to assist with the administration of the Lawyers and Judges Assistance Program. This funding will help the program to grow and be more helpful to members.

One of the highlights of each president's year is always the Annual Meeting. This year was no exception. I enjoyed every minute of the conference at the Inn of the Mountain Gods in Mescalero, N.M., and I was proud to host national figures like prosecutor and author Marcia Clark, lawyer and journalist Mark Curriden, and professor Sheldon Nahmod. In addition, I had the honor of celebrating excellence in our community when I presented the State Bar Annual Awards to six deserving individuals and one outstanding program.

This year the New Mexico State Bar Foundation hosted 100 attorneys, sponsors, and members of the legal community for the First Annual Golf Classic tournament. Teams played 18 holes on Albuquerque's beautiful Tanoan Country Club. After the tournament, teams gathered for food, fun, networking and the awards banquet. The event raised more than $26,000, which bodes well for its continued success in the future.

Earlier this month, the Board of Bar Commissioners announced that Richard Spinello was selected as the State Bar's next Executive Director. Many of you know him from his 17-year career with the State Bar including his role as General Counsel. He succeeds Joe Conte who retired this year after 14 years as Executive Director. Richard has been an invaluable resource for the State Bar and to me during my time as President. I know the State Bar is in great hands under his leadership.

I am very proud of the State Bar and what we have accomplished in 2017. We had an excellent year financially and programmatically. On Dec. 7, Wesley Pool was sworn in as the 2018 President, with Jerry Dixon and Tina Cruz to follow him. I know that each of these individuals, as well as the Board of Bar Commissioners as a whole, will lead us into future years with energy and success.

I encourage each of you to get involved with the State Bar and your local communities. Reach out to your local Bar Commissioner to find out how you can serve. My time as a Bar Commissioner and as your President has been very rewarding. Thank you for allowing me to serve you and for your support this year.

Sincerely,

Scotty Holloman

Scotty Holloman
President,
State Bar of New Mexico

2018 President
Wesley O. Pool
Is Sworn In

Taking the Oath

The 2018 officers of the Board of Bar Commissioners were sworn in on Dec. 7 at the New Mexico Supreme Court in Santa Fe by Chief Justice Judith K. Nakamura. The officers are President Wesley O. Pool, President-Elect Gerald G. Dixon, Secretary-Treasurer Ernestina R. Cruz and Immediate Past President Scotty A. Holloman. After being sworn in, President Pool thanked his family and the current Board for their support. "It's important to have fun in what you do," he said, "We're gonna have some fun this year!"

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

Wesley Pool (second from left) was joined by his family for the swearing in

The State Bar's version of "passing the baton"—passing the gavel

Officers Jerry Dixon, Tina Cruz, Scotty Holloman and Wesley Pool

2018 Board of Bar Commissioners: Joseph F. Sawyer, J. Brent Moore, Wesley O. Pool, Tomas J. Garcia, Erin M. Atkins, Barbara C. Lucero, David P. Lutz, Joshua A. Allison, Ben Sherman, Raynard Struck, Tina R. Cruz, Scotty A. Holloman, Clara Moran, Hon. Kevin L. Fitzwater (ret.), Carla C. Martinez, John P. Burton, Aja N. Brooks and Jerry G. Dixon (Not pictured: Elizabeth J. Travis and Carolyn A. Wolf)

Legal Education

December 2017

27 **2017 How to Become Your Own Cybersleuth: Conducting Effective Internet Investigation & Background Research**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Oil and Gas: From the Basics to In-Depth Topics**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **How to Protect Yourself and Preserve Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Ethics of Lawyer Advertisements Using Social Media**
1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

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

29 **New Mexico DWI Cases: From the Initial Stop to Sentencing—Evaluating Your Case**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

January 2018

5 **2018 Legislative Preview**
2.0 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF

10 **2017 Fair Pay Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Health Care issues in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Drafting Distrubtion Provisions in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics of Working with Witnesses**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

23 **Arbitration Clauses in Business Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **SALT Online: Understanding State and Local Taxes When Your Client Sells Online**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **ABCs of Choosing and Drafting the Right Trust for Client Goals, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **ABCs of Choosing and Drafting the Right Trust for Client Goals, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

February 2018

9 **Regional Seminar**
20.5 G
Live Seminar, Santa Fe
Trial Lawyers College
307-432-4042

March 2018

1 **Introduction to the Practice of Law in New Mexico (Reciprocity)**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Board of Bar Examiners
www.nmexam.org

2-4 **Taking and Defending Depositions (Part 1of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

23-25 **Taking and Defending Depositions (Part 2 of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

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 December 15, 2017

PUBLISHED OPINIONS

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A-1-CA-34709	State v. G Luna	Affirm/Reverse/Remand	12/13/2017

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A-1-CA-36084	State v. J Plowman	Reverse/Remand	12/11/2017
A-1-CA-36155	State v. B Baca	Affirm	12/11/2017
A-1-CA-36209	State v. D Begaye	Affirm	12/11/2017
A-1-CA-36258	State v. D Branch	Affirm	12/11/2017
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A-1-CA-36214	S Tellez v. M Dixson	Affirm	12/13/2017
A-1-CA-36401	State v. J Steward	Affirm	12/13/2017
A-1-CA-36434	CYFD v. Michael H	Affirm	12/13/2017
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A-1-CA-34989	State v. Eleanor A	Affirm	12/14/2017
A-1-CA-36157	State v. Ybarra	Affirm	12/14/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADMISSION

On December 12, 2017:
Eric Austin Ashley
Kohm & Associates, PC
112 E. Pecan Street,
Suite 2810
San Antonio, TX 78205
210-704-1067
eashley@kalawpc.com

On December 12, 2017:
Robert A. Berlin
Duhigg, Cronin,
Spring & Berlin, PA
620 Roma Avenue, NW
Albuquerque, NM 87102
505-243-3751
505-246-9797 (fax)
rberlin@duhigglaw.com

On December 12, 2017:
Shawna Bree Casebier
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Council Service
411 State Capitol
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Santa Fe, NM 87501
505-986-4600
shawna.casebier@nmlegis.gov

On December 12, 2017:
Shane P. Gale
Rausch, Sturm, Israel,
Enerson & Hornik LLP
250 N. Sunnyslope Road,
Suite 300
Brookfield, WI 53189
262-789-1100
262-796-5710 (fax)
sgale@rsieh.com

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Wheeler Trigg O'Donnell LLP
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Denver, CO 80202
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303-244-1879 (fax)
homiak@wtotrial.com

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Elizabeth A. Knox
Walsh Gallegos Treviño Russo
& Kyle PC
105 Decker Court,
Suite 600
Irving, TX 75062
214-574-8800
214-574-8801 (fax)
eknox@wabsa.com

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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 December 27, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-015	Amended and supplemental pleadings	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017
1-088	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017
1-121	Temporary domestic orders	12/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-105	Assignment and designation of judges	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-105	Assignment and designation of judges	12/31/2017
3-112	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
Civil Forms		
4-223	Order for free process	12/31/2017
4-402	Order appointing guardian ad litem	12/31/2017
4-602	Withdrawn	12/31/2017
4-602A	Juror summons	12/31/2017
4-602B	Juror qualification	12/31/2017
4-602C	Juror questionnaire	12/31/2017
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017
Domestic Relations Forms		
4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
4A-201	Temporary domestic order	12/31/2017
4A-209	Motion to enforce order	12/31/2017
4A-210	Withdrawn	12/31/2017
4A-321	Motion to modify final order	12/31/2017
4A-504	Order for service of process by publication in a newspaper	12/31/2017
Rules of Criminal Procedure for the District Courts		
5-105	Designation of judge	12/31/2017
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information and Indictment	07/01/2017
5-211	Search warrants	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
5-802	Habeas corpus	12/31/2017

Rules of Criminal Procedure for the Magistrate Courts

6-105	Assignment and designation of judges	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017
6-202	Preliminary examination	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017
6-207	Bench warrants	04/17/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017
6-207.1	Payment of fines, fees, and costs	12/31/2017
6-208	Search warrants	12/31/2017
6-304	Motions	12/31/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-506	Time of commencement of trial	12/31/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-703	Appeal	07/01/2017

Rules of Criminal Procedure for the Metropolitan Courts

7-105	Assignment and designation of judges	12/31/2017
7-113	Public inspection and sealing of court records	03/31/2017
7-202	Preliminary examination	12/31/2017
7-203	Probable cause determination	12/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-208	Search warrants	12/31/2017
7-304	Motions	12/31/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
7-506	Time of commencement of trial	07/01/2017
7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-606	Subpoena	12/31/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-202	Probable cause determination	12/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-207	Search warrants	12/31/2017
8-304	Motions	12/31/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-506	Time of commencement of trial	12/31/2017
8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-207A	Probable cause determination	12/31/2017
9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-513	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
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017
9-809	Order of transfer to children's court	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017

Children's Court Rules and Forms

10-161	Designation of children's court judge	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017
10-166	Public inspection and sealing of court records	12/31/2017
10-169	Criminal contempt	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017
10-612	Request for court interpreter	12/31/2017
10-613	Cancellation of court interpreter	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017

Rules of Appellate Procedure

12-202	Appeal as of right; how taken	12/31/2017
12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-210	Calendar assignments for direct appeals	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017
12-307.2	Electronic service and filing of papers	08/21/2017
12-313	Mediation	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	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
13-2401	Legal malpractice; elements	12/31/2017
13-2402	Legal malpractice; attorney-client relationship	12/31/2017
13-2403	Legal malpractice; negligence and standard of care	12/31/2017
13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
13-2405	Duty of confidentiality; definition	12/31/2017
13-2406	Duty of loyalty; definition	12/31/2017
13-2407	Legal malpractice; attorney duty to warn	12/31/2017
13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
13-2410	Legal malpractice; expert testimony	12/31/2017
13-2411	Rules of Professional Conduct	12/31/2017
13-2412	Legal malpractice; attorney error in judgment	12/31/2017
13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017

Uniform Jury Instructions – Criminal

14-240	Withdrawn	12/31/2017
14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
14-251	Homicide; "proximate cause"; defined	12/31/2017
14-1633	Possession of burglary tools; essential elements	12/31/2017
14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017
14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017

14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017
14-4205	Money laundering; definitions	12/31/2017
14-5130	Duress; nonhomicide crimes	12/31/2017

Rules Governing Admission to the Bar

15-103	Qualifications	12/31/2017
15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-100	Terminology	12/31/2017
16-101	Competence	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017
16-106	Confidentiality of information	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017
16-304	Fairness to opposing party and counsel	12/31/2017
16-305	Impartiality and decorum of the tribunal	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
16-803	Reporting professional misconduct	12/31/2017

Rules Governing Discipline

17-202	Registration of attorneys	07/01/2017
17-202	Registration of attorneys	12/31/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service	07/01/2017

Rules for Minimum Continuing Legal Education

18-203	Accreditation; course approval; provider reporting	09/11/2017

Code of Judicial Conduct

21-004	Application	12/31/2017

Supreme Court General Rules

23-106	Supreme Court rules committees	12/31/2017
23-106.1	Supreme Court rule-making procedures	12/31/2017

Rules Governing the New Mexico Bar

24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

Local Rules for the Second Judicial District Court

LR2-308	Case management pilot program for criminal cases	01/15/2018

Local Rules for the Thirteenth Judicial District Court

LR13-112	Courthouse security	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 Denied, September 26, 2017, No. S-1-SC-36570

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-076

No. A-1-CA-34640 (filed June 21, 2017)

DON R. BACA,
Worker-Appellant,
v.
STATE OF NEW MEXICO and
RISK MANAGEMENT DIVISION,
Employer/Insurer-Appellee.

APPEAL FROM THE WORKERS' COMPENSATION ADMINISTRATION
TERRY S. KRAMER, Workers' Compensation Judge

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for Appellant

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

Opinion

Timothy L.Garcia, Judge

{1} The primary issue in this workers' compensation appeal is the enforceability of the parties' stipulated compensation order (the SCO) that was filed on August 4, 2004. Although much has happened since the SCO was approved and both parties have substantially contributed to the procedural dilemma since 2004, we are able to resolve the present appeal succinctly. We conclude that the workers' compensation judge (the WCJ) was without authority to approve the SCO containing a partial lump-sum payment to Worker because the SCO did not comply with the Workers' Compensation Administration Act (the WCAA), NMSA 1978, §§ 52-5-1 to -22 (1987, as amended through 2013), specifically Section 52-5-12(C). In 2014, when addressing a motion by the State (Employer), the WCJ erred by determining that the SCO was enforceable against Worker. As a result, we reverse and remand this matter to the Workers' Compensation Administration (the WCA) for further proceedings.

BACKGROUND

{2} On August 4, 2004, the parties entered into the SCO to settle a dispute regarding Worker's entitlement to workers' compensation benefits as the result of an accident and injuries to Worker's back that occurred on July 24, 2002. It is undisputed by Employer that no hearing was held by the WCJ to approve the provisions of the SCO or otherwise confirm Worker's knowledge of the partial lump-sum settlement or any of the material facts contained therein. The SCO set Worker's permanent partial disability (PPD) benefits at $193,554.62, offset $54,746.12 for previous PPD benefits paid, allowed a $60,000 partial lump-sum payment to Worker to pay debts, and provided for the remaining PPD benefits to be paid at $250 per week, on a bi-weekly basis, for 315.234 weeks. In 2010, Worker underwent the first of several additional surgeries due to the further deterioration of his back injury. Without any modification of the SCO or Worker's previous 2004 benefits and without any application, hearing, or order of modification pursuant to the Workers' Compensation Act (the Act), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2016) and the WCAA, specifically Section 52-1-56 and Section 52-5-9, Employer unilaterally notified and paid Worker additional workers' compensation indemnity benefits of approximately $92,530.72.

{3} In 2014, Employer filed an application seeking an independent medical examination (IME) of Worker for the purpose of determining his current medical condition, ascertaining whether Worker has attained maximum medical improvement (MMI), whether Worker had an impairment rating, and to determine the reasonableness, necessity, and scope of future medical care. After Employer's application for an IME was addressed and denied by the WCJ, Employer filed a complaint seeking a determination of compensability/benefits and a credit for any overpayment, as well as a motion for supplemental compensation order (the MSCO). In response to the MSCO, Worker asserted that: (1) the SCO was not enforceable because a hearing to approve the SCO was never held; (2) Employer waived any overpayment of additional benefits that Employer had voluntarily paid to Worker pursuant to the provisions of the SCO; and (3) Worker was entitled to a reinstatement of temporary total disability (TTD) payments and a modification of benefits pursuant to Section 52-1-56, Section 52-5-9, *Benny v. Moberg Welding*, 2007-NMCA-124, 142 N.M. 501, 167 P.3d 949, and also applying *Fowler v. Vista Care*, 2014-NMSC-019, 329 P.3d 630. Worker also filed a counterclaim for the approval of a spinal cord stimulator, approval of TTD payments until he reached MMI in the future, and approval of PPD payments once MMI was reached in the future. Employer asserted that the issues to be resolved were only legal and that the WCJ could rule from the pleadings without the need for an evidentiary hearing. The WCJ granted Employer's MSCO and ruled that (1) the SCO was enforceable "as written," (2) Employer mistakenly overpaid benefits to Worker, and (3) Worker was required to reimburse Employer for the excess benefits paid in the amount of approximately $92,530.72.Worker timely appealed.

{4} Worker raises four separate arguments on appeal. Worker asserts that the WCJ erred by: (1) failing to mutually apply the principle of waiver to all provisions in the SCO; (2) converting the MSCO into a strictly legal argument and granting summary judgment in favor of Employer; (3) failing to apply the holding in *Benny* to effectuate a modification of the SCO based upon the parties' actions since 2004; and (4) failing to determine that the SCO was invalid and unenforceable under *Sommerville v. Southwest Firebird*, 2008-NMSC-034, 144 N.M. 396, 188 P.3d 1147. Because we reverse and remand based

upon our determination that the SCO was unenforceable, it is not necessary that we address Worker's other issues at this time.

DISCUSSION

I. The WCJ Erred by Enforcing the SCO

{5} We review "a summary judgment ruling de novo." *Id.* ¶ 5; *see Paradiso v. Tipps Equip.*, 2004-NMCA-009, ¶ 23, 134 N.M. 814, 82 P.3d 985 ("We therefore review the issue de novo and determine whether the applicable law was correctly applied to the facts."). Depending upon the statutory section in dispute, our appellate courts may still apply principles of liberal construction to the Act and the WCAA as "one of many tools employed in construing legislation." *Benavides v. E. N.M. Med. Ctr.*, 2014-NMSC-037, ¶ 44, 338 P.3d 1265. When a statute is not clear, "we must attempt to construe [it] according to its obvious spirit or reason." *Id.* ¶ 24 (internal quotation marks and citation omitted); *see Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, ¶ 13, 117 N.M. 91, 869 P.2d 279 ("There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." (internal quotation marks and citation omitted)).

{6} The statutory construction considerations in the present case—the old law, the mischief, and the remedy—regarding lump-sum payments to injured workers have been clearly articulated. Lump-sum payments are specifically disfavored in workers' compensation cases. *See* § 52-5-12(A) ("It is stated policy for the administration of the [Act] . . . that it is in the best interest of the injured worker or disabled employee that the worker or employee receive benefit payments on a periodic basis."); *Sommerville*, 2008-NMSC-034, ¶ 6 ("The Act's express policy is that it is in an injured worker's best interest to receive workers' compensation benefits on a periodic basis, rather than in a lump[-]sum."). As a result, the Legislature has specifically restricted their use. *See* §§ 52-5-12 to -14; *Paradiso*, 2004-NMCA-009, ¶ 25 (emphasizing that "[t]he Legislature set unmistakable policy [when it limited] lump[-]sum payments under the [WCAA]"). These restrictions are aimed at protecting workers from future financial risk. *See Sommerville*, 2008-NMSC-034, ¶ 7 ("Payment of disability benefits in a lump[-]sum creates a risk that the worker will need to rely on public benefits during the time that periodic disability payments would otherwise be available." (alteration, internal quotation marks, and citation omitted)); *Cabazos v. Calloway Constr.*, 1994-NMCA-091, ¶ 12, 118 N.M. 198, 879 P.2d 1217 ("The chief reason not to grant a lump-sum benefit is that it creates a risk that the worker will need to rely on welfare during the time that periodic disability payments would otherwise be available." (internal quotation marks and citations omitted)).

{7} Section 52-5-12(A) expressly states that "[e]xcept as provided in this section, lump-sum payments in exchange for the release of the employer from liability for future payments of compensation or medical benefits *shall not* be allowed." (Emphasis added.) As explained in *Sommerville*:

> The [only] two exceptions to this policy are set out in Sections 52-5-12(B) and (C). Both sections allow a worker, with the approval of [the] WCJ, to elect to receive a lump[-]sum payment under specified circumstances. Section 52-5-12(B) permits a worker to elect to receive a lump[-]sum payment award if he or she has returned to work for at least six months and is earning at least eighty percent of his or her pre-injury wage. Section 52-5-12(C) permits a worker who has reached [MMI] to elect to receive a partial lump[-]sum payment for the sole purpose of paying debts that have accumulated during the worker's period of disability.

2008-NMSC-034, ¶ 6. Section 52-5-13 requires WCJ approval for all lump-sum settlements and requires the WCJ to "assure that the worker or his dependents understand the terms and conditions of the proposed settlement[.]" Section 52-5-14(A) states,

> If the [WCJ] finds the lump-sum payment agreement to be fair, equitable[,] and consistent with the provisions of the [Act,] . . . he shall approve the agreement by order[.] . . . The [WCJ] may refuse to approve a settlement if he does not believe that it provides substantial justice to the parties.

A. Whether the SCO Was in Compliance With Section 52-5 12(B) and (C)

{8} We first address the two limited exceptions, Sections 52-5-12(B) and (C), that allow a worker to elect, with the approval of the WCJ, to receive a lump-sum payment in lieu of future workers' compensation benefits. Because Worker only received a partial lump-sum payment of his disability benefits under the SCO, Section 52-5-12(B) is not applicable in this case. *See Cabazos*, 1994-NMCA-091, ¶ 9 (recognizing that Subsection B only applies when the worker has received a full lump-sum payment of all compensation benefits). Neither Worker nor Employer contend that the $60,000 partial lump-sum settlement payment in the SCO meets the "for the sole purpose of paying debts" exception set forth in Section 52-5-12(C). Based upon our review of the record, we agree that this $60,000 amount is unsupportable. Worker filed an unverified petition and affidavit alleging that "debts . . . may have accumulated during the course of [his] disability," identified an amount of "$21,000," and referenced outstanding itemized sources totaling $20,084.94. *See Souter v. Ancae Heating & Air Conditioning*, 2002-NMCA-078, ¶ 12, 132 N.M.608, 52 P.3d 980 (recognizing that "partial lump-sum payments are restricted to the amount necessary to pay accumulated debts of workers who may never be able to return to work and are based on need"). Instead, the parties primarily argue about the approval process for lump-sum payments, the disputed application of *Sommerville*, and any requirements for a formal hearing to approve lump-sum payments under Section 52-5-13 and Section 52-5-14.

{9} The second issue we address is whether a proper review and determination under Section 52-5-13 is required to enforce the parties' SCO that contains a lump-sum payment of benefits to Worker under Subsection 52-5-12(C). *See Quintana v. Ilfelds*, 1993-NMCA-158, ¶ 6, 116 N.M. 836, 867 P.2d 1218 (determining sua sponte that the proposed partial lump-sum payment pursuant to Section 52-5-12(C) was unenforceable and must be set aside). Our Court, in a memorandum opinion that carries no precedential effect in the present case, has previously addressed whether an agreement that includes an impermissible lump-sum payment of workers' compensation benefits is enforceable. *See Lucero v. First Fleet*, No. 31,096, mem. op. (N.M. Ct. App. July 5, 2012) (non-precedential).

We now address and resolve this issue formally.

{10} The purpose for severely restricting lump-sum payments of workers' compensation benefits under the WCAA is to prevent injured workers from "rely[ing] on public benefits during the time that periodic disability payments would otherwise [have been] available." *Sommerville*, 2008-NMSC-034, ¶ 7 (alteration, internal quotation marks, and citation omitted). To grant the WCJ discretion to approve partial lump-sum payments that do not qualify under Section 52-5-12(C) would clearly circumvent the unmistakable policy restricting lump-sum payments under the WCAA and the Act. *See Cabazos*, 1994-NMCA-091, ¶ 15 (noting that even qualifying partial lump-sum payments under Subsection C must be carefully scrutinized by the WCJ during the approval process to prevent abuse). Agreements have been rejected and overturned by this Court for non-compliance with Section 52-5-12(C). *See Quintana*, 1993-NMCA-158, ¶¶ 6, 9 (reinstating the requirement for periodic payments when a partial lump-sum payment of benefits under Subsection C of Section 52-5-12 was set aside). As a result, where the parties' SCO was not in compliance with Section 52-5-12(C), the WCJ had no authority to approve the SCO containing a partial lump-sum payment of benefits, and the SCO was invalid, unenforceable, and will "not be allowed" under Section 52-5-12(A). Because the SCO continued to be invalid and unenforceable when Employer filed the MSCO, the WCJ's order granting the MSCO and ruling that the SCO was enforceable "as written" was also error and is now reversed.

B. Whether the SCO Was in Compliance With Sections 52-5-13, 52-5-14(A) and *Sommerville*

{11} We continue our analysis of the WCJ's approval of the SCO under *Sommerville* because this analysis effectively overlaps our determination that the SCO is unenforceable under Section 52-5-12. This overlap occurs because the plain language of Section 52-5-14(A) required the WCJ to approve the SCO and partial lump-sum payment agreement only after it determined that it was "fair, equitable[,] . . . *consistent with provisions of* the . . . Act," and "provides substantial justice to the parties." (Emphasis added.) As emphasized above, the partial lump-sum payment presented to the WCJ was, based upon the undisputed facts in the record, inconsistent with Section 52-5-12(C). Employer argues that "*Sommerville* did not interfere with [the] WCJ's discretion" to approve a lump-sum payment of benefits, but should be limited to cases "when a worker is not represented by counsel." Employer also argues that even if *Sommerville* is applicable to Worker's arguments under Sections 52-5-13 and -14(A), "it does not have retroactive effect to 2004" and its holding should only have "prospective application" under the factors established by the *Marckstadt*, case. *See Marckstadt v. Lockheed Martin Corp.*, 2010-NMSC-001, ¶ 31, 147 N.M. 678, 228 P.3d 462 (setting out the factors to determine whether an appellate court's decision is to be applied retroactively or only prospectively). We reject Employer's arguments.

{12} First, the need for strict scrutiny regarding the approval of lump-sum payments of benefits to a worker is to ensure that the WCJ fulfills its "integral role in ensuring that the [WCAA's] policy regarding lump[-]sum settlements is preserved [and t]he WCJ is required to consider all material circumstances surrounding the lump[-]sum settlement agreement[.]" *Sommerville*, 2008-NMSC-034, ¶ 8. The importance for this strict compliance "with the [review and approval] requirements of Sections 52-5-13 and -14(A) is . . . to assure adherence to the policies established by the Legislature favoring periodic payments over lump[-]sum payments[.]" *Sommerville*, 2008-NMSC-034, ¶ 8 (internal quotation marks and citation omitted). "Lump[-]sum agreements that *do not follow the express requirements of* the Act are not enforceable." *Id.* ¶ 9 (emphasis added); *see Paradiso*, 2004-NMCA-009, ¶ 31 (recognizing that a lump-sum settlement agreement was not enforceable when it failed to comply with Sections 52-5-13 and -14(A) of the WCAA). Therefore, "[t]he WCJ must . . . play an active role in the approval of lump[-]sum settlements." *Sommerville*, 2008-NMSC-034, ¶ 13.

{13} We reject a narrow reading of *Sommerville*'s policy analysis imposing strict adherence to the review and approval requirements of Sections 52-5-13 and -14(A). Although *Sommerville* involved the rejection of a lump-sum settlement agreement where the worker was not represented by counsel, its ruling was directed toward compliance with the WCAA and specified that where "[t]he WCJ [fails to] follow the express requirements of the [WCAA,] the lump[-]sum agreement is unenforceable." 2008-NMSC-034, ¶ 11. Accordingly, we reject Employer's argument that our Supreme Court's holding in *Sommerville* was only intended to apply in cases involving unrepresented workers. It is applicable under Sections 52-5-12, -13 and -14(A) whenever "[t]he WCJ [fails to] follow the express requirements of the [WCAA]." *Sommerville*, 2008-NMSC-034, ¶ 11.

{14} Like *Sommerville*, we hold that the WCJ failed to strictly adhere to the review and approval requirements of Sections 52-5-13 and 14(A) in this case. The petition and unverified affidavit only supported a partial lump-sum payment of no more than $20,084.94. No hearing was even held to approve the SCO. To ignore the strict review and approval requirements under Sections 52-5-13 and -14(A), as Employer suggests, would render the language in Section 52-5-12 surplusage, which is "contrary to ordinary rules of statutory construction." *Benny*, 2007-NMCA-124, ¶ 8. Since the partial lump-sum payment did not conform to Section 52-5-12(C), the WCJ erred in approving the SCO under Sections 52-5-13 and -14. *See Sommerville*, 2008-NMSC-034, ¶ 9 (confirming that "[l]ump[-]sum agreements that do not follow the express requirements of the [WCAA] are not enforceable"). As a result, the SCO was equally unenforceable due to the WCJ's failure to comply with the review and approval requirements of Sections 52-5-13 and -14(A).

{15} Finally, we address Employer's argument that our Supreme Court's holding in *Sommerville* should not have retroactive effect over settlement agreements entered into prior to April 9, 2008, the date the *Sommerville* opinion was filed. *See* 2008-NMSC-034 (including a filing date of April 9, 2008). Nothing in *Sommerville* indicates that our Supreme Court understood or even considered that its ruling would overrule clearly established past precedent, establish a new principle of law, or create an injustice or hardship. *Id.* Employer provides no supporting evidence or cited authority that remotely establishes or confirms that its fears of retroactive injustice and hardship materialized between 2008 and 2014, the date Employer filed its MSCO. *See Atma v. Munoz*, 1944-NMSC-016, ¶ 20, 48 N.M. 114, 146 P.2d 631 (noting that where there is a lack of evidence to support a finding, the court cannot assume evidence exists in support of a party's view of the law); *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 45, 140 N.M. 49, 139 P.3d 209 (noting that when no authority is cited for a proposition, we are "entitled

to assume that there is no applicable or analogous authority").

{16} The general presumption is that the holding established in a civil case will "apply retroactively." *Marckstadt*, 2010-NMSC-001, ¶ 31. Our Supreme Court's decision in *Sommerville* does not satisfy the first factor established in *Marckstadt* to prevent its retroactive application to prior lump-sum distributions under Section 52-5-12. *See Marckstadt*, 2010-NMSC-001, ¶ 31 (stating that the first factor for determining that a decision will not be applied retroactively is it "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (internal quotation marks and citation omitted)). We conclude that Employer's prospective application argument is not persuasive.

{17} First, whether the analysis in *Sommerville* could be considered an issue of first impression is disputed by Worker. We agree. Although the review and approval process under Sections 52-5-13 and -14(A) were addressed in *Sommerville*, the requirement that the WCJ play an active role in determining whether a worker—not represented by counsel—understands the terms and conditions of a settlement agreement should not be considered unique or contrary to recognized precedent. *See Sherrill v. Farmers Ins. Exch.*, 2016-NMCA-056, ¶¶ 3, 11, 19, 374 P.3d 723 (recognizing the vulnerability of unrepresented parties in the insurance settlement process and its public policy implications); *State v. Reyes*, 2005-NMCA-080, ¶ 10, 137 N.M. 727, 114 P.3d 407 (recognizing that, in a criminal prosecution, special care must be taken to make sure the defendant is advised "as to the ramifications of proceeding pro se [and] is aware of the pitfalls of self-representation"). We recognize the WCJ must fulfill its role—assuring that the worker understands the terms and conditions of the settlement and determining that a worker's lump-sum payment of benefits is fair and just—but this role is not a unique or novel legal issue of first impression. *See* §§ 52-5-13 and -14(A).

{18} Second, no new rule of law or rejection of past precedent was established in *Sommerville*. As noted in *Marckstadt*, "a matter of statutory and regulatory interpretation drawing on explicit language in the relevant provisions [is a result] the parties could have foreseen." 2010-NMSC-001, ¶ 31; *see Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶¶ 12-19, 140 N.M. 630, 145 P.3d 110 (recognizing that the first factor limiting retroactive application of a court's ruling was not met because the Act was not ever intended to immunize employers from liability for intentional torts, even where *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, articulated a new rule or principle of law). In effect, it "is not . . . a new rule[,] it does not supplant any prior rule," and it does not weigh in favor of the factors limiting a ruling to prospective application. *Marckstadt*, 2010-NMSC-001, ¶ 31. The interpretations of Sections 52-4-13 and -14(A) in *Sommerville* were equally foreseeable and are consistent with the Legislature's unmistakable policy limiting lump-sum payments under the WCAA. *See Paradiso*, 2004-NMCA-009, ¶ 25 ("The Legislature set unmistakable policy [when it limited] lump[-]sum payments under the . . . Act[.]"). As a result, Employer has failed to satisfy the first factor under *Marckstadt* for establishing that *Sommerville* should not have retroactive effect over lump-sum settlement agreements entered into prior to April 9, 2008. Our Supreme Court's holding in *Sommerville* will be applied retroactively and, to the extent it is applicable to our decision in the present case, it is controlling precedent. *See Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993 ("encourag[ing] the Court of Appeals to express its rationale for any reservations it might harbor over Supreme Court precedent[,]" but emphasizing "the Court of Appeals, nonetheless, remains bound by Supreme Court precedent" (alteration, internal quotation marks, and citations omitted)).

II. Remand to Address Worker's Claims

{19} Now that this Court has held the SCO invalid and unenforceable, our remand to the WCA will place a burden on the parties and the WCJ to reconcile the actions of the past. *See Scott v. Rizzo*, 1981-NMSC-021, ¶¶ 8, 16-22, 96 N.M. 682, 634 P.2d 1234 (recognizing that some decisions by the appellate courts can result in difficulties that must be addressed on remand), *superseded by statute as stated in Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 2016-NMSC-009, 368 P.3d 389. Initially, we note that much has happened since the SCO was erroneously approved in 2004. The WCJ will need to address the subsequent deterioration of Worker's back injury that required additional surgeries in 2010 and 2011, reconcile the various benefit payments actually made by Employer, and incorporate the many applicable appellate court workers' compensation cases since 2004. *See Fowler*, 2014-NMSC-019; *Sommerville*, 2008-NMSC-034; *Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, 143 N.M. 726, 181 P.3d 718; *Benny*, 2007-NMCA-124. In our view, the ramifications of reversal in this case do not present circumstances that common sense and a reasonable application of the Act and the WCAA will not resolve. *See Scott*, 1981-NMSC-021, ¶¶ 16, 18-19 (noting that common sense and basic theories of law should be sufficient to address the difficulties imposed upon fact-finders when confusion and uncertainty arise in a case).

CONCLUSION

{20} We reverse the WCJ's ruling that the SCO is valid and enforceable against Worker. We do not address the remaining arguments presented by Worker and remand to the WCA for further proceedings consistent with this opinion.

{21} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-077

No. A-1-CA-35411 (filed June 30, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MARK WEBB,
Defendant-Appellant.

INTERLOCUTORY APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BENJAMIN CHAVEZ, District Judge

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Opinion

Jonathan B. Sutin, Judge

{1} Defendant Mark Webb was charged in two separate cases after he allegedly surreptitiously videotaped the minor daughter (Victim) of his former girlfriend unclothed in her bathroom. The first case, *State v. Webb*, Second Judicial District Court Case No. D-202-CR-2014-02997 (*Webb I*), was filed in 2014 and charged Defendant with voyeurism (child under eighteen), in violation of NMSA 1978, Section 30-9-20(A)(1) (2007), attempted voyeurism (child under eighteen), in violation of Section 30-9-20(A)(1) and NMSA 1978, Section 30-28-1(A) (1963), tampering with evidence, in violation of NMSA 1978, Section 30-22-5(B) (2003), and battery on a household member, in violation of NMSA 1978, Section 30-3-15(A) (2008). These charges were based on videos dated February 19, 2013 and February 24, 2013 that were discovered on a hidden camera located in Victim's bathroom. The second case, *State v. Webb*, Second Judicial District Court Case No. D-202-CR-2015-01400 (*Webb II*), which is the subject of this appeal, was filed in 2015 and charged Defendant with two counts of sexual exploitation of a child (manufacture), in violation of NMSA 1978, Section 30-6A-3(D) (2007, amended 2016), and one count of attempted sexual exploitation of a child (manufacture), in violation of Sections 30-6A-3(D) and 30-28-1(B). These charges were based on videos dated between January 1, 2013 and January 30, 2013 that were discovered on a computer to which Defendant had access. After the State unsuccessfully sought to join the two cases, Defendant filed a motion to dismiss *Webb II*. The district court denied Defendant's motion, Defendant filed an application for interlocutory appeal, and this Court granted the application.

{2} On appeal, Defendant argues that *Webb II* should be dismissed because the mandatory joinder provisions of Rule 5-203(A) NMRA were violated, the State chose not to timely pursue the *Webb II* charges and forfeited any discretion to pursue them, and the State's unjustifiable delay in seeking the *Webb II* charges created judicial inefficiency and prejudiced Defendant. For the reasons set forth in this opinion, we hold that *Webb I* and *Webb II* should have been mandatorily joined under Rule 5-203(A) as initially requested by the State. Because the district court should have granted the pretrial motion to join, dismissal of *Webb II* is not appropriate, and therefore, we affirm the district court's denial of Defendant's motion to dismiss.

BACKGROUND

{3} On February 24, 2013, Victim, then age seventeen, discovered a USB camera hidden in her bathroom in the home that she shared with her mother and brother, as well as with mother's boyfriend (Defendant). Detective Steve Walsh, the on-call child exploitation detective, was called to the home. Detective Walsh obtained a search warrant for the USB camera on February 26, 2013, viewed the contents of the camera, and discovered two videos dated February 19, 2013 and February 22, 2013. According to Detective Walsh, in the February 19 video, Defendant could be seen placing and adjusting the camera, and thereafter, Victim could be seen entering the bathroom and undressing. In the February 22 video, Defendant again could be seen placing and manipulating the camera, and thereafter, Victim could be seen entering the bathroom, preparing to take a shower, and noticing the camera, which she subsequently removed from its location.

{4} Defendant was arrested on February 26, 2013, and charged in Bernalillo County Metropolitan Court with sexual exploitation of a child (manufacture) and attempted sexual exploitation of a child. After his arrest, Defendant was interviewed. During the interview, Defendant apparently admitted to recording Victim "[a]bout half a dozen times" and indicated to police that he would download the recorded videos to the "community laptop" (the laptop), of which Victim's mother was the administrator.[1] Sometime in March 2013, Victim's mother provided the police with the laptop so that they could search the computer. Detective Walsh returned the laptop in June 2013 and indicated to Victim's mother that he found nothing on the computer. A few days later, Victim's mother, as the administrator for the laptop, changed

[1] We mention these admissions with hesitation because the district court ultimately suppressed Defendant's statements on the ground that there was a *Miranda* violation. However, because Defendant relies on the fact that he told the police about the additional recordings on February 26, 2013, in an attempt to bolster his argument on appeal, we are compelled to mention the incriminating statements even though they cannot later be used as evidence in the State's case.

the login information for Defendant's accounts and discovered additional videos of Victim. She attempted to call Detective Walsh directly and again through the Albuquerque Police Department. She then contacted a victim's advocate at the Office of the New Mexico Attorney General and told her that she had found more videos on the laptop. The victim's advocate told Victim's mother she would contact Detective Walsh and have him call Victim's mother. Detective Walsh followed up with Victim's mother, and after she showed him how to access the additional videos, the laptop was taken back into evidence by the detective.

{5} After Defendant's arrest, three target notices were issued to Defendant. The first, dated March 4, 2013, was from the Second Judicial District Attorney and indicated that the State intended to present charges of sexual exploitation of a child, tampering with evidence, and voyeurism, which occurred on or about February 24, 2013. The second, dated August 9, 2013, was from the Office of the Attorney General and indicated that the State intended to present charges of sexual exploitation of a child (three counts) and attempt to commit the same (two counts), which were alleged to have occurred on or between February 19, 2013 and February 24, 2013. The third, dated June 9, 2014, was also from the Office of the Attorney General and restated its intent to present the charges listed in the August 9, 2013 notice.

{6} Although the first and second notices listed specific dates on which the State intended to present the listed charges to the grand jury, the grand jury only convened on the date listed in the third notice—June 25, 2014. Defendant was subsequently indicted, on June 25, 2014, in district court with voyeurism (child under eighteen), attempted voyeurism (child under eighteen), tampering with evidence, and battery on a household member (*Webb I*). Those charges arose from the videos found on the camera, which were both dated in February 2013.

{7} On August 28, 2014, Detective Don Roberts with the Albuquerque Police Department requested a forensic examination of the laptop, which had been in police custody for approximately fourteen months. A September 18, 2014 forensic report documented three additional videos of Victim naked in her bathroom that had been saved on the laptop. These videos were dated between January 1, 2013 and January 30, 2013.

{8} On May 26, 2015, the State procured a second indictment charging Defendant with two counts of sexual exploitation of a child (manufacture) and one count of attempted sexual exploitation of a child (*Webb II*). Those charges arose from the videos found on the laptop that were dated in January 2013. On June 8, 2015, the State moved for joinder of *Webb I* and *Webb II*. In its motion, the State argued that the charges in each proceeding involved different videos—the former related to the videos on the camera, the latter related to videos on the laptop—but were of similar character, involved the same Victim, and were "based on the same conduct or on a series of acts connected together and constituting parts of a single scheme or plan" under Rule 5-203(A)(2). Defendant agreed that joinder was mandatory under Rule 5-203(A) but argued against joinder because the State did not join the offenses in one indictment. According to Defendant, the State was required to "join offenses at the outset[,]" and because it failed to do so, it was barred from adding additional charges at such a "late juncture."

{9} On July 1, 2015, the district court denied the motion for joinder on the ground that Defendant had timely filed a peremptory challenge of the district judge and thus the judge "lack[ed] jurisdiction to entertain the motion before the court." On December 17, 2015, Defendant filed a number of pleadings, including a motion to dismiss for failure to properly join the charges in *Webb II* with the charges in *Webb I*. The district court denied Defendant's motion to dismiss on February 24, 2016, concluding that although "[t]he charges in *Webb I* and *Webb II* are subject to joinder pursuant to Rule 5-203" and "the separate incidents charged in *Webb I* and *Webb II* are of the exact same type and were committed by the same individual against the same [V]ictim in the same location, because they are not identical, it is permissible to charge and try them separately." This interlocutory appeal followed.

DISCUSSION

{10} In New Mexico, our rule concerning joinder in criminal cases "as originally promulgated was discretionary and reflected the common law." *State v. Gallegos*, 2007-NMSC-007, ¶ 10, 141 N.M. 185, 152 P.3d 828. However, in 1979, consistent with other courts at the time, our Supreme Court issued an order stating that " '[w]hen a person is charged with more than one crime and the crimes can be incorporated in one information or indictment in separate counts, this practice shall be followed.' " *Id.* ¶¶ 11, 14 (emphasis omitted) (quoting Rule 5-203 comm. cmt.). The change reflected the Court's "distaste for piecemeal prosecutions" and mandated joinder in certain cases "in order to avoid disorderly criminal procedures that threaten the existence of our judicial system and risk . . . prejudice to the accused[.]" *Id.* ¶ 14 (omission in original) (alteration, internal quotation marks, and citations omitted).

{11} New Mexico's current approach to joinder in criminal cases is articulated in Rule 5-203(A), which states that "[t]wo or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses . . . are of the same or similar character, even if not part of a single scheme or plan; or . . . are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan." The question of whether offenses must be joined under Rule 5-203(A) is a question of law that we review de novo. *See State v. Paiz*, 2011-NMSC-008, ¶ 10, 149 N.M. 412, 249 P.3d 1235 (stating that Rule 5-203(A) is a mandatory rule and improper joinder under the rule is a question of law, which we review de novo); *State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824 ("We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts of [the] case.").

{12} The most relevant case regarding Rule 5-203(A) and the ramifications for failing to join offenses is *State v. Gonzales*, 2013-NMSC-016, 301 P.3d 380, a case upon which both parties rely. In *Gonzales*, the defendant was charged with child abuse resulting in death, child abuse not resulting in death, aggravated driving while under the influence, and leaving the scene of an accident after she drove drunk and crashed into another vehicle, killing one child and injuring another. *Id.* ¶¶ 1-2. After the defendant's conviction for negligent child abuse was reversed on appeal for lack of substantial evidence, the defendant was prosecuted for vehicular homicide. *Id.* ¶ 3. In evaluating the lawfulness of the vehicular homicide charge after the defendant had already been through a trial in *Gonzales*, our Supreme Court sua sponte turned to Rule 5-203(A). *Gonzales*, 2013-NMSC-016, ¶¶ 25-26. According to the Court, "[t]he purpose of a compulsory joinder [rule], viewed as a whole, is twofold: (1) to protect a defendant from the governmental harassment

of being subjected to successive trials for offenses stemming from the same criminal episode; and (2) to ensure finality without unduly burdening the judicial process by repetitious litigation." *Id.* ¶ 26 (alteration, internal quotation marks, and citation omitted). The Court held that the vehicular homicide offense was "based on the same conduct against the same victim" as the offenses pursued in the earlier trial and thus must have been joined under Rule 5-203(A). *Gonzales*, 2013-NMSC-016, ¶¶ 25, 27 (emphasis and internal quotation marks omitted). Because the facts of the case mandated joinder under the rule and because the prosecution failed to join the offenses in the first trial, our Supreme Court also held that "a failure to join offenses under Rule 5-203(A) bars piecemeal prosecution in a subsequent trial." *Gonzales*, 2013-NMSC-016, ¶¶ 30-31. In deciding that the prosecution was barred from pursuing a vehicular homicide in *Gonzales*, our Supreme Court noted that:

> This is not a case in which the charge the [prosecution] now seeks to bring, vehicular homicide, was unknown at the time [the d]efendant was indicted. The [prosecution] had at least three different opportunities to join these offenses. The first was in the original indictment, but it chose to ask the grand jury to indict only on charges of child abuse. The second was at the hearing on the motion to dismiss. The [prosecution] was made fully aware that the charge was available and admitted at that hearing that it knew it was taking a risk when it decided on this particular trial strategy. Finally, . . . the [prosecution] could have asked for a vehicular homicide instruction notwithstanding its omission from the indictment, but again the [prosecution] elected not to do so.

Id. ¶ 32. Thus, our Supreme Court affirmed that the subsequent prosecution of the defendant for vehicular homicide was barred. *Id.* ¶ 34.

{13} Defendant's position on appeal is that the State was required under Rule 5-203 to bring all charges related to Defendant's alleged videotaping of Victim in a single indictment and that because the State chose not to pursue the charges in a single indictment, dismissal of *Webb II* is appropriate as stated in *Gonzales*, 2013-NMSC-016. Defendant asserts that the State and its prosecutors knew about the videos on the laptop prior to the indictment in *Webb I* as evidenced by: the statement from Victim's mother that she informed the police and a victim's advocate from the Office of the Attorney General about the laptop videos; Defendant's admission to police that he saved videos of Victim to the laptop; and the target letters from the Office of the Attorney General that alluded to five counts, which, as a matter of logic and math, appear to be related to the two videos found on the camera and the three videos found on the laptop. Defendant argues that because the State chose not to join the charges at the time of the indictment in *Webb I*, the State abandoned the charges that were ultimately pursued in *Webb II*. Defendant asserts that dismissal is the only appropriate remedy for the failure to join because there was a long delay between the filing of *Webb I* and *Webb II*, the State had no justification for the delay, the failure resulted in inefficiency and harmed judicial resources, the failure prejudiced and harmed Defendant, and Rule 5-203 is mandatory.

{14} We begin our analysis by noting that there is no real dispute that the offenses should have been joined under Rule 5-203. The State argued that joinder was mandatory in its motion for joinder, and Defendant admitted that joinder was mandatory in his response to the motion for joinder and in his motion to dismiss. Although the district court ultimately concluded that *Webb I* and *Webb II* could proceed separately in its order denying Defendant's motion to dismiss, it noted that "[t]he charges in *Webb I* and *Webb II* are subject to joinder pursuant to Rule 5-203[,]" and "the separate incidents charged in *Webb I* and *Webb II* are of the exact same type and were committed by the same individual against the same [V]ictim in the same location[.]"

{15} We agree that the offenses in *Webb I* and *Webb II*, all of which were related to Defendant's alleged videotaping of Victim in her bathroom, were of the same or similar character or based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan. *See Gallegos*, 2007-NMSC-007, ¶ 15 (stating that the defendant "engaged in inappropriate sexual activities with minors in his care[,]" and at the very least, his acts toward the two victims "were of the same or similar character regardless of whether they were part of a single scheme or plan" (internal quotation marks and citation omitted)); *State v. Riordan*, 1974-NMCA-013, ¶¶ 4-5, 86 N.M. 92, 519 P.2d 1029 (recognizing that "[i]t would be difficult to conceive of three separate offenses, more the same or similar in character" where the defendant sold controlled substances to a single officer on three occasions in the same community over the course of approximately three weeks). The rule does not require that the cases be "identical" as suggested by the district court. We hold that the district court erred in not joining all the offenses into one proceeding.

{16} Although there is no real dispute that the offenses in *Webb I* and *Webb II* were of the same or similar character or continued parts of a single scheme or plan, both parties on appeal expend much of their energy and briefing on whether the State and/or the prosecutors knew about the laptop videos prior to the *Webb I* indictment. Interestingly, however, prosecutorial knowledge, although a seemingly reasonable limiter to Rule 5-203, is not explicitly required under Rule 5-203. *See* Rule 5-203; *see also* Ryan C. Schotter, *State v. Gonzales: Reinvigorating Criminal Joinder in New Mexico*, 44 N.M. L. Rev. 467, 485-88 (2014) (noting that Rule 5-203 is "devoid of any of the important limiting principles expressed in the model codes promulgated by the ABA, ALI, and NCCUSL[,]" including a prosecutorial knowledge limitation). And although our Supreme Court stated in *Gonzales*, 2013-NMSC-016, ¶ 32, that it was "not a case in which the charge the [prosecution sought] to bring . . . was unknown at the time [the d]efendant was indicted[,]" *Gonzales* does not say that a finding of actual prosecutorial knowledge is necessary in order for there to be a compulsory joinder violation. But, more importantly, we need not and do not address prosecutorial knowledge head-on here because, in this case, even assuming arguendo that the State and/or the prosecutors knew about the laptop videos prior to the *Webb I* indictment, we hold that the State was not precluded from seeking to join the offenses in *Webb II* with similar offenses in *Webb I*, as it did in this case. The relevant inquiry is whether the State was permitted, under Rule 5-203, to move for joinder of the offenses in *Webb II* after the indictment was filed in *Webb I*, or whether they were, as a matter of law, barred from joining offenses once there was an indictment in *Webb I*.

{17} Although Rule 5-203 is admittedly broad and states that offenses shall be joined "in one complaint, indictment or information[,]" our Supreme Court in *Gonzales* suggested that additional offenses could be joined after an indictment even when a prosecutor knows of the additional offenses at the time of the indictment. As noted earlier, in *Gonzales*, the Court identified two post-indictment opportunities that the prosecution had to seek joinder of additional charges—one at the time of the hearing on a motion to dismiss and another by asking for "a vehicular homicide instruction notwithstanding its omission from the indictment[.]" 2013-NMSC-016, ¶ 32. If the sanction of dismissal for New Mexico's compulsory joinder provision were intended automatically to be triggered upon the State's failure to join all charges in an original indictment, there would have been no legal or other basis for our Supreme Court to reference additional opportunities for joinder thereafter. We interpret the Supreme Court's instructions in *Gonzales* as indicating that additional offenses can be joined post-indictment, but prior to a case being submitted to a jury.

{18} Applying the Court's guidance in *Gonzales* to the present case, we hold that the State, having moved to join the offenses in *Webb I* and *Webb II* post-indictment but pretrial, did not run afoul of Rule 5-203. Because the State properly sought to join the offenses in a manner that is acceptable under the rule and as contemplated by *Gonzales*, there is no merit to Defendant's argument that *Webb II* should be dismissed.

CONCLUSION

{19} For the reasons set forth in this opinion, we affirm the district court's denial of Defendant's motion to dismiss and remand for proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
JULIE J. VARGAS, Judge

Certiorari Granted, October 10, 2017, No. S-1-SC-36656

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-078

No. A-1-CA-35769 (filed August 10, 2017)

KATHLEEN OAKEY,
Personal Representative
of the ESTATE OF TAWANA LUCERO, Deceased,
Plaintiff-Appellee,
v.
JOHN TYSON, MD,
Defendant-Appellant,
and
JOHN VIGIL, MD,
Doctor on call, LLC,
Doctor on call 2, LLC,
Doctor on call 3, LLC ,
Doctor on call 4, LLC,
Doctor on call, PC, and
May Maple Pharmacy, INC.
Defendants

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
C. SHANNON BACON, District Judge

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FUQUA LAW & POLICY, PC
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Opinion

Linda M. Vanzi, Chief Judge

{1} This appeal arises from a lawsuit filed July 3, 2012, by "Lance Lucero, [as] Personal Representative of the Estate of Tawana Lucero, deceased," following Tawana's death on December 1, 2009, from an overdose of prescription medications. The complaint asserted claims against Doctor On Call, LLC and John Tyson, M.D., including negligence, medical malpractice, and wrongful death, based on allegations that Dr. Tyson had prescribed excessive amounts of dangerous medications to Tawana. Before he filed this suit (the civil action), Lance Lucero, Tawana's uncle, was appointed as personal representative of Tawana's probate estate in a separate case, *In re Estate of Tawana Lucero*, No. D-202-PB-2012-00031 (the probate case).

{2} Lance did not obtain a separate district court appointment in the civil action as personal representative under the Wrongful Death Act (WDA), NMSA 1978, §§ 41-2-1 to -4 (1882, as amended through 2001), which provides that damages actions for death resulting from wrongful conduct "shall be brought by and in the name of the personal representative of the deceased person[.]" Section 41-2-3. Neither the district judge presiding over the civil action (who also presides over the probate case) nor anyone else questioned or raised any objection concerning Lance's capacity or authority to file or prosecute the civil action.

{3} In the spring of 2013, Lance and Dr. Tyson entered into a settlement agreement, and the district court entered an agreed order dismissing all claims against Dr. Tyson with prejudice. Over two years later, on July 15, 2015, the court entered an order that stated, among other things, that Lance "was not appointed as the Personal Representative for the Wrongful Death Estate" and "removed" him as "Personal Representative of the Estate of Tawana Lucero, deceased," replacing him as personal representative in both the civil action and the probate case.

{4} A year after Lance was removed as personal representative, on July 26, 2016, the district court entered an order granting a motion filed by Kathleen Oakey (the newly appointed personal representative in the civil action) seeking to set aside the settlement and reinstate the claims against Dr. Tyson. That order was replaced and superseded by an order entered August 16, 2016, which recited that the relief sought in Oakey's motion "was to set aside the district court's [o]rder of [d]ismissal with prejudice of all claims against Dr. John Tyson, M.D., dated May 13, 2013" and ordered reinstatement of the claims against Dr. Tyson. Dr. Tyson filed an application for interlocutory appeal, which we granted. We reverse.

BACKGROUND

{5} The complaint in the civil action identified the plaintiff as "Lance Lucero, [as] Personal Representative of the Estate of Tawana Lucero, deceased" and alleged that "[Lance] is the duly appointed Personal Representative of the Estate of [Tawana]." A subsequent amended complaint adding additional defendants (collectively, Defendants) and claims identified Lance in the same way and contained the same allegation concerning Lance's appointment as "Personal Representative of the Estate of Tawana." As we have noted, no one objected to Lance's capacity or authority to commence or prosecute this case.

{6} After Lance entered into a settlement agreement with Dr. Tyson on or about April 4, 2013, the district court entered an agreed order on May 13, 2013, dismissing the claims against Dr. Tyson with prejudice (the dismissal order). Lance continued to litigate the civil action against the remaining Defendants for the next two years without any objection from anyone concerning Lance's capacity or authority to prosecute the case. On June 12, 2015,

Teresa Lucero, Lance's sister, filed an emergency motion seeking to intervene and obtain relief based on allegations that Teresa is Tawana's "natural mother" and "the statutory beneficiary of the wrongful death proceeds" and that Lance and his attorney at the time, Joseph Camacho, failed to distribute to her any proceeds of the settlement with Dr. Tyson.[1] Teresa had known of Tawana's death since early December 2009 and learned of this lawsuit no later than December 10, 2014 (the date of Camacho's withdrawal as Lance's attorney), perhaps earlier.

{7} Teresa's motion sought the following "immediate" relief: (1) an "accounting as to whom the settlement money was paid and the whereabouts of the funds[,]" (2) payment to Teresa of any funds from Camacho's trust account controlled by the New Mexico Disciplinary Board, and (3) removal and replacement of Lance as personal representative in the wrongful death case (WDA PR) because of his failure "to insure the partial settlement proceeds were properly paid to Teresa." The motion also represented that Lance's "current counsel is requesting to be allowed to withdraw[2] and the court-appointed Personal Representative should select a new attorney with the consent of [Teresa]." The motion's request for the removal and replacement of Lance as WDA PR was not based on Lance's failure to obtain court appointment as WDA PR, separate from his prior court appointment as personal representative in the probate case (the probate PR). In other words, Teresa's motion did not contend that Lance lacked capacity or authority to commence or prosecute the civil action, or to enter into the settlement with Dr. Tyson.

{8} Defendants (not including Dr. Tyson, who had been dismissed more than two years earlier) opposed Teresa's motion on the grounds that they did not want any further delay, a WDA beneficiary has no intervention right, and an accounting should be sought in the probate case, not the civil action.

{9} The district court held a motion hearing on July 8, 2015, at which Teresa's counsel argued that Lance should be removed as WDA PR and replaced with "a neutral person" because Lance had not distributed money and, "due to his non-cooperation with various counsel," had not "pushed the case along after three years." The court observed that the file contained no indication that Lance "was ever appointed the personal representative for purposes of the [WDA]." When defense counsel advised that Lance "was appointed in a separate proceeding[,]" the court said that there was such an indication in the probate case but that "[a]ppointment of a personal representative in a probate proceeding does not legally appoint anyone as the PR for purposes of wrongful death. They're distinct appointments." The court said, "I'm not convinced that [Lance] is actually the PR in this case[.]"

{10} As noted, neither the court nor anyone else had raised this issue or otherwise questioned or objected to Lance's capacity or authority to file or prosecute the civil action during the prior three years of litigation. Teresa's counsel stated that, although the duties of a probate PR and a WDA PR differ, Lance had acted with proper authority in the civil action based on his appointment as the probate PR, including in settling the claims against Tyson. He also stated that the simple remedy is entry of a stipulated order appointing the probate PR as WDA PR.

{11} The court subsequently stated that "we have a partial settlement with a party who is long departed from this case" and that "there is [no] unringing of that particular bell." But the issue of "undoing something like that" was not before the court. The court said it did not know "if there's going to be a question about legal capacity to enter that settlement" but that Dr. Tyson had been "dismissed with prejudice" and is "not a party to the case anymore." The court also observed that Teresa had standing in the probate case to seek "essentially everything" requested in her motion but that there was a question as to Teresa's standing in the civil action.

{12} On July 15, 2015, the court entered an order declaring that Lance was not appointed as WDA PR and had not filed an inventory or closed the probate case, and that Teresa is Tawana's mother and a proper probate PR. The court ordered (1) the removal of Lance "as Personal Representative of the Estate of Tawana Lucero, deceased"; (2) the appointment of Kathleen Oakey as WDA PR; (3) the appointment of Teresa as probate PR;[3] (4) the immediate payment by Lance of "all amounts collected on behalf of the statutory beneficiary" to Teresa's attorney, James Ellis, to be held "in his trust account on behalf of the Estate of Tawana Lucero"; (5) distribution to James Ellis of "[a]ny money held by the Disciplinary Board in which [Teresa] has an interest" to be held

[1]The record reflects the possibility that Teresa's maternal rights as to Tawana may have been terminated. Lance testified that they had been. Teresa could not recall. Barbara Wilton, Tawana's grandmother, testified that she was Tawana's court-ordered kinship guardian. The record also contains testimony that (1) Teresa said she did not want to be a WDA beneficiary and wanted Tawana's sister Veronica and/or Veronica's daughter to be the beneficiaries, (2) Lance believed that Veronica and her daughter were the WDA beneficiaries, and (3) the Tyson settlement money had been placed in a trust account and used only for the benefit of Veronica and her daughter. In staying discovery pending the outcome of this appeal, the district court ordered that the stay did not prevent discovery concerning, inter alia, whether Teresa is a WDA beneficiary. It thus appears that the court ordered relief to vindicate rights claimed by Teresa before ever establishing whether Teresa had any such rights.

[2]The number of attorneys representing the plaintiff in this case is staggering. Camacho represented Lance in this case and the probate case until he sought withdrawal in this case on December 10, 2014. Robert Cole entered his appearance as co-counsel on May 15, 2014, but moved to withdraw on December 19, 2014. Mario Medrano, Raynard Struck, and Michael Santistevan entered appearances on February 2, 2015. Three months later, on May 26, 2015, Arturo Nieto and Timothy Padilla substituted for Mario Medrano. Within a week, Nieto, Padilla, and Santistevan filed a motion for permissive withdrawal and filed another motion with the same request on June 30, 2015, which was granted on July 15, 2015. On August 14, 2015, Mark Fine entered his appearance, and some time the following year—perhaps around April 2016—Scott Fuqua was identified as also representing the plaintiff.

[3]Although the district court stated that it had jurisdiction over the probate case, it cited no legal authority for its decision to replace the probate PR, where no party requested removal, and no motion was made in the probate case. Nevertheless, and despite the court's instructions to Teresa's counsel to "draft the necessary letters of appointment" and Teresa's counsel's agreement to do so, it appears that two years later, Lance continues to be probate PR. *See In re Estate of Tawana Lucero*, No. D-202-PB-2012-0031.

"in his trust account on behalf of the Estate of Tawana Lucero"; and (6) the notification of all banks in which Lance has accounts by James Ellis that such accounts must be immediately frozen pending an accounting and further court order.[4]

{13} Six months later, on January 25, 2016, Oakey, now WDA PR (hereinafter, Plaintiff), filed a motion seeking to set aside the settlement with Dr. Tyson and to reinstate the claims against him. The motion stated that "Plaintiff takes no issue with the propriety of" Lance having acted as the probate PR, but argued that the Tyson settlement "is void ab initio" because Lance "fundamentally lacked the necessary statutory authority to pursue the claims presented by the litigation." The motion did not contest the amount of the settlement or manner in which it was negotiated. Although the motion asserted that undoing the settlement is "[t]he appropriate remedy" and that the court had authority to do so, it cited no authority supporting either contention. Instead, the motion faulted the insurer for paying the settlement and complained that it would be "fundamentally unfair" to allow Lance to "steal" Plaintiff's entitlement to pursue claims against Dr. Tyson as she saw fit. The motion did not address the fact that, by this time, Teresa had received at least some of the settlement monies. The motion also said nothing about the fact that the claims against Dr. Tyson were not limited to wrongful death but included claims for negligence and medical malpractice.

{14} Dr. Tyson (who intervened for the limited purpose of responding to the motion), filed a response, as did the remaining Defendants in the case, who also filed a motion to dismiss. Because Plaintiff cited no law purportedly authorizing the relief sought in the motion, Dr. Tyson and Defendants were left to their own devices to determine what legal authority might possibly be construed as authorizing Plaintiff's requested relief. Among other things, Defendants argued that Plaintiff could not have it both ways: if the court concluded that the Tyson settlement was void because Lance lacked legal authority to enter into it, the court must dismiss the civil action in its entirety because a legally authorized plaintiff had not filed the case within the time required by the WDA, a statute of repose. Defendants also argued that Rule 1-060(B) NMRA was the only authority the court might have, but that none of Rule 1-060(B)'s provisions applied; the motion was untimely; and the requested relief would prejudice Dr. Tyson and Defendants. Defendants argued further that the dismissal order was not void because a probate administrator may serve as WDA PR, and that Plaintiff should be judicially estopped from arguing that the Tyson settlement was void because, inter alia, that position is necessarily inconsistent with a position that allowed Plaintiff to avoid dismissal under the statute of repose.

{15} Dr. Tyson made similar arguments but emphasized, among other things, that, at the time of the settlement, New Mexico law did not require a probate PR to obtain an additional court appointment in order to serve as a WDA PR; no law authorizes "reinstatement" of a lawsuit that has been dismissed with prejudice; the contention that the correct WDA beneficiary had not been paid was an unproven allegation; the remedy for a technical failure concerning the appointment could be cured by ratification or appointment, and does not require a "do-over" of everything in the case; and Lance's alleged failure to distribute proceeds was not the result of failure to obtain a separate WDA PR appointment issue but a distinct wrong to be remedied in a separate action against Lance or his attorney. In addition, Dr. Tyson argued that Plaintiff's motion was not the proper procedural vehicle to request that a settlement agreement be set aside and that the request to do so was not properly before the court.

{16} In response to the motion to dismiss, Plaintiff asserted that her appointment as WDA PR relates back to the filing of the original complaint and that Rule 1-017(A) NMRA allows Plaintiff's substitution as WDA PR because Lance obtained appointment as the probate PR and his failure to obtain a separate appointment as WDA PR was an "honest mistake"; the "wrong" here is not that Lance filed the civil action without obtaining a separate appointment as WDA PR, but that Lance misappropriated the Tyson settlement funds; Plaintiff's substitution was timely; and Defendants were not prejudiced by delay. In reply to the motion to set aside, Plaintiff argued the law has always required a separate court appointment as WDA PR and that Lance's failure to distribute proceeds from an "unauthorized" settlement to the WDA beneficiary qualifies as an "exceptional circumstance" justifying relief under Rule 1-060(B)(6); and that the motion was timely.

{17} The district court held a motion hearing on June 27, 2016, at which it stated that the issue presented fell under Rule 1-060(B)(6), and not any other subsection of the rule; "these are extraordinary circumstances" justifying relief under that rule from the dismissal order; and that the motion was brought within a reasonable time. The court also denied Defendants' motion to dismiss, apparently on the ground that relation back to the filing of the original complaint was permitted under Rule 1-017(A) because that complaint gave Defendants notice of the claims against them.

{18} On July 26, 2016, the court entered an order granting Plaintiff's motion to set aside the settlement with Dr. Tyson and certifying the order for interlocutory appeal.[5] That order was replaced and superseded by an order entered August 16,

[4]We note also that the district court did not explain the legal basis for apparently accepting, without documentation or conducting any hearing on the matter, that Teresa was the sole statutory beneficiary under the WDA and that all monies recovered from Lance and the Disciplinary Board should be disbursed to her. It is also unclear why the court ordered Ellis to recover these funds in light of the WDA's requirement that it is the personal representative bringing the wrongful death action who is charged with collecting damages and distributing them to the statutory beneficiaries. Section 41-2-3; s*ee also Leyba v. Whitley*, 1995-NMSC-066, ¶ 21, 120 N.M. 768, 907 P.2d 172 (noting that the personal representative has a nondiscretionary duty to distribute the wrongful death proceeds in the ratio described by the WDA).

[5]On August 1, 2016, the district court entered an order "[i]n furtherance of" its July 15, 2015 order that required Teresa's attorney to provide the court and counsel "a status of the distribution of the monies to the Estate of Tawana Lucero Trust Account held and maintained by attorney James C. Ellis[,]" including "an accounting of all funds traceable to" the Tyson settlement. Ellis responded with a letter stating that monies received from the disciplinary board were disbursed to Teresa on August 4, 2015 and that it appeared that "[Lance] had absconded with the [remaining] funds." Ellis also indicated that he had scheduled Lance's deposition for the following week. The process server apparently was unable to serve Lance with the subpoena at that time. The record contains no further information about these issues.

2016, which clarified that the relief sought in Plaintiff's motion "was to set aside the district court's [dismissal order] with prejudice of all claims against John Tyson, M.D., dated May 13, 2013" and ordered reinstatement of the claims against Dr. Tyson. We granted interlocutory review.

STANDARD OF REVIEW

{19} "We generally review the district court's grant of relief under Rule 1-060(B) for an abuse of discretion except in those instances where the issue is one of pure law." *Kinder Morgan CO2 Co., L.P. v. N.M. Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 9, 145 N.M. 579, 203 P.3d 110 (alteration, internal quotation marks, and citation omitted). "Such discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law." *State ex rel. King v. B & B Inv. Grp.*, 2014-NMSC-024, ¶ 28, 329 P.3d 658 (internal quotation marks and citation omitted). "An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason." *Id.* (internal quotation marks and citation omitted). Even where we review for an abuse of discretion, we review the court's application of the law to the facts de novo. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450. A discretionary decision premised on a misapprehension of the law is an abuse of discretion. *Id.*

DISCUSSION

{20} The question whether the district court properly reinstated the claims against Dr. Tyson turns on the answer to an antecedent controlling question of law—whether, at the time the civil action was filed and the claims against Dr. Tyson were settled and dismissed with prejudice, New Mexico law clearly required an individual who had obtained a court appointment as probate PR to obtain an additional court appointment in order to serve as a WDA PR. Because we answer that question in the negative, it follows that the district court abused its discretion in ordering, under Rule 1-060(B)(6), that the claims against Dr. Tyson be reinstated, and we so hold. We also conclude that the district court erred as a matter of law in ruling that the relief requested in Plaintiff's motion to set aside is properly analyzed under Rule 1-060(B)(6) and that the court abused its discretion in ordering reinstatement of the claims against Dr. Tyson under that rule.

A. The District Court Abused Its Dicretion by Basing Its Reinstatement of the Claims Against Dr. Tyson on an Erroneous Interpretation of the Law

{21} The WDA provides that actions under that statute "shall be brought by and in the name of the personal representative of the deceased person[.]" Section 41-2-3. The statutory text contains no requirement that the personal representative of the deceased person must be appointed by the district court for the purpose of bringing an action that asserts a claim for wrongful death, and we may not insert one. *See, e.g.*, *Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 19, 331 P.3d 992 (stating that "[c]ourts must construe statutes as they find them and may not amend or change them under the guise of construction." (internal quotation marks and citation omitted)); *Martinez v. Sedillo*, 2005-NMCA-029, ¶ 7, 137 N.M. 103, 107 P.3d 543 ("We will not rewrite a statute."). Rule 1-017(B) does contain an explicit requirement of court appointment for WDA purposes. It provides:

> **B. Wrongful death actions; personal representative.** An action for wrongful death brought under Section 41-2-1 . . . shall be brought by the personal representative appointed by the district court for that purpose under Section 41-2-3 . . . . A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself.

Rule 1-017(B).

{22} This rule was not adopted until 2014, pursuant to Supreme Court Order No. 14-8300-010, which made it "effective for all cases pending or filed on or after December 31, 2014[.]" Rule 1-017. And no case was pending against Dr. Tyson as of May 13, 2013, as the dismissal order filed that date "dismiss[ed] Plaintiff's [c]omplaint with prejudice pursuant to Rule 1-041(A)(2) NMRA as to Dr. Tyson." For this reason alone, Rule 1-017(B)'s requirement that a WDA PR must be "appointed by the district court for that purpose under Section 41-2-3" does not govern any aspect of this case as to the claims against Dr. Tyson. But there is more.

{23} First, the committee commentary concerning the 2014 amendment reflected in Rule 1-017(B) also makes clear that the requirement that a court-appointed probate PR must obtain a separate court appointment in order to serve as a WDA PR was not clearly mandated by the law existing prior to the amendment's effective date of December 31, 2014. The committee commentary states, "To maintain the distinction between a traditional personal representative and one appointed to maintain a wrongful death action, Paragraph B *now* provides that only a personal representative appointed by the district court may bring a wrongful death action." Rule 1-017(B) comm. cmt. (emphasis added).

{24} Second, even if the Supreme Court order adopting the requirement stated in Rule 1-017(B) was silent as to the rule's effective date, "New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary." *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500, 882 P.2d 541. And it further holds that "[a] statute or rule is not retroactively construed when applied to a condition existing on its effective date even though the condition results from events which occurred prior to the date." *Id.* (internal quotation marks and citation omitted).

{25} In our view, this analysis establishes that the law in effect when the civil action was filed, when the claims against Dr. Tyson were settled, and when the complaint was dismissed with prejudice as to Dr. Tyson did not require an individual who had obtained court appointment as personal representative of a decedent's probate estate, as Lance had done, to obtain a separate court appointment as personal representative under the WDA in order to bring and prosecute a WDA claim. Accordingly, the premise of the district court's order reinstating the claims against Dr. Tyson and Plaintiff's argument—that Lance lacked authority to file and settle the claims against Tyson—is erroneous as a matter of law, requiring reversal of the district court's order reinstating the claims against Dr. Tyson.

{26} We disagree with Plaintiff's contention that the 2014 amendment adding Paragraph B's district court appointment requirement "codified a statutory requirement" and "simply clarified what both the [WDA] and cases applying and interpreting it have always required." The statute itself says nothing about the need to obtain a court appointment, as discussed above, and if the case law had clearly held that an individual who had obtained court appointment as personal representative of a decedent's probate estate must also obtain

a separate court appointment as a WDA PR in order to bring and prosecute a WDA claim, the 2014 amendment to Rule 1-017 would not have been necessary.

{27} Several cases involving claims under the WDA predating the 2014 amendment to Rule 1-017 were brought by administrators of the decedent's probate estate, who were treated as proper WDA personal representatives. *See Torres v. Sierra*, 1976-NMCA-064, ¶¶ 16-17, 89 N.M. 441, 553 P.2d 721 (noting that an estate administrator—here a non-resident alien illegally in the United States—"comes within the category of 'personal representative' " for purposes of maintaining a WDA claim); *see also Varney v. Taylor*, 1966-NMSC-080, ¶ 13, 77 N.M. 28, 419 P.2d 234 (stating in a WDA action brought by the administrator of the deceased's estate that "[t]he right of recovery in New Mexico is by the personal representative solely as an agency for the prosecution of the suit"); *Hall v. Stiles*, 1953-NMSC-041, ¶ 7, 57 N.M. 281, 258 P.2d 386 (stating in a WDA action brought by the administrator of the deceased's estate that "actions under the [WDA] may be brought by the personal representative of the deceased person only"); *Henkel v. Hood*, 1945-NMSC-006, ¶¶ 2, 5, 27-28, 49 N.M. 45, 156 P.2d 790 (holding that the "community administrator" of his wife's estate under Texas law was a proper personal representative under the New Mexico WDA).

{28} As we have noted, the WDA does not define the term "personal representative." Our Supreme Court explained in *Henkel* that "[i]t is incidental that a [WDA] 'personal representative' (usually defined to be an executor or administrator . . .) is named to bring [the WDA] suit" and that "[i]t is not because this would fall within his duties as such, but because someone must be named and our Legislature has fixed upon such a person as the one to sue." 1945-NMSC-006, ¶ 9. "The term 'personal representative' is used simply to designate the agency, the trustee, the person, who may prosecute this particular character of statutory action[,]" the Court concluded, and "should not be limited so as to exclude special administrators." *Id.* ¶ 12 (internal quotation marks and citation omitted). A person who is "in some sense, a personal representative of the deceased . . . meets the requirement." *Id.* ¶ 13. In a concurring opinion, Justice Bickley stated that "[w]hen the Legislature employed the phrase 'personal representative' [in the WDA] they meant executor or administrator of the estate of the deceased." *Id.* ¶ 31 (Bickley, J., specially concurring).

{29} In *Chavez v. Regents of University of New Mexico*, 1985-NMSC-114, ¶ 8, 103 N.M. 606, 711 P.2d 883, our Supreme Court explained that "[i]t is merely incidental that a personal representative is named to bring a wrongful death action" and that "[t]he personal representative is only a nominal party who was selected by the Legislature to act as the statutory trustee for the individual statutory beneficiaries." (Internal quotation marks and citation omitted.) Noting that the WDA does not define "personal representative," the Court recited the Probate Code's definition of "personal representative" as "[a] statutory definition of the term" that "includes an executor, administrator, successor personal representative, special administrator and persons who perform substantially the same function under the law governing their status." *Id.* ¶ 9 (quoting NMSA 1978, § 45-1-201(A)(29) (1983, amended 2011)). The Court also noted *Henkel*'s determination that " 'personal representative' means executor or administrator, and includes a temporary, special, or ancillary administrator[.]" *Chavez*, 1985-NMSC-114, ¶ 10 (internal quotation marks and citation omitted). The *Chavez* Court further explained that "the cases have generally broadly construed who qualifies as a personal representative under the [WDA,]" and concluded that "*a personal representative under the [WDA] may be an estate administrator, as well as an executor or a court-appointed personal representative*. *Id.* (emphasis added) (citation omitted).

{30} It is certainly true that *Chavez* and other cases pre-dating the 2014 amendment to Rule 1-017 distinguish the duties of personal representatives under the WDA from those of administrators, executors, and personal representatives under the Probate Code. *See Chavez*, 1985-NMSC-114, ¶ 10 (explaining that a WDA PR "need not . . . have the full powers required by the Probate Code, since his duties under the [WDA] are merely to act as a nominal party for all the statutory beneficiaries in order to centralize the claims and prevent multiple and possibly contradictory lawsuits"). But these cases also permitted probate administrators, executors, and personal representatives to serve as personal representatives under the WDA. *See Stang v. Hertz Corp.*, 1970-NMSC-048, ¶ 15, 81 N.M. 348, 467 P.2d 14 (holding that, for "the purposes of the case before us, 'administrator' and 'personal representative' are one and the same" and noting that the plaintiff, "as 'personal representative,' was also ancillary administratrix with the will annexed"); *Torres*, 1976-NMCA-064, ¶¶ 16-17 (holding that a non-resident alien estate administrator "comes within the category of 'personal representative' " authorized to bring a WDA claim); *Stang v. Hertz Corp.*, 1969-NMCA-118, ¶ 38, 81 N.M. 69, 463 P.2d 45 (stating that, "[w]hile the administrator may be the personal representative, there may be a personal representative who is not the administrator"), *aff'd by Stang*, 1970-NMSC-048.

{31} No New Mexico case contains any language even suggesting that an individual who had obtained a court appointment as probate PR must obtain an additional court appointment in order to serve as a WDA PR. *See Dominguez v. Rogers*, 1983-NMCA-135, ¶ 11, 100 N.M. 605, 673 P.2d 1338 (observing, in considering motion to intervene in which appellant sought to be joined with the deceased's mother as a fellow WDA PR, that the "appellant never requested the trial court *or* the probate court to recognize him as a personal representative" (emphasis added)), *superseded by statute on other grounds as stated in Spoon v. Mata*, 2014-NMCA-115, ¶ 23, 338 P.3d 113.

{32} Our decision in *In re Estate of Sumler*, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776, does not compel a contrary conclusion. In *Sumler*, a five-year-old child and her mother died in an explosion. *Id.* ¶ 3. The mother's half-brother and mother-in-law petitioned the district court for an order appointing them as personal representatives of the minor child's probate estate. *Id.* ¶¶ 5, 6. The child's father objected and filed his own petition to be appointed sole personal representative of the child's probate estate. *Id.* ¶ 6. The district court appointed the father as personal representative, and the father filed a wrongful death action in federal court. *Id.* ¶¶ 6-7. The half-brother and mother-in-law appealed the father's probate appointment. *Id.* ¶ 7.

{33} We stated that the case was "nominally an appeal" from the order appointing the father as the personal representative of the child's probate estate and, at its core, concerned "who should control and profit from the action for the child's wrongful death." *Id.* ¶ 2. We observed further that the appellants "sought appointment

as the personal representative of [the child's] estate not in order to administer what appears to be an asset-less estate, but because of counsel's belief that a [WDA] personal representative *must* be appointed in accordance with the [P]robate [C]ode." *Id.* ¶ 9 (emphasis added). Citing *Henkel* and *Chavez*, we explained that a WDA PR is merely a nominal party who need not have the full panoply of powers and duties required for a probate PR. *Estate of Sumler*, 2003-NMCA-030, ¶ 8. We did not hold in *Sumler* that a probate PR must obtain a separate court appointment in order to bring and prosecute a WDA claim, but only that the issue of the validity of the probate PR appointment was moot because the decedent's father was already prosecuting the wrongful death claim in the federal court. *Id.* ¶ 11. In any event, this Court has no authority to abrogate or overrule decisions of our Supreme Court.

{34} Even if the law in effect when the claims against Dr. Tyson were settled and dismissed with prejudice did require that a probate PR obtain a separate appointment as a WDA PR, the proper remedy for the "honest mistake" of failing to do so would be the ministerial act of appointing the probate PR as WDA PR (or appointing a different person as WDA PR, as the district court did here), effective as of the filing of the original complaint, and ratifying what had happened since, as in *Chavez*, 1985-NMSC-114, ¶¶ 11-20. No principle of law or equity supports the district court's decision to employ a "relation back" theory to Plaintiff's appointment as WDA PR in order to rescue the civil action from the WDA's three-year statute of limitations (repose), *see* § 41-2-2, while refusing to give effect to the settlement resolving the claims against Dr. Tyson on the ground that the probate PR who filed the original complaint within the statute of limitations (Lance) failed to obtain a second appointment as WDA PR.

{35} The only justification offered by Plaintiff to support the district court's anomalous decision is that Lance allegedly "absconded with the proceeds of the settlement" and "settled claims he had no authority to settle in contravention of the sole statutory beneficiary's entitlement to the proceeds of that settlement." In other words, relying on Lance's filing of the civil action within the statute of limitations while forcing the settling Dr. Tyson—despite the effectuation of settlement terms and his dismissal with prejudice—back into the case is necessary to vindicate Teresa's claimed rights as WDA beneficiary. We reject this reasoning.

{36} There is no dispute that the WDA PR must distribute any recovery under the WDA claim in accordance with the statute's distribution provisions. *See* § 41-2-3; *Spencer v. Barber*, 2013-NMSC-010, ¶ 22, 299 P.3d 388 ("[T]he personal representative has a nondiscretionary duty to distribute the wrongful death proceeds in the ratio prescribed by the [WDA]."). But whether Lance breached that obligation is an issue entirely distinct from his failure to obtain a separate court appointment as WDA PR. As noted, the record indicates that some of the Tyson settlement funds were recovered and paid to Teresa. To the extent they were not, Teresa may pursue claims against Lance and/or his attorney(s) in a separate action. *See Leyba v. Whitley*, 1995-NMSC-066, ¶¶ 1-2, 21, 120 N.M. 768, 907 P.2d 172 (concluding that "an attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interest in receiving any proceeds obtained" and upholding the right of a WDA beneficiary to sue the attorneys when the WDA PR misappropriated WDA proceeds obtained from settlement); *see also Spencer*, 2013-NMSC-010, ¶¶ 4, 8, 9, 22 (following *Leyba*); *Spoon*, 2014-NMCA-115, ¶ 29 (stating that WDA PR's failure to comply with statutory duty to ensure that WDA beneficiaries receive a proper allocation of any WDA recovery could potentially expose both WDA PR and her counsel to "significant legal liabilities" and that "a [WDA] beneficiary is not precluded from pursuing traditional tort claims such as misrepresentation, fraud, or collusion"); *Dominguez*, 1983-NMCA 135, ¶ 19 (recognizing that statutory beneficiaries may assert a claim against a WDA PR who fails to properly fulfill his or her statutory responsibilities). Plaintiff cites no case authorizing reinstatement of claims against a party who has settled those claims and, by reason of that settlement, obtained a court order dismissing the claims with prejudice.

{37} In sum, the district court abused its discretion by reinstating the claims against Dr. Tyson based on an erroneous interpretation of the law in effect when those claims were settled and dismissed. *See B & B Inv. Grp.*, 2014-NMSC-024, ¶ 28 (stating that the district court's discretion "is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law" (internal quotation marks and citation omitted)); *N.M. Right to Choose/NARAL*, 1999-NMSC-028, ¶ 7 (observing that a discretionary decision premised on a misapprehension of the law is an abuse of discretion).

B. The District Court Abused Its Discretion in Ordering Reinstatement of the Claims Against Dr. Tyson Under Rule 1-060(B)(6)

{38} Our determination that the law in effect at the relevant time did not require that a court-appointed probate PR obtain a separate court appointment as a WDA PR obviates the need to analyze the district court's application of Rule 1-060(B). Nevertheless, we briefly address the issue.

{39} Rule 1-060(B) provides that "[o]n motion and on such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for" reasons including "mistake, inadvertence, surprise, or excusable neglect" or "any other reason justifying relief from the operation of the judgment[.]" Rule 1-060(B)(1), (6). "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one (1) year after the judgment, order, or proceeding was entered or taken." Rule 1-060(B)(6).

{40} Plaintiff contends that the premise of her motion to set aside is that "the settlement agreement underlying the [dismissal] order was void because [*Lance*] *had made the mistake* of failing to obtain the necessary authority to enter into it." Plaintiff's own characterization places the motion squarely within Rule 1-060(B)(1). Plaintiff's apparent assumption that Rule 1-060(B) applies only to correct judicial error is unfounded. *See Resolution Tr. Corp. v. Ferri*, 1995-NMSC-055, ¶ 8, 120 N.M. 320, 901 P.2d 738 (explaining that the error at issue was based on a mistaken belief about whether note signatories were married properly fell within Rule 1-060(B)(1)). Motions falling within Rule 1-060(B)(1) must be brought "not more than one (1) year after the judgment, order, or proceeding was entered or taken." Rule 1-060(B)(6). The dismissal order was entered May 13, 2013. The motion seeking to set aside that order was not filed until January 25, 2016. Accordingly, the motion was untimely.

{41} Motions seeking relief under Rule 1-060(B)(6) need not be brought within a year, but "shall be made within a reasonable time[.]" Our Supreme Court has made clear, however, that Rule 1-060(B)(6) "provides relief only for reasons *other*

than those enumerated in [Rule] 1-060(B)(1) through (5)" and that "a party seeking to set aside a default judgment under Rule 1-060(B)(6) must show the existence of exceptional circumstances and reasons for relief other than those set out in Rules 1-060(B)(1) through (5)." *Ferri*, 1995-NMSC-055, ¶ 10 (alteration, internal quotation marks, and citation omitted); *see Wehrle v. Robison*, 1979-NMSC-016, ¶ 8, 92 N.M. 485, 590 P.2d 633 (same). Our Supreme Court "has also made it clear that a party seeking to set aside a judgment cannot claim exceptional circumstances and rely upon [Rule] 1-060(B)(6) in order to circumvent the one-year limit within which to advance grounds set out in [Rule] 1-060(B)(1) through (3)." *Ferri*, 1995-NMSC-055, ¶ 6. It seems plain to us that Plaintiff relies on Rule 1-060(B)(6) for these very same proscribed purposes and that the district court erred as a matter of law in ruling that the issue is properly analyzed under Rule 1-060(B)(6).

{42} Leaving aside these problems, which we regard as insurmountable, the only purported "exceptional" circumstance invoked by Plaintiff is Lance's alleged failure to distribute proceeds of the Tyson settlement to Teresa. But there is nothing exceptional in this. Disagreements can and do "arise between the beneficiaries themselves and between the beneficiaries and the personal representative in wrongful death actions regarding the prosecution of the claim." *Spoon*, 2014-NMCA-115, ¶ 22. And, as discussed above, Teresa may assert whatever rights she may have as a WDA beneficiary (to the extent that she is one) by bringing a claim against Lance and/or his attorney(s) based on Lance's breach of the obligation of a WDA PR to a WDA beneficiary.

{43} The district court's order granting relief under Rule 1-060(B)(6), moreover, is at odds with the purpose of a rule "designed to apply only to exceptional circumstances, which, in the sound discretion of the trial judge, require an exercise of a reservoir of equitable power to assure that justice is done." *Edens v. Edens*, 2005-NMCA-033, ¶ 24, 137 N.M. 207, 109 P.3d 295 (internal quotation marks and citation omitted). "The [intent] of Rule [1-060(B)] is to carefully balance the competing principles of finality and relief from unjust judgments" and, in performing this task, courts "must consider whether there are any intervening equities that make it inequitable to grant relief." *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶ 15, 92 N.M. 47, 582 P.2d 819; *see* Rule 1-060(B) (providing that relief must be "on such terms as are just").

{44} It is decidedly inequitable to require Dr. Tyson to bear the burden of being forced back into a case he paid to settle over four years ago based on an asserted need to protect the claimed rights of Teresa, who took no action to protect her rights as a WDA beneficiary until June 12, 2015, despite having known of her daughter's death since early December 2009. The district court abused its discretion in ordering reinstatement of the claims against Dr. Tyson under Rule 1-060(B)(6).

CONCLUSION

{45} The district court's August 16, 2016 order setting aside the May 13, 2013 order dismissing with prejudice all claims against Dr. John Tyson and reinstating Dr. Tyson as a defendant in this case is hereby reversed.

{46} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:
J. MILES HANISEE, Judge
JULIE J. VARGAS, Judge

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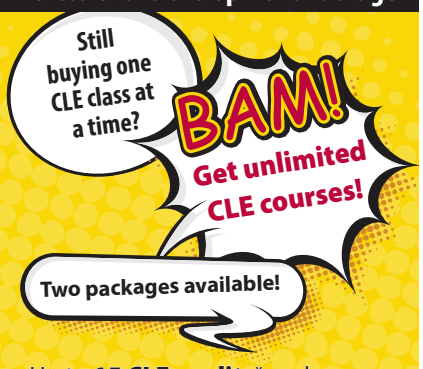

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Montgomery & Andrews, Law Firm is accepting resumes for a Legal Assistant position in our Santa Fe Office. Must have a minimum of three to five years' experience working in a mid- or large-sized law firm. Applicants must have experience, including knowledge of local court rules and filing procedures. Experience with government relations would be a plus. Must have excellent clerical, organizational, computer and word processing experience. Applicants must be able to multi-task and work in a team player environment. Firm offers a congenial work environment, competitive compensation and a benefit package. Please send resume to tgarduno@montand.com or mail to T. Garduno, P.O. Box 2307, Santa Fe, New Mexico 87504-2307.

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

Full-Time Receptionist
Full-Time Receptionist needed for established, mid-sized law firm. Applicant is required to have strong organizational, communication and computer skills (Word/Office 365 a plus), and should be self-motivated and comfortable working in a team-first environment. Responsibilities include answering telephones, greeting clients and legal professionals, and supporting attorneys and legal staff with a variety of duties. Some duties include lifting of up to 25 pounds. Applicant is required to make daily post office runs and occasional errands, and will need reliable transportation. Please send resume with references and salary requirements to: jjelson@ylawfirm.com. No phone calls please.

Services

Board Certified Orthopedic Surgeon
Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odewitt@alumni.rice.edu

Office Space

620 Roma N.W.
620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

Nob Hill Office Building For Rent
3616 Campus Blvd NE. Approx 900 sq. ft.; 3 private offices, 2 admin areas; 6 offstreet parking spaces; near ART line. $1900/month exclusive of all utilities and insurance with year lease. masseylaw@swcp.com.

Modern Law Office
Modern Law Office, shared space for rent, close to downtown, Lomas & I-25. At least two professional offices. Plenty of room for staff. Parking & Storage available. Immediate move-in. Call Paul 505-246-8600

Downtown Office Space
Converted casa in cul-de-sac off Lomas. 4 offices/rooms, large reception/secretarial area and kitchenette. Hard wood flooring, fireplace, free parking in adjacent private lot and street side. Walking distance to Courthouses. $1500/mo. Ken Downes 238-0324

Miscellaneous

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

Great Opportunity
I am seeking an Attorney or Attorneys to purchase or take over my practice as a sole practitioner in Alamogordo, New Mexico. The Twelfth Judicial District, and Alamogordo in particular, is experiencing a shortage of attorneys who practice civil and family law. This is a great opportunity for an attorney to take over an established law firm. I opened the Robert M. Doughty II, PC, in July 1999, upon retiring from the District Court Bench. Please contact Robert M. Doughty II, Esq., Robert M. Doughty II, PC, P.O. Box 1569, Alamogordo, NM 88311-1569,(575)434-9155,rmdlaw@qwestoffice.net.


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