

BAR BULLETIN

January 17, 2018 • Volume 57, No. 3



A Sound in the Wind, by Joe Weatherly

Daniel Maghen, Paris, France

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Announcing THE 2018 SCHEDULE FOR

Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204

This program fulfills the requirement of Rule 17-204 NMRA that an attorney take a trust accounting class at least once every three years, or within the first year of being licensed in New Mexico, and is one of the Disciplinary Board's ongoing programs designed to educate attorneys on proper practices and procedures.

Right now, the Center for Legal Education is the only approved course provider!

22 courses scheduled for your convenience!

| Day | Date | Time |
|----------|-------|-----------|
| | 1/19 | Noon |
| Friday | 2/16 | 3:30 p.m. |
| Friday | 2/23 | 2:30 p.m. |
| Friday | 3/2 | Noon |
| Friday | 4/6 | 3:30 p.m. |
| Friday | 4/20 | 9 a.m. |
| Friday | 4/26 | Noon |
| Thursday | 5/18 | 3:30 p.m. |
| Friday | 5/24 | 3:30 p.m. |
| Thursday | 6/22 | 3:30 p.m. |
| Friday | 6/29 | 9 a.m. |
| Friday | 7/20 | Noon |
| Friday | 7/27 | 3:30 p.m. |
| Friday | 8/17 | 3:30 p.m. |
| Friday | 9/18 | 9 a.m. |
| Tuesday | 9/20 | Noon |
| Thursday | 9/27 | Noon |
| Thursday | 10/18 | 3:30 p.m. |
| Thursday | 10/25 | Noon |
| Thursday | 11/8 | 3:30 p.m. |
| Thursday | 11/9 | 3:30 p.m. |
| Friday | 12/28 | 9 a.m. |
| Friday | | |

Attend in person at the State Bar Center or from the convenience of your home or office via live webcast.
Register online at www.nmbar.org or call the Center for Legal Education at 505-797-6020.





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Ernestina R. Cruz, Secretary Treasurer
Scotty A. Holloman, Immediate Past President

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State Bar Staff

Executive Director Richard Spinello
Director of Communications
Evann Kleinschmidt
505-797-6087 • notices@nmbar.org
Graphic Designer Julie Schwartz
jschwartz@nmbar.org
Account Executive Marcia C. Ulibarri
505-797-6058 • mulibarri@nmbar.org
Digital Print Center
Manager Brian Sanchez
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From the New Mexico Court of Appeals

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Meetings

January

- 19**
Family Law Section Board
9 a.m., Teleconference
- 19**
Indian Law Section Board
Noon, State Bar Center
- 20**
Young Lawyers Division Board
10 a.m., State Bar Center
- 23**
Intellectual Property Law Section Board
Noon, Lewis Roca Rothgerber Christie,
Albuquerque
- 24**
Real Property, Trust and Estate Section Board
Noon, Teleconference
- 25**
Natural Resources, Energy and Environmental Law Section Board
Noon, Teleconference

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
- 16**
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County
Metropolitan Court, Albuquerque,
505-841-9817
- 28**
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

About Cover Image and Artist: *A Sound in the Wind*, oil on panel, 16 by 20 inches

Joe Weatherly is a Southern California based artist specializing in the drawing and painting of animals. His style is bold and vigorous capturing the essence and drama of the subjects he draws and paints. The attitude and expression of the animal's character along with telling a visual story is what his work conveys. Conservation of the natural world is something Weatherly is very passionate about and hopes his work will motivate people to protect it and promote its survival. Weatherly has published several books and teaches drawing part time. Some of his clients include Nickelodeon Animation, Dreamworks Feature Animation, Universal Studios, Art Center, Laguna College of Art and Design and the Academy of Art in San Francisco. His drawings and paintings hang in private collections in Europe and North America. For more of his work, visit www.joeweatherly.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 defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Professionalism Tip

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

I will be open to constructive criticism and make such changes as are consistent with this creed and the Code of Judicial Conduct when appropriate.

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

Announcement of 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.

Bernalillo County Metropolitan Court Destruction of Tapes

Pursuant to the Judicial records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes of proceedings associated with the following civil and criminal cases:

1. d-202-CV-1992-00001 through d-202-CV-1992-11403;
2. d-202-CV-1993-00001 through d-202-CV-1993-11714;
3. d-202-CV-1994-00001 through d-202-CV-1994-10849;
4. d-202-CV-1995-00001 through d-202-CV-1995-11431;
5. d-202-CV-1996-00001 through d-202-CV-1996-12005;
6. d-202-CV-1997-00001 through d-202-CV-1997-12024;
7. d-202-CR-1983-36058 through d-202-CR-1983-37557;
8. d-202-CR-1984-37558 through d-202-CR-1984-39151;
9. d-202-CR-1985-39152 through d-202-CR-1985-40950;
10. d-202-CR-1986-40951 through d-202-CR-1986-42576.

Attorneys who have cases with proceedings on tape and want to have duplicates made should verify tape information with the Special Services Division at 505-841-7401 from 10 a.m.–2 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 31.

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 available. Dial 1-866-640-4044 and enter code 7976003#.
- **New meeting added**
First meeting: Feb. 19, 5:30 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is 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.

Legal Services and Programs Committee

Equal Justice Conference Attendance Financial Assistance Available

The Legal Services and Programs Committee has made available three \$1,000 stipends to provide financial assistance to civil legal service providers staff and attorneys interested in attending the 2018 Equal Justice Conference on May 10-12 in San Diego. Visit www.nmbar.org/LSAP for more information and to apply. Applications must be received by 5 p.m. on Jan. 26 for consideration.

Practice Sections Proposed Cannabis Law Section

Interested in becoming a part of history and joining a proposed brand-new State Bar Cannabis Law Section? Whether you defend or prosecute cannabis cases, whether you're a proponent or an opponent of cannabis issues, if you are in a related field or enforce our State's laws, consider signing the petition to create New Mexico's inaugural Cannabis Law Section! The Cannabis Law Section will strive to be the preeminent legal section dedicated to addressing and solving all cannabis law issues as they involve the New Mexico medical cannabis program, cannabis legislation, the interplay between the State Bar of New Mexico and the cannabis industry, litigation issues concerning cannabis and any other issue concerning current and future laws, rules and regulation relating to cannabis. If you are interested in this proposed practice section, visit <https://form.jotform.com/72974569603974> or contact Carlos N. Martinez at carlos@legalsolutionsofnm.com or Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division 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



**New Mexico Lawyers
and Judges
Assistance Program**

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505-228-1948 • 800-860-4914
Judges 888-502-1289
www.nmbar.org/JLAP

at 8:15 a.m. for breakfast and orientation. Attorneys will provide free wills, health-care and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve as witnesses and notaries. Visit <https://www.jotform.com/70925407803961> 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 Through May 12

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

Don't get fined for missing anymore ethics or the mandatory hour on trust

accounts. Criminal and civil attorneys are welcomed to "Best Practices in Law Office Management" (4.5 G, 2.0 EP) on Jan. 26. Buff up on digital security, master the ethical use of social media, and increase the efficiency and bottom line of your office. This program is hosted by the New Mexico Criminal Defense Lawyers Association. The trust hour is provided by the New Mexico State Bar Foundation Center for Legal Education. For more information and to register, visit www.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.

Requesting Judges for Gene Franchini High School Mock Trial

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Mock Trial qualifiers will be held Feb. 16-17, 2018, at the Bernalillo County Metropolitan Court in Albuquerque. CCV needs volunteers for judges (opportunities exist for sitting judges and non-judges). Learn more and register at www.civicvalues.org.

Please remember the State Bar General Referral Program for clients you can't help.

We serve people trying to find an attorney.

State Bar General Referral Program (SBGR)

505-797-6066 • 1-800-876-6227

How it works:

- SBGR matches the caller with a private attorney for a 30 minute consultation.
- SBGR charges a \$35 referral fee for this service.
- SBGR does not guarantee that the attorney will accept the caller's case. If the attorney agrees to provide additional services beyond the consultation, the caller must negotiate the cost of those services directly with the referral attorney.



A MESSAGE FROM YOUR State Bar President



Dear State Bar members:

I am excited and proud to serve as your State Bar president for 2018. On Dec. 7, 2017, I was sworn in by Chief Justice Judith K. Nakamura, in the company of my family, friends and colleagues.

In 2018, the State Bar will encounter several changes. As many of you know, Richard Spinello was selected in December as Executive Director. Richard has been with the State Bar for 17 years and I know we will be able to rely on his leadership and guidance.

By order of the New Mexico Supreme Court, the State Bar will have greater responsibility in three key areas: Minimum Continuing Legal Education, the Access to Justice Grant Commission, and the Lawyers and Judges Assistance Program. MCLE will transition under the State Bar. We are working on a transition plan this spring and the transition will be complete by the end of the year. With this regulatory responsibility falling on the State Bar, I hope we can better serve our members.

Similarly, the State Bar's newly created ATJ Fund Grant Commission will take over grant funding allocation responsibility. We are excited to take on this task. Wellness in the legal community is always of great concern. Additional funding from the Disciplinary Board will help us expand our JLAP Program by making it more accessible to all our members.

The 2018 Annual Meeting will be held Aug. 9-11 at the Hyatt Regency Tamaya Resort and Spa. The Annual Meeting is a great way to connect with fellow State Bar members and get your required CLE credits. We are still putting the finishing touches on the agenda, but we will have more information this spring.

I have been involved with the State Bar for many years now and I have found every experience to be rewarding. Through volunteering I have learned much more about the State Bar and I have made many friends who I otherwise would not have had the opportunity to meet. Additionally, getting involved has offered the opportunity to voice my opinions and spearhead change and improvement where I saw a need. I would highly recommend that you consider how you can give back to the State Bar in this way. I would be happy to help you find the right volunteer role and to answer any questions you might have. Please reach out if I can be of service in any way. I'm looking forward to the road ahead!

Sincerely,

A handwritten signature in black ink that reads "Wesley O. Pool". The signature is fluid and cursive, with the first and last names being more prominent.

Wesley O. Pool
President
State Bar of New Mexico

Legal Education

January

- | | | |
|--|---|--|
| <p>17 Drafting Distrubtion Provisions in Trusts 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>19 Strategies for Well-Being and Ethical Practice (2017) 2.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> | <p>26 2017 Business Law Institute 5.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>19 Ethics of Working with Witnesses 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>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</p> | <p>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</p> |
| <p>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</p> | <p>19 2018 Legislative Preview 2.0 G Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> | <p>26 Legal Malpractice Potpourri (2017) 1.5 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>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</p> | <p>23 Arbitration Clauses in Business Agreements 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>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</p> |
| | <p>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</p> | <p>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</p> |

February

- | | | |
|--|---|---|
| <p>1 Workplace Issues for Employers 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>7 Ethics Update Part II 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>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</p> |
| <p>2 How to Practice Series: Adult Guardianship 4.0 G, 2.0 EP Webcast/Live Seminar, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> | <p>9 Negotiating (and Renegotiating Leases) Part I 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>12 Negotiating (and Renegotiating Leases, Part 2 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> |
| <p>6 2018 Ethics Update Part I 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org</p> | <p>9 Regional Seminar 20.5 G Live Seminar, Santa Fe Trial Lawyers College 307-432-4042</p> | <p>16 2017 Real Property Institute 6.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org</p> |

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|----|---|----|--|----|--|
| 16 | New Mexico Liquor Law for and Beyond (2017) 3.5 G Live Replay, 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 | 23 | Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017) 1.0 G, 1.0 EP 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 | 21 | Sophisticated Choice of Entity, Part II 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 23 | The Ethics of Lawyer Advertisements Using Social Media (2017) 1.0 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 | 23 | Drafting Waivers of Conflicts of Interests 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 23 | 2017 Family Law Institute Day 1 5.0 G, 1.0 EP Live Replay, Albuquerque Center for Legal Education of NMSBF www.nmbar.org |

March

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|-----|---|----|--|-------|---|
| 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 | 6 | Successor Liability in Business Transactions 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 14 | Role of LLCs in Trust and Estate Planning 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org |
| 1 | Service Level Agreements in Technology Contracting 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 7 | Family Feuds in Trusts: How to Anticipate & Avoid 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 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/depositions |
| 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 | 9 | Drafting Professional and Personal Services Agreements 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 27 | Lawyer Ethics When Clients Won't Pay Fees 1.0 EP Teleseminar Center for Legal Education of NMSBF www.nmbar.org |
| 2-4 | Taking and Defending Depositions (Part 1 of 2) 31.0 G, 4.5 EP Live Seminar, Albuquerque UNM School of Law goto.unm.edu/depositions | 13 | Fiduciary Duties in Closely-held Companies: What Owners Owe the Business & Other Owners 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org | 28 | Structuring For-Profit/Non-Profit Joint Ventures 1.0 G Teleseminar Center for Legal Education of NMSBF www.nmbar.org |

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 29, 2017

PUBLISHED OPINIONS

| | | | |
|--------------|----------------------------------|----------------|------------|
| A-1-CA-35247 | W Collins v. St Vincent Hospital | Affirm | 12/20/2017 |
| A-1-CA-35253 | Communities v. NM Water Quailty | Reverse/Remand | 12/27/2017 |

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 |
| A-1-CA-34516 | State v. L Garcia | Affirm/Reverse/Remand | 12/26/2017 |
| A-1-CA-35886 | M Daood v. H Abdu Lateef Ali | Affirm/Dismiss | 12/26/2017 |
| A-1-CA-36112 | State v. C Holguin | Reverse/Remand | 12/26/2017 |
| A-1-CA-36275 | State v. J Gardner | Affirm | 12/26/2017 |
| A-1-CA-36329 | L Szatko v. J Szatko | Affirm | 12/26/2017 |
| A-1-CA-36349 | A Brown v. City of Rio Rancho | Affirm | 12/26/2017 |
| A-1-CA-36405 | R Aguiar v. K Aguiar | Dismiss | 12/26/2017 |
| A-1-CA-35112 | State v. Shantel A | Affirm | 12/27/2017 |
| A-1-CA-36182 | C Estrada v. City of Alb. | Dismiss | 12/27/2017 |
| A-1-CA-36282 | L Sandelin v. G Langworthy | Dismiss | 12/27/2017 |
| A-1-CA-36328 | State v. A Morrisette | Affirm | 12/27/2017 |
| A-1-CA-36365 | State v. H Hartman | Affirm | 12/27/2017 |
| A-1-CA-36385 | State v. R Parissi | Affirm | 12/27/2017 |
| A-1-CA-36264 | Contreras v. Contreras | Affirm | 12/28/2017 |
| A-1-CA-36341 | CYFD v. Tara V | Affirm | 12/28/2017 |
| A-1-CA-36371 | State v. J Apodaca | Affirm | 12/29/2017 |

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

PUBLISHED OPINIONS

| | | | |
|--------------|--------------------------|-----------------------|------------|
| A-1-CA-34523 | J Gabriele v. D Gabriele | Affirm/Reverse/Remand | 01/03/2018 |
|--------------|--------------------------|-----------------------|------------|

UNPUBLISHED OPINIONS

| | | | |
|--------------|--|----------------|------------|
| A-1-CA-34331 | University Village Mobile v. J Calderon | Reverse | 12/18/2017 |
| A-1-CA-36255 | City of SF v. One 2009 Red | Affirm | 01/02/2018 |
| A-1-CA-36390 | State v. C O'Dell | Reverse/Remand | 01/02/2018 |
| A-1-CA-36413 | County of Quay v. L Stone | Dismiss | 01/02/2018 |
| A-1-CA-36550 | State v. F Nelson | Affirm | 01/02/2018 |
| A-1-CA-36575 | CYFD v. Katie M | Affirm | 01/02/2018 |
| A-1-CA-36649 | DLJ Mortgage Captial v. R Handler Jacobs | Dismiss | 01/02/2018 |
| A-1-CA-36427 | State v. O Sisneros | Affirm | 01/03/2018 |

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective January 4, 2018:
Marilyn C. Ashcroft
PO Box 55
Blue Hill, ME 04614

Effective January 4, 2018:
Moulin J. Desai
2225 N Street, NW #229
Washington, DC 20037

Effective January 4, 2018:
Hon. Erin Hillary Leff
4301 Lilac Court
Upper Gwynedd, PA
19446

Effective January 4, 2018:
Donald C. Trigg
133 Sierra Azul
Santa Fe, NM 87507

Effective January 4, 2018:
Susan H. Ybarra
PO Box 901
Silver City, NM 88062

CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

As of December 20, 2017:
**Hon. Margaret Charlotte
Cornelia Benny
F/K/A Margaret Ellen Benny**
Maricopa County Superior
Court
222 E. Javelina Avenue,
Suite 1350
Mesa, AZ 85210
602-506-3915
bennym@superiorcourt.
maricopa.gov

CLERK'S CERTIFICATE OF ADMISSION

On January 3, 2018:
Thomas Adam Biscup
Zebrowski Law
45952 Schoenherr Road
Shelby Township, MI 48315
586-566-7266
586-566-6898 (fax)
tom@zebrowskilaw.com

On December 15, 2017:
Jazmin Coronel
Instituto Legal
201 Third Street, NW,
Suite 500
Albuquerque, NM 87102
505-944-9065
505-944-9091 (fax)
jazmin@institutolegal.org

CLERK'S CERTIFICATE OF WITHDRAWAL AND CHANGE OF ADDRESS

Effective January 4, 2018:
Jeffrey M. Carr
6906 31st Avenue #3
Woodside, NY 11377

Effective January 4, 2018:
Carl Neprud Love
916 W. 880 N.
American Fork, UT 84003

Effective January 4, 2018:
Michael Howard Smith
Fairfield and Woods, PC
1801 California Street,
Suite 2600
Denver, CO 80202

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective December 19, 2017:
Suzanne G. Lubar
5905 Camino Placido, NE
Albuquerque, NM 87109
505-239-1006
slubar@centurylink.net

CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective January 1, 2018:
Dan Evans Sheehan
9227 Flushing Meadows
Drive, NE
Albuquerque, NM 87111
505-715-7194
attorneydansheehan@gmail.
com

Effective January 1, 2018:
Jamye Boone Ward
312 Vandeville Drive
El Paso, TX 79912
915-539-3029
jbooneward@gmail.com

Effective January 1, 2018:
Sarah S. Works
6329 Avenida Chamisa
Santa Fe, NM 87507
602-510-2055
works.sarah@gmail.com

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective 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 | | |
| 2-105 | Assignment and designation of judges | 12/31/2017 |
| 2-112 | Public inspection and sealing of court records | 03/31/2017 |
| 2-301 | Pleadings allowed; signing of pleadings, motions, and other papers; sanctions | 12/31/2017 |
| Rules of Civil Procedure for the Metropolitan Courts | | |
| 3-105 | Assignment and designation of judges | 12/31/2017 |
| 3-112 | Public inspection and sealing of court records | 03/31/2017 |
| 3-301 | Pleadings allowed; signing of pleadings, motions, and other papers; sanctions | 12/31/2017 |
| Civil Forms | | |
| 4-223 | Order for free process | 12/31/2017 |

| | | |
|--------|--|------------|
| 4-402 | Order appointing guardian ad litem | 12/31/2017 |
| 4-602 | Withdrawn | 12/31/2017 |
| 4-602A | Juror summons | 12/31/2017 |
| 4-602B | Juror qualification | 12/31/2017 |
| 4-602C | Juror questionnaire | 12/31/2017 |
| 4-940 | Notice of federal restriction on right to possess or receive a firearm or ammunition | 03/31/2017 |
| 4-941 | Petition to restore right to possess or receive a firearm or ammunition | 03/31/2017 |
| 4-941 | Motion to restore right to possess or receive a firearm or Ammunition | 12/31/2017 |

Domestic Relations Forms

| | | |
|--------|--|------------|
| 4A-200 | Domestic relations forms; instructions for stage two (2) forms | 12/31/2017 |
| 4A-201 | Temporary domestic order | 12/31/2017 |
| 4A-209 | Motion to enforce order | 12/31/2017 |
| 4A-210 | Withdrawn | 12/31/2017 |
| 4A-321 | Motion to modify final order | 12/31/2017 |
| 4A-504 | Order for service of process by publication in a newspaper | 12/31/2017 |

Rules of Criminal Procedure for the District Courts

| | | |
|---------|---|------------|
| 5-105 | Designation of judge | 12/31/2017 |
| 5-106 | Peremptory challenge to a district judge; recusal; procedure for exercising | 07/01/2017 |
| 5-123 | Public inspection and sealing of court records | 03/31/2017 |
| 5-204 | Amendment or dismissal of complaint, information and Indictment | 07/01/2017 |
| 5-211 | Search warrants | 12/31/2017 |
| 5-302 | Preliminary examination | 12/31/2017 |
| 5-401 | Pretrial release | 07/01/2017 |
| 5-401.1 | Property bond; unpaid surety | 07/01/2017 |
| 5-401.2 | Surety bonds; justification of compensated sureties | 07/01/2017 |
| 5-402 | Release; during trial, pending sentence, motion for new trial and appeal | 07/01/2017 |
| 5-403 | Revocation or modification of release orders | 07/01/2017 |
| 5-405 | Appeal from orders regarding release or detention | 07/01/2017 |
| 5-406 | Bonds; exoneration; forfeiture | 07/01/2017 |
| 5-408 | Pretrial release by designee | 07/01/2017 |
| 5-409 | Pretrial detention | 07/01/2017 |

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

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

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

| | | | | |
|---|---|------------|--|--|
| 14-4204 | Money laundering; making property available to another by financial transaction OR transporting; essential elements | 12/31/2017 | Rules Governing Discipline | |
| | | | 17-202 | Registration of attorneys 07/01/2017 |
| 14-4205 | Money laundering; definitions | 12/31/2017 | 17-202 | Registration of attorneys 12/31/2017 |
| 14-5130 | Duress; nonhomicide crimes | 12/31/2017 | 17-301 | Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service 07/01/2017 |
| Rules Governing Admission to the Bar | | | Rules for Minimum Continuing Legal Education | |
| 15-103 | Qualifications | 12/31/2017 | | |
| 15-104 | Application | 08/04/2017 | 18-203 | Accreditation; course approval; provider reporting 09/11/2017 |
| 15-105 | Application fees | 08/04/2017 | Code of Judicial Conduct | |
| 15-301.1 | Public employee limited license | 08/01/2017 | | |
| 15-301.2 | Legal services provider limited law license | 08/01/2017 | 21-004 | Application 12/31/2017 |
| Rules of Professional Conduct | | | Supreme Court General Rules | |
| 16-100 | Terminology | 12/31/2017 | 23-106 | Supreme Court rules committees 12/31/2017 |
| 16-101 | Competence | 12/31/2017 | 23-106.1 | Supreme Court rule-making procedures 12/31/2017 |
| 16-102 | Scope of representation and allocation of authority between client and lawyer | 08/01/2017 | Rules Governing the New Mexico Bar | |
| 16-106 | Confidentiality of information | 12/31/2017 | 24-110 | "Bridge the Gap: Transitioning into the Profession" program 12/31/2017 |
| 16-108 | Conflict of interest; current clients; specific rules | 12/31/2017 | Rules Governing Review of Judicial Standards Commission Proceedings | |
| 16-304 | Fairness to opposing party and counsel | 12/31/2017 | 27-104 | Filing and service 07/01/2017 |
| 16-305 | Impartiality and decorum of the tribunal | 12/31/2017 | Local Rules for the Second Judicial District Court | |
| 16-402 | Communications with persons represented by counsel | 12/31/2017 | LR2-308 | Case management pilot program for criminal cases 01/15/2018 |
| 16-403 | Communications with unrepresented persons | 12/31/2017 | Local Rules for the Thirteenth Judicial District Court | |
| 16-701 | Communications concerning a lawyer's services | 12/31/2017 | LR13-112 | Courthouse security 12/31/2017 |
| 16-803 | Reporting professional misconduct | 12/31/2017 | | |

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

Certiorari Denied, September 26, 2017, No. S-1-SC-36627

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-083

No. A-1-CA-34812 (filed July 28, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.

CODY PLATERO,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY

JAMES LAWRENCE SANCHEZ, District Judge

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico

JOHN J. WOYKOVSKY
Assistant Attorney General
Albuquerque, New Mexico
for Appellant

BENNETT J. BAUR
Chief Public Defender
J.K. THEODOSIA JOHNSON,
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellee

Opinion

Timothy L. Garcia, Judge

{1} This case presents the question of whether, as a preliminary matter, the State should be prohibited from presenting its evidence to establish the *corpus delicti* of vehicular homicide where the cause of an accident and the cause of death are to be drawn purely from circumstantial evidence and without any expert testimony. The State appeals the district court's order dismissing the charges against Defendant Cody Platero for two counts of vehicular homicide and possession of a controlled substance. The district court dismissed the charges, pursuant to Rule 5-601(B) NMRA and *State v. Foulentfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329. The district court found that "the State [could not] meet its burden of proving cause of death or presenting evidence of [the] cause of death" without expert testimony, which the State did not schedule to call for trial. We conclude that circumstantial evidence may be used to establish the elements of

vehicular homicide and that an expert's testimony is not required as a matter of law before the State may proceed with its case in chief. The State presented sufficient facts in the indictment and at the pretrial hearings to circumstantially establish the *corpus delicti* of vehicular homicide. Therefore, the district court erred in finding that an expert was required as a matter of law in this case. We reverse and remand to the district court for further proceedings.

BACKGROUND

{2} On December 14, 2010, the Valencia County Sheriff's Department responded to reports of a wrecked car on New Mexico Highway 47. There were no eyewitnesses to the crash. Officers on the scene observed what they believed to be "a rollover accident that resulted in the death of a female subject, who had been apparently ejected from the motor vehicle." Officers followed a pair of footprints and located Defendant, who smelled "strongly of an alcoholic beverage, had slurred speech and blood-shot watery eyes." He sustained numerous injuries, which the officers concluded were the result of being ejected from the vehicle. When interviewed by police at the

hospital, Defendant initially denied knowledge of the wreck and then told officers that he and the deceased, Amber Smith, were going to the desert to have sex and that she was driving.

{3} On January 26, 2012, a grand jury indicted Defendant on two counts of homicide by vehicle, by driving while under the influence of intoxicating liquor or drugs and by reckless driving, in violation of NMSA 1978, Section 66-8-101(C) (2004, amended 2016). Defendant was also charged with possession of a controlled substance, in violation of NMSA 1978, Section 30-31-23 (2005, amended 2011), and leaving the scene of the accident, in violation of NMSA 1978, Section 66-7-201(C) (1989). The indictment, in pertinent part, charged Defendant "did cause the death of [decendent] in the unlawful operation of a motor vehicle while under the influence of intoxicating liquor or any drug . . . [or] in a reckless manner[.]"

{4} Defendant was arraigned on March 13, 2012. The case was set for trial in March 2015. On February 18, 2015, Defendant moved to exclude or limit the testimony of State witnesses, including lab technicians and police officers, regarding the cause of the accident and the cause of death of the decedent. Defendant argued that because the State's witness list included no experts on these issues, testimony about the cause of the accident or cause of the death of the decedent would be speculation and prejudicial to Defendant. The State agreed that it would not call an expert witness to testify as to the cause of the accident and that there were no witnesses who observed the cause of the crash. Furthermore, the State did not have an autopsy report for the decedent, and no one from the Office of the Medical Investigator (OMI) was on the State's witness list.

{5} The district court held a hearing on Defendant's motion on February 25, 2015, and trial was scheduled to begin the following week, March 2, 2015. The district court asked the State how it would prove that the accident was the decedent's cause of death. The State argued that circumstantial evidence was sufficient. Defendant responded that the State could not show who was driving or what happened to cause the accident stating, "This case is all about speculation. . . . We have a problem with the sufficiency of the evidence." Defendant agreed with the district court's characterization of the motion as a "direct[ed] verdict [motion]." The district court asked the parties to provide relevant

case law as to whether trial could move forward on the facts presented, otherwise the court would rule that “as a matter of law, the State does not have a critical piece of the puzzle to go forward with the case” and would dismiss pursuant to *Foulenfont*, 1995-NMCA-028. After a subsequent hearing on February 27, 2015, the district court dismissed counts one, two and three, related to vehicular homicide and the possession of a controlled substance, and stayed the proceedings with regard to count four, leaving the scene of an accident. The district court explained its belief that dismissal was proper because “the State cannot meet its burden of proving cause of death or presenting evidence of [the] cause of death, . . . they can’t do it circumstantially on this case with lay witnesses.” The district court dismissed the charges “for failure of the State to have a critical witness ready to testify [for trial].” The State timely appealed.

DISCUSSION

{6} “Judicial authority to rule on pretrial motions in criminal matters is outlined in Rule 5-601.” *State v. LaPietra*, 2010-NMCA-009, ¶ 7, 147 N.M. 569, 226 P.3d 668. Rule 5-601(B) provides that “[a]ny defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.” *Id.*; see *State v. Gomez*, 2003-NMSC-012, ¶ 8, 133 N.M. 763, 70 P.3d 753 (stating that where a motion involves factual matters that are not capable of resolution without a trial on the merits, Rule 5-601(B) requires the question to be submitted to the fact-finder). We review whether the district court was within its authority under Rule 5-601 in dismissing charges against Defendant under a de novo standard of review. See *LaPietra*, 2010-NMCA-009, ¶ 5 (“The contours of the district court’s power to conduct a pretrial hearing on a motion to dismiss charges brought under Rule 5-601 is a legal question reviewed under a de novo standard.”).

{7} “In *Foulenfont*, we stated that it was proper for a district court to decide purely legal matters and dismiss a case when appropriate before trial.” *LaPietra*, 2010-NMCA-009, ¶ 7. “Questions of fact, however, are the unique purview of the jury and, as such, should be decided by the jury alone.” *Id.*; see *Foulenfont*, 1995-NMCA-028, ¶ 3 (stating that “it was improper to dismiss a failure to appear charge on the basis of a factual determination made at the preliminary hearing

stage”). In *Foulenfont*, the purely legal issue addressed by this Court was whether a fence is a “structure” under the burglary statute; the district court had ruled it was not. 1995-NMCA-028, ¶¶ 2, 7. The state conceded that the facts of the case were not in dispute and that finding the defendant guilty turned only on the resolution of the legal question regarding the fence. *Id.* ¶ 6. Accordingly, we held that the district court properly resolved the legal question prior to trial and upheld the dismissal. *Id.* ¶¶ 10, 13. However, in such cases where the factual matters are in dispute and not capable of resolution without a trial on the merits, our Supreme Court held that the district court “lacks the authority to grant the motion prior to trial.” *State v. Hughey*, 2007-NMSC-036, ¶ 11, 142 N.M. 83, 163 P.3d 470.

{8} Generally, a Rule 5-601(B) motion may not be used to test the sufficiency of the State’s evidence to establish the elements of the charged crime. In *LaPietra*, the defendants, charged with intentional or neglectful child abuse resulting in great bodily harm, brought a *Foulenfont* motion arguing that the state lacked evidence to prove that the defendants caused their children to be placed in a situation that endangered their life or health. *LaPietra*, 2010-NMCA-009, ¶¶ 1, 8. On appeal, the defendants framed the issue as a legal question that asked whether the state had any evidence that would justify a jury trial. *Id.* ¶ 8. In reversing, this Court explained that “[w]hen an issue involves a specific determination or finding, especially when it is an element of the offense, it is a question that is within the unique purview of the jury” and rejected what the state characterized as “a pretrial attack on the sufficiency of [the] evidence under the guise of a *Foulenfont* motion[.]” *LaPietra*, 2010-NMCA-009, ¶¶ 6, 10.

{9} Recently in *State v. Pacheco*, this Court recognized that the question of “the district court’s ‘authority’ to decide a motion or whether the motion involves a question of fact or a pure question of law” may be confusing and therefore sought to reframe the analysis. 2017-NMCA-014, ¶ 10, 388 P.3d.307. In *Pacheco*, the state appealed the district court’s dismissal of charges against the defendant for fraud. 2017-NMCA-014, ¶¶ 1-2. The state argued that the district court improperly resolved a question of fact as to the meaning of a release agreement between the defendant and the other party to the contract. *Id.* ¶ 9. Based upon Rule 5-601 and *Foulenfont*, this Court

reframed the issue before it, stating, “the underlying question [is] whether the undisputed facts—whether stipulated to by the [s]tate or alleged in the indictment or information—show that the [s]tate cannot prove the elements of the charged offense at trial, thereby making a trial on the merits unnecessary.” *Id.* ¶ 10. More succinctly, “whether the state could reasonably assert the availability of additional evidence.” *Id.* (alteration, internal quotation marks, and citation omitted). This Court held that the defendant’s motion to dismiss could not be decided without a trial because an element of the charge of fraud was in dispute and the state planned to present such evidence at trial. *Id.* ¶¶ 11-12.

{10} Here, the State argues that the district court erred by dismissing the charges against Defendant in reliance on *Foulenfont*. The State frames the question on appeal as a purely legal issue: whether expert testimony was required, as a matter of law, to prove the cause of death of the decedent. The State argues that there is no such requirement, and in this case, no need that expert testimony be offered to prove cause of death as a matter of law. The State further argues that the district court was in no position to require such testimony in this case because: (1) the district court could not make a determination without hearing testimony and considering photographs and other evidence of the accident scene and the decedent’s injuries, and (2) the district court did not have the authority, pretrial, to make such a factual determination. We agree, and Defendant concedes that cause of death may be proved by circumstantial evidence and an expert is not required in every instance. See *State v. Brown*, 1984-NMSC-014, ¶ 8, 100 N.M. 726, 676 P.2d 253 (holding the eyewitness accounts that the defendant struck the victim in the head and dragged her body away was sufficient to prove that she died as a result of her injuries); *State v. Bell*, 1977-NMSC-013, ¶¶ 11-15, 90 N.M. 134, 560 P.2d 925 (rejecting the defendant’s argument that “great bodily harm” be proved by medical testimony); see also *State v. Jacobs*, 1978-NMCA-013, ¶ 12, 91 N.M. 445, 575 P.2d 954 (“Even if the evidence is circumstantial, if the circumstantial evidence substantially supports the verdict, the verdict will not be set aside.”), *overruled on other grounds by State v. Moore*, 1989-NMCA-073, 109 N.M. 119, 782 P.2d 91. However, Defendant argues that the State could not prove the *corpus delicti* of vehicular homicide because it had

“no evidence, direct or circumstantial,” of the two elements of the crime: (1) “that [Defendant] was in the unlawful operation of a motor vehicle[.]” and (2) “that the death was caused by the unlawful operation of a motor vehicle.”

{11} In reliance on the framework set forth in *Pacheco*, we must determine whether the facts—as alleged in the indictment and presented at the pretrial hearing—show that the State could not prove the elements of vehicular homicide at trial, thereby making trial unnecessary. See 2017-NMCA-014, ¶ 10.

{12} Defendant was charged with two counts of vehicular homicide, pursuant to Section 66-8-101(C) which states, “A person who commits homicide by vehicle or great bodily harm by vehicle while under the influence of intoxicating liquor or while under the influence of any drug or while [driving recklessly] is guilty of a third degree felony[.]” The corresponding Uniform Jury Instruction states that the elements of vehicular homicide are: (1) “[t]he defendant operated a motor vehicle. . . while under the influence of intoxicating liquor [or] while under the influence of . . . a drug [or] in a reckless manner”; (2) “[t]he defendant thereby caused the death of or great bodily injury to [the victim]”; and (3) “[t]his happened in New Mexico[.]” UJI 14-240 NMRA (alternations omitted).

{13} First, the State presented circumstantial evidence that Defendant was not in the lawful operation of the vehicle. Defendant admitted to officers that he was in the vehicle. The investigation concluded that blood found on the driver’s side matched Defendant’s DNA. Defendant had a blood alcohol content of 0.06 and had methamphetamine in his system. Although the State admits that the prosecutor had no intention of calling an expert reconstructionist or an eyewitness to testify to the cause of the accident, *corpus delicti* may be proved by direct or circumstantial evidence. See *State v. Maestas*, 1978-NMCA-084, ¶ 60, 92 N.M. 135, 584 P.2d 182. The State therefore presented acceptable facts as to the first element of the charge of vehicular homicide.

{14} Defendant argues that the State should be required to provide additional evidence as to the cause of the accident. Defendant cites several prior cases where this Court determined there was sufficient evidence to prove vehicular homicide based on facts presented by eyewitness testimony or an expert to reconstruct

the accident. See *State v. Munoz*, 2014-NMCA-101, ¶ 11, 336 P.3d 424 (compiling cases of vehicular homicide by reckless driving in which all had eyewitnesses of the defendant’s driving at high speeds or an accident reconstructionist to establish recklessness). However, we do not view these authorities as “requiring” such proof as a preliminary matter. Instead, we see Defendant’s argument to be an attempt to have us weigh the sufficiency of the circumstantial evidence presented—a factual determination that would be inappropriate at this juncture in the case. See *State v. Bregar*, 2017-NMCA-028, ¶ 49, 390 P.3d 212 (stating that the state proved the *corpus delicti* of vehicular homicide where the inference could be drawn from the position of the driver’s seat that the defendant was the driver of the vehicle).

{15} The second element of the crime may also be proved through circumstantial evidence. Our appellate courts, in evaluating the sufficiency of the evidence, have stated that circumstantial evidence and lay witness testimony is sufficient to establish the cause of death, as well as to establish great bodily harm. See, e.g., *State v. Coyle*, 1935-NMSC-020, ¶ 16, 39 N.M. 151, 42 P.2d 770 (rejecting the argument that the evidence was insufficient to prove murder where the state failed to obtain an autopsy report on the cause of death). In *Brown*, the defendant, convicted of first degree murder and criminal sexual penetration, argued on appeal that there was insufficient evidence to support his conviction because the jury relied on circumstantial evidence. 1984-NMSC-014, ¶¶ 1, 5. Our Supreme Court recognized that the evidence—the defendant struck victim in the head and helped drag her body away—was sufficient to prove she died as a result of the injuries inflicted by the defendant. *Id.* ¶ 8. In *Bell*, our Supreme Court rejected the defendant’s argument that there was no medical testimony establishing great bodily harm to support a first degree kidnapping conviction, stating “the law does not require that great bodily harm be proved exclusively by medical testimony.” 1977-NMSC-013, ¶¶ 11-15 (internal quotation marks and citation omitted). Many other jurisdictions have similarly concluded that cause of death in homicide cases may be “established not only by a physician or pathologist, but by lay and circumstantial evidence.” *Wiley v. State*, 449 So. 2d 756, 760 (Miss. 1984); see *Higgs v. State*, 222 P.3d 648, 654 (Nev. 2010); *Fountain v. State*, 401 S.W.3d 344, 356 (Tex. Crim. Ct. App.

2013); see also *Shields v. State*, 677 S.E.2d 100, 103 (Ga. 2009); *State v. Casper*, 219 N.W.2d 226, 227 (Neb. 1974). Resultantly, some courts have also concluded that the type of circumstantial evidence generally presented in vehicular homicide cases makes expert testimony unnecessary on the issue of the cause of death. See *People v. Tostado*, 416 N.E.2d 353, 357 (Ill. App. Ct. 1981) (stating that “[p]roof of death . . . may be established by circumstantial evidence” in a case in which an eyewitness observed the accident, the victim was ejected from the vehicle, and the paramedics found no pulse); *State v. Price*, 406 A.2d 883, 885 (Me. 1979) (stating that the “[s]tate’s failure to call a medical expert does not render the evidence insufficient for a jury determination on the cause of death” in which the victim’s airway filled with blood after the crash); *State v. Golstone*, 175 N.W. 892, 893 (Minn. 1920) (holding that “the jury might infer that the contact with the car caused his death” from the fact that the victim was knocked down and dragged under the vehicle).

{16} In this case, although the facts are attenuated and would require the jury to make several inferences, there is circumstantial evidence to support the second element of vehicular homicide—the crash caused the death of the decedent. Defendant told officers that the decedent was alive in the vehicle and that she was driving prior to the accident. The decedent was found by officers with “visible signs of trauma” and appeared to have been ejected from the vehicle in the roadway. Although the State readily conceded that it would not call an expert to testify as to the cause of death and that its officers would only be able to testify as to their personal observations on the scene, the circumstantial evidence to be presented by the State is sufficient to establish the *corpus delicti* of the crime and to overcome a motion pursuant to *Foulenfont*.

{17} Defendant continues to argue as to the cause of death that there is no evidence that the decedent died as a result of the accident. Again, Defendant distinguishes the case law cited above as having an eyewitness to the crash to establish that the decedent was alive immediately before and dead after the crash. The fact-finder may be troubled by the State’s failure to secure any expert from OMI or an autopsy to opine on the cause of death but that does not allow the district court to ignore the circumstantial evidence and our legal precedent on the issue. This appeal does not present us

with the question of whether the facts as alleged are sufficient to overcome a directed verdict motion or to support a finding by the jury of guilt beyond a reasonable doubt. Whether the evidence presented at trial would meet these standards is not before us. Neither is the question of the admissibility of the State's evidence. We only conclude that the circumstantial facts presented by the State are sufficient for the State to proceed to trial in its attempt to prove the elements of vehicular homicide.

See Pacheco, 2017-NMCA-014, ¶ 10.

{18} We, therefore, hold that the district court erred in finding that an expert was required to prove cause of death in this case and, inconsistent with established precedent, the district court improperly weighed and measured the sufficiency of the evidence. *See LaPietra*, 2010-NMCA-009, ¶ 13 (stating that “[d]istrict courts are simply not permitted to re-evaluate the sufficiency of the evidence behind an indictment prior to trial”).

CONCLUSION

{19} For the foregoing reasons, we reverse the district court's order and remand for further proceedings.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, August 7, 2017 No. S-1-SC-36489

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-084

No. A-1-CA-33731 (filed April 25, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANNETTE C. FUSCHINI,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
FERNANDO R. MACIAS, District Judge

BENNETT J. BAUR
Chief Public Defender

NINA LALEVIC
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

HECTOR H. BALDERAS
Attorney General
Santa Fe, New Mexico

M. VICTORIA WILSON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

Opinion

Jonathan B. Sutin, Judge

{1} Defendant Annette C. Fuschini was convicted of involuntary manslaughter and aggravated driving while intoxicated (DWI) after she ran over her fiancé with a vehicle, which resulted in his death. On appeal, Defendant argues that her convictions violate the double jeopardy clause of the Fifth Amendment of the United States Constitution. We hold that double jeopardy was not violated and thus affirm Defendant's convictions.

BACKGROUND

{2} Defendant and her fiancé, Carlos Nevarez, were celebrating his birthday at their friends' house. Defendant and Nevarez had been drinking at their home, and they continued to drink at the celebration. When they left their friends' house, Defendant was driving their Silverado truck, and Nevarez was in the passenger seat.

{3} As they were driving home, Defendant and Nevarez were having an argument, Defendant suddenly stopped the truck on the side of the road, and Nevarez got out. Nevarez yelled at Defendant to leave and

walked away onto the curb. Defendant then drove the truck over the curb and hit Nevarez, pulling him underneath the wheels. Nevarez died from his injuries.

{4} A grand jury indictment charged Defendant with the deliberate and intentional killing of Nevarez in violation of NMSA 1978, Section 30-2-1(A)(1) (1994), and aggravated DWI for causing bodily injury to Nevarez in violation of NMSA 1978, Section 66-8-102 (2010, amended 2016). At trial, Defendant requested and the district court submitted instructions on second degree murder and involuntary manslaughter as lesser included offenses to the first degree murder charge. The jury found Defendant guilty of involuntary manslaughter and aggravated DWI.

{5} Prior to sentencing, Defendant submitted a sentencing memorandum to the district court opposing the State's request to impose consecutive sentences. Defendant asserted that, under the facts and instructions given to the jury, imposing a sentence for both convictions would result in multiple punishments for the same offense in violation of the Fifth Amendment. In support of her argument, Defendant referred the district court to *State v.*

Montoya, 2013-NMSC-020, 306 P.3d 426; *State v. Swick*, 2012-NMSC-018, 279 P.3d 747; and *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223. The State responded that in its view there was no double jeopardy prohibition to imposing a sentence for each conviction to be served consecutively. The district court agreed. Defendant appeals.

DISCUSSION

{6} Defendant's sole argument on appeal is that she has been convicted and sentenced in violation of her right to be free from double jeopardy under the Fifth Amendment to the United States Constitution. Double jeopardy challenges involve constitutional questions of law, which we review de novo. *State v. Melendrez*, 2014-NMCA-062, ¶ 5, 326 P.3d 1126. The prohibition against double jeopardy "functions in part to protect a criminal defendant against multiple punishments for the same offense." *Swick*, 2012-NMSC-018, ¶ 10 (internal quotation marks and citation omitted). Double jeopardy multiple-punishment cases are divided into two classifications: (1) multiple convictions under a single statute are "unit of prosecution" cases, and (2) multiple convictions under separate statutes resulting from the same conduct are "double description" cases. *Id.* This is a double description case because Defendant argues that the same conduct resulted in two convictions under separate statutes.

{7} In analyzing a double description multiple-punishment claim, we first determine whether the underlying conduct for the offenses is unitary. *Swafford*, 1991-NMSC-043, ¶ 25. The parties do not dispute that the conduct in this case, Defendant running over and killing Nevarez, was unitary. When the conduct is unitary, we then review "the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses." *Id.*; see *Swick*, 2012-NMSC-018, ¶ 20 (noting that because the prosecution did not challenge the defendant's assertion that the conduct was unitary, the Court proceeded to determine whether the Legislature intended multiple punishments for that conduct). Multiple punishments for unitary conduct are constitutionally prohibited when the Legislature did not intend to create separately punishable offenses. See *Swick*, 2012-NMSC-018, ¶¶ 24, 27 (concluding that, under the prosecution's theory of the case, the Legislature did not intend to create separately punishable offenses

and punishment could not be had for both convictions without violating double jeopardy).

{8} We begin by determining whether there is an explicit authorization for multiple punishments. See *State v. Gutierrez*, 2011-NMSC-024, ¶ 50, 150 N.M. 232, 258 P.3d 1024 (“Where the [L]egislature has explicitly authorized multiple punishment the judicial inquiry is at an end, and multiple punishment is authorized and proper.” (alterations, internal quotation marks, and citation omitted)). Here, neither party argues and we fail to find an express legislative statement that multiple punishments may be imposed for both involuntary manslaughter and aggravated DWI that results in the death of one victim. In the absence of an express statement of legislative intent, we apply “the rule of statutory construction from *Blockburger v. United States*, 284 U.S. 299 . . . (1932), to ensure that each provision requires proof of a fact that the other does not. When applying *Blockburger* to statutes that are vague and unspecific or written with many alternatives, we look to the charging documents and jury instructions to identify the specific criminal causes of action for which the defendant was convicted.” *State v. Ramirez*, 2016-NMCA-072, ¶ 18, 387 P.3d 266 (citation omitted).

{9} “If that [inquiry] establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” *Swafford*, 1991-NMSC-043, ¶ 30. “If one statute requires proof of a fact that the other does not, then the Legislature is presumed to have intended a separate punishment for each statute without offending the principles of double jeopardy. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent.” *State v. Silvas*, 2015-NMSC-006, ¶¶ 12-13, 343 P.3d 616 (internal quotation marks and citations omitted). In analyzing other indicia of legislative intent, we look to “the language, history, and subject of the statutes, and we must identify the particular evil sought to be addressed by each offense.” *Id.* ¶ 13 (quoting *Montoya*, 2013-NMSC-020, ¶ 32). When these tools are used, if doubt still remains regarding legislative intent, the ambiguity must be resolved in favor of a defendant under the rule of lenity. See *Montoya*, 2013-NMSC-020, ¶ 51 (citing *Swick*, 2012-NMSC-018, ¶ 30).

{10} In this case, the parties focused on the jury instructions in their modified *Blockburger* analyses. The jury instruction in this case for involuntary manslaughter stated the following elements: Defendant ran over Nevarez with a vehicle, she should have known of the danger involved in her actions, she acted with a willful disregard for the safety of others, and her act caused the death of Nevarez. The jury instruction in this case for aggravated DWI stated the following elements: when operating a motor vehicle, Defendant “was under the influence of intoxicating liquor, that is, as a result of drinking such liquor . . . [D]efendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public”; and “[D]efendant caused the death of . . . Nevarez[.]”

{11} On appeal, Defendant concedes that proof of each crime under the jury instructions required something different. Involuntary manslaughter required a finding that Defendant willfully disregarded the safety of others, while aggravated DWI required a finding that she was intoxicated to the point where she could not safely handle the vehicle she was driving. Defendant, therefore, concedes that the modified *Blockburger* analysis favors the State. She attempts to overcome the presumption that the Legislature intended multiple punishments by relying on “other indicia of legislative intent” to support her argument that her convictions violate double jeopardy. Without looking to the language, history, or subject of the statutes and relying on *State v. Santillanes*, 2001-NMSC-018, ¶ 5, 130 N.M. 464, 27 P.3d 456, for the proposition that “[i]t is the death of another that the Legislature intended to punish, not the manner in which it was accomplished[.]” she argues that the Legislature did not intend that she be punished for aggravated DWI and involuntary manslaughter because the result is that she is being punished twice for causing one death.

{12} We are not convinced that Defendant’s “one death” rationale shows an indicia of legislative intent sufficient to overcome the presumption that the Legislature intended multiple punishments in this case. While we agree that, in general, a defendant cannot be convicted under multiple homicide statutes for causing a single death, death is not a factor in this case. Aggravated DWI is not a homicide

statute. See § 66-8-102(D)(2) (establishing that aggravated DWI consists of “causing bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs”). The aggravated DWI statute targets DWI that results in “bodily injury.” *Id.* By express definition, “‘bodily injury’ means an injury to a person that is not likely to cause death or great bodily harm to the person, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the person’s body[.]” Section 66-8-102(U) (1) (2010) (current version at Section 66-8-102(V)(1) (2016)).

{13} Although neither party points out the error of including death as an element in the aggravated DWI instruction, the fact that the district court erred in that regard does not logically or rationally give rise to a double jeopardy issue based on the “one death” rationale. *Santillanes*, cited by Defendant, is distinguishable from the present case. The statutes in *Santillanes*, which were vehicular homicide and child abuse resulting in death, are both homicide statutes. 2001-NMSC-018, ¶ 1. Similarly, other cases relying on the “one death” rationale implicated homicide statutes. See *Montoya*, 2013-NMSC-020, ¶¶ 30, 54 (addressing convictions for voluntary manslaughter and shooting at a motor vehicle resulting in death for the death of a single victim); *State v. Cooper*, 1997-NMSC-058, ¶ 53, 124 N.M. 277, 949 P.2d 660 (addressing convictions for felony murder and second degree murder for the death of a single victim). Aggravated DWI is patently not a homicide statute.

{14} Absent the “one death” rationale, Defendant provides no indicia of legislative intent to overcome the presumption that the Legislature intended multiple punishments. Because we are satisfied that the Legislature intended multiple punishments, we need not consider Defendant’s rule of lenity argument, which we would consider only if we first determined that insurmountable ambiguity remained after analyzing legislative intent under *Blockburger* and considering other indicia of legislative intent. See *Santillanes*, 2001-NMSC-018, ¶ 34 (“In deciding whether the Legislature intends to create separately punishable offenses, the rule of lenity dictates that, if insurmountable ambiguity remains after applying the *Blockburger* test and after resorting to traditional indicia of legislative intent, it is to

be presumed the Legislature did not intend pyramiding punishments for the same offense.” (alteration, internal quotation marks, and citation omitted)). We therefore conclude that the Legislature intended multiple punishments, and we hold that there is no double jeopardy violation.

CONCLUSION

{15} For the foregoing reasons, we affirm Defendant’s convictions.

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

JONATHAN B. SUTIN, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL E. VIGIL, Judge (dissenting).

VIGIL, Judge (dissenting).

{17} Defendant was convicted and sentenced twice for the homicide of one person by a single act of DWI, and the majority concludes this does not violate the constitutional prohibition against double jeopardy. I respectfully disagree and therefore dissent. In my opinion, the majority fails to properly apply the modified *Blockburger* test mandated by our Supreme Court, and therefore arrives at an incorrect, unconstitutional result.

{18} The two-part test used to analyze a double description multiple punishment case is well settled. We first determine whether the underlying conduct for the offenses is unitary. *Swafford*, 1991-NMSC-043, ¶ 25. If the conduct is not unitary, the analysis ends because there is no double jeopardy violation. *Id.* If the conduct is unitary, we review “the statutes at issue to determine whether the [L]egislature intended to create separately punishable offenses.” *Id.* When a defendant engages in unitary conduct violating two statutes and the Legislature did not intend to create separately punishable offenses, multiple punishments for the unitary conduct are constitutionally prohibited. *Id.*

A. Unitary Conduct

{19} This aspect of the test is to determine whether the same conduct violated two statutes. *Id.* “Conduct is unitary when not sufficiently separated by time or place, and the object and result or quality and nature of the acts cannot be distinguished.” *Silvas*, 2015-NMSC-006, ¶ 10. Here, it is undisputed that Defendant engaged in a single act of driving over Nevarez while DWI and that this single act resulted in Defendant’s two convictions under separate statutes. I agree with the majority that the conduct here was unitary. I therefore proceed to the next step of the

analysis. *See Swick*, 2012-NMSC-018, ¶ 20.

B. Legislative Intent

{20} “Where the [L]egislature has explicitly authorized multiple punishment the judicial inquiry is at an end, and multiple punishment is authorized and proper.” *Gutierrez*, 2011-NMSC-024, ¶ 50 (alterations, internal quotation marks, and citation omitted). I therefore first determine whether the Legislature intended multiple punishments to be imposed for Defendant’s unitary conduct.

{21} I agree with the majority that there is no express legislative intent to impose multiple punishments for both involuntary manslaughter and aggravated DWI arising out of a single act of DWI which results in the death of one victim. I also agree with the majority that we therefore must determine if one statute is subsumed within the other. That is to say, it must be determined if the conviction under each statute requires proof of a fact that the other does not. *See Swafford*, 1991-NMSC-043, ¶ 12. If one statute is subsumed within the other, they are the same for double jeopardy purposes, and convictions and punishment for both are prohibited. *See Swick*, 2012-NMSC-018, ¶ 24 (stating multiple convictions are prohibited) (citing *Swafford*, 1991-NMSC-043, ¶ 30 (stating multiple punishments are prohibited)).

{22} To determine whether one statute is subsumed within the other, we previously applied the strict elements test established in *Blockburger*. *see* 284 U.S. at 299, 304 (“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”). However, our Supreme Court has concluded that the *Blockburger* strict elements test is inadequate in all cases for determining whether one crime is subsumed within another for double jeopardy purposes. *See Montoya*, 2013-NMSC-020, ¶ 49; *Swick*, 2012-NMSC-018, ¶ 21; *Gutierrez*, 2011-NMSC-024, ¶ 58.

{23} Where a statute is “multi-purposed and written with many alternatives, or is vague and unspecific[,]” a modified *Blockburger* analysis is used to determine if one crime is subsumed within the other. *Gutierrez*, 2011-NMSC-024, ¶ 59 (emphasis, internal quotation marks, and citation omitted). Under this analysis, appellate courts “[look] beyond [the] facial statutory language to the actual legal theory

in the particular case by considering such resources as the evidence, the charging documents, and the jury instructions.” *Montoya*, 2013-NMSC-020, ¶ 49 (citing *Swick*, 2012-NMSC-018, ¶¶ 21, 26); *see Ramirez*, 2016-NMCA-072, ¶ 22 (stating that the modified *Blockburger* test is used “to determine whether the state’s theory for one crime, as charged to the jury, is logically subsumed . . . within the state’s theory for a separate crime”); *Gutierrez*, 2011-NMSC-024, ¶ 53 (considering the prosecution theory of the case as expressed in the charging document and jury instructions to determine if double jeopardy was violated where two separate statutes were violated). When these tools are used, if doubt still remains regarding the legislative intent, the ambiguity must be resolved in favor of a defendant under the rule of lenity. *See Montoya*, 2013-NMSC-020, ¶ 51 (citing *Swick*, 2012-NMSC-018, ¶ 30).

{24} Defendant was convicted of involuntary manslaughter as a lesser included offense to the indicted charge of first degree murder. Involuntary manslaughter under NMSA 1978, Section 30-2-3(B) (1994) may be committed in three different ways: “in the commission of an unlawful act not amounting to [a] felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.” (Emphasis added). Each of the three different ways in which involuntary manslaughter may be committed has numerous, generally described ambiguous alternatives, multiple purposes, and deterrent possibilities. Following *Montoya*, *Swick*, and *Gutierrez*, I therefore depart from the *Blockburger* strict elements test and proceed to examine the actual legal theory supporting Defendant’s convictions. *See Gutierrez*, 2011-NMSC-024, ¶ 59 (concluding that because the phrase “anything of value” in NMSA 1978, Section 30-16-2 (1973) defining “robbery” is “vague and unspecific,” the modified *Blockburger* test would be applied by reference to the state’s legal theory of the case).

{25} The legal theory for Defendant’s conviction of involuntary manslaughter was that Defendant caused “the unlawful killing of [Nevarez] without malice” by “the commission of an unlawful act not amounting to [a] felony[.]” Section 30-2-3(B). The only “unlawful act not amounting to a felony” that Defendant committed under the evidence and the State’s legal theory to support the involuntary manslaughter conviction is the

misdeemeanor of aggravated DWI under Section 66-8-102. See *State v. Deming*, 1959-NMSC-074, ¶¶ 1, 23, 66 N.M. 175, 344 P.2d 481 (affirming convictions for involuntary manslaughter when the defendant was driving while under the influence of alcohol and collided with a motor scooter, killing the riders); *State v. Alls*, 1951-NMSC-016, ¶¶ 4, 10, 18-20, 55 N.M. 168, 228 P.2d 952 (concluding that driving while under the influence of alcohol constitutes an unlawful act, not amounting to a felony, in affirming the defendant's involuntary manslaughter conviction). We are therefore confronted with the question of whether, under the evidence and legal theory of this case, aggravated DWI is subsumed within involuntary manslaughter. Pursuant to *Montoya*, 2013-NMSC-020, ¶ 49; *Ramirez*, 2016-NMCA-072, ¶ 22; and *Gutierrez*, 2011-NMSC-024, ¶ 53, I look to the jury instructions for guidance.

{26} To find Defendant guilty of aggravated DWI, the jury was required to find that the State proved the following elements beyond a reasonable doubt:

1. The defendant operated a motor vehicle;

2. At that time the defendant was under the influence of intoxicating liquor, that is, as a result of drinking such liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;

3. The defendant caused the death of Carlos Nevarez, III;

4. This happened in New Mexico, on or about the 12[th] day of June, 2013.

In finding Defendant guilty of aggravated DWI, the jury found that Defendant caused Nevarez's death while DWI, and the jury also found that Defendant committed involuntary manslaughter by the same DWI. Therefore, under the evidence and legal theory of the case, Defendant was convicted of two separate homicide convictions by committing a single act of DWI, and Defendant's unintended killing of Nevarez by involuntary manslaughter failed to require proof of a fact that the aggravated DWI did not. The result is that the aggravated DWI conviction is subsumed by the involuntary manslaughter conviction, and Defendant's conviction and sentence for both violate double jeopardy.

C. Majority Opinion

{27} I agree with the majority that death is not a statutory element of aggravated DWI under Section 66-8-102. Aggravated DWI under Section 66-8-102(D)(2) is committed when "bodily injury" results from DWI, and death is not included in the definition of "bodily injury" in the aggravated DWI statute. Section 66-8-102(V) (1) defines "bodily injury" as "an injury to a person that is not likely to cause death or great bodily harm to the person, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the person's body[.]" However, what the majority overlooks and ignores, is that the instructions given to the jury are the law of the case. See *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 40, 132 N.M. 631, 53 P.3d 398 ("Jury instructions not objected to become the law of the case."); see also *State v. Trujillo*, 2012-NMCA-092, ¶¶ 16-18, 287 P.3d 344 (reversing the defendant's conviction for criminal sexual contact of a minor (CSCM) in the second degree because under the jury instructions, the defendant's conduct constituted CSCM in the third degree, not CSCM in the second degree). The result, under the evidence, the State's theory, and the instructions, is that Defendant was convicted of aggravated DWI for causing the death of Nevarez while DWI, and for involuntary manslaughter by the same DWI.

{28} In New Mexico, multiple homicide convictions for causing a single death violate double jeopardy. In *Cooper*, 1997-NMSC-058, ¶ 53, our Supreme Court agreed with the defendant's argument that "the fact that there was only one murder victim means he can be convicted only once for murder[.]" and concluded that separate convictions for felony murder and second degree murder for the death of a single victim violated double jeopardy. Similarly, in *Santillanes*, 2001-NMSC-018, ¶ 5, our Supreme Court held that the convictions for both vehicular homicide and child abuse resulting in death for the same victims also violated double jeopardy. In coming to this conclusion, the Supreme Court agreed with "the generally accepted notion that one death should result in only one homicide conviction," and that "[i]t is the death of another that the Legislature intended to punish, not the manner in which it was accomplished." *Id.* (internal

quotation marks and citation omitted). Finally, in *Montoya*, 2013-NMSC-020, ¶¶ 11, 54, our Supreme Court held that separate convictions for voluntary manslaughter and shooting at a motor vehicle resulting in death for the same victim violated double jeopardy, and in doing so, reaffirmed the reasoning "that one death should result in only one homicide conviction under New Mexico law." *Id.* ¶ 43 (internal quotation marks and citation omitted).

{29} In my opinion, the majority errs by focusing its attention on the statutory elements of aggravated DWI and limiting its analysis to "other indicia of legislative intent" while ignoring the evidence, the State's theory, and the law of the case contained in the jury instructions. Majority Op., ¶¶ 9-11. In doing so, the majority is reverting back to the strict elements *Blockburger* test instead of the modified *Blockburger* test our Supreme Court has instructed us to follow.

{30} Moreover, to the extent there is "other indicia of legislative intent," it is that the Legislature intends that a single conviction will result from one DWI that results in a single death. "A person who commits homicide by vehicle while under the influence of intoxicating liquor or while under the influence of any drug is guilty of a second degree felony[.]" NMSA 1978, § 66-8-101(C) (2016). In *State v. Yarborough*, 1996-NMSC-068, ¶¶ 28-29, 122 N.M. 596, 930 P.2d 131, our Supreme Court discussed the legislative history of our involuntary manslaughter statute and the homicide by vehicle statute and held, "the [L]egislature intended to preempt the crime of involuntary manslaughter with the specific crime of homicide by vehicle when the predicate offense is a violation of the Motor Vehicle Code." *Id.* ¶ 30. Since aggravated DWI is a violation of the Motor Vehicle Code, I would follow *Yarborough's* reasoning and conclude that by adopting the crime of homicide by vehicle, our Legislature expressed its intent that only one conviction for a death is permitted when a single DWI causes a single death.

D. Conclusion

{31} In my opinion, the constitutional protection against double jeopardy mandates that Defendant's conviction and sentence for aggravated DWI must be vacated. Since the majority disagrees, I dissent.

MICHAEL E. VIGIL, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-085

No. A-1-CA-34511 (filed April 26, 2017)

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH AND
FAMILIES DEPARTMENT,
Petitioner-Appellee,
v.
ROSALIA M.,
Respondent-Appellant,
IN THE MATTER OF MONIQUE L.
and MICHAEL L.,
Children.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY

CAMILLE MARTINEZ OLGUIN, District Judge

CHARLES E. NEELLEY
CHILDREN, YOUTH & FAMILIES
DEPARTMENT
Chief Children's Court Attorney
Santa Fe, New Mexico

KELLY P. O'NEILL,
Children's Court Attorney
Albuquerque, New Mexico
for Appellee

JANE B. YOHALEM
LAW OFFICE OF JANE B. YOHALEM
Santa Fe, New Mexico
for Appellant

TWILA A. HOON
MARK A. RAMSEY
THE LAW OFFICES OF RAMSEY &
HOON, LLC
Albuquerque, New Mexico
Guardians Ad Litem

Opinion

Stephen G. French, Judge

{1} Rosalia M. (Mother) appeals the district court's order terminating her parental rights to two of her children (Children). She raises two issues on appeal: deprivation of due process and structural error. First, Mother argues that her due process rights were violated when counsel for the Children, Youth and Families Department (CYFD) improperly "coached" witnesses prior to the termination hearing by providing witnesses with a document containing their anticipated testimony and CYFD counsel's opening and closing arguments. Mother argues this left her with no meaningful opportunity to cross-examine the witnesses, and artificially ensured the consistency and credibility of the witnesses. Second, Mother argues the

due process violation qualifies as structural error requiring reversal because it affected the reliability of the entire proceeding.

{2} Based on our review of the record and the district court's response and remedy upon learning of the document provided to the witnesses, we conclude Mother was afforded due process and the proceedings were not rendered fundamentally unfair. We affirm the order terminating Mother's parental rights.

I. BACKGROUND

{3} Mother's parental rights to Children were terminated pursuant to NMSA 1978, Section 32A-4-28(B)(2) (2005) based on a finding of neglect as defined by NMSA 1978, Section 32A-4-2(E)(2). At the termination hearing on October 29, 2014, the attorney for CYFD called witness Kristiana Desiderio, the permanency planning worker from August 2013 to July 2014 for Mother, the father of the children (Father),

and Children. Ms. Desiderio's testimony included the reasons Children were in state custody, information about the referrals she made to Mother and Father for assessments and evaluations, details about their supervised visits with Children, and the results of various drug tests. On cross-examination, Father's attorney asked Ms. Desiderio how she prepared for her testimony, given that she was no longer a CYFD employee. Ms. Desiderio said she read an outline prepared by CYFD's attorney, which he emailed to her two days before the hearing.

{4} Initially, CYFD's attorney objected to questions about the substance of the outline based on attorney-client privilege. Ms. Desiderio was excused from the courtroom while the parents' attorneys made several other objections. Through the course of this discussion, CYFD's attorney explained that the outline Ms. Desiderio received included the information Ms. Desiderio would testify to, the information the other witnesses for CYFD would testify to before Ms. Desiderio took the stand, and CYFD's opening and closing arguments. Father's attorney argued that to permit Ms. Desiderio to testify as CYFD planned would amount to a violation of Father's due process rights because Father was unable to effectively cross-examine Ms. Desiderio because Ms. Desiderio's testimony was based on the content of the outline rather than her own memory. Mother's attorney objected on the same grounds. Both moved to strike Ms. Desiderio's testimony. {5} The district court noted "the tension" between improperly scripting a trial and properly preparing witnesses for trial, and took Ms. Desiderio's copy of the outline under seal. The district court also allowed further cross-examination of Ms. Desiderio. Additionally, CYFD's attorney, Mother's attorney, and Father's attorney questioned Ms. Desiderio about the contents of the outline and which sections of the outline she read as voir dire on the motion to strike her testimony. Ultimately, the district court denied the motion to strike Ms. Desiderio's testimony and terminated the parental rights of Mother and Father. Mother appeals the order terminating parental rights based on a violation of her right to due process, arguing the violation resulted in structural error requiring reversal. Additional facts are provided throughout the discussion as needed.

II. DISCUSSION

A. Preservation

{6} CYFD argues that Mother's attorney failed to preserve the due process claim.

During the hearing, Mother's attorney only argued that emailing the outline to the department's witnesses violated Rule 11-615 NMRA, which requires the exclusion of witnesses from the courtroom when invoked. Because Mother's argument on appeal is purportedly different than the argument she made during the hearing, CYFD contends she did not properly preserve the argument based on due process grounds.

{7} We disagree. First, during the termination hearing, Mother's attorney reiterated the due process claim made by Father's attorney, specifically discussing concerns about Ms. Desiderio relying on the outline rather than her own memory. Second, the district court spent nearly three hours during the termination hearing considering the impropriety of the outline and whether it violated the due process rights of the parents. This satisfies the purposes of the preservation rule, which are:

- (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.

Sandoval v. Baker Hughes Oilfield Operations, Inc., 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791. Given the extensive discussion during the termination hearing, we conclude that the district court was clearly alerted to the due process issue as it applied to both Mother and Father, that CYFD had the opportunity to respond to the claim of error, and that the lengthy discussion of the issue created a record sufficient for review by this Court. We therefore conclude Mother properly preserved her due process claim and proceeded to the merits of that claim.

B. Due Process

{8} On appeal, Mother argues her due process rights were violated. "[W]hether an individual was afforded due process is a question of law that we review de novo." *State ex rel. Children, Youth & Families Dep't v. Mafin M.*, 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266.

{9} Parental rights cannot be terminated without due process of law. *Id.* ¶ 18. In particular, termination proceedings require "scrupulous fairness" to the parent. *State*

ex rel. Children, Youth & Families Dep't v. Ruth Anne E., 1999-NMCA-035, ¶ 19, 126 N.M. 670, 974 P.2d 164 (internal quotation marks and citation omitted). "[D]ue process is a flexible right, the amount of process due at each stage of the proceedings is reflective of the nature of the proceeding and the interests involved[.]" *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 25, 136 N.M. 53, 94 P.3d 796. To evaluate the due process owed to a parent in termination proceedings, we use the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mafin M.*, 2003-NMSC-015, ¶ 19. The *Mathews* test requires weighing three factors: the parent's interest; the risk to the parent of an erroneous deprivation through the procedures used in light of the probable value, if any, of additional or substitute procedural safeguards; and the government's interest. *Mathews*, 424 U.S. at 335. The "[p]arents' interest in maintaining a parental relationship with their children is a fundamental right [meriting] strong protection. The government's interest in protecting the welfare of children is equally significant." *In re Pamela A.G.*, 2006-NMSC-019, ¶ 13, 139 N.M. 459, 134 P.3d 746 (alteration, internal quotation marks, and citation omitted). "We thus focus on the second prong and compare the risk to the parent of erroneous deprivation of rights with the potential burden to the state associated with additional procedures." *State ex rel. Children, Youth & Families Dep't v. Steve C.*, 2012-NMCA-045, ¶ 13, 277 P.3d 484. Therefore, whether Mother was afforded due process depends on whether CYFD's method of preparing witnesses increased the risk of an erroneous deprivation of Mother's parental rights, and whether additional procedural safeguards would eliminate or lower that risk. *See Mafin M.*, 2003-NMSC-015, ¶ 25.

{10} Here, the risk of an erroneous deprivation of parental rights was low for several reasons. First, the outline was created from court reports that are part of the record and that were available to Mother's attorney. The district court entered a stipulated judgment and dispositional order on September 6, 2013, finding that Children were neglected. The order specifically says, "All reports and other documentation concerning the treatment efforts, relating to both the children and the Respondents and any other interested parties, including reports of therapists and evaluators who are providing services connected with the treatment efforts under this order,

shall be made available to [CYFD and] all attorneys of record and to the Court . . ." (Emphasis added). The family treatment plan prepared by Ms. Desiderio is provided in the record proper, and was available during the termination hearing; CYFD's attorney repeatedly stated that he created the outline using Ms. Desiderio's treatment plan and court reports.

{11} Second, Mother does not argue that the information provided in the outline and taken from Ms. Desiderio's treatment plan and court reports was, in fact, inaccurate or incorrect, and there is nothing in the record indicating the information was inaccurate or incorrect. Additionally, there is nothing in the record indicating that CYFD's attorney advised Ms. Desiderio to testify falsely or coerced her into testifying falsely, or that Ms. Desiderio did in fact testify falsely. *See State v. Lopez*, 1986-NMCA-094, ¶ 42, 105 N.M. 538, 734 P.2d 778 (explaining that "it is patently improper for a prosecutor to advise a witness to testify falsely or to phrase a witness' testimony," but where "there is no showing in the record that the witness testified falsely" then "[t]he record does not support the claim of improper coaching"). Because the treatment plan and court reports that served as the source of information for the outline were part of the record and available to Mother's attorney, and because nothing in the record indicates the outline or Ms. Desiderio's testimony was inaccurate or incorrect, the risk to Mother of an erroneous deprivation of her parental rights was low.

{12} Furthermore, the district court took several measures to prevent the risk of an erroneous deprivation, even after stating that it appeared Ms. Desiderio was testifying from her memory. The district court allowed both Mother's attorney and Father's attorney to question Ms. Desiderio as *voir dire* on the motion to strike her testimony. During this questioning, Ms. Desiderio stated that she did not read the narratives of the other CYFD employees in the outline. Ms. Desiderio explained that she only read the section labeled with her name, that CYFD's attorney did not tell her what to say during her testimony, and that there was nothing inaccurate in the outline because the outline contained what she remembered putting in her treatment plan and court reports. To the extent Mother argues a violation of due process because of Ms. Desiderio's exposure to the testimony of other witnesses, this argument is not

supported by the record. Ms. Desiderio only actually read and relied upon the portion of the outline that pertained to her testimony.

{13} Moreover, the district court took the outline under seal and allowed both attorneys to fully cross-examine Ms. Desiderio. Courts that have considered witness coaching claims in the context of criminal trials have held that cross-examination is an adequate corrective measure. *Geders v. United States*, 425 U.S. 80, 89-90 (1976) (“The opposing counsel in the adversary system is not without weapons to cope with ‘coached’ witnesses. A prosecutor may cross-examine a defendant as to the extent of any ‘coaching’ Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant’s credibility[.]”). By taking the document under seal and allowing for voir dire in addition to cross-examination, the district court provided sufficient procedural safeguards. Any additional procedural safeguards would have had little effect on the risk of an erroneous deprivation. {14} In sum, by allowing for cross-examination and voir dire, the district court sufficiently corrected any alleged impropriety in CYFD’s handling of its witnesses, and therefore, Mother was not deprived of due process.

C. Structural Error

{15} Mother also argues that the violation of her due process rights is structural error, requiring automatic reversal. Mother argues the witness’s memory was “replaced by the outline” prepared by CYFD, thereby depriving Mother of meaningful cross-examination, an integral part of the trial process. Accordingly, Mother argues “reversal is required because the error affects

the reliability and credibility of the judicial system itself.”

{16} Whether the district court’s actions amount to structural error is a legal question subject to de novo review. *State ex rel. Children, Youth & Families Dep’t v. Brandy S.*, 2007-NMCA-135, ¶ 17, 142 N.M. 705, 168 P.3d 1129.

{17} “A structural error is a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *State v. Nguyen*, 2008-NMCA-073, ¶ 9, 144 N.M. 197, 185 P.3d 368 (internal quotation marks and citation omitted). Structural errors are rare. *See Brandy S.*, 2007-NMCA-135, ¶ 19. They have been found “‘only in a very limited class of cases.’” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). “Such errors infect the entire trial process and necessarily render a trial fundamentally unfair.” *Neder*, 527 U.S. at 8 (internal quotation marks and citations omitted).

{18} Assuming the doctrine of structural error applies to a termination hearing, we conclude there was no structural error in the present case. *See Brandy S.*, 2007-NMCA-135, ¶ 20 (holding no structural error and “[a]ssuming, without deciding, that the doctrine of structural error applies to TPR [termination of parental rights] proceedings”). As noted, courts have found structural error only in the most extreme cases. For example, a defective reasonable doubt jury instruction may be reviewed for structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Racial discrimination in grand jury selection may also be reviewed for structural error. *Vasquez v. Hillery*, 474 U.S. 254, 261-64 (1986). Additionally, the denial of the right to self-representation at trial and a complete denial of counsel at trial have both been reviewed for structural error.

See McKaskle v. Wiggins, 465 U.S. 168, 177-78 (1984) (discussing importance to trial of right to self-representation); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (discussing essential nature of counsel to criminal trial). This case does not belong in this class of cases. The proceedings were not rendered fundamentally unfair by the outline used to prepare CYFD’s witnesses for the reasons noted above. Namely, Ms. Desiderio only read and relied on the portion of the outline that pertained to her testimony, which was created from her own court reports and treatment plan, and Mother was provided an opportunity to question and to cross-examine Ms. Desiderio. Notably, the district court spent several hours fleshing out the contents of the outline, the extent to which Ms. Desiderio relied on the outline, and the ways in which the substance of the outline pertaining to Ms. Desiderio were readily available to counsel through Ms. Desiderio’s court reports. Therefore, we cannot conclude that Ms. Desiderio’s testimony rendered the entire proceeding fundamentally unfair. We hold that the facts of the present case do not support a finding of structural error.

III. CONCLUSION

{19} Mother received due process of law throughout the termination hearing given the district court’s corrective response, and the claimed violation does not amount to structural error. We affirm the order terminating Mother’s parental rights.

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

STEPHEN G. FRENCH, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

Certiorari Denied, August 3, 2017, No. S-1-SC-36494

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-086

No. A-1-CA-34432 (filed May 1, 2017)

THOMAS and LESLIE HAMMACK,
Protestants-Appellants,

v.

NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,
Respondent-Appellee.

APPEAL FROM TAXATION AND REVENUE DEPARTMENT

MONICA ONTIVEROS, Hearing Officer

GARY D. EISENBERG
BETZER, ROYBAL & EISENBERG, PC
Albuquerque, New Mexico
for Appellants

HECTOR H. BALDERAS
Attorney General
ELENA ROMERO MORGAN
Special Assistant Attorney General
Santa Fe, New Mexico
for Appellee

Opinion

M. Monica Zamora, Judge

{1} Thomas and Leslie Hammack (collectively, Taxpayers) appeal from the decision and order of the hearing officer affirming the New Mexico Taxation and Revenue Department's (the Department) assessment of unpaid personal income tax and interest for tax years 2009-2010, and unpaid personal income tax, penalties, and interest for tax years 2011-2012. The sole issue on appeal is whether the hearing officer correctly determined that Mr. Hammack's service in the United States Public Health Service (USPHS) was not active duty service in the armed forces of the United States (armed forces), within the meaning of NMSA 1978, Section 7-2-5.11 (2007). *See* § 7-2-5.11 ("A salary paid by the United States to a taxpayer for active duty service in the armed forces of the United States is exempt from state income taxation."). Having considered Taxpayers' arguments raised on appeal and concluding that the hearing officer's decision and order is supported by substantial evidence, we affirm.

BACKGROUND

{2} For the tax years 2009-2012, Mr. Hammack was employed as an active duty commissioned officer for USPHS. During that period of time Mr. Hammack was a New Mexico resident and his regular place of employment for USPHS was in Arizona. For tax years 2009-2012, Taxpayers filed New Mexico personal income tax returns. Taxpayers were married and filed jointly for those tax years. On their joint returns, Taxpayers claimed an exemption for Mr. Hammack's wages and omitted his wages from their joint returns.

{3} On January 3, 2014, the Department issued two notices of assessment for unpaid personal income tax and interest for tax years 2010 and 2011. On January 10, 2014, the Department issued two notices of assessment for unpaid personal income tax, penalties, and interest for tax years 2011 and 2012. On May 7, 2014, the Department issued one notice of assessment for unpaid personal income tax, penalties, and interest for tax year 2009.

{4} Taxpayers timely filed a written protest to the assessments, asserting that Mr. Hammack's wages were exempt from New Mexico income tax under the armed forces salaries exemption. Taxpayers claimed that when Mr. Hammack contacted the

Department in 2009 a Department employee confirmed that his wages were exempt. Taxpayers' protest was heard by a Department hearing officer on December 10, 2014.

{5} After the hearing, the hearing officer entered a decision and order concluding that Mr. Hammack was not in the armed forces for tax years 2009-2012, and therefore did not qualify for the armed forces salaries exemption. The hearing officer reversed the Department's penalty assessment for tax year 2009 since the Department mistakenly issued a refund for that year allowing the exemption. The Department's remaining assessments of unpaid personal income tax and interest for tax years 2009-2010, and unpaid personal income tax, penalties, and interest for tax years 2011-2012, were affirmed. This appeal followed.

DISCUSSION

{6} On appeal, this Court shall set aside a decision and order of the hearing officer only if it is "(1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." NMSA 1978, § 7-1-25(C) (2015); *Holt v. N.M. Dep't of Taxation & Revenue*, 2002-NMSC-034, ¶ 4, 133 N.M. 11, 59 P.3d 491. {7} To determine whether Mr. Hammack's wages from the USPHS were exempt from state income taxes, pursuant to Section 7-2-5.11, we must interpret the relevant statute, which is a question of law that we review de novo. *See Schuster v. N.M. Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶ 9, 283 P.3d 288. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Sec. Escrow Corp. v. N.M. Taxation & Revenue Dep't*, 1988-NMCA-068, ¶ 8, 107 N.M. 540, 760 P.2d 1306; *see also Reed v. Jones*, 1970-NMCA-050, ¶ 9, 81 N.M. 481, 468 P.2d 882 (noting that taxpayer did not clearly establish a right to the deduction because, if the statute clearly and unambiguously authorized the deduction, the court would not have had to construe the phrase, "initial use"). "Thus, taxation is the rule and the claimant[s] for an exemption must show that [their] demand is within the letter as well as the spirit of the law." *Sec. Escrow Corp.*, 1988-NMCA-069, ¶ 10.

{8} Section 7-2-5.11 exempts salaries “paid by the United States to a taxpayer for active duty service in the armed forces of the United States . . . from state income taxation.” Taxpayers argue that they are eligible for the exemption because Mr. Hammack’s service, as a commissioned officer of the USPHS, is considered active military service in the armed forces of the United States under federal law. We are unpersuaded.

{9} The Surgeon General administers the USPHS under the supervision and direction of the Secretary of Health and Human Services. 42 U.S.C. § 202 (2012). The USPHS maintains a Regular Corps and a Ready Reserve Corps, both of which consist of commissioned officers. 42 U.S.C. § 204 (2012). The commissioned corps of the USPHS are part of the United States’ “uniformed services.” See 10 U.S.C. § 101(a)(5) (2012) (“The term ‘uniformed services’ means—(A) the armed forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the [USPHS].”). In times of war or emergency involving national defense, the president may declare the commissioned corps of the USPHS to be a military service. See 42 U.S.C. § 217 (2012). Commissioned officers of the USPHS can be detailed for duty with other government departments including the armed forces. See 42 U.S.C. § 215(a) (2012). In some limited circumstances, they are entitled to the same rights, privileges, immunities, and benefits as members of the armed forces. See 42 U.S.C. § 213(a), (d), (e), (f) (2012). {10} Taxpayers suggest that because Mr. Hammack’s service in the USPHS is considered active military service under 42 U.S.C. § 213(e) and 50 App. U.S.C. §§ 511(1), (2) (2012), and 50 App. U.S.C. § 571(b) (2012) of the Servicemembers Civil Relief Act (SCRA), which are now codified as 50 U.S.C. § 3911(1), (2) (2015), and 50 U.S.C. § 4001 (2015)¹, it should also be considered active military service under Section 7-2-5.11. This argument is unavailing.

{11} Under 42 U.S.C. § 213(e), the “[a]ctive service of commissioned officers of the [USPHS] shall be deemed to be active military service in the Armed Forces of the United States for the purposes of all rights, privileges, immunities, and benefits now or hereafter provided under the [SCRA].” Likewise, “military service” is defined within the SCRA to include the active service of commissioned officers

of the USPHS. 50 U.S.C. § 3911(2)(B). However, these federal statutes on which Taxpayers rely apply only in the context of the SCRA. See 42 U.S.C. § 213(e) (deeming USPHS officer service as military service “for the purposes of all rights, privileges, immunities, and benefits now or hereafter provided under the [SCRA]” (emphasis added)); see also 50 U.S.C. § 3911 (defining “military service” for the purposes of Chapter 50–SCRA only). By specifically granting USPHS officers the same status of officers in the armed forces in only limited circumstances and for only limited purposes, Congress has recognized that USPHS officers are not regularly considered to be officers in the armed forces. Cf. *Hedin v. Thompson*, 355 F.3d 746, 749–50 (4th Cir. 2004) (discussing fact that, if active duty in USPHS was the same as active duty in the armed forces, there would be no reason for Section 213(f)). We do not agree that the SCRA, which is limited in scope and application, indicates that USPHS officers are considered members of the armed forces by the federal government, or should be considered such for purposes of Section 7-2-5.11.

{12} Section 7-2-5.11 also does not support Taxpayers’ argument. In construing our statutes, this Court “will not read into a statute . . . language which is not there, particularly if it makes sense as written.” *Johnson v. N.M. Oil Conservation Comm’n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327 (internal quotation marks and citation omitted). Section 7-2-5.11 states that “[a] salary paid by the United States to a taxpayer for active duty service in the armed forces of the United States is exempt from state income taxation.” To the extent that Taxpayers argue that the New Mexico Legislature intended to include commissioned officers of the USPHS within the term “armed forces” in Section 7-2-5.11, we are not persuaded. Although “armed forces” is not defined in the New Mexico tax code, the statutory provision allowing for tuition for veterans defines “armed forces” as “the United States army, navy, air force, marine corps or coast guard.” NMSA 1978, § 21-1-4.5(I) (2016). Likewise, the federal government, which governs the armed forces, has defined “armed forces” in Title 10—Armed Forces, as “the [a]rmy, [n]avy, [a]ir [f]orce, [m]arine [c]orps, and [c]oast [g]uard.” 10 U.S.C. § 101(a) (4) (2012). Neither of these definitions includes commissioned officers of the USPHS. Given the federal government’s classification of USPHS officers vis a vis

the armed forces, as well as New Mexico’s consistent definition of armed forces in Section 21-1-4.5(I), we cannot agree with Taxpayers that the New Mexico Legislature intended to include commissioned officers of the USPHS within the term “armed forces” in Section 7-2-5.11.

{13} Nor do we agree that regulations adopted by the Department support Taxpayers’ position. The regulations governing personal income taxes and residency define “armed forces” to include “all members of the army of the United States, the United States navy, the marine corps, the air force, the coast guard, all officers of the [USPHS] detailed by proper authority for duty either with the army or the navy, reservists placed on active duty, and members of the national guard called to active federal duty.” 3.3.1.9(D)(5) NMAC (12/15/10). Taxpayers rely on *State ex rel. McCulloch v. Ashby*, 1963-NMSC-217, ¶ 17, 73 N.M. 267, 387 P.2d 588, for the proposition that the definition of “armed forces” in 3.3.1.9(D)(5) NMAC improperly modifies the exemption set forth in Section 7-2-5.11. Such reliance is misplaced.

{14} In *McCulloch*, the Court held that a regulation adopted by the Department that created an exemption not contemplated by the exemption statute, or included within the exemption specified within the statute, was void. 1963-NMSC-217, ¶¶ 12, 17. In this case, the regulation defines the term “armed forces,” which appears in the statute but is not defined therein. See Section 7-2-5.11 (“A salary paid by the United States to a taxpayer for active duty service in the armed forces of the United States is exempt from state income taxation.”). In *McCulloch*, it was explained that “the [L]egislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty.” 1963-NMSC-217, ¶ 17. However, in 3.3.1.9(D)(5) NMAC, the Department simply defines “armed forces.” The definition does not modify the statute.

{15} Taxpayers also contend that the Department’s regulation 3.3.1.9(D)(1)-(5) NMAC was enacted to ensure that New Mexico military residence tax law complied with federal law, and that 3.3.1.9(D)(5) NMAC should therefore be read consistently with the SCRA, which defines military service to include the service of commissioned officers of the USPHS. See 50 U.S.C. § 3911 (defining “service-member” as “a member of the uniformed services,” and defining “military service” to

include the active service of commissioned officers of the USPHS).

{16} We reject Taxpayers' assertion that the Department's regulations were enacted to ensure that New Mexico military residence tax law complied with federal law. The purpose of the Department's regulations is "to interpret, exemplify, implement and enforce the provisions of [New Mexico's] Income Tax Act." 3.3.1.6 NMAC (12/14/00); see NMSA 1978, § 9-11-6.2(A) (2015) (authorizing the Department to issue all regulations "necessary to implement and enforce any provision of any law the administration and enforcement of which the department, the secretary, any division of the department or any director of any division of the department is charged"). And as we previously discussed, the definitions in 50 U.S.C. § 3911 are provided for the purposes of the SCRA and do not assist in our interpretation of Section 7-2-5.11.

{17} Finally, Taxpayers argue that the Department already recognizes Mr. Hammack as a member of the armed forces because New Mexico income tax is withheld from his USPHS wages earned out of state. Taxpayers rely on 5 U.S.C. § 5517(a) (2012), which provides for withholding of state income tax from a federal employee's wages where (1) an employee is subject to the tax and the employee's place of federal employment is within the state, or (2) where the employee is a resident of the state and a member of the armed forces. Taxpayers contend that USPHS could not have withheld New Mexico income tax from Mr. Hammack's compensation under the first option, since Mr. Hammack's place of employment was not in New Mexico. Therefore, Taxpayers argue that the USPHS must have withheld New Mexico income tax under the second option for members of the armed forces. We are not persuaded.

{18} Under 5 U.S.C. § 5517(a), the head of each agency of the United States is required to comply with a state's income tax withholding statute "in the case of employees of the agency who are subject to the tax and whose regular place of [f]ederal employment is within the [s]tate with which the agreement is made" and "[i]n the case of pay for service as a member of the armed forces . . . who are residents of the [s]tate." (internal quotation marks omitted). The term "service as a member of the armed forces," for the purposes of 5 U.S.C. § 5517, includes the participation in required drills and field exercises by a member of the Na-

tional Guard under 32 U.S.C. § 502 (2012), and the participation in scheduled drills or training periods, or service on active duty for training by a member of the Armed Forces Ready Reserve under 10 U.S.C. § 10147 (2012). See 5 U.S.C. § 5517(d)(1), (2); 10 U.S.C. § 10101 (2012) (stating that reserve components include the army national guard, the army reserve, the navy reserve, the marine corps reserve, the air national guard, the air force reserve, and the coast guard reserve). It does not include service by a commissioned officer of the USPHS. See 5 U.S.C. § 5517(d)(1), (2).

{19} Mr. Hammack's regular place of federal employment was not within New Mexico, and Mr. Hammack's employment is not considered "service as a member of the armed forces" for the purposes of 5 U.S.C. § 5517. Thus, 5 U.S.C. § 5517 did not require that the USPHS withhold New Mexico income tax from Mr. Hammack's compensation. If USPHS withheld New Mexico income tax despite the fact that it was not required to under 5 U.S.C. § 5517, there is no indication in the record that it did so because the Department considered Mr. Hammack to be a member of the armed forces.

CONCLUSION

{20} Because Taxpayers have not clearly and unambiguously established their right to the exemption in question, we affirm the hearing officer's decision and order.

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

M. MONICA ZAMORA, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

**TIMOTHY L. GARCIA, Judge
(dissenting).**

GARCIA, Judge (dissenting).

{22} I respectfully dissent in this case. Our rules of statutory construction can appropriately be applied to Section 7-2-5.11 and, in doing so, the undefined term "active duty service in the armed forces of the United States" would include all active duty service members in the USPHS who are detailed for active duty with the armed forces, not just two specific branches of the armed forces, the army and the navy. Because issues of statutory construction involve a legal determination, we are not required to give any deference or discretion to a hearing officer's ruling on this issue of law. See *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1 ("Statutory interpretation is a question

of law, which [appellate courts] review de novo" (internal quotation marks and citation omitted)); *T-N-T Taxi, Ltd. v. N.M. Pub. Reg. Comm'n*, 2006-NMSC-016, ¶ 5, 139 N.M. 550, 135 P.3d 814 ("When an administrative agency determines legislative intent[, appellate courts shall] review de novo."); *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 27, 147 N.M. 583, 227 P.3d 73 ("[Our appellate courts] review these questions of law de novo, without deference to the [lower] court's legal conclusions." (internal quotation marks and citation omitted)). Applying our de novo standard of review to the term "active duty service in the armed forces of the United States," I conclude that, if Mr. Hammack's service in the USPHS was based upon being detailed for active duty with any branch of the armed forces of the United States, then he qualified for the exemption from state income tax pursuant to Section 7-2-5.11, regardless of which branch of the United States military he was detailed with for his service.

{23} I begin my analysis by clarifying one of the issues that does not need to be resolved under Section 7-2-5.11. Although the majority opinion determines that Mr. Hammack's service in the USPHS "was not active duty service in the armed forces of the United States," it agrees that he was on "active duty" service with the USPHS during the tax periods at issue. Majority Opinion ¶¶ 1-2. The only disputed legal issue is whether Mr. Hammack's "active duty" service in the USPHS qualified as "service in the armed forces of the United States." Majority Opinion ¶¶ 9-20.

{24} The majority also failed to provide a historical analysis and factual perspective regarding the development of the USPHS over time. Majority Opinion ¶ 9. It simply summarized the current status of the USPHS under federal law. *Id.* Taxpayers provided a historical and factual analysis in their brief in chief, but it is lengthy and I am not compelled to repeat it in detail as part of this dissent. In summary, Taxpayers explained how the services of various scientific professions—primarily physicians, dentists, nurses, engineers and scientists—that work within the armed service communities became part of the current active duty military that is now identified as the USPHS and is presently codified and governed by the SCRA. The active duty military service by USPHS officers is not limited to select branches of the military in the SCRA, specifically the army and navy as designated by the

Department in its regulation. See 3.3.1.9(D)(5) NMAC. The Department neither disputes this historical analysis of how the present day USPHS was legislatively developed by Congress for more than a century nor challenges its vital role within the entire United States military defense system. As a result, the accuracy of Taxpayers' historical analysis and factual summary regarding the development of the USPHS does not appear to be in dispute. See *Lasley v. Baca*, 1981-NMSC-041, ¶ 1, 95 N.M. 791, 626 P.2d 1288 (recognizing that the appellate courts will accept, as undisputed, the statement of the applicable facts "fully and clearly set forth in appellant's brief in chief and not objected to in [the] appellee's answer brief").

{25} With this understanding and summarization of the historic development of the USPHS and its vital role in the country's military defense system, I turn to the critical issue in this case, whether the Legislature intended to exclude some military branches of the armed forces that an active duty member of the USPHS is detailed to serve with, thereby excluding certain USPHS officers from qualifying as a service member of the "armed forces of the United States" under Section 7-2-5.11. The majority determined that this statutory phrase—service in the armed forces of the United States—was not "intended by the Legislature "to include [a] commissioned officer of the USPHS within the term 'armed forces' in Section 7-2-5.11." See Majority Opinion ¶ 12. For statutory construction purposes, the phrase—service in the armed forces of the United States—is ambiguous in Section 7-2-5.11 and requires further analysis. I do not agree with the majority regarding its interpretation of Section 7-2-5.11, particularly any assertion that the Legislature intended to totally exclude USPHS officers from the term "armed forces" in Section 7-2-5.11.

{26} I start with the basic presumption that the Legislature "knows the law and acts rationally" when statutes are enacted. *Bybee v. City of Albuquerque*, 1995-NMCA-061, ¶ 11, 120 N.M. 17, 896 P.2d 1164; see *Kmart Corp. v. N.M. Taxation & Revenue Dep't*, 2006-NMSC-006, ¶ 15, 139 N.M. 172, 131 P.3d 22 ("[The appellate courts] presume that the Legislature knows the state of the law when it enacts legislation[.]"). In Taxpayers' case, this "knowledge of the law" presumption would apply to the statutory definition of "armed forces" in Section 7-2-5.11. In

2005, when the Legislature enacted Section 21-1-4.5 to provide tuition deductions for members of the armed forces, it provided a specific statutory definition for "armed forces." See § 21-1-4.5(F) (2005, amended 2016) (defining armed forces as "the United States army, navy, air force, marine corps[,] or coast guard"). In 2007, the Legislature chose not to use a statutory definition for "armed forces" derived from Section 21-1-4.5(F), or any other source, when it enacted Section 7-2-5.11. Without the benefit of legislative history, this Court can only surmise that the Legislature was fully aware of the definition it used for armed forces in Section 21-1-4.5 and intentionally chose not to define any particular branches of the armed forces when it enacted Section 7-2-5.11. See *Bybee*, 1995-NMCA-061, ¶ 11 (noting that an appellate court will surmise that the Legislature can provide some waivers of immunity for some types of public systems and not others, even where it may seem contradictory); see also *Hi-Country Buick GMC, Inc. v. N.M. Taxation & Revenue Dep't*, 2016-NMCA-027, ¶ 21, 367 P.3d 862 (recognizing that the Legislature can intend to define the same term in separate statutes differently because it is presumed to be aware and informed regarding existing laws at the time a statute is enacted). As a result, the lack of a definition for "armed forces" in Section 7-2-5.11 renders the term unclear, ambiguous, and requires further interpretation by this Court. See *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, ¶¶ 25-26, 340 P.3d 597 (recognizing that where the Legislature's intent is not "so easy to discern from [the statute or] . . . is unclear, ambiguous, or reasonably subject to multiple interpretations," our appellate courts look to other indicators and rules of statutory construction to determine legislative intent (internal quotation marks and citation omitted)).

{27} Based upon the multiple definitions and interpretations of "armed forces" actually cited and relied upon by the majority, see Majority Opinion ¶¶ 12-13, it would be error to conclude that the meaning of "service in the armed forces of the United States" is clearly stated in Section 7-2-5.11. This ambiguity is also apparent, and impossible to reconcile based upon the Department's use of a strikingly different definition of "armed forces" when it issued its regulation. See 3.3.1.9(D)(5) NMAC (specifying that "armed forces means all members of the army of the United States, the United States navy, the marine corps,

the air force, the coast guard, all officers of the [USPHS] detailed by proper authority for duty either with the army or the navy, reservists placed on active duty, and members of the national guard called to active federal duty"). As a result, the undefined term "service in the armed forces of the United States" set forth in Section 7-2-5.11 is ambiguous and requires further interpretation by this Court. See *Wilson v. Denver*, 1998-NMSC-016, ¶ 36, 125 N.M. 308, 961 P.2d 153 ("In order to discern the intent of the Legislature when interpreting an ambiguous statute, we resort to [the] well-accepted rules of statutory construction[.]").

{28} The first basic rule of statutory construction instructs us to "select the rationale that most likely accomplishes the legislative purpose—or best fills a void not addressed by the Legislature." *Id.* (internal quotation marks and citation omitted). In many situations, our appellate courts start by using a dictionary definition to ascertain the ordinary meaning of words that form the basis of a statutory interpretation inquiry. See *N.M. Atty. Gen. v. N.M. Pub. Regulation Comm'n.*, 2013-NMSC-042, ¶ 26, 309 P.3d 89 ("Under the rules of statutory construction, we first turn to the plain meaning of the words at issue, often using the dictionary for guidance."). I hesitate to utilize this method of statutory construction for four reasons. First, the majority did not venture to define the plain meaning of the term "service in the armed forces" by reference to any definitions from the dictionary. See Majority Opinion ¶¶ 9-14. Second, neither party has suggested in the briefing that we define the requisite statutory language by utilizing any definitions from the dictionary. See *TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2000-NMCA-083, ¶¶ 11-13, 129 N.M. 539, 10 P.3d 863 (addressing the issue of statutory construction where both parties offered dictionary definitions for the statutory term in dispute but the two definitions were not identical and would create different outcomes in the dispute), *rev'd on other grounds*, 2003-NMSC-007, 133 N.M. 447, 64 P.3d 474. Third, the Department's definition in 3.3.1.9(D)(5) NMAC was not represented to be based upon any definitions from the dictionary. Finally, the military service at issue arises under federal law and this tax exemption statute involves a financial incentive for our state's residents who serve in the military. See § 7-2-5.11. As a result, utilizing a dictionary based method of statutory

construction does not appear to be the best method for this Court to apply in the present case. Several other rules of statutory construction can be applied both individually and collectively to provide a definition for “service in the armed forces of the United States.”

{29} One helpful principle of statutory construction recognizes that “[w]hen the [L]egislature does not provide an express definition of an essential statutory term, it must be assumed that the [L]egislature was aware of the construction given that term in the judicial decisions of other jurisdictions.” *Sunwest Bank of Albuquerque v. Nelson*, 1998-NMSC-012, ¶ 16, 125 N.M. 170, 958 P.2d 740 (internal quotation marks and citation omitted). In *Sunwest Bank of Albuquerque*, our Supreme Court interpreted the New Mexico statute consistently with the federal statute because this is the type of persuasive “extrinsic aid deserving special attention in the process of [statutory] interpretation.” *Id.* (internal quotation marks and citation omitted). In the present case, the related federal statute is the SCRA, and it deems commissioned officers of the USPHS that are detailed for service with any branch of the armed forces to be included within “active military service of . . . the [a]rmed [f]orces of the United States.” 42 U.S.C. § 213(e). The Department agrees that USPHS officers meet the definition for “active duty service in the armed forces of the United States,” but only included those USPHS officers’ detailed for active duty in the army or navy. See 3.3.1.9(D)(5) NMAC; see also § 7-2-5.11. In addition, a federal court has determined that USPHS officers detailed for active duty with any branch of the armed forces are recognized to be identical to commissioned officers in the armed forces of the United States. See *Wanner v. Glen Ellen Corp.*, 373 F. Supp. 983, 985-86 (D. Vt. 1974) (stating “[i]t appears that the intent of Congress in amending [S]ection 213(a) of [the USPHS Act] was to grant [USPHS] officers on detail with the [a]rmed [f]orces the identical federal rights available to commissioned [a]rmy officers[, t]hus, . . . officers on detail with the [c]oast [g]uard by altering the phrase ‘members of the [a]rmy’ in that section to include persons occupying [the] plaintiff’s status [with the coast guard]”).

{30} In addition to looking at the related federal statute, another recognized rule of statutory construction is known as “ejusdem generis.” See *State v. Office of the Pub. Def. ex rel. Muqqaddin*, 2012-NMSC-029, ¶

29, 285 P.3d 622 (recognizing that where general words follow words of a more specific meaning, the general words are “construed as applying to persons or things of the same kind or class as those specifically mentioned” (internal quotation marks and citation omitted)). The same rule has been applied in many jurisdictions “[w]here the opposite sequence is found,” specific words followed by the general words. *State v. Strauch*, 2014-NMCA-020, ¶ 13, 317 P.3d 878 (internal quotation marks and citation omitted), *rev’d on other grounds*, 2015-NMSC-009, 345 P.3d 317. “The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty . . . but it may not be used to defeat the obvious purpose of legislation.” *State v. Johnson*, 2009-NMSC-049, ¶ 20, 147 N.M. 177, 218 P.3d 863 (emphasis added) (internal quotation marks and citation omitted). Here the general words “armed forces” followed by words of a more specific meaning, “of the United States,” reasonably limit the general words “armed forces” to those members recognized by the federal government to be serving in the United States military. Applying the principle of *ejusdem generis* allows the term “service in the armed forces of the United States” to recognize all the inter-related branches of service in the United States military. In the present case, a proper reading of “service in the armed forces of the United States” would also include USPHS officers detailed for active duty with any of the branches of the military of the United States.

{31} Continuing with this type of analysis, our appellate courts also consider analyzing a “statute’s function within a comprehensive legislative scheme.” See *T-N-T Taxi*, 2006-NMSC-016, ¶ 5. In the present case, I find little distinction between the statutory function and the statutory purpose of Section 7-2-5.11. Both the purpose and function of this statute is to allow a tax exemption to all active duty service members detailed with the military branches of the armed forces of the United States, as long as they are considered residents of the State of New Mexico. The words used by the Legislature provide no limitation or distinguishment that would narrow this statutory purpose or function.

{32} Finally, when the Legislature specifically narrows a statutory term in one instance, it is reasonable to use the process of negative inference to assume the absence

of a definition or other specificity in another analogous statute is intentional. See *Levario v. Ysidro Villareal Labor Agency*, 1995-NMCA-133, ¶¶ 11-12, 120 N.M. 734, 906 P.2d 266 (applying the process of negative inference to assist in interpreting undefined words in a statute and to give them ordinary and common meanings rather than a narrow definition); *State v. Lucero*, 1992-NMCA-103, ¶ 6, 114 N.M. 460, 840 P.2d 607 (recognizing how the process of negative inference is applied to similar provisions in statutes and court rules); see also *Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541, 685 P.2d 396 (recognizing that “the Legislature knows how to create a private remedy if it intends to do so [and b]y negative inference, the Legislature’s failure to provide for a private action suggests that it did not intend to create one”), *superseded by statute on other grounds as stated in Journal Publ’g Co. v. Am. Home Assurance Co.*, 771 F. Supp. 632, 635 (S.D.N.Y. 1991). Under this principle of statutory construction, it would be illogical and improper to provide a more narrow definition for “armed forces” in Section 7-2-5.11 than the specific definition provided by the Legislature under Section 21-1-4.5. Based on a consistent application of these rules of statutory construction, “armed forces of the United States” in Section 7-2-5.11 should properly be interpreted to include all active duty members of the USPHS detailed for duty with any of the military branch of the armed forces of the United States. According to the Department’s own broad determination of the active duty military branches of the armed forces in 3.3.1.9(D)(5) NMAC, this would include USPHS officers detailed for active duty with the army, navy, air force, marine corp, coast guard, the reserve corp placed on active duty, and the national guard placed on active federal duty. As a result, any of Mr. Hammack’s active duty service within the USPHS that involved being detailed with any of these military branches of the armed forces of the United States would qualify him as providing “service within the armed forces of the United States” pursuant to Section 7-2-5.11.

{33} Recognizing that the rules of statutory construction support a broader and more inclusion definition of “service in the armed forces of the United States,” I now turn to the Department’s more narrow definition in 3.3.1.9(D)(5) NMAC. This regulation limits the definition of “active duty service in the armed forces

of the United States” to “all officers of the [USPHS] detailed by proper authority for duty either with the army or the navy[.]” Taxpayers challenge this narrow definition. The majority has avoided any discussion of the discrepancy between this definition and the broader definition of armed forces in Section 21-1-4.5. Majority Opinion ¶¶ 13-16. Instead the majority only focused on whether the Department’s regulation improperly modifies or narrows the statutory term “service in the armed forces of the United States” or should be consistent with the SCRA. *Id.*

{34} To function efficiently and properly, the Department’s narrow definition in 3.3.1.9(D)(5) NMAC—excluding all the other active duty USPHS officers not detailed with the army or navy—must be consistent with the statute and cannot be an arbitrary application of the statute. See *Rainbo Baking Co. of El Paso v. Comm’r of Revenue*, 1972-NMCA-139, ¶¶ 8-12, 84 N.M. 303, 502 P.2d 406 (noting that where regulatory authority exists to interpret statutes to which such regulation relates, the administrative agency exceeds its

interpretative authority when it imposes a limitation that the Legislature did not prescribe). Nothing within the language of Section 7-2-5.11 or the SCRA supports this narrow definition. Nothing within the language of any other New Mexico statute, including Section 21-1-4.5, supports this narrow definition. I have already concluded in my previous analysis that the rules of statutory construction do not support this narrow definition. As a result, such a narrow definition was not contemplated by the Legislature, and excluding USPHS officers that are detailed with any branch of the United States military from qualifying for the personal income tax exemption is void because it modifies and abridges Section 7-2-5.11 in a manner not contemplated or authorized by the Legislature. See *McCulloch*, 1963-NMSC-217, ¶¶ 12, 17 (voiding a tax regulation—adopted to deal with a non-resident tax exemption—that was not contemplated by the statute because it abridged, enlarged, extended, or modified the statute at issue); *Rainbo*, 1972-NMCA-139, ¶¶ 10-12 (recognizing that a tax regulation that imposed a time

limitation on a deduction that the Legislature did not prescribe was, to that extent, void).

{35} As a result, I do not agree with the majority regarding its recognition and use of the narrow definition of “armed forces” set forth in 3.3.1.9(D)(5) NMAC. If Mr. Hammack was detailed for active duty in the USPHS with any branch of the United States military for any of the tax years in question, then Taxpayers were entitled to an exemption under Section 7-2-5.11 for those qualifying tax years. The hearing officer only determined that Mr. Hammack was not detailed with two branches of the United States military, the army and the navy. The decision of the hearing officer should be reversed and remanded for further proceedings to properly address whether Mr. Hammack was detailed for active duty with any other branch of the United States military during any of the tax years in question.

TIMOTHY L. GARCIA, Judge

¹The SCRA was previously codified at 50 App. U.S.C. §§ 501-597(b) (2012, current version at 50 U.S.C. §§ 3901-4043 (2015)).

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Guebert Bruckner P.C. is pleased to announce that **Robert F. Gentile** has become a named partner with the firm. Mr. Gentile practices in the areas of civil litigation including wrongful death, catastrophic personal injury, product defect liability, premises liability, and medical malpractice. Prior to joining Guebert Bruckner in 2013, Mr. Gentile was a Deputy District Attorney in San Juan County in northern New Mexico.

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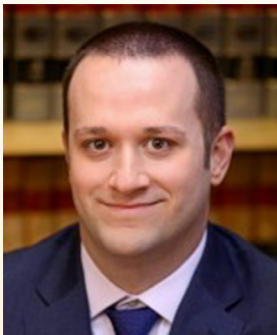
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ANDRÉA SALAZAR

Cuddy & McCarthy, LLP formally welcomes Andréa Salazar to the Firm. Ms. Salazar joined the Firm as an Associate in May, 2017. Ms. Salazar has 7 years of legal experience and previously worked as an Assistant Santa Fe County Attorney. Her practice focuses on litigation, school law, employment law, land use and zoning.



SAM W. MINNER

Cuddy & McCarthy, LLP is pleased to announce that Sam W. Minner joined the Firm as an Associate in its Santa Fe office on November 1, 2017. His practice is in the areas of real property, business, intellectual property and education law.

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