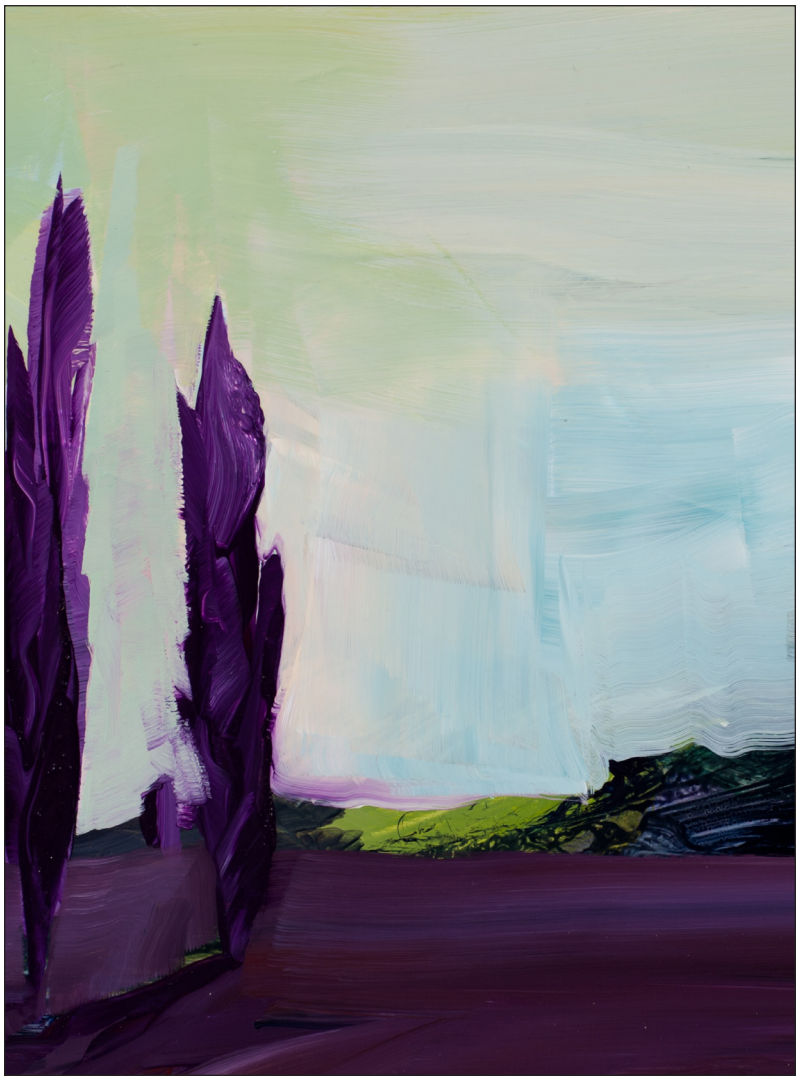
Official Publication of the State Bar of New Mexico

Bar Bulletin

January 10, 2018 • Volume 57, No. 2



Venture Into Spring, by Dick Evans ARTWORKinternational, INC., Santa Fe

Inside This Issue

New!

The New Mexico State Bar Foundation Announces its How to Practice Series

How to Practice Series

Providing practitioners with hands-on basic skills they can use right away.

How to Practice attendees will receive:

- **An overview of substantive law**
- **Hands-on training including sample forms**
- **Ethics and professionalism**

Mark your calendars for 2018:

Adult Guardianship Feb. 2
Non-probate Transfers March 6
Probate March 23
Civil Litigation May 4

*Watch for **Family Law** later in the year.*

For more information about the How to Practice Series, contact the Center for Legal Education at 505-797-6020 or cleonline@nmbar.org.

State Bar of New Mexico
Bar Foundation
Center for Legal Education

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
address@nmbar.org • www.nmbar.org

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11
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Noon, State Bar Center

11
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

12
Prosecutors Section Board
Noon, State Bar Center

16
Appellate Practice Section Board
Noon, teleconference

16
Solo and Small Firm Section Board
11 a.m., State Bar Center

16
Senior Lawyers Division Board
4 p.m., State Bar Center

Workshops and Legal Clinics

January

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

February

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

28
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

March

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About Cover Image and Artist: *Venture Into Spring*, acrylic on clayboard panel, 12x36
Dick Evans was born in the Land of Enchantment and grew up in a rural farming community in the panhandle of Texas with no exposure to art until he started college. He graduated from the University of Utah with a B.F.A. in Drawing and Painting and an M.F.A. in Ceramics and Sculpture. Evans has taught art, primarily in ceramics, which is his primary form of expression. He has also produced sculpture in welded steel and cast bronze. Evans' art is found in many art museums, corporate collections and publications. He feels that the more personal the statement is, the more universal it may be. By avoiding the visually expected, his art often aids the viewer to see surroundings in a different and richly rewarding manner. To view more of Evans' work, visit www.dickevansart.com.

Notices

Court News

Supreme Court Law Library

Hours and Information

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

Second Judicial District Court

Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon, Jan. 19, in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque, NM 87107. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 841-7644 for more information.

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. 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.

Professionalism Tip

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

I will not adopt procedures that needlessly increase litigation expense.

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. 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. 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, 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.

Eleventh Judicial District Court

Judicial Vacancy

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

State Bar News

Attorney Support Groups

- Feb. 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Feb. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

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

2018 Licensing Notification

Must Be Completed by Feb. 1

2018 State Bar licensing fees and certifications are due and must be completed by Feb. 1, 2018, to avoid non-compliance and related late fees. Complete annual licensing requirements online at www.nmbar.org/licensing or email license@nmbar.org to request a PDF copy of the license renewal form. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, email clopez@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

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, 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 résumé 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, 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 résumé by Jan. 10, to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Solo and Small Firm Section

Spring Monthly Speaker Series Opens with Mark Rudd

On Jan. 16, former UNM and CNM associate professor Mark Rudd, who has been organizing 50 years for social justice, will address "Life in the Second Gilded Age." On Feb. 20, join Jeff Proctor, an investigative reporter who has reported on a number of N.M. controversies from The Round House to the Boyd case to drug interdiction, for a discussion on the hot topics of the day. Both presentations are open to all and will take place from noon-1 p.m. at the State Bar Center. Lunch will be provided. Please R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

Volunteers Needed for Homeless Legal Clinic in Albuquerque

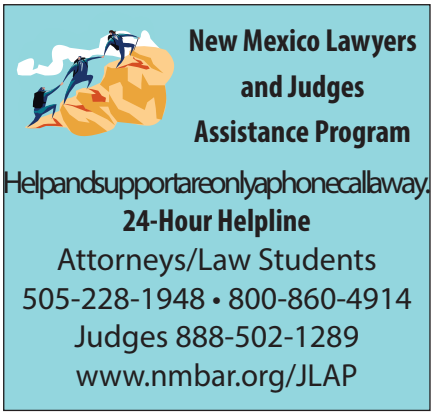
The Homeless Legal Clinic returns to Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), in 2018 on Jan. 18, Feb. 15, March 15, April 19, May 17, June 21, July 19, Aug. 16, Sept. 20, Oct. 18, Nov. 15 and Dec. 13. Clinics are held at Albuquerque Healthcare for the Homeless located at 1217 First Street 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.

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. Visit https://www.jotform.com/build/70925407803961/publish 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, 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.

Depositions CLE with Steve Scholl

The UNM School of Law presents "Taking and Defending Depositions" with Steve Scholl and his all-star faculty on March 2-4 and March 23-24. This "learn by doing" course is approved for 31.0 G and 4.5 EP credits by MCLE. Attendees will learn how to effectively prepare witnesses; defend the deposition, deal with obstreperous counsel, get the answers within time constraints, optimize information from expert witnesses, test theories and close off avenues of escape. Whether you are new to depositions or want to refresh your skills, this class will give you the tools you need to be successful. Register by Feb. 9. For more information and online registration visit: goto.unm.edu/depositions or contact Cheryl Burbank at burbank@law.unm.edu or 505-277-0609.

Other Bars

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 in Albuquerque. Register at 505-992-0050 or info@nmcdla.org.

Other News

Center for Civic Values

Manzano High School Seeks Attorney Coach

Manzano High School in Albuquerque seeks an attorney coach to help with its mock trial team. For more information, contact Kristen Leeds, director, Center for Civic Values and Gene Franchini New Mexico High School Mock Trial Program. at 505-764-9417 or kristen@Civicvalues.org.

Submit announcements

for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Ian M. Alden has joined Giddens, Gatton & Jacobus, PC, as an associate attorney. Alden earned his Juris Doctor from the University of New Mexico School of Law in 2015. He also earned a Master of Laws in Taxation from Boston University School of Law in May 2017. He served as a law clerk, then as an associate attorney, in the Law Offices of Brad D. Hall before joining GGJ.

Jeremy Harrison has been named a shareholder with the Modrall Sperling Law Firm. He has experience in state and federal court litigation and defends local and national businesses, governmental entities, and public schools in tort and personal injury matters, employment disputes, and other areas of civil litigation. Every year since 2014, Harrison has been named a Southwest Rising Star by *Southwest Super Lawyers®*.

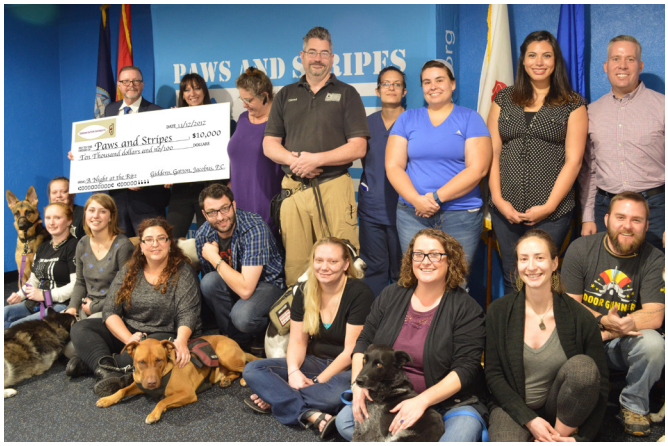
New Mexico Junior College has named **Scotty Holloman** as general counsel/executive director of administrative services. Holloman was shareholder, director and president of Maddox, Holloman & Moran PC in Hobbs, N.M., where he specialized in business and oil and gas, and handled the firm's business-oriented litigation practice. Holloman attended Texas Tech University (B.B.A., J.D.). He recently completed service as president of the State Bar of New Mexico.

Anna Indahl has been named a shareholder with the Modrall Sperling Law Firm. She concentrates her practice on the defense of legal malpractice, commercial litigation, products liability, and employment matters, representing clients ranging from small businesses to international corporations. She has achieved an AV® peer review rating from Martindale-Hubbell and is named a Southwest Rising Star by *Southwest Super Lawyers®*.

Laura E. Sanchez-Rivét became partner with Cuddy & McCarthy LLP effective Jan. 1. She joined the firm in November 2015, and has 12 years of experience in the practice of law and more than 18 years of experience in government and legislative issues. Her law practice focuses generally on business, government affairs and regulatory matters in New Mexico and Arizona. She earned her Juris Doctorate from the UCLA School of Law (2004).

Vanessa Kaczmarek has been named a shareholder with the Modrall Sperling Law Firm. Her practice is focused on tax, estate planning, closely-held business matters and non-profit law. She represents taxpayers in federal and state audits and appeals, and her experience covers the full range of tax issues that businesses face. She was recently elected to serve a second three-year term on the State Bar's Tax Section Board.

Sarah Stevenson has been named a shareholder with the Modrall Sperling Law Firm. She is a member of the firm's Energy, Environment, and Natural Resources Department. Her practice focuses on water law, Native American law, and commercial litigation. Stevenson has been named a Southwest Rising Star by Southwest Super Lawyers® in appellate law since 2014.



Albuquerque-based law firm **Giddens, Gatton & Jacobus, PC,** recently awarded a check for $10,000 to the local nonprofit, Paws and Stripes. These funds were raised at GGJ's second annual "A Night at the Ritz," a Roaring '20s-themed dinner, dance and silent auction. This fundraising event, which took place at the Tanoan Country Club, is fully funded by the local law firm. All proceeds from ticket sales, the silent auction and other contributions were included in the donation. In the photo above, Dave Giddens, founding partner of GGJ (back left), awarded the check to Lindsey Stanek, founder and CEO of Paws and Stripes (to Dave's immediate left), along with Paws and Stripes staff and clients.

Joel B. Burr, after a long and productive life, passed away on Oct. 26, 2017, of natural causes in Farmington, N.M. at the age of 87. Burr was born Nov. 13, 1929 in Clovis, N.M. to a pioneering family that came to Vaughn, N.M., in 1906 in a covered wagon. His great uncle Aaron Clark was the first person to be buried in the Vaughn Cemetery in 1907, having frozen to death in a blizzard hunting antelope on the New Mexico prairies surrounding Vaughn. Burr was one of two sons born to a union consisting of Joel B. Burr and Josephine Carabajal whose family were early inhabitants of New Mexico, tracing their lineage back to Estevan Carabajal, one of Juan de Oñate's associates, and first settlers in New Mexico. Burr attended the public schools in Vaughn and thereafter graduated from the University of New Mexico where he received a Juris Doctor degree in 1956. After practicing law in Santa Fe as an assistant attorney general for three years, Burr started a private law practice in Farmington in 1959 with the late William J. Cooley. The firm specialized in oil and gas law and through the years represented several major oil companies and many large and small independent oil and gas companies and oilfield service companies in the San Juan Basin. In 1973 Burr, in partnership with William J. Cooley, started Basin Fuels, Inc. a small oil and gas exploration and production company in Farmington, and operated the same successfully until Cooley's death in 1981. Thereafter, Burr continued his operation in the oil and gas business in Farmington under the corporate name of Burr Oil & Gas, Inc., which grew and prospered through the years into a Rocky Mountain operation with oil and gas properties in New Mexico, Colorado, Utah and Wyoming. Burr remained active in the company in his final years although his son Sean oversaw operations as president and chief operating officer. Burr met and married Alma Patricia Jones of London, England, in 1962. At the time, she was visiting a girlfriend in Farmington, and their marriage proved to be a long and fruitful one. A son, Sean Christian Burr was born of the marriage in 1964, and continues to make his home in Farmington. Burr was an early member of the New Mexico Amigos and a lifetime member of the Farmington Elks Club (1747). He was also an early member of the San Juan Country Club and a member of the Evening Lion's Club, an active service club in the community. Throughout his life he loved to travel and together with his wife and many friends visited numerous countries throughout the world. In his retirement years Burr, an avid golfer, spent the winter months in Scottsdale, Ariz., where he was an early member of the Terravita Golf and Country Club in North Scottsdale. Burr was preceded in death by his wife Alma on Sept. 25, 2016, after a marriage that spanned 55 years. He is survived by his only child, a son Sean Christian and his wife Lisa; granddaughters, Ashley Nicole Burr, and Brittany Ann Kibel and husband Matthew; great grandsons, Jacob Laurence and Jordan Eli Kibel.

Bernard Rosenblum, attorney at law, beloved husband, brother, friend and son,passed away at age 72 in his home Dec. 11, 2017. He was born July 19, 1945, in Bronx, N.Y., son of Lillian and Herman Rosenblum. Bernard graduated from Ohio State University, Cleveland Marshall Law School and practiced family law in Albuquerque for 24 years. He is survived by his wife, Karen Triger Rosenblum and brothers, Harry and George Rosenblum.

Les Houston passed away on Dec. 8, 2017, at the age of 81. He is survived by his wife, Diane; son, Dennis Houston and his wife, Diane; son, Jason Houston; daughter, Holly Houston; two grandchildren, Joshua Duvall-Houston and Shane Houston; brother, Ralph Houston and his wife, Karen; sister-in-law, Sandy Houston; and numerous extended family. Les was preceded in death by his parents, Ernest and Imogene Houston; sister, Janice Pelphrey; brother, Donald Ray Houston; and recently his favorite dog, Turbo. Houston attended the University of Louisville on a football scholarship and received a law degree in 1961. He was a legal officer (Captain-Judge Advocate) in the U.S. Air Force before moving to New Mexico and practicing law. He served 16 years in the New Mexico State Senate where he was elected as president pro tem, senate minority leader (Republican) and senate majority floor leader while a member of the minority party. After leaving the State Senate, he was a lobbyist and served eight years as a Bernalillo County Commissioner.

Legal Education

January 2018

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

19 **Trial Know-How! (The Rush to Judgment) 2017 Trial Practice Section Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Strategies for Well-Being and Ethical Practice (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2017 Mock Meeting of the Ethics Advisory Committee (2017)**
2.0 EP
Live Replay, 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

26 **2017 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **The Cyborgs are Coming! The Cyborgs are Coming! The Latest Ethical Concerns with the Latest Technology Disruptions (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
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

1 **Workplace Issues for Employers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics Update Part I**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **2018 Ethics Update Part II**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Negotiating (and Renegotiating Leases) Part I**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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

9 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **New Mexico Liquor Law for and Beyond (2017)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **Sophisticated Choice of Entity, Part I**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Sophisticated Choice of Entity, Part II**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.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 22, 2017

PUBLISHED OPINIONS

A-1-CA-35247	W Collins v. St Vincent Hospital	Affirm	12/20/2017

UNPUBLISHED OPINIONS

A-1-CA-34331	University Village Mobile v. J Calderon	Reverse	12/18/2017
A-1-CA-36451	State v. C Stevenson	Affirm	12/18/2017
A-1-CA-36603	State v. M Rael	Dismiss	12/18/2017
A-1-CA-35460	W Collins v. St Vincent Hospital	Affirm	12/20/2017
A-1-CA-36259	M Lawler v. NM American Housing	Affirm	12/20/2017
A-1-CA-36332	F Smith v. R Merheb	Affirm	12/20/2017
A-1-CA-36419	State v. D Robinson	Affirm	12/20/2017
A-1-CA-36605	State v. B Johnson	Affirm	12/20/2017
A-1-CA-36228	Wells Fargo v. G Anaya	Affirm	12/21/2017
A-1-CA-36237	L Summers v. FMI-Marketing	Affirm	12/21/2017
A-1-CA-36345	C Daigle v. Eldorado Community	Affirm	12/21/2017
A-1-CA-36420	Deutsche Bank v. J Cardenas	Affirm	12/21/2017
A-1-CA-36444	D Shelle v. T Shelle	Dismiss	12/21/2017
A-1-CA-36486	I Budden v. Target Corp	Affirm	12/21/2017
A-1-CA-36658	L Zurla v. C Santillanes	Dismiss	12/21/2017

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

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective January 10, 2018

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		
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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		
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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
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4A-201	Temporary domestic order	12/31/2017
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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

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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
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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

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7-113	Public inspection and sealing of court records	03/31/2017
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7-203	Probable cause determination	12/31/2017
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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
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7-408	Pretrial release by designee	07/01/2017
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7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
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7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-606	Subpoena	12/31/2017
7-703	Appeal	07/01/2017

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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

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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
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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
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9-513B	Juror qualification	12/31/2017

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9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
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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

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10-166	Public inspection and sealing of court records	12/31/2017
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Certiorari Denied, August 15, 2017 No. S-1-SC-36577

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-080

No. A-1-CA-34090 (filed June 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
VICTOR GONZALES,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRETT R. LOVELESS, District Judge

HECTOR H. BALDERAS
Attorney General
MAHA KHOURY
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

BENNETT J. BAUR
Chief Public Defender
Santa Fe, New Mexico
VICKI W. ZELLE
Assistant Appellate Defender
Albuquerque, New Mexico
for Appellant

Opinion

Stephen G. French, Judge

{1} Defendant Victor Gonzales was convicted of criminal sexual contact, a misdemeanor, contrary to NMSA 1978, Section 30-9-12 (1993), in the Bernalillo County Metropolitan Court. He appealed to the Second Judicial District Court, which affirmed his conviction after reviewing his case on-record. Defendant now appeals to this Court, arguing (1) the district court erred in affirming the metropolitan court's denial of defense counsel's motion for continuance, and (2) he was entitled to a de novo appeal, not an on-record review, in the district court. We address the issue concerning de novo appeals from the metropolitan court first because it is dispositive of the continuance issue if answered affirmatively. We conclude Defendant was not entitled to a de novo appeal and that the metropolitan court did not abuse its discretion by denying defense counsel's motion for continuance.

BACKGROUND

{2} Around 2:30 a.m. on September 24, 2011, a woman (Victim) called the police to report that a man attacked her in the parking lot of the apartment complex where she resided. Victim reported that the man approached her while she was getting laundry from the trunk of her car. Victim said the man grabbed her, exposed her buttocks by pulling her shorts down, and briefly squeezed them. Victim allegedly screamed for help, and the man "eventually" began walking away from her, pushing a red dolly that carried a white garbage bin.

{3} Five days after the incident, a detective presented Victim with a photo array. She was unable to identify her assailant in the array. She told the detective that it was dark, her assailant was wearing a baseball cap, and his face was shadowed. The next day, six days after the incident, Victim believed a man she saw standing on a street corner, Defendant, was her assailant. Victim and her husband followed Defendant in their car, and Victim's husband got out of the car to confront Defendant. Defendant called 911 for assistance. On October 6, six days after Victim and her husband confronted Defendant, a detective presented Victim with a second photo array that included a photograph of Defendant, and she identified Defendant as her assailant.

{4} Defendant's case was first scheduled for trial in metropolitan court on June 5, 2012. Victim failed to appear at trial on this date. The State could not proceed with the trial without Victim present and requested the trial date be reset. The metropolitan court reset the trial for July 23, 2012, yet victim again failed to appear. The State contacted Victim, who said she could be present within one hour. Defense counsel interjected, stating that it was not necessary for Victim to come that day and stipulated to a continuance. Defense counsel also noted that she had not yet interviewed Victim due to scheduling problems. The metropolitan court reset trial for September 5, 2012.

{5} At trial on September 5, defense counsel requested a continuance. Defense counsel argued that the State failed to account for evidence relevant to the investigation of the State's initial suspect, who was not Defendant—namely, a lapel video recording from a camera worn by an investigating officer that was only twenty seconds long, and an incident number logged by an investigating officer that did not have an accompanying police report. Defense counsel also repeatedly argued she needed time to subpoena each officer on the State's witness list. Ultimately, the metropolitan court denied the motion for continuance.

{6} The jury convicted Defendant of criminal sexual contact. Defendant appealed to the district court, which reviewed his case on-record and affirmed the conviction.

DISCUSSION

Appeal in the District Court

{7} Initially, this appeal requires us to clarify the analysis to be employed by a district court acting in its appellate capacity when reviewing a conviction from the metropolitan court that potentially arises from domestic abuse under the Family Violence Protection Act (FVPA), NMSA 1978, §§ 40-13-1 through 40-13-12 (1987, as amended through 2016). Generally, the district court reviews appeals from the metropolitan court de novo, but cases involving domestic violence are heard on-record. *See* NMSA 1978, § 34-8A-6 (C), (D) (1993). First, we conclude that a judgment and sentence convicting a defendant of criminal sexual contact, regardless of whether the victim and the defendant are household members, is a criminal action involving domestic abuse as defined in the FVPA. Second, determining the procedure for Defendant's appeal in the district court requires us to interpret Section 34-8A-6, and this leads us to conclude that Defendant was entitled to an on-record appeal.

{8} "The proper procedure to be followed

by a district court when reviewing a [m]etropolitan [c]ourt's conviction is a question of statutory interpretation which we review de novo." *State v. Wilson*, 2006-NMSC-037, ¶ 6, 140 N.M. 218, 141 P.3d 1272; *see State v. Krause*, 1998-NMCA-013, ¶ 3, 124 N.M. 415, 951 P.2d 1076 (describing the issue of whether a defendant was entitled to a de novo appeal in district court as a legal question, which is reviewed de novo).

{9} The New Mexico Constitution vests district courts with "appellate jurisdiction of all cases originating in inferior courts." N.M. Const. art. VI, § 13. These trials "shall be had de novo unless otherwise provided by law." N.M. Const. art. VI, § 27. Article 8A of Chapter 34 provides such an exception. Section 34-8A-6 sets forth the criminal actions for which the metropolitan court is a court of record, as well as those criminal actions for which the metropolitan court is not.

{10} Subsection (C) states, "The metropolitan court is a court of record for criminal actions involving . . . domestic violence. A criminal action involving domestic violence means an assault or battery . . . in which the alleged victim is a household member as defined in the [FVPA]." Section 34-8A-6(C). The FVPA defines a "household member" as "a spouse, former spouse, parent, present or former stepparent, present or former parent-in-law, grandparent, grandparent-in-law, child, stepchild, grandchild, co-parent of a child or a person with whom the petitioner has had a continuing personal relationship." Section 40-13-2(E). A "continuing personal relationship" means "a dating or intimate relationship[.]" Section 40-13-2(A). Section 34-8A-6(D) states, "The metropolitan court is not a court of record for criminal actions other than . . . domestic violence actions." Appeals of these criminal actions shall be reviewed de novo. *Id.*

{11} In short, when construed alongside one another, Section 34-8A-6(C) and Section 40-13-2(E) of the FVPA combine to provide that a defendant receives an on-record review on appeal only when the conviction involves domestic violence and the victim and the defendant are related by blood or by marriage, or have been in an intimate relationship. The defendant receives an appeal de novo if the conviction is anything other than such instances of domestic violence or driving while under the influence. *See* § 34-8A-6(D).

{12} Here, Victim and Defendant are strangers. Victim purportedly had only two encounters with Defendant: the night of the incident and six days after the incident. She had not met Defendant before the night of the incident. Her only way of identifying Defendant was by the item that he carried when the incident occurred. Furthermore, the record shows Victim is in an intimate relationship with someone else, her husband. Victim and Defendant in this case are not related by blood or by marriage, nor is there any indication they were in an intimate relationship with one another. These facts preclude application of Section 34-8A-6(C), as they are afield of the circumstances for which on-record review is provided by the FVPA's definition of household member. *See* § 40-13-2(A) and (E).

{13} Next, we look to Section 34-8A-6(D), which encompasses de novo review for non-excepted convictions in metropolitan court. Subsection (D) encompasses criminal actions other than domestic violence or driving under the influence. We do not read Subsection (D) as a catch-all provision, such that all criminal actions not described by Subsection (C) must therefore be categorized as Subsection (D) criminal actions. That is not how Subsection (D) is written. Subsection (D) does not, for example, state: "The metropolitan court is a court of record for all other criminal actions not described by Subsection (C)." Furthermore, the Legislature specifically employed the term "household member" in Subsection (C) and omitted the term in Subsection (D). Accordingly, the question becomes: is criminal sexual contact against a non-household member a criminal action other than domestic violence? If so, Subsection (D) applies, and Defendant was entitled to a de novo appeal.

{14} Because the facts of this case lack any element of domesticity, it would seem the conviction is a criminal action other than domestic violence. However, two developments complicate the application of Section 34-8A-6. First, our Supreme Court's holding in *State ex rel. Schwartz v. Sanchez* incorporates into Section 34-8A-6 the definition of "domestic abuse" as it appears in the FVPA. 1997-NMSC-021, ¶ 7, 123 N.M. 165, 936 P.2d 334. The Court held that the term "domestic violence" in Section 34-8A-6 "must be read in pari materia" with the definition of "domestic abuse" in the FVPA. *Schwartz*, 1997-NMSC-021, ¶ 7; *see also Wilson*, 2006-NMSC-037, ¶ 1 n.1 ("Although the language in these two statutes is not identical, the same definition is employed to identify both domestic violence and domestic abuse."). Without *Schwartz*, Section 34-8A-6 only references the definition of "household member" in the FVPA, not the definition of "domestic abuse."

{15} Second, the Legislature has amended the definition of "domestic abuse" in the FVPA since the Supreme Court decided *Schwartz*. *See* § 40-13-2(D); 2008 N.M. Laws, ch. 40, § 2. Currently, under the FVPA, "domestic abuse" means: (1) "an incident of stalking or sexual assault whether committed by a household member or not"; and (2) "an incident by a household member against another household member" consisting of or resulting in physical harm, severe emotional distress, bodily injury or assault, etc. Section 40-13-2(D). Generally, the FVPA applies to conduct that occurs between household members, but it also applies to some criminal actions that have no element of domesticity. Its protections, thus, directly extend to victims of sexual assault. The victim and the accused could be complete strangers; so long as the conduct at issue is sexual assault, the FVPA applies nonetheless.

{16} The FVPA, however, does not define the term "sexual assault." We must therefore determine whether Defendant's conviction, criminal sexual contact, is sexual assault. If criminal sexual contact is a sexual assault, then Defendant's conviction is "domestic abuse" as defined by the FVPA. Such a conclusion would then render the de novo provision of Section 34-8A-6 inapplicable by its own terms, because Subsection (D) only applies, in pertinent part, to criminal actions other than domestic abuse.

{17} Defendant acknowledges that the Legislature has amended the FVPA to include within the definition of "domestic abuse" an incident of sexual assault "whether committed by a household member or not," but he maintains that criminal sexual contact is not sexual assault. Rather, he contends sexual assault refers only to criminal sexual penetration. Defendant cites to the Sexual Assault Survivors Emergency Care Act (SASECA) that defines "sexual assault" as criminal sexual penetration, excluding criminal sexual contact.

{18} Contending that the SASECA is inapplicable here, the State argues that criminal sexual contact is sexual assault, and therefore, this is a criminal action involving domestic abuse. If correct, and in light of *Schwartz*, Defendant's conviction would

be excluded from those metropolitan court convictions for which Section 34-8A-6(D) provides a right to a de novo appeal. We agree with the State that the SASECA is designed for a purpose unrelated to the categorization of sexual assault offenses. In fact, the purpose of the SASECA is to provide emergency services, including contraceptive services, to victims of sexual assault. To that end, it defines sexual assault as criminal sexual penetration. So, in the context of the SASECA, it is sensible that sexual contact and penetration are treated differently insofar as each present different dangers to recent victims. But we fail to see how such unrelated classification of sexual assault is relevant for purposes of the FVPA, and agree with the State's general argument that the ordinary meaning of "sexual assault" is an "offensive sexual contact with another person," as defined by *Black's Law Dictionary* and the federal Violence Against Women Act.

{19} We hold that criminal sexual contact against a non-household member is sexual assault as the term is used in the FVPA. "In interpreting a statute, [the] primary objective is to give effect to the Legislature's intent." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. To discern legislative intent, appellate courts look first to the language used in the statute and the plain meaning of that language. *See id.*; *see also High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 ("The first rule is that the plain language of a statute is the primary indicator of legislative intent." (internal quotation marks and citation omitted)). Courts must "give the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent." *State ex rel. Klineline v. Blackhurst*, 1988-NMSC-015, ¶ 12, 106 N.M. 732, 749 P.2d 1111 (1988)). Courts "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *Burroughs v. Bd. of Cty. Comm'rs*, 1975-NMSC-051, ¶ 14, 88 N.M. 303, 540 P.2d 233. If the statute contains clear and unambiguous language, courts "will heed that language and refrain from further statutory interpretation." *Trujillo*, 2009-NMSC-012, ¶ 11. "The plain meaning rule requires that statutes be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason." *State v. Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830 (internal quotation marks and citation omitted).

{20} We first consider the language of the statute. The FVPA states that "domestic abuse" means "an incident of stalking or sexual assault whether committed by a household member or not[.]" Section 40-13-2(D)(1). The statute does not list specific crimes that constitute sexual assault. If, as Defendant contends, the Legislature intended only that victims of criminal sexual penetration receive the protections of the FVPA, it could have stated that explicitly in the statute. For example, the Legislature could have amended the FVPA to read as follows: domestic abuse means an incident of stalking or *criminal sexual penetration* whether committed by a household member or not. Given the option to write the statute this way and the fact that the statute is not written to reference only criminal sexual penetration, it stands to reason that the Legislature intended "domestic abuse" to refer to a broader category of sexual offenses.

{21} Second, we note that "our courts interpret the intended meaning of statutory language by consulting the dictionary to ascertain the words' ordinary meaning." *Boyse*, 2013-NMSC-024, ¶ 9. The entry for "sexual assault" in *Black's Law Dictionary* provides two definitions. First, "sexual assault" means "[s]exual intercourse with another person who does not consent[,]" noting "[s]everal state statutes have abolished the crime of rape and replaced it with the offense of sexual assault." *Black's Law Dictionary* 138 (10th ed. 2014). Second, "sexual assault" means "[o]ffensive sexual contact with another person, exclusive of rape." *Id.*

{22} The first entry in the dictionary narrowly defines sexual assault as intercourse because, as noted, many states used the offense of sexual assault to replace conduct formerly defined as rape. In New Mexico, the crime of rape was not replaced with the offense of sexual assault. *State v. Keyonnie*, 1977-NMSC-097, ¶ 5, 91 N.M. 146, 571 P.2d 413 (explaining that "[t]he essential elements of the common law crime of rape, from which the statutory offense of criminal sexual penetration was derived," were carnal knowledge or intercourse). Rather, the crime of rape was replaced with the offense of criminal sexual penetration. *State v. Williams*, 1986-NMCA-122, ¶ 14, 105 N.M. 214, 730 P.2d 1196 (explaining that "[t]he statutory crime of rape was repealed in 1975" and Chapter 30 was amended to substitute "criminal sexual penetration" for "rape" (citing 1975 N.M. Laws, ch. 109, § 8)). Thus, in New Mexico, "sexual assault" is not the term used for rape or intercourse without consent. Rather, "criminal sexual penetration" is the offense that replaced the crime of rape. Therefore, the first entry for "sexual assault" in *Black's Law Dictionary* is not an accurate description of how New Mexico has used the term in its statutes, and the second entry—"offensive sexual contact with another person, exclusive of rape"—comports with the way the term is used in this state. *See Black's Law Dictionary* at 138. Accordingly, we conclude the term "sexual assault" as used in the FVPA means offensive sexual contact with another person, and therefore includes Defendant's conviction of criminal sexual contact. Defendant's conviction is, thus, an act of domestic abuse as defined by the FVPA, and Section 34-8A-6(D), providing for de novo appeals in the district court, is inapplicable.

{23} At this point in our analysis, we have concluded that the facts of the case fit into neither Section 34-8A-6(C) (because it requires the victim to be a household member) nor Section 34-8A-6(D) (because it only applies to criminal actions other than domestic abuse, and criminal sexual contact is domestic abuse as currently defined by the FVPA). This seemingly conflicting result is not surprising given the number of amendments made to the FVPA and the fact that no amendments have been made to Section 34-8A-6. The 2010 amendment to the FVPA and Section 32-8A-6 are thus functionally at odds. We must, therefore, next look to the object and purpose behind the statutes in order to determine whether Defendant's conviction is the sort of criminal action that receives an on-record or de novo review on appeal according to Section 34-8A-6.

{24} The State argues that *Schwartz* is controlling. It characterizes the holding broadly, stating that "our Supreme Court held that all acts of domestic abuse as defined in the [FVPA] are tried on-the-record in [m]etropolitan [c]ourt and only entitled to an on-record review." The purpose and intent behind the FVPA is to give victims of domestic abuse special protections because they are especially vulnerable. The Legislature has expanded that class of victims to include non-household members by amending the definition of "domestic abuse" in the FVPA. *Compare* § 40-13-2(D)(1), *with* § 40-13-2(C) (1995).

Indeed, *Schwartz* directs this Court to read Section 34-8A-6 "in pari materia" with the FVPA. *Schwartz*, 1997-NMSC-021, ¶ 7. Section 34-8A-6(D) in effect means that domestic abuse actions do not receive de novo appeals, and because domestic abuse now includes criminal actions between non-household members, those defendants are only entitled to an on-record review under *Schwartz*. The State notes that the Legislature has been in session nineteen times since the Supreme Court decided *Schwartz*, and it has made no amendments to Section 34-8A-6. According to the State, this inaction "indicates that the legislative intent articulated in *Schwartz* was correct."

{25} Defendant argues the opposite—*Schwartz* is not controlling. He maintains the holding stems from considerations that are no longer compelling because of the way the Legislature has amended the definition of "domestic abuse." Specifically, our Supreme Court recognized that victims of domestic abuse are especially vulnerable "[*b*]*ecause of the close relationship between the victim and the accused*" and "*because this form of violence is often repeated*[.]" *Schwartz*, 1997-NMSC-021, ¶ 9 (emphasis added). Defendant argues that the rationale and the holding in *Schwartz* depend on the fact that the victim and the accused are in a close or continuing relationship. According to Defendant, only "those charged with sexual assault that have or have had a continuing relationship with their victim are justified in being included in the scope of criminal actions of 'domestic violence' for the purposes of 'on-record appeal' cases versus 'de novo appeals.' "

{26} We agree with Defendant that *Schwartz* answers a different question, but we hold that the tools of statutory interpretation compel the conclusion that Defendant was only entitled to an on-record review on appeal.

{27} This case is distinguishable from *Schwartz* for two reasons. First, our Supreme Court decided *Schwartz* before the definition of "domestic abuse" in the FVPA included conduct that occurs between completely unrelated people. In 1993 the Legislature amended the FVPA to expand the definition of "domestic abuse" to include more than just assault and battery, *see* § 40-13-2(C) (1993) (current version at Section 40-13-2(D)), the same offenses that are specifically listed in Section 34-8A-6(C). *See Schwartz*, 1997-NMSC-021, ¶ 6. *Schwartz* was decided in 1997, when the FVPA defined "domestic abuse" as " 'any incident by a household member against another household member' " resulting in physical harm, severe emotional distress, bodily injury, etc. *Id.* ¶ 5 (quoting Section 40-13-2(C) (1995)). Our Supreme Court had to determine whether all of the conduct described in the FVPA came under the purview of Section 40-13-2(C) (1993) even though Subsection (C) only lists assault and battery. *Id.* ¶ 6 (noting that the question is "whether all of the acts of domestic abuse included in the [FVPA after the 1993 amendment] should be tried on-record"). The 1993 amendment at issue in *Schwartz* expanded the offenses considered to be domestic abuse under the FVPA; it did not change anything about the requisite relationship between the victim and the accused. *Compare* § 40-13-2(C) (1993), *with* § 40-13-2(D)(1). After the 1993 amendment, the FVPA still required that the conduct occur between household members in order to be considered domestic abuse. Here, the issue is a later amendment that expanded the class of people to whom the FVPA applies, not the nature of the conduct to which it applies. *See* § 40-13-2(D)(1) (including the phrase "whether committed by a household member or not" in the definition of "domestic abuse").

{28} Second, this case is factually different from *Schwartz*. In *Schwartz*, it can be presumed that the victim and the accused were household members. *See* 1997-NMSC-021, ¶ 9. Here, Victim and Defendant are strangers. The distinction is legally relevant because it proves that, at the time *Schwartz* was written, our Supreme Court did not contemplate a scenario like the one presented by the facts of this case, where no relationship exists between the victim and the accused.

{29} For the foregoing reasons, *Schwartz* is not controlling. Nevertheless, the logic and spirit of *Schwartz* is instructive. It directs that we read Section 34-8A-6 "in pari materia" with the FVPA. *Schwartz*, 1997-NMSC-021, ¶ 7. We must construe the two statutes "in a way that facilitates their operation and the achievement of their goals[,]" according to the Legislature's intent and policy. *Id.* (internal quotation marks and citation omitted). *Wilson* reiterates this point: "We have previously recognized that Section 34-8A-6(C) 'must be read in pari materia with the definition of domestic abuse in the [FVPA].' " *Wilson*, 2006-NMSC-037, ¶ 8 (internal quotation marks and citation omitted). Similarly, in *Wilson*—also decided when the FVPA only applied to crimes occurring between household members—our Supreme Court stated:

> we believe that the Legislature recognized that violence in the context of genuinely long-term relationships was particularly serious, and that victims of violence in this context were in need of greater protection than victims of other crimes. The FVPA is intended to address the unique needs of this group of victims.

Id. ¶ 15 (citation omitted).

{30} *Schwartz* and *Wilson* make it clear that the policy behind the FVPA is to extend certain protections to a victim of domestic abuse because the relationship between the victim and the accused makes the victim especially vulnerable. Given the more recent amendment to the definition of "domestic abuse" to include non-household member victims, we conclude the Legislature's intent behind the FVPA has shifted since *Schwartz* and *Wilson*. By defining "domestic abuse" in the FVPA to include criminal conduct of a sexually assaultive nature by non-household members, the Legislature opted to expand the class of victims entitled to the special protections of the FVPA. The language is clear: the meaning of "domestic abuse" is "an incident of stalking or sexual assault whether committed by a household member *or not*." Section 40-13-2(D)(1) (emphasis added). Accordingly, the Legislature must have intended for these victims to receive the same protections as the victims previously covered by the FVPA before the 2008 amendment. Aligned with the Legislature's evolved perspective and the rationale which underpinned *Schwartz* and *Wilson*, we hold that the victims of criminal sexual contact, regardless of their relationship with the accused, also receive the same protections under Section 34-8A-6, that is, the accused receives an on-record review on appeal in the district court, which ensures the victim is not required to testify twice. *See Schwartz*, 1997-NMSC-021, ¶¶ 7, 9.

{31} The provisions of the FVPA provide further support for this conclusion. Generally, the FVPA allows a victim to obtain a protective order, and limits the victim's exposure to the defendant. For example, Section 40-13-11 authorizes the victim to use the Secretary of State as a substitute address and requires the Secretary of State to maintain a confidential record of appli-

cations for substitute address. Our holding, that a person convicted of criminal sexual contact in the metropolitan court receives on-record review on appeal in the district court, ensures that the victims of sexual assault, regardless of their relationship with the accused, receive the same protections as the victims previously covered by the FVPA, whom the Legislature considers especially vulnerable, and who are therefore not required to testify more than once. This is consistent with and furthers the purposes of the FVPA because, like Section 40-13-11, it limits the victim's exposure to the defendant. We hold that a person convicted of criminal sexual contact against a non-household member receives an on-record review on appeal in the district court, following our Supreme Court's declaration that " 'all domestic abuse actions, as defined in the [FVPA], should be tried on-record.' " *Wilson*, 2006-NMSC-037, ¶ 8 (quoting *Schwartz*, 1997-NMSC-021, ¶ 7).

Motion for Continuance

{32} Defendant contends that the metropolitan court abused its discretion by denying trial counsel's motion for continuance. We review the denial of a motion for continuance for an abuse of discretion. *See State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. An abuse of discretion is a ruling that is "clearly against the logic and effect of the facts and circumstances of the case." *State v. Moreland*, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted). A court abuses its discretion when "the denial of the motion for continuance does not follow from a logical application of these factors" to the facts and circumstances of the case. *State v. Torres*, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20. The defendant carries the burden of establishing an abuse of discretion, and that the abuse was to the injury of the defendant. *See Salazar*, 2007-NMSC-004, ¶ 10.

{33} When reviewing the denial of a motion for continuance, courts consider several factors:

> (1) the length of the requested delay; (2) the likelihood that a delay would accomplish the movant's objectives; (3) the existence of previous continuances in the same matter; (4) the degree of inconvenience to the parties and the court; (5) the legitimacy of the motives in requesting the delay; (6) the fault of the movant in causing a need for the delay; and (7) the prejudice to the movant in denying the motion.

Torres, 1999-NMSC-010, ¶ 10.

{34} Considering these factors in light of the facts of this case, we conclude the metropolitan court did not abuse its discretion by denying defense counsel's motion for continuance. First, Defense counsel requested an additional two or three weeks. This is not an unreasonable length of time, especially when paired with the fact that one of the previous continuances added sixty days, more than twice the length of defense counsel's request. However, the trial had already been continued two times. By the date of the requested continuance, defense counsel had received an additional three months to prepare for trial. As such, the first factor weighs against granting the motion.

{35} The second factor also weighs against granting the motion. When asked why further continuance was needed, defense counsel stated "so that I can satisfy myself that I have all the information." In this instance, however, defense counsel's objective, that is, making sure she had all of the information she needed, could not possibly have been accomplished by resetting the trial for a later date because the metropolitan court specifically addressed each piece of information defense counsel was concerned about. Specifically, the State personally spoke with the officer who wore the lapel video with the brief recording, who said she had no explanation for why the video was cut short aside from battery failure and that the State possessed the exact same recording as Defendant. The State also communicated with the investigating officer who purportedly prepared the police report that Defendant never received, and that officer stated that no such report had been prepared. That evidence, which formed the basis of defense counsel's need for the continuance, was thus accounted for before the metropolitan court ruled on the motion.

{36} The third and fourth factors generally weigh against granting the motion for continuance. As noted, two previous continuances had already delayed trial three months beyond the initial trial setting. While we note that the parties dispute to whom the second continuance should be attributed, we also note that although Victim was not present at the start of the July setting, the State specifically said Victim could be there in one hour. The State did not move for a continuance. Defense counsel interjected before the court could comment, seeking to "stipulate" to a continuance because counsel had not yet interviewed Victim. The district court responded: "I really want the defense to interview the victim before we start the jury trial, so it's going to be reset." The second continuance was, therefore, granted for the benefit of Defendant. As well, we presume resetting the trial date on the day trial is supposed to begin is inconvenient for the parties and for the court. *See State v. Aragon*, 1997-NMCA-087, ¶ 22, 123 N.M. 803, 945 P.2d 1021 ("[A]s a general rule, a motion for continuance filed at the last minute is not favored."). We also note that any additional delay caused by granting defense counsel's requested continuance on the day of the trial would have inconvenienced and prejudiced the State, given that Victim was present to testify at trial.

{37} The fifth factor also weighs against granting the motion. The discussions that occurred prior to the September trial setting cast doubt on the purpose of defense counsel's request. The lapel video in question, for example, was discussed at the June trial setting in addition to the discussion in September. During the June discussion, the State explained that the recording in its possession was also cut short, and that it would address the officer who wore the camera to confirm the correct length of the recording. Moreover, the metropolitan court judge actually reviewed the recording personally, confirming that defense counsel had in its possession the same recording as the State. The lapel video issue had been raised by defense counsel and resolved by the State and the metropolitan court months before trial. To raise this issue as a basis for continuing trial a third time lacks merit. Defense counsel also argued that officers on the State's witness list were not present to testify, and stated the defense would "possibly" call them as witnesses. First, we note that the State is not required to call as witnesses every person on its witness list. The State's witness list expressly states: "If the defendant requires the presence of any of the above witnesses, the defendant should subpoena them." Second, counsel failed to assert or demonstrate that the presence of the officers would materially affect her presentation of a defense.

{38} The parties also dispute the sixth factor, whether the movant caused the need for the delay. Defendant argues that defense counsel did not cause the need for delay. Rather, the fault lies with the

use of horizontal representation employed by the metropolitan court trial division of the Office of the Public Defender. As a result, Defendant's case passed through numerous attorneys throughout the pretrial process. The metropolitan court took into consideration the fact that Defendant had a new attorney every time the case was called and that counsel present at the trial in September may have had less than the typical amount of time to prepare, noting: "You've had time to prepare . . . not as much as others. Again, he has different attorneys . . . every time he's been in here." As acknowledged by the metropolitan court, this factor weighs in favor of granting the motion.

{39} Finally, the last factor requires the movant to show that a denial of the continuance will prejudice the movant. *See Salazar*, 2007-NMSC-004, ¶ 10 ("Defendant must establish not only an abuse of discretion, but also that the abuse was to the injury of the defendant." (internal quotation marks and citation omitted)). Defense counsel made no such showing before the metropolitan court. To reiterate, the metropolitan court resolved the issues with the lapel video and the non-existent police report. The metropolitan court also made several statements indicating the lack of prejudice to Defendant if the officers on the state's witness list were not present for trial. Defense counsel's only statement indicating the prejudicial effect of their absence was: "I believe that these witnesses have information that would be relevant to the defense." First, the metropolitan court noted that defense counsel had already interviewed all of the officers and knew what their testimony would be if they were present for trial. The court also expressly stated: "If they are [essential], I'm not going to force you to go. . . . I certainly don't want to jeopardize the rights of Mr. Gonzales. . . . If they are essential for you, I need to know." When defense counsel did not answer the question affirmatively, the court concluded, "There is no representation they're essential or that you would even call them [as witnesses]." Given that defense counsel had already interviewed the officers and did not claim them to be essential trial witnesses, no showing of prejudice was made before the metropolitan court.

{40} On appeal, Defendant also argues the continuance was necessary to allow time for counsel to retain an eyewitness identification expert to educate the jury about the likelihood of an erroneous identification. Given that Victim's personal identification of Defendant was essential to Defendant's guilt or innocence, the absence of an eyewitness expert was detrimental to Defendant's case. But this argument was not made to the metropolitan court. Therefore, it was not preserved for review and we decline to consider it. Rule 1-073(O) NMRA (providing that in order "[t]o preserve a question for review it must appear that a ruling or decision by the metropolitan court was fairly invoked"); *State v. Telles*, 1999-NMCA-013, ¶ 15, 126 N.M. 593, 973 P.2d 845 (explaining that an issue raised on appeal is not preserved where a defendant failed to invoke a ruling by the trial court on that issue).

{41} The metropolitan court carefully considered defense counsel's motion before denying it, reviewing each one of defense counsel's arguments about the lapel video and the police report, and specifically inquiring about whether the officers on the State's witness list were essential, which would have shown prejudice to Defendant's case. For the foregoing reasons, we cannot conclude the metropolitan court's ruling was unfair, arbitrary, or erroneous, or that the court acted beyond the bounds of its discretion by denying the motion. *State v. Brazeal*, 1990-NMCA-010, ¶ 16, 109 N.M. 752, 790 P.2d 1033 (explaining that a trial court "has broad discretion in ruling on a motion for continuance"); *State v. Gonzales*, 1991-NMSC-075, ¶ 13, 112 N.M. 544, 817 P.2d 1186 (explaining that a court abuses its discretion only if the court's ruling can be "characterized as unfair, arbitrary, or as manifest error"). We affirm the denial of Defendant's motion for continuance.

CONCLUSION

{42} We hold that Defendant was entitled to an on-record review on appeal in the district court and that the metropolitan court did not abuse its discretion by denying Defendant's motion for continuance. Defendant's conviction is affirmed.

{43} IT IS SO ORDERED.
STEPHEN G. FRENCH, Judge

I CONCUR:
J. MILES HANISEE, Judge
JONATHAN B. SUTIN, Judge
(concurring in part and dissenting in part)

SUTIN, Judge (concurring in part and dissenting in part).

{44} I concur in the majority's continuance ruling and respectfully dissent as to its review-standard ruling.

{45} I view the review standard issue as one of policy that places at odds (1) the majority's protection of victims of misdemeanor sexual contact outside of domesticity against having to testify twice, and (2) the right of defendants who have been charged with a non-domestic-related misdemeanor to a district court trial de novo. Assuming, without deciding, that we are not confronted with a constitutional deprivation or governance by the province of courts over the Legislature, my choice is to leave the answer for the Legislature, as I now explain.

{46} The crux of my concern is how we interpret the "protection" that the Legislature intends the FVPA to afford to victims of misdemeanor sexual contact. It appears that the Section 40-13-2(D)(1) amendment intended to extend the protections of the FVPA to sexual contact victims who are not household members. But nowhere in the FVPA is there a protection in regard to the review standard in misdemeanor sexual contact cases. It is an analytic jump to conclude that the amendment was intended to provide review "protection" or that the concern about a victim's vulnerability and apparent need for FVPA protection, as expressed in *Schultz* and *Wilson*, has to do with the review to be provided in Section 34-8A-6.

{47} Sections 34-8A-6(C) and (D) relating to metropolitan court appeals were enacted in 1993. Section 40-13-2 was first enacted before 1993, apparently in 1987, and contained the definition of "household member." *Schwartz* was decided in 1997, *Wilson* in 2006. All of these enactments and decisions occurred before Section 40-13-2(D)(1), which was enacted in 2008.

{48} Section 34-8A-6(C) and (D) or the section's earlier subsection designations referred to the definition of "household member" as defined in Section 40-13-2 before the advent of Section 40-13-2(D)(1) and its "or not" language. Section 34-8A-6(C) and (D) have not been amended to apply to non-household members. Further, statutory interpretation rules, ordinarily applied, should lead this Court to hold that the definition of "a criminal action involving domestic violence" in Section 34-8A-6(C) would apply to "domestic violence actions" in Section 34-8A-6(D), contrary to the majority opinion's treatment of those two subsections. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 15, 309 P.3d 1047 (requiring courts to examine a statute as a whole, including the purposes

and consequences of the statute); *Allen v. McClellan*, 1965-NMSC-094, ¶ 6, 75 N.M. 400, 405 P.2d 405 (requiring in statutory construction for courts to read all of the provisions of a statute together to ascertain legislative intent and that "each part should be construed in connection with every other part so as to produce a harmonious whole").

{49} Thus, I question the analysis in the majority opinion that ties FVPA protection and victim vulnerability to non-household victims of misdemeanor sexual contact. The idea of not requiring a victim of domestic misdemeanor sexual contact to have to testify twice came from the unique circumstances of sexual assault in domestic relationships involving close and continuing long-term relationships. *See* § 40-13-2(A) (defining a "continuing personal relationship" referred to in Section 40-13-2(E) to mean "a dating or intimate relationship"). When neither victim nor perpetrator is a household member but are complete strangers, the foregoing rationales of protection and vulnerability in unique domestic circumstances do not apply. A non-household member assaulted by a non-household perpetrator is far afield from the Legislature's clear concern about *domestic* violence and the vulnerability of persons in domestic or long-term continuing relationships. Balancing the concerns for misdemeanor sexual contact victims outside of domestic circumstances with concerns relating to criminal justice and procedure, it would appear that the criminal justice and procedure concern of allowing the defendant a de novo trial in district court should prevail. This leaves to pure domestic circumstances the exception to the otherwise constitutionally required de novo review. *See* N.M. Const. art. VI, §§ 13, 27 (vesting district courts with "appellate jurisdiction of all cases originating in inferior courts" and that such trials "shall be had de novo unless otherwise provided by law").

JONATHAN B. SUTIN, Judge

Certiorari Denied, September 20, 2017 No. S-1-SC-36610

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-081

No. A-1-CA-34822 (filed July 17, 2017)

STATE OF NEW MEXICO ex rel.
HONORABLE DONNA BEVACQUA-YOUNG,
MAGISTRATE JUDGE, SANTA FE COUNTY,
Plaintiff-Appellant,
v.
MICHAEL STEELE,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
T. GLENN ELLINGTON, District Judge

HECTOR H. BALDERAS
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for Appellant

BENNETT J. BAUR
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Opinion

Michael E. Vigil, Judge

{1} The State, on behalf of the Honorable Donna Bevacqua-Young, appeals from an order of the district court that vacated a judgment and sentence entered by the magistrate court for direct criminal contempt against Defendant Michael Steele, and further ordered that the contempt charge be dismissed with prejudice. Concluding that the district court acted beyond its jurisdiction by hearing the matter in its appellate capacity instead of hearing the criminal contempt charge de novo, we reverse.

FACTS

{2} The magistrate court filed a criminal complaint charging Defendant with criminal contempt, together with an order on direct criminal contempt finding that Defendant committed direct criminal contempt during a video arraignment. It entered a judgment and sentence ordering Defendant to be confined in the Santa Fe County Detention Center for thirty days and pay court costs of $73. Defendant appealed to the district court, where he obtained an order staying execution of the sentence and his release from custody pending the result of the appeal. *See* Rule 6-703(D) NMRA (stating that execution of any sentence or fine "shall be stayed pending the results of the appeal to district court").

{3} In the district court, Defendant filed a motion to vacate the judgment and sentence, asserting that he was denied the right of allocution before being sentenced, and that the magistrate court judgment should be set aside. *See Concha v. Sanchez*, 2011-NMSC-031, ¶ 27, 150 N.M. 268, 258 P.3d 1060 ("If feasible, even in summary proceedings for an act of direct contempt occurring in open court, an adequate opportunity to defend or explain one's conduct is a minimum requirement before imposition of punishment." (internal quotation marks and citation omitted)). In support of the motion, Defendant attached the notarized statement of a corrections officer who was in the arraignment room with the inmates that described what she observed during the arraignment. The State filed a response arguing that Defendant was not entitled to allocution because he was found to be in direct criminal contempt. In support of its position, the State attached to its response a copy of the magistrate court's order on criminal contempt and the judgment and sentence.[1]

{4} The district court held a hearing on Defendant's motion to dismiss. No evidence was presented at the hearing, and the parties limited themselves to presenting legal arguments with reference to the documents attached to their pleadings. At the end of the hearing, the district court "[accepted] as the factual basis, both the statements offered in the order of contempt issued by Judge Bevacqua-Young, and in the affidavit of the [corrections] officer" and concluded that Defendant was denied his right to allocute. The district court's order formalized its oral finding that Defendant was denied his right to allocution before being sentenced for direct criminal contempt, granted Defendant's motion to vacate sentence, ordered that the sentence on the order of direct contempt be vacated, and dismissed the case with prejudice. In addition, the district court ordered that the case be remanded to the magistrate court for its order to be implemented. The State appeals.

DISCUSSION

{5} The district court in this case acted as an appellate court by undertaking a review of what the facts were in the magistrate court, and then determining whether the magistrate court committed reversible, legal error. Such review is referred to as an on-the-record review or an on-the-record appeal. *See State v. Foster*, 2003-NMCA-099, ¶ 9, 134 N.M. 224, 75 P.3d 824 (noting that if an appeal from the metropolitan court to the district court is on the record, "the district court acts as a typical appellate court reviewing the record of the lower court's trial for legal error"). The State's briefing before this Court assumes that

[1]Copies of these documents had already been filed in the district court. *See* Rule 5-826(F)(2), (3) NMRA (providing in part that in an appeal from the magistrate court to the district court, the magistrate court shall file with the district court clerk the record on appeal, which includes a copy of all papers and pleadings filed in the magistrate court, and a copy of the judgment or final order sought to be reviewed).

the district court had jurisdiction to conduct an on-the-record appeal. The State's brief in chief only argues that the district court erred in holding that Defendant was entitled to allocution, and that even if the Defendant was entitled to allocution, the district court erred in dismissing the contempt charge rather than remanding for resentencing. Defendant's answer brief in turn responds to the State's legal arguments.

{6} Whether the district court had jurisdiction to engage in on-the-record review of the proceedings before the magistrate court raises a threshold jurisdictional question that we must resolve. "The question of jurisdiction is a controlling consideration that must be resolved before going further in a proceeding and may even be raised by the appellate court on its own motion." *State v. Favela*, 2013-NMCA-102, ¶ 6, 311 P.3d 1213 (internal quotation marks and citation omitted), *aff'd*, 2015-NMSC-005, 343 P.3d 178; *see also Smith v. City of Santa Fe*, 2007-NMSC-005, ¶ 10, 142 N.M. 786, 171 P.3d 300 ("[I]t is incumbent upon the appellate court to raise jurisdiction questions sua sponte when the Court notices them."). We review jurisdictional issues de novo. *Favela*, 2013-NMCA-102, ¶ 6.

{7} The magistrate court has statutory jurisdiction "to punish for contempt only for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of [its] court." NMSA 1978, § 35-3-9 (1991); *see* Rule 6-111 NMRA (establishing procedures to implement the inherent and statutory powers of a magistrate court to impose punitive sanctions for criminal contempt of court). A person convicted of contempt by the magistrate court "may appeal to the district court in the same manner as in other criminal actions in the magistrate court." Section 35-3-9; *see* Rule 6-703(A) (stating that a party aggrieved by a judgment or final order in a criminal action may appeal to the district court); Rule 5-826 (setting forth the procedure to follow in a criminal appeal from the magistrate court to the district court).

{8} "The magistrate court is not a court of record[,]" NMSA 1978, § 35-1-1 (1968), and therefore, "[a]ppeals from the magistrate courts shall be tried de novo in the district court." NMSA 1978, § 35-13-2(A) (1996); Rule 5-826(J) ("Trials upon appeals from the magistrate court . . . to the district court shall be de novo."); *see City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, ¶ 1, 311 P.3d 446 ("[T]he right of appeal from courts not of record is the right to a trial or hearing de novo in district court[.]"). These provisions implement the right guaranteed by the New Mexico Constitution to an appeal from the magistrate court to the district court, "and in all such appeals, trial shall be had de novo unless otherwise provided by law." N.M. Const. art. VI, § 27. *See generally State v. Armijo*, 2016-NMSC-021, ¶¶ 3-13, 375 P.3d 415 (tracing the background, history, and evolution of appeals from the magistrate court to the district court from the Pre-Territorial Kearney Code to the present).

{9} In a de novo appeal to the district court, there is "a new trial on the entire case —that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance." *State v. James*, 2017-NMCA-___, ¶ 3, ___ P.3d ___ (No. 33,312, Apr. 10, 2017) (alteration, internal quotation marks, and citation omitted) ; *see Foster*, 2003-NMCA-099, ¶ 9 (stating that in a de novo appeal, "a district court conducts a new trial as if the trial in the lower court had not occurred"). Thus, the district court was required to hold a trial, in which the State was required to prove beyond a reasonable doubt that Defendant committed direct criminal contempt of the magistrate court. *See Concha*, 2011-NMSC-031, ¶ 26 (stating that "criminal contempt is a crime in the ordinary sense" (alteration, internal quotation marks, and citation omitted)). Here, however, there was no trial de novo. Instead, as we have already observed, the district court acted as a typical appellate court and engaged in on-the-record review.

{10} "A court's jurisdiction derives from a statute or constitutional provision." *Armijo*, 2016-NMSC-021, ¶ 19 (internal quotation marks and citation omitted). "The right to appeal is also a matter of substantive law created by constitutional or statutory provision." *Id.* ¶ 19. The district court had jurisdiction, and was required to hold a trial de novo on the criminal charge of direct criminal contempt of the magistrate court. However, the district court engaged in on-the-record review, and the district court had no jurisdiction to do so. The order of the district court must therefore be reversed and the case remanded to the district court for a de novo trial where the State must prove beyond a reasonable doubt that Defendant committed the crime of direct criminal contempt of the magistrate court.

CONCLUSION

{11} The order of the district court in all respects is reversed, and the case is remanded to the district court for further proceedings in accordance with this opinion.

{12} IT IS SO ORDERED.

Michael E. Vigil, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
J. MILES HANISEE, Judge

Certiorari Denied, October 31, No. S-1-SC-36620

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-082

No. A-1-CA-35251 (filed July 26, 2017)

AMY AVALOS, CHELSIE CARTER, SHELBY HUGHES, MARCELLA MADRID, MARGARITA MELENDEZ, FRANCINE SIMMS, JEAN SMITH, and ANGELA CAVENDER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,
v.
THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY, in its capacity as the body politic for NEW MEXICO STATE UNIVERSITY and DOÑA ANA COMMUNITY COLLEGE,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
JERRY H. RITTER JR., District Judge

ROB TREINEN
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The Pickett Law Firm LLC
Las Cruces, New Mexico
for Appellees

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CODY R. ROGERS
LUKE A. SALGANEK
Miller Stratvert PA
Las Cruces, New Mexico
for Appellant

Opinion

Jonathan B. Sutin, Judge

{1} Plaintiffs are a group of former students who were enrolled in Doña Ana Community College's associate's degree nursing program (the program) in 2012. When Plaintiffs enrolled in the program, written documents provided by the Doña Ana Community College stated that the program was nationally accredited by, among others, the National League of Nursing Accrediting Commission (the Commission). Before the students completed their studies, the Doña Ana Community College lost its Commission accreditation and Plaintiffs sued. They brought an action that included a claim for breach of contract against the Board of Regents of New Mexico State University in its capacity as the body politic for the university and Doña Ana Community College (collectively, Defendant).[1] Defendant sought summary judgment as to Plaintiffs' breach of contract claim, arguing that it was immune under NMSA 1978, Section 37-1-23(A) (1976), because Plaintiffs' claim was not based on a "valid written contract." The district court denied Defendant's motion for summary judgment, Defendant filed a petition for writ of error, and this Court granted the petition to review Defendant's immunity claim. *See Handmaker v. Henney*, 1999-NMSC-043, ¶¶ 14-15, 128 N.M. 328, 992 P.2d 879 (stating that determinations of immunity under Section 37-1-23(A) can, in general, be reviewed by writ of error). We hold that the written documents regarding accreditation relied upon by Plaintiffs do not constitute a valid written contract under Section 37-1-23(A).

DISCUSSION

{2} Plaintiffs' breach of contract claim alleged that "[a] written agreement existed between Plaintiffs . . . and [Defendant] . . . whereby [Defendant] agreed that it would provide a nationally accredited education in nursing in exchange for [Plaintiffs'] enrollment and tuition." Plaintiffs asserted that they entered into a valid written contract with Defendant for a nationally accredited nursing program as evidenced by (1) the offer letter that they received from Defendant that offered admission to the program and required a written response accepting or declining a position in the program; (2) a student handbook that included a statement that information about accreditation of the program could be obtained from the Commission and included a ledger that stated, in relevant part, that the program was accredited by the Commission; and (3) a student handbook acknowledgment form that Plaintiffs were required to sign.

{3} Section 37-1-23(A) states that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." Underlying the Section 37-1-23(A) grant of immunity is an overarching policy to "protect the public purse" by requiring that "parties seeking recovery from the state for benefits conferred on it have valid written contracts[.]" *Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, ¶ 23, 110 N.M. 173, 793 P.2d 855 (internal quotation marks omitted). This Court has determined that "[b]y limiting lawsuits to valid written contracts, the [L]egislature placed the risk of loss on a party who transacts business with a governmental entity without a valid written contract." *Campos de Suenos, Ltd. v. Cty. of Bernalillo*, 2001-NMCA-043, ¶ 14, 130 N.M. 563, 28 P.3d 1104. Our standard of review is de novo. *See Univ. of N.M. Police Officer's*

[1]Plaintiffs also filed claims for breach of the covenant of good faith and fair dealing, promissory estoppel, and declaratory and injunctive relief. Those claims were voluntarily abandoned and are not before us

Ass'n v. Univ. of N.M., 2005-NMSC-030, ¶ 8, 138 N.M. 360, 120 P.3d 442; *see also Ruegsegger v. Bd. of Regents of W. N.M. Univ.*, 2007-NMCA-030, ¶ 22, 141 N.M. 306, 154 P.3d 681 ("We apply a de novo review to the application of Section 37-1-23(A) to the facts[.]").

{4} The parties discuss several cases in which our appellate courts have considered the application of Section 37-1-23(A). We discuss these cases for legal background relating to the issue at hand.

{5} In *Garcia v. Middle Rio Grande Conservancy District*, 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7, our Supreme Court considered whether a personnel policy that set forth "certain rights, expectations, obligations, and other promises between the [employer] and its employees" constituted a valid written contract such that the plaintiff's governmental employer could be held liable for breach of an employment contract. *Id.* ¶¶ 1, 3. The plaintiff sued for breach of an employment contract after he was demoted, which resulted in a reduction in pay. *Id.* ¶¶ 1-2. In analyzing the case, our Supreme Court first noted that although an employment contract for an indefinite period of time is terminable at will, New Mexico recognizes implied contracts as an exception to the at-will rule. *Id.* ¶ 10. The Court determined that the employer's personnel policy contained "provisions relating to most every aspect of an employment relationship, including job description, compensation (including salary on promotion, demotion, or transfer), overtime, compensatory time, time clock violations, tardiness, sick leave and annual leave, and holidays." *Id.* ¶ 12. And the Court recognized that the policy was part of an implied employment contract because "it controlled the employer-employee relationship and [the plaintiff] could reasonably expect [the] employer to conform to the procedures it outline[d]." *Id.* ¶¶ 11-13 (internal quotation marks and citation omitted). The Court then held that, under the particular facts of *Garcia*, the implied employment contract, which was based on terms set forth in a personnel policy, constituted a "valid written contract[,]" and thus immunity was waived for such claims under Section 37-1-23(A). *Garcia*, 1996-NMSC-029, ¶¶ 14, 20 (internal quotation marks omitted).

{6} In *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 1, 120 N.M. 680, 905 P.2d 718, the plaintiffs sued the defendant for breach of contract after the plaintiffs' child was injured at the defendant's day camp. Our Supreme Court considered whether the breach of contract claim based on the plaintiffs' written application to the day camp was a valid written contract that waived governmental immunity under Section 37-1-23(A). *Espinoza*, 1995-NMSC-070, ¶¶ 1, 15. Ultimately, the Court rejected the claim, stating that the town "did not undertake a contractual obligation for liability in the event of injury to a child attending its . . . day camp[,]" and "[a]t most, the terms of the application merely ensured that space would be provided in the day camp program for children who registered and paid the applicable fee." *Id.* ¶ 15.

{7} In *Ruegsegger*, 2007-NMCA-030, ¶¶ 4, 17, 21-22, this Court considered whether athletic scholarship agreements and a student handbook created a valid written contract under Section 37-1-23(A) between the defendants and the plaintiff. In *Ruegsegger*, the plaintiff filed a breach of contract claim against the defendants after she was allegedly raped by two school-affiliated athletes. 2007-NMCA-030, ¶ 2. According to the plaintiff, the defendants "breached their contractual obligations by deliberately failing to follow . . . policies and procedures in investigating the sexual attack, failing to provide a school free from harassment and hostility, and failing to provide reasonable support for [the plaintiff] following the assault." *Id.* The plaintiff was a student athlete and claimed that her athletic scholarship agreements constituted an enforceable, written contract and that she had an implied contract based on the student handbook. *Id.* ¶ 4. Specifically, the plaintiff highlighted the defendants' failure to assemble a crisis intervention team as required by the student handbook and alleged that the defendants subjected the plaintiff "to humiliation and unfair treatment by deliberately failing to follow . . . policies and procedures after the rape" and failed to "provide reasonable support following the assault." *Id.* ¶ 14 (internal quotation marks omitted).

{8} In *Ruegsegger*, this Court first analyzed the scholarship agreements and held that the scholarship agreements required the plaintiff to maintain acceptable academic performance, play basketball, and comply with university regulations, and in exchange, the university was obligated to provide the plaintiff with scholarship assistance for her education. *Id.* ¶ 19. According to this Court, the scholarship agreements made "no reference to any duty on the part of [the university] to comply with any . . . regulations or to investigate claims of harassment, sexual assaults, or any other misbehavior by other students[,]" and thus, the agreements could not form the basis for the plaintiff's breach of contract claim. *Id.* ¶¶ 18-20.

{9} The *Ruegsegger* Court next analyzed the provisions in the student handbook to determine whether there was a claim for breach of implied contract. *Id.* ¶¶ 21-37. In analyzing the handbook, this Court assumed without deciding that Section 37-1-23(A) did not bar the plaintiff's claim and ultimately held that the plaintiff "failed to state a valid claim for breach of contract based upon the language of the [s]tudent [h]andbook." *Ruegsegger*, 2007-NMCA-030, ¶ 22. We noted that "[t]o establish a claim for breach of implied contract based upon the terms of the [s]tudent [h]andbook, [the p]laintiff was required to demonstrate that those terms created a reasonable expectation of contractual rights. The reasonableness of the [plaintiff's] expectation is measured by the definiteness, specificity, or explicit nature of the representation at issue." *Id.* ¶ 24 (citation omitted).

{10} The handbook in *Ruegsegger* contained:

> (1) a student code of conduct and sanctions that [could] be imposed against a student who violate[d] the code, (2) a description of academic standards and procedures that [would] be used when considering the imposition of sanctions for poor academic performance and appeal of those sanctions, (3) a provision for a disciplinary committee that [would] hear[] cases involving student discipline without specifying the type of hearings that should be conducted except to recognize a student's right to due process, (4) a drug and alcohol policy with specified procedures for any student who violate[d] the policy, and (5) a general nondiscrimination policy.

Id. ¶ 25. It also contained a section regarding the student appeals committee, a sexual harassment policy, and a section titled "response to an alleged sexual assault," which outlined a procedure for the university regarding its response to sexual assault allegations. *Id.* ¶¶ 26-28.

{11} The *Ruegsegger* Court held that the provisions in the handbook did not contractually guarantee rights to specific

types of investigations, support, and sanctions in the event of a sexual assault, but rather provided guidelines. *Id.* ¶¶ 30, 33. The Court acknowledged that the plaintiff had cited to a number of cases in which courts across the country have held that the relationship between students and post-secondary educational institutions is contractual, but differentiated those cases from *Ruegsegger* on the ground that those cases involved claims by students that the institution had "breached promises relat[ed] to academic matters or access to educational programs." *Id.* ¶ 32. This Court stated that "[n]one of the cases cited by [the p]laintiff support[ed] her conclusion that, merely because there is a contractual relationship between a university and a student, the university is contractually bound to honor every provision found in a student handbook." *Id.* ¶ 33. In dismissing the plaintiff's breach of contract claim on the basis that it was unreasonable for the plaintiff to expect that the university had promised services, this Court rejected the plaintiff's claim that dismissal entitled students to less contractual protection and stated that "dismissal only indicate[d] that students' contractual protections, absent explicit language to the contrary, will be confined to the scope of their academic relationship with an educational facility." *Id.* ¶¶ 33, 36.

{12} In *Campos de Suenos*, 2001-NMCA-043, ¶ 1, this Court considered whether to expand the analytical framework of *Garcia*, which allowed implied-in-fact contracts to be considered valid written contracts, outside of the employment context. In *Campos de Suenos*, the plaintiff began negotiating with the defendant for the sale of a ballpark. *Id.* ¶¶ 2-3. At a public meeting, members of the defendant's commission voted in favor of purchasing the ballpark. *Id.* ¶ 3. However, in the months following that meeting, the parties were unable to negotiate a proposed sales agreement and no written contract was ever executed by the parties. *Id.* Eventually the defendant decided not to move forward with the purchase. *Id.* Although the parties never entered into an express written contract for the sale of the complex, the plaintiff offered "a slew of partial writings as evidence of its contract with the [defendant]." *Id.* ¶¶ 18, 20. Specifically, the plaintiff pointed to "transcripts of meetings, staff summaries, and the like[.]" *Id.* ¶ 23. This Court held that allowing the plaintiff to "cobble together a contract in such a manner undermine[d] the purpose of having a comprehensive document," i.e., "a valid written contract" as required in Section 37-1-23(A). *Campos de Suenos*, 2001-NMCA-043, ¶ 18. We expressed "grave reservations with the proposition that *Garcia* allows implied-in-fact contracts outside of the employment context to override governmental immunity." *Campos de Suenos*, 2001-NMCA-043, ¶ 26. Accordingly, we stated, "Given the particular nature of employment law, we decline to expand the Supreme Court's holding in *Garcia*, beyond the employment arena." *Campos de Suenos*, 2001-NMCA-043, ¶ 28.

{13} In the case now before us, Plaintiffs recognize that "[o]rdinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent." *Garcia*, 1996-NMSC-029, ¶ 9 (internal quotation marks and citation omitted). They argue that a contractual offer and acceptance is evidenced by the offer letter and the representation that the education provided would be a nationally accredited nursing education as evidenced by statements in the handbook and supported by the handbook acknowledgment form. Plaintiffs assert that whether the statement in the handbook regarding accreditation is sufficient to allow a breach of contract claim does not impact contract formation but rather impacts only breach of contract and contract interpretation, and therefore Section 37-1-23(A) immunity is not implicated. Plaintiffs also argue that Defendant's representation of accreditation in the handbook is definite, specific, or explicit as required by *Ruegsegger*. *See* 2007-NMCA-030, ¶ 24. According to Plaintiffs, the facts in this case are distinguishable from *Ruegsegger* because national accreditation is a "core academic matter[,]" and thus "[i]t is entirely within students' and higher education institutions' objectively reasonable expectations to believe that when an institution says its program is nationally accredited, it will deliver a nationally accredited education."

{14} We begin by noting our disagreement with Plaintiffs' assertion that Defendant's Section 37-1-23 arguments implicate breach of contract and contract interpretation rather than contract formation and therefore should be considered by a jury. We are asked to determine whether there was a valid written contract that contractually obligated Defendant to provide a nationally accredited education to Plaintiffs, an issue that squarely involves contract formation and requires this Court to determine, as a matter of law, whether immunity is waived. *See Univ. of N.M. Police Officer's Ass'n*, 2005-NMSC-030, ¶ 8 (stating that "[i]n analyzing the application of [Section 37-1-23(A)] to the facts . . . , [the appellate courts] are faced with a question of law"); *Ruegsegger*, 2007-NMCA-030, ¶ 22 (analyzing, as a matter of law, "the application of Section 37-1-23(A) to the facts").

{15} We hold that the offer letter, the handbook, and the handbook acknowledgment form do not constitute a valid written contract under Section 37-1-23(A) that contractually obligated Defendant to provide a nationally accredited education to Plaintiffs. We address the documents in turn.

{16} The offer letter—which Plaintiffs argue evidences offer and acceptance—does not mention accreditation, the handbook, or the handbook acknowledgment form. The offer letter is similar to the application to the day camp in *Espinoza* and the scholarship agreements in *Ruegsegger*. In both cases, the appellate courts rejected the plaintiffs' respective breach of contract claims because the writings, at best, created contracts that were not implicated by the plaintiffs' particular breach of contract claim. *See Espinoza*, 1995-NMSC-070, ¶ 15 (holding that the defendant "did not undertake contractual obligation for liability" for damages by virtue of the plaintiffs' day camp application because the language in the application simply ensured space in the program); *Ruegsegger*, 2007-NMCA-030, ¶¶ 18-20 (holding that the scholarship agreements could not form the basis of the plaintiff's breach of contract claim because those agreements did not obligate the defendants to investigate sexual assault claims but rather simply required the plaintiff to maintain acceptable academic performance, play basketball, and comply with regulations, and in exchange, the defendants were obligated to provide the plaintiff with scholarship assistance). Here, the offer letter, at best, evidences an agreement that Plaintiffs would or intended to enroll in the program. It does not, however, evidence an agreement to provide a nationally accredited education.

{17} We also reject Plaintiffs' argument that there exists a contract sufficient to waive immunity because it was reasonable for Plaintiffs to expect contractual rights based on the handbook and the handbook acknowledgment form. *See id.* ¶ 24. Although Plaintiffs argue that "nothing need be implied to show there exists a written

contract that the education to be provided will be a nationally accredited education[,]" this "reasonableness" argument is an implied contract argument similar to the argument made in *Ruegsegger*. *See id.* ¶¶ 4, 22 (construing the plaintiff's breach of contract argument based on the student handbook as an implied contract argument).[2] As noted earlier, in *Ruegsegger*, we held that, based on the language in the student handbook, the plaintiff could not reasonably expect that the defendants would be obligated to perform a comprehensive investigation and provide her with more support after she disclosed the alleged assault to officials. 2007-NMCA-030, ¶¶ 24, 30. And although we suggested that the outcome of the implied contract analysis in *Ruegsegger* might be different in cases involving academic matters, we noted that the inquiry would center on what was reasonable. *Id.* ¶¶ 32-33.[3]

{18} In this case, as in *Ruegsegger*, we are not persuaded that an implied contract exists based on the handbook or other writings that would waive immunity under Section 37-1-23(A). Implied contract claims require proof that the promise or representation must be definite, specific, or explicit so that there is "a reasonable expectation of contractual rights." *Ruegsegger*, 2007-NMCA-030, ¶ 24; *see Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 14, 115 N.M. 665, 857 P.2d 776 (same). In this case, there is no representation or promissory language in any of the writings that Defendant "promise[s] it will be accredited" or is obligated to obtain or maintain national accreditation. The general, non-promissory accreditation language here is insufficiently definite, specific, or explicit to give rise to a reasonable expectation of *contractual rights* regarding national accreditation. *See Ruegsegger*, 2007-NMCA-030, ¶¶ 30, 33 (holding that the provisions in the student handbook provided guidelines rather than contractually guaranteeing a right, that it was unreasonable for the plaintiff to expect that the defendants promised support following a sexual assault, and that the provisions in the handbook did not constitute the terms of an implied contract); *see also Sanchez v. The New Mexican*, 1987-NMSC-059, ¶ 12, 106 N.M. 76, 738 P.2d 1321 (affirming the dismissal of an implied contract claim on grounds that "the handbook lacked specific contractual terms which might evidence the intent to form a contract" and that "[t]he language is of a non-promissory nature and merely a declaration of [the] defendant's general approach"); *Stieber v. Journal Publ'g Co.*, 1995-NMCA-068, ¶ 13, 120 N.M. 270, 901 P.2d 201 ("General policy statements of a non-promissory nature contained in an employee handbook are insufficient to create an implied contract."). As in *Ruegsegger*, Plaintiffs have not demonstrated that the terms in the handbook or other writings created a reasonable expectation of contractual rights in continued accreditation, even though accreditation may be academic in nature. Therefore, we hold that there is no implied contract sufficient to waive immunity pursuant to Section 37-1-23(A).

{19} Plaintiffs' assertion that the offer letter can and should be read in tandem with the handbook and the handbook acknowledgment form does not alter our holding. As stated earlier, the documents are insufficient to create a valid written contract on their own, and our conclusion that there is no valid written contract for Defendant to provide Plaintiffs with a nationally accredited education is not altered merely by reading the multiple, insufficient documents together. Moreover, although a contract can consist of several related writings, *see Crow v. Capitol Bankers Life Ins. Co.*, 1995-NMSC-018, ¶ 29, 119 N.M. 452, 891 P.2d 1206, we reiterate our concern that allowing Plaintiffs to "cobble together a contract in such a manner [would] undermine[] the purpose of having a comprehensive document," i.e., "a valid written contract" as required in Section 37-1-23(A). *See Campos de Suenos*, 2001-NMCA-043, ¶ 18.

CONCLUSION

{20} As to Plaintiffs' contract claims, Defendant is immune under Section 37-1-23(A). We reverse and remand with instructions to enter summary judgment in favor of Defendant.

{21} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JULIE J. VARGAS, Judge

[2] In *Ruegsegger*, this Court did not outright reject the proposition that an implied contract based on a student handbook could meet the requirements of Section 37-1-23(A); however, we also did not explicitly expand our Supreme Court's holding in Garcia such that implied contracts may always constitute valid written contracts beyond the employment arena. *See Ruegsegger*, 2007-NMCA-030, ¶ 22 (assuming without deciding that Section 37-1-23(A) did not bar the plaintiff's claim).

[3] *Ruegsegger* did not clarify whether it is appropriate to construe an implied contract as a valid written contract as contemplated by Section 37-1-23(A) outside of the employment arena. In *Campos de Suenos*, 2001-NMCA-043, ¶¶ 18, 26, this Court expressed "grave reservations" with expanding our Supreme Court's holding in *Garcia* to non-employment cases and with allowing a plaintiff to "cobble together a contract" in an attempt to satisfy the requirements of Section 37-1-23(A).

Classified

Positions

Associate Attorney

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

Bilingual Associate Attorney (Uptown Albuquerque)

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Associate Attorney

Couture Law, LLC is seeking a full-time associate attorney to join our team. We offer a professional, fast-paced, and pleasant environment. The areas of practice include Family Law and Workers' Compensation, with a primary focus in Family Law. Salary is commensurate with qualifications. Interested candidates should email a cover letter, resume, and salary history to: Tamara@CoutureLaw.com. No phone calls, please.

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Santa Fe County – Assistant County Attorney

Santa Fe County is seeking a qualified individual to join its team of attorneys. The successful candidate's practice will focus in areas assigned based upon experience, need, and interest. The ideal candidate are those with strong analytical, research, communication, and interpersonal skills, who enjoy working hard in a collaborative, fast-paced environment on diverse and topical issues that directly impact the community in which they live or work. Salary range is from $27.0817 to $40.6221 per hour, depending upon qualifications and budget availability. Applicant must be licensed to practice law in the State of New Mexico and in the New Mexico federal courts and have a minimum of three (3) years of experience practicing law. This position is open until filled, so interested individuals should apply as soon as possible. Individuals interested in joining our team must apply through Santa Fe County's website, at http://www.santafecountynm.gov/job_opportunities.

Want to Fulfill Your Pro Bono Obligations?

It is a New Year and a great time to make a resolution to provide pro bono services to help low income women and girls in New Mexico. The Southwest Women's Law Center is looking for attorneys who want to fulfill their pro bono obligations by assisting with at least one high impact litigation case whose resolution could have a positive effect for a large group of women and girls in New Mexico. We recently received grant funding that will help with some of the costs of the case. Please contact Elena Rubinfeld, Staff Attorney, at erubinfeld@swwomenslaw.org or (505) 244-0502 and say "Yes," I am ready to make the resolution and I will help.

Lawyer Position

Guebert Bruckner P.C. seeks an attorney with up to five years experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Bruckner P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Assistant Attorney General III

The Office of the New Mexico Attorney General is recruiting for an Assistant Attorney General III position in the Litigation Division in Civil Affairs. The job posting and further details are available at www.nmag.gov/human-resources.aspx.

Associate Attorney

Stiff, Keith & Garcia, LLC is receiving applications for an associate attorney position to practice in the areas of insurance defense and civil litigation. Strong academic credentials, and research and writing skills are required. You should have 3-5 years' experience and be able to work without supervision, have great people skills and a strong work ethic. Excellent benefits and salary. Great working environment with opportunity for advancement. We are a successful and growing law firm representing national clients across the state. Send resume to resume01@swcp.com.

Paralegal

Paralegal for downtown defense law firm, 5+ years paralegal experience. Strong organizational skills and attention to detail necessary. Must be familiar with Outlook and Word. Full-time, salary DOE, great benefits inc. health & life ins. and 401K match. E-mail resume to: kayserk@civerolo.com; fax resume to 505-764-6099; or, mail to Civerolo, Gralow & Hill, PA, P.O. Box 887, Albuquerque NM 87103.

Services

Board Certified Orthopedic Surgeon
Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odrice@icloud.com

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

Miscellaneous

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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.

Last Will and Testament
We are searching for the Last Will and Testament of Carlene Mitchell. If you have either the original or a copy, please contact Vincent Haslam at (505) 888-1188.

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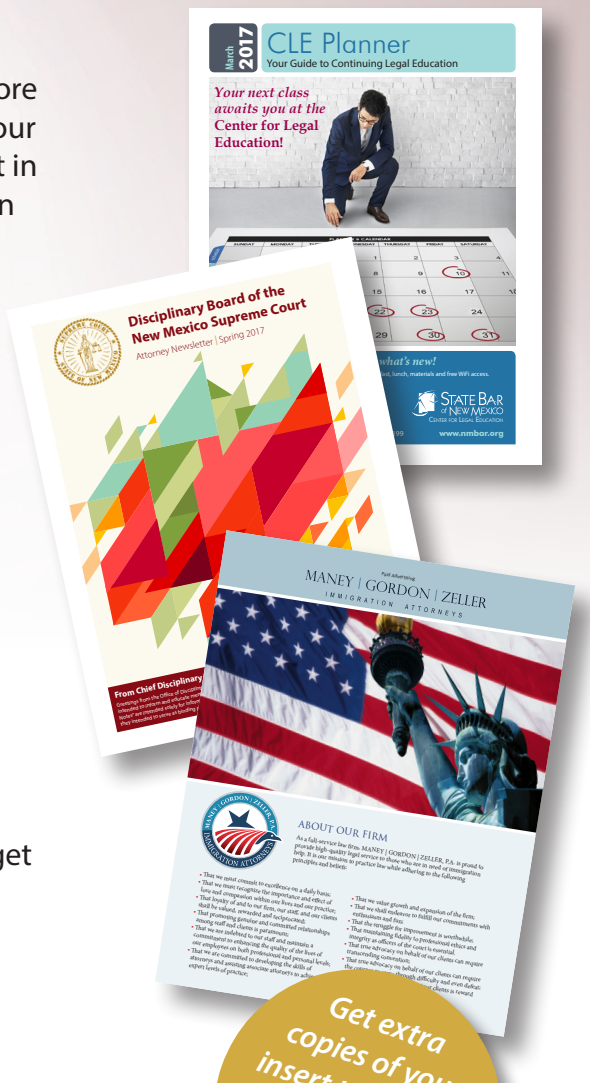

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